IN THE SUPREME COURT OF MISSISSIPPI

JOSEPH BISHOP GOFF, *Appellant*

versus **NO. 2006-DP-0815-SCT**

STATE OF MISSISSIPPI, *Appellee*

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

This case arises from the capital murder of Brandy Stewart Yates (Brandy Yates) on or about August 27, 2004, in George County, Mississippi. At that time, Brandy Yates' mutilated and burned body was discovered in Room 121 of the Rocky Creek Inn in George County. On August 27, 2007, the appellant, Joseph Bishop Goff (Goff) was taken into custody after a traffic stop in Warren County and transported back to George County.

On October 19, 2004, Goff was indicted by the George County Grand Jury for the capital murder of Brandy Yates while in the commission of a robbery in violation of § 97-3-19(2)(e). After pre-trial motions and hearings the trial commenced on May 3, 2005, and continued until its conclusion on May 5, 2005. Goff was found guilty of the capital murder of Brandy Yates as well as the charged count of second degree arson. The following day a sentencing hearing was conducted, after which, on May 6, 2005, the jury returned the

following:

COUNT I

We, the Jury, unanimously find the evidence beyond a reasonable doubt that the following facts existed at the time of the commission of Capital Murder. Next we, the Jury unanimously find the aggravating circumstances of:

(1) That the Defendant actually killed Brandy S. Yates.

(2) That the Defendant intended the killing of Brandy S. Yates.

(3) That the Defendant contemplated that lethal force would be used.

Next, we the jury, unanimously find the aggravating circumstances of:

(1) The Defendant was previously convicted of a felony involving the use or threat of violence to the person.

(2) The Defendant knowingly created a great risk of death to many persons.

(3) The capital offense was committed while the defendant was engaged in the commission of a robbery

(4) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest.

(5) The capital offense was especially heinous, atrocious and cruel.

are sufficient to impose the death penalty and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances and we further find that the Defendant should suffer death.

/S/ Claudia Havard
FOREMAN OF THE JURY

C.P. 272-73, 276-77.

On May 26, 2005, Goff filed a post-trial "Motion for Judgment Notwithstanding the Verdict and/or Motion For a New Trial." C.P. 288-90. On June 30, 2005, the court denied that motion. C.P. 305. Goff is represented here on appeal by Andre' de Gruy of the Office of Capital Defense Counsel, and raises the following assignments of error for consideration by this Court:

I. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS EVIDENCE WHICH RESULTED FROM THE UNREASONABLE SEIZURE THAT VIOLATED GOFF'S RIGHTS PURSUANT TO THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND §23 OF THE MISSISSIPPI CONSTITUTION OF 1890.

II. THE CIRCUIT COURT ERRED IN PERMITTING GOFF TO ACT AS HIS OWN ATTORNEY AT TRIAL.

III. THE EVIDENCE IN THIS CASE IS INSUFFICIENT TO PROVE THAT JOSEPH GOFF IS GUILTY OF CAPITAL MURDER.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL:

- A. DEFENSE COUNSEL FAILED TO TIMELY INVESTIGATE GOFF'S POTENTIAL MENTAL HEALTH CLAIMS AND PROVIDED INACCURATE INFORMATION TO THE TRIAL COURT.
- B. FAILURE TO VOIR DIRE JURORS ON EFFECT OF VIEWING CRIME SCENE PHOTOGRAPHS ON THEIR DECISION REGARDING PENALTY.
- C. FAILURE TO OBJECT TO VICTIM IMPACT AT VOIR DIRE, IN OPENING STATEMENT AND IN TESTIMONY AT THE CULPABILITY PHASE.
- D. FAILURE TO OBJECT TO JURY COMPOSITION.
- E. FAILURE TO OBJECT TO PROSECUTOR'S IMPROPER QUESTIONING ON VOIR DIRE, IMPROPER CLOSING ARGUMENT ON JUROR "PROMISE" AND ARGUMENT OUTSIDE THE RECORD.

As the following analysis demonstrates, each of the issues raised on appeal is procedurally barred from consideration and/or is without legal merit. Accordingly, Goff's conviction and sentence should be affirmed.

STATEMENT OF FACTS

On the morning of August 27, 2004, Dee Dee Wall, owner of the Rocky Creek Inn, a motel located in George County, was walking along a sidewalk at her business and observed what appeared to be signs of fire damage in Room 121. Tr. 463. Ms. Wall proceeded to the room and with her master key, which encountered no problems in unlocking the door[1], entered into the room. Tr. 465-66. Inside the room, in addition to smoke and fire damage, she viewed a body lying between the beds. Tr. 464, Exhibit S-3. She exited and authorities soon responded to her 911 call that she placed at approximately 8:45 a.m. Tr. 465.

Deputies, Sheriff Gary Welford and Detective Ronnie Lambert of the George County Sheriff's Office responded to the motel and made some initial observations of the room and took photographs before sealing the room to preserve the scene for processing by technicians requested from the State Crime Lab. Tr. 740. While awaiting the arrival of the crime lab technicians, Detective Lambert tentatively identified the victim as Brandy Yates by the registration card on file in the motel office. Tr. 742, Exhibit S-4. The registration card revealed Brandy Yates and a companion had checked in on August 26, at 3:53 p.m. Exhibit

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[1]The motel uses electronic card keys that are swiped to gain entry into the rooms. Tr. 465.

S-4. With that information Detective Lambert contacted law enforcement authorities in Alabama for assistance and was informed that Brandy Yates had last been known to be in the company of Joseph Goff. Tr. 748. Detective Lambert asked for and received a photograph of Goff from the Alabama authorities. Tr. 754. Margaret Clark, the hotel clerk on duty the night before, identified the individual in the photograph, Goff, as the same person that had approached her at about 11:30 p.m. on August 26, and that he had stated to her that he was the boyfriend of Brandy Yates and was locked out of Room 121. Tr. 479.

Ms. Clark went on to explain that she made a key for Room 121 and gave it to Goff after he identified the person the room was registered to, Brandy Yates. Tr. 476. Ms. Clark further stated that Goff returned to the office within about three minutes and informed her that the room key did not work. Tr. 477. Thinking she may not have made the key correctly she made Goff another and gave it to him once again. Tr. 477. Once more shortly thereafter Goff returned to the office and again announced the key did not work. Tr. 478. Ms. Clark was certain she had correctly made the key and asked Goff if anyone was inside the room, to which Goff replied that there was. Tr. 477-78. She then informed Goff that the reason the door would not open was that someone had the door locked from the inside. Tr. 477-78. Ms. Clark did not make another key and Goff left the office. Goff did not return with any further complaints of a non-working key. Tr. 478.

Sheriff's deputies also spoke with Pearl Boulware, the clerk that had checked Brandy Yates into the motel the day before. Ms. Boulware related that prior to her leaving work at

11:00 p.m., a male subject had been calling the motel wishing to speak with the occupant of Room 121. Tr. 472. That subject requested the clerk go to Room 121, as he had spoken to Brandy Yates earlier and that she seemed upset, and check on her well being. Tr. 472. Ms. Boulware did go to Room 121 and after several knocks Brandy Yates opened the door. Tr. 473. Ms. Boulware could not tell if anyone else was in the room but did state that Brandy Yates looked as if she had been crying. Tr. 473.

After arrival at the motel the crime lab personnel, led by forensic scientist Stacy Smith, began to process the crime scene for the collection and preservation of evidence. Tr. 646-76. The victim's body along with "organ masses"(pieces of Brandy Yates intestines and internal organs) were packaged and sent for autopsy. Tr. 652. The autopsy, performed by Dr. Steven Hayne, revealed numerous injuries to Brandy Yates' body. Tr. 611. Her body was substantially burned and she had suffered broken bones in her face, chest and ribs. Gaping wounds were found on her face, neck and chest with partially charred toothpicks found in her neck wounds. Tr. 611 In addition, the "organ masses" found strewn about the motel room were determined to be parts of her large and small bowels, spleen and fatty tissue. Tr. 617-18 Her insides had been torn from her body through a hole found to have been gouged into her chest. Tr. 629. The cause of death, her lethal injuries, were determined to be from blood loss associated with the slashing of her carotid artery and jugular vein on the right side of her neck. Tr. 615, 619-20.

While the investigation was still ongoing in George County, the deputies were notified that a state trooper had stopped a white Ford Mustang driven by Goff on Interstate 20 near Vicksburg. Tr. 494. The trooper had stopped Goff's vehicle for an expired tag violation and was requested by George County authorities to place Goff into custody. Tr. 514, 534. The trooper did so and ultimately Goff and his vehicle were transported back to George County.

Back in George County, Goff was informed of his Miranda rights which he acknowledged and he then gave a statement detailing his version of the events surrounding the murder of Brandy Yates, stating that she was already dead when he entered Room 121. Exhibits S-6 and S-70. Goff went on to admit that he took everything from the room which he thought may contain his fingerprints and to setting the room on fire in order to attempt to erase his presence in the room. Exhibit S-70.

A search warrant for Goff's vehicle was obtained by Detective Lambert and again the State Crime Lab, led by forensic scientist Stacy Smith conducted the search wherein a number of pieces of evidence were seized, including Brandy Yates wallet, which contained $557.00, and Goff's bloody shirt. Exhibits S-52A and S-49A.

At trial Goff chose to represent himself and his two attorneys that had been privately retained for his defense were appointed as stand-by counsel by the court. The trial proceeded and at its conclusion the jury found Goff be to guilty of the crimes charged. A separate sentencing hearing was held and the jury determined death was the appropriate sentence.

Goff was also sentenced to three years confinement based on his conviction of second degree arson.

Goff's post-trial motions were denied and he now files the instant automatic appeal of his capital murder conviction. Goff does not contest or present argument regarding his conviction of arson in the second degree.

SUMMARY OF THE ARGUMENT

Goff's argument that certain items, State's Exhibits 52-A and 49-A, is procedurally barred from consideration in that Goff did not object to the introduction of the Exhibits and agreed by stipulation to the introduction of all of the evidence seized from his vehicle pursuant to a valid search warrant.

That the trial court did not err in granting Goff's motion to represent himself at trial as the evidence shows he knowingly and intelligently waived his right to counsel.

Goff's argument that the underlying felony of robbery was not sufficiently proven at trial is without merit as it was clearly shown at trial that Goff was in possession of Brandy Yates property, her wallet and money, at the time he was taken into custody.

Goff's argument that he received ineffective assistance of counsel is procedurally barred in that Goff represented himself at trial and may not now complain of the lack of effective assistance by counsel.

Goff's argument that Goff's sentence of death is disproportionate based on his "mental illness" is without foundation in the record and without merit.

Goff's claim of cumulative error can not be sustained as there was no error in the court below that would require a reversal of the conviction or sentence handed down.

LEGAL ANALYSIS

I. GOFF'S CLAIM THAT THE TRIAL COURT ERRED IN NOT SUPPRESSING CERTAIN EVIDENCE FOUND IN HIS VEHICLE IS PROCEDURALLY BARRED.

Goff first contends that certain items discovered in his vehicle, specifically Brandy Yates' wallet, Exibit S-52A , and Goff's bloody shirt, Exhibit S-49A , should not have been allowed into evidence at the trial. At the pretrial suppression hearing, Goff argued the evidence taken from his vehicle was tainted as the fruit of an illegal stop and unreasonable detention of his person on Interstate 20, near Vicksburg. At the end of the suppression hearing the court denied Goff's motion and found all of the evidence generated as a result of the traffic stop was admissible. Tr.137-44. Now on appeal, Goff disagrees with the ruling of the court below and contends the verdict and sentence must be thrown out and his case remanded for a new trial without the alleged tainted evidence.

Goff's argument centers around the evidence elicited during the suppression hearing conducted on April 7, 2005, regarding the validity of the traffic stop and his subsequent detention by Trooper Jason Ginn of the Mississippi Highway Safety Patrol. The court below

ruled Trooper Ginn legally and reasonably stopped and detained Goff prior to his being taken into custody for his role in the murder of Brandy Yates. Tr. 137-44.

In his brief Goff argues that the traffic stop initiated by Trooper Ginn was improper, going so far as to accuse Trooper Ginn of perjury in his testimony regarding his observations of Goff's expired tag prior to the stop.[2] *See* Brief of Appellant, Footnote 1, Page. 9. What Goff does not mention or discuss in his argument is that, at trial, Goff not only did not object to the admission of Exhibits S-52A and S-49A[3], he offered to stipulate to the admissibility of the items.[4] That Goff declined to object to the admission of the exhibits and his stipulation of the items into evidence precludes him from now on appeal claiming they were wrongfully accepted. Regarding this issue this Court has held:

> ¶ 86. [F]ailure to raise an issue at trial bars consideration on an appellate level. *See Smith*, 729 So.2d at 1201 ("A trial judge will not be found in error on a matter not presented to him for decision."); *Williams*, 684 So.2d at 1203 (contemporaneous objection rule is applicable in death penalty cases); *Foster*, 639 So.2d at 1270 ("If no contemporaneous objection is made, the error, if any, is waived. This rule's applicability is not diminished in a capital case."); *Cole v. State*, 525 So.2d 365, 369 (Miss.1987) ("Counsel may not sit idly by making no protest as objectionable evidence is admitted, and then raise the issue for the first time on appeal."); M.R.E. 103(1)(a) (requiring timely,

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[2]Goff includes this allegation against Trooper Ginn in spite of Goff's admission that the tag was in fact expired. Tr. 110.

[3]Goff stipulated to and/or lodged no objection to the admission of all evidence taken from the vehicle.

[4]Goff omits any mention of the stipulations he entered into at trial in this claim, however he does mention the stipulations in Section II, *infra*, in an attempt to show that Goff's stipulations and then the attempt to withdraw the stipulations somehow show that the trial court's decision to allow Goff to represent himself was defective.

> on-the-record objection before error can be predicated on the admission of evidence). The rule that failure to object constitutes waiver applies to Fourth Amendment claims as well. *Stevens v. State*, 458 So.2d 726, 730 (Miss.1984).
>
> *Walker v. State,* 913 So.2d 198, 224 (Miss.2005).

By lack of an objection and the willing stipulations to the admission of all evidence taken from his vehicle, specifically Exhibits S-52A and S-49A, Goff has waived the right to now claim the items were wrongfully entered into evidence.

Alternatively, without waiving the procedural bar, the State would address the merits of Goff's claim. In order to prevail on this issue regarding the suppression hearing, Goff must show the trial court was manifestly in error or that the ruling was against the overwhelming weight of the evidence. *Hunt v. State*, 687 So.2d 1154, 1160 (Miss.1996).

At the suppression hearing the judge was presented with the following evidence related to the trooper's encounter with Goff. On August 27, 2004, Trooper Ginn observed a vehicle traveling westbound on Interstate 20 in Warren County. Trooper Ginn saw that the vehicle displayed a paper tag that appeared to be disfigured. Tr. 27. The trooper proceeded to catch up with the vehicle and once he had verified the tag was out of date he initiated a traffic stop. Tr. 29.

After the stop, due to Goff's suspicious behavior and appearance, Trooper Ginn decided to investigate for more information regarding his background as, among other factors, Goff had identified himself as a convicted felon and believed he may have active warrants for his arrest. Tr. 37, 45. Trooper Ginn also investigated further for additional

information regarding Goff's injuries that he claimed were caused by Brandy Yates during an assault. Tr. 49. During the traffic stop, Trooper Ginn asked for and received permission from Goff to search his vehicle. Tr. 39. The totality of that search consisted of looking inside of a cigarette pack and the discovery of an amount of cash found in the vehicle's console. Tr. 41-42. The money consisted of three rolls of fifty dollar bills and was handed over to Goff at the scene. Tr. 42. Shortly thereafter the George County Sheriff's Office requested Trooper Ginn take Goff into custody as a suspect in the murder of Brandy Yates. Tr. 50-51.

Goff was handcuffed and his vehicle sealed by Trooper Ginn and all were transported to the Warren County Sheriff's Office until George County officials arrived and took custody of Goff and his car. Tr. 51-52. Trooper Ginn's involvement with the case ended at that point.

Goff and his vehicle arrived back in George County where a search warrant was obtained for the vehicle. Tr. 76-77. A search of the vehicle, pursuant to the warrant, was conducted by forensic scientist Stacy Smith, wherein numerous articles of evidence were seized, including Exhibits S-52A and S-47A.

Goff admitted during his testimony at the suppression hearing that the tag was indeed expired thereby nullifying any argument that the traffic stop was improper. Tr. 110. Goff admits that Trooper Ginn's search of the vehicle ended with nothing more than a check of a cigarette pack and discovery of money in the vehicles console which was turned over to

Goff at the scene. *See* Appellant Brief at Page 9. It appears that Goff's only complaint is that Trooper Ginn did not end his questioning earlier, before George County authorities could request the officer place Goff into custody, so that he may have proceeded on his way with Brandy Yates money and property as well as evidence of his guilt in her murder. It was by virtue of a search warrant in George County that the complained of items of evidence were discovered, not through Trooper Ginn's cursory search. Exhibit S-5.

At the conclusion of the suppression hearing the trial court determined that Trooper Ginn had properly initiated the traffic stop on Goff for the expired tag. Tr. 137-38. The court below went on to conclude the detention was reasonable under a totality of the circumstances. Tr. 139-41. The court's ruling was not manifestly in error nor against the overwhelming weight of the evidence. Nothing in Goff's argument attacks the validity of the traffic stop as the record reflects there was no reasonable doubt that Goff's tag was expired. Nor does Goff show or present any credible attack as to the trial court's determination that the detention following the traffic stop was reasonable under the totality of the circumstances.

Further, as Goff failed to object to the validity of the search warrant by which the complained of items of evidence, Exhibits S-52A and S-47A were discovered, a further waiver of his attempt to portray them as improperly admitted at trial must follow. As stated above, the failure to have raised this issue in the court below precludes consideration by the appellant court. *Walker v. State,* 913 So.2d 198, 224.

Goff's claim that Brandy Yates wallet and his bloody shirt should not have been admitted into evidence at trial is procedurally barred and without merit and he is not entitled to any relief on this issue.

II. THE TRIAL COURT DID NOT ERR IN ALLOWING THE APPELLANT TO PROCEED PRO SE.

At trial, just prior to the beginning of voir dire, Goff asked the court to allow him to exercise his constitutional right to represent himself. After questioning Goff at length the trial court determined that Goff's waiver of counsel was knowingly and intelligently made and granted the request. Goff now maintains the trial court was in error and that a competency hearing should have been ordered to determine if Goff properly waived his right to counsel.

The standard for determining a defendant's competence to waive counsel and represent himself at trial is the same standard for competency to stand trial. The United States Supreme Court has held:

> Nor do we think that a defendant who waives his right to the assistance of counsel must be more competent than a defendant who does not, since there is no reason to believe that the decision to waive counsel requires an appreciably higher level of mental functioning than the decision to waive other constitutional rights. Respondent suggests that a higher competency standard is necessary because the defendant who represents himself " 'must have greater powers of comprehension, judgment, and reason than would be necessary to stand trial with the aid of an attorney.' " Brief for Respondent 26 (quoting Silten & Tullus, Mental Competency in Criminal Proceedings, 28 Hastings L.J. 1053, 1068 (1977)). Accord, Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae* 10-12. But this argument has a flawed premise; the competence that is required of a defendant seeking to

> waive his right to counsel is the competence to *waive the right*, not the competence to represent himself. [Footnote omitted]

Godinez v. Moran, 509 U.S. 389, 399, 113 S.Ct. 2680, 2686-87 (1993).

Although there was no heightened standard for Goff to have waived the right to counsel and to represent himself, it is clear that his decision must have indeed been made competently and intelligently. *Faretta v. California*, 422 U.S. 806, 835, 95 S.Ct. 2525, 2541 (1975). "The test for competency to stand trial is certainly a standard which must be met before a defendant can be said to be capable of intelligently and knowingly waiving the right to counsel." *Howard v. State*, 701 So.2d 274, 280 (¶ 18)(Miss.1997)

In Mississippi the trial court must make a "case-by-case determination of a defendant's assertion of the right to proceed *pro se.*" *Howard v. State*, 701 So.2d 274, 283 (¶ 31)(citing *Metcalf v. State*, 629 So.2d 558 (Miss.1993)). This Court reviews the trial court's decision to allow a defendant to act as his own attorney for abuse of discretion. *Metcalf v. State*, 629 So.2d at 566. As there is no requirement that a trial judge order a competency hearing to determine if a defendant may represent himself, this Court has adopted a test from the Fifth Circuit Court of Appeals that it utilizes when examining a trial court's decision to proceed without a competency hearing. The question to be answered is, "Did the trial judge receive information which, objectively considered, should reasonably have raised a doubt about [a] defendant's competence and alerted him to the possibility that the defendant could neither understand the proceedings, appreciate their significance, nor rationally aid his attorney in his defense?" *Howard*, 701 So.2d at 281(¶ 21). If the trial court

were to determine a reasonable ground existed to believe the defendant is incompetent then a competency hearing must follow. "The determination of what is 'reasonable,' of course, rests largely within the discretion of the trial judge [who] sees the evidence first hand [and] observes the demeanor and behavior of the defendant." *Howard* at (¶ 20).

Prior to the *ex parte* hearing requested by Goff's counsel at the time, the court did have before it a motion to have Goff evaluated for competency. C.P. 51-52. During that *ex parte* hearing the defense counsel candidly informed the judge that the reason he first requested the mental evaluation regarding competency was based on nothing more than the horrific nature of the crime.

> BY MR. DEEN: . . .And when I came over here at first to represent him, I told him, due to the horrendousness of the allegation, that we ought to look into some type of maybe not guilty by reason of insanity or some type of looking into his competency at the time the event was done. Joseph instructed me he didn't want to do that, because he - - basically, that's why I went to ex parte - - because he maintains he didn't do it.
>
> Tr. 155.

Defense counsel went on to further provide the court with information as to his investigation of the claim and with his lack of any evidence in support of the claim that Goff may have been insane or incompetent. Tr. 155-159. Defense counsel then made clear to the court that he was withdrawing the previous request for a mental evaluation for the purposes of determining competence to stand trial or for asserting an insanity defense. Tr. 161. "BY MR. DEEN: That was the original motion, yes, sir. *Then I tried to update it with what I was really looking for.*" Tr. 161-62. (Emphasis added). Thereafter, Goff did receive what was

really being sought which was a mental evaluation to include the determination of any mitigating factors that Goff may use in his defense.

Counsel went further in his explanation to the court at a pre-trial hearing on April 25, 2005, in which he stated that after investigation he could find no indication Goff was ever admitted to psychiatric care and had no reason to question Goff's sanity at the time of the crime nor his competence to stand trial. Tr. 190.

By the time Goff had made his request to the court to proceed pro se, the trial court had concluded the *ex parte* hearing with Goff's then counsel and had the opportunity to observe and hear Goff render testimony at the suppression hearing regarding the traffic stop discussed *supra* in Issue I, and observed and discussed with Goff the issue regarding his mental status. Tr. 192-93. The trial court observed:

> BY THE COURT: It was my observation at the hearings conducted April 7th, at least I think we conducted at the lengthy suppression hearing on that date, I did not observe or perceive any untoward conduct on the part of the defendant. He certainly appeared to me to appreciate the nature of the proceedings. He was able to proceed and testify at that hearing, and his responses to the questions that were asked were appropriate and responsive. I didn't see any basis for the Court on its own, sua sponte, bringing up, you know, having a hearing conducted or an examination conducted.

Tr. 192.

Goff states that the record in this case "is more egregious" than in *Howard*, and attempts to show a parallel between the two cases. Goff points to comparisons of problems communicating with his lawyers and family. The record clearly points out the defense attorney felt he had no unusual problem communicating with Goff and that Goff had been

ably assisting in the preparation of the defense. Tr. 190-91. This Court has held that "defense counsel is in the best possible position to determine if the defendant has executed a knowledgeable waiver of counsel". *Howard* at 425. Goff's counsel made clear to the court that it was his belief that Goff knew what he was doing and fully understood the consequences of what he was doing. Tr. 249. Goff goes on to assert that counsel, at that time stand-by counsel, questioned Goff's competence to continue pro se during the sentencing phase in another comparison to *Howard.* Actually, the attorney questioned Goff's competence in his capacity as an attorney, not his mental competence Tr. 996.

As far as his family relationship, Lessie Goff, the defendant's adoptive mother, was called upon to testify but gave no information as to whether or not her son had ever been treated for any mental illness. Tr. 1004-26. Instead of an excuse of mental illness, Ms. Goff looked back to the onset of her son's disciplinary problems as being caused by returning to his biological family and not to any mental defect. Tr. 1011.

Prior to the start of the actual trial and after voir dire the trial judge also had the opportunity to review the mental evaluation of Goff prepared by Dr. C. Van Rosen.[5] The report did not change the trial judges decision that Goff be allowed to proceed pro se with the assistance of stand-by counsel. Tr. 433.

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[5]The report of Dr. Rosen was reviewed by the court regarding Goff's mental evaluation and was marked as an Exhibit No. 1for Identification Only. Tr. 439.

The record in the case is lengthy and clear that the trial judge had ample opportunity to observe, listen to and interact with Goff prior to the request to proceed pro se was placed before him and had the benefit of defense counsel's insight as to Goff's competence. Tr. 249-254. The court never received information of any type that would have required a competency hearing for Goff be ordered. Goff, at all times showed he understood the proceedings and their significance and was able to rationally aid his attorney in his defense. This issue is without merit as Goff was properly allowed to exercise his right to self representation.

III. THE EVIDENCE AT TRIAL WAS SUFFICIENT TO SUSTAIN THE GUILTY VERDICT.

Goff next contends the evidence presented at trial was insufficient to support the proof of the underlying felony of robbery and as a result his conviction must be overturned and he should face a retrial on a less than capital murder charge.

When confronted with a challenge to the sufficiency of the evidence this Court looks to all of the evidence that was before the jury to determine whether a reasonable juror could find, beyond a reasonable doubt, that the defendant is guilty. *Jackson v. State*, 614 So.2d 965, 972 (Miss.1993). The evidence presented must be viewed in a light that is most favorable to the verdict, and all of the credible evidence consistent with guilt is required to be accepted as true. *Gleeton v. State,* 716 So.2d 1083, 1087 (Miss.1998).

> [A]n elemental principle is that this Court is reviewing whether or not the jury had sufficient evidence to make its finding of fact is required to

> examine the facts most favorable to the party against whom a motion for directed verdict or peremptory instruction is requested, in this case the State.
>
> *Callahan v. State*, 419 So.2d 165, 174 (Miss.1982).

See generally, Williams v. State, 463 So.2d 1064 (Miss.1985); *Christian v. State*, 456 So.2d 729 (Miss. 1984); *Hyde v. State*, 413 So.2d 1042 (Miss.1982); *Sparks v. State*, 412 So.2d 745 (Miss.1982); *Robinson v. State*, 409 So.2d 719 (Miss.1982); *Sadler v. State*, 407 So.2d 95 (Miss.1981); *Carroll v. State*, 396 So.2d 1033 (Miss.1981). Within the realm of criminal law, an absolute standard must be met prior to a reversal predicated upon the evidence. As stated in *Maiben v. State*, 305 So.2d 87 (Miss.1981):

> We have held in numerous cases that the jury is the sole judge of the credibility of the witnesses and the weight to be attached to their testimony. We have further said that we will not set aside a guilty verdict, absent other error, unless it is clearly a result of prejudice, bias or fraud, or is manifestly against the weight of the credible evidence. *Cromeans v. State*, 261 So.2d 453 (Miss.1972); *Marr v. State*, 159 So.2d 167 (Miss.1963); and *Freeman v. State*, supra. [Emphasis added.]
>
> 305 So.2d at 88.

Further, in *Spikes v. State*, 302 So.2d 250 (Miss.1974), this Court held:

> On appeal, in this situation, in passing on the sufficiency of evidence to support a verdict, this Court must accept as true the evidence which supports the verdict. *Murphee v. State*, 288 So.2d 599 (Miss.1969).
>
> 302 So.2d at 251.

Goff contends that since the wallet, containing Brandy Yates cash and identification, Exhibit S-52A, was not covered in "biological evidence", the fluids from Brandy Yates mutilated body, and the State did not test the wallet for fingerprints, that there exists no proof

the wallet was inside of Room 121, hence he could not have removed it from the room and is therefore innocent of robbery. The lack of testing for bodily fluids or fingerprints on the wallet does not absolve Goff of the consequences of his murderous actions as Mississippi follows the "one continuous transaction" rational in capital cases. That is "the underlying crime begins where an indictable attempt is reached." *Pickle v. State*, 345 So.2d 623 (Miss.1977). An indictment charging a killing occurring "while engaged in the commission of" one of the enumerated felonies includes the actions of the defendant leading up to the felony, and "flight from the scene of the felony." *Turner v. State*, 732 So.2d 937, 949-50, ¶¶ 47-48 (Miss.1999); *Pickle, supra*; *Neal v. State*, 451 So.2d 743, 757-58 (Miss.1984); *Pruett v. State*, 431 So.2d 1101, 1105-05 (Miss.1983). *See Duplantis v. State*, 708 So.2d 1327, 1341-42, ¶¶ 63-67 (Miss.1998); *Walker v. State*, 671 So.2d 581, 594-96 (Miss.1995); *West v. State*, 553 So.2d 8 (Miss.1989); *Wheat v. State*, 420 So.2d 229, 238-39 (Miss.1982). This Court has further held that even though a victim is killed prior to property being taken from them, proof of a robbery can be sustained. *Manning v. State,* 726 So.2d 1152, 1196, ¶¶ 189-91 (Miss.1998); *Mackbee v. State*, 575 So.2d 16, 35-37 (Miss.1990); *West v. State*, 463 So.2d 1048, 1055-56 (Miss.1985). It is of no consequence when the robbery occurred so long as it occurred 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 robbery." *See* MISS. CODE ANN.§ 99-19-101 (5)(d).

Goff goes further in proclaiming his innocence for the robbery by pointing out in his brief that he did not mingle Brandy Yates wallet with the other items of evidence that he had loaded into his vehicle that did in fact have her blood and fluids on them. *See* Appellant's Brief at 19. Goff had in fact placed Brandy Yates wallet into the same console with his bundles of money that were found by Trooper Ginn during the traffic stop on Interstate 20, discussed *supra* in Issue I. All of the other items besides the wallet were being transported to Texas by Goff, presumptively so that those items could be concealed and/or destroyed. *See* Exhibit S-70.

The evidence presented at trial shows that during the course of the murder of Brandy Yates that Goff took her wallet containing her cash and identification. Goff's own statement made clear that Goff admitted to assaulting Brandy Yates in Room 121 and that he then "[l]eft with the intentions of never coming back."; "[l]ike I said, I had no intentions of coming back." *See* Exhibit S-70 Goff then retreated to his mother's home in Mobile, Alabama.[6]

Goff's argument is not credible and only solidifies the proof of his guilt as the wallet was found in the console alongside his own bundled money. The wallet was not found on

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[6] Further evidence of Goff's carrying out of the robbery was the testimony by Goff's mother, Lessie Goff, during the sentencing phase when she testified that she had listened in on a telephone conversation between Goff and a female which contained the following exchange: "And she said: Joseph, you can't just put me in a motel and go off and leave me. She said: I'm hungry. And he said: I left you $500.00." Tr. 1020. There was no money discovered in the room with Brandy Yates body.

the floor with the other bloody evidence that Goff admitted he was taking to Texas. The wallet was instead at his fingertips and under his control, ready to be used at his leisure. Goff obviously had no intention of discarding Brandy Yates money as he intended to dispose of the other evidence of her killing.

The facts in this case are similar to those in the case of *Knox v. State*, 805 So.2d 527 (Miss.2002). In *Walker v. State,* 913 So.2d 198 (Miss.2005) this Court looked to Knox in its analysis as being another similar case and held:

> ¶ 81. This Court has stated that the intent to rob, which is required to prove the underlying felony of robbery, can be shown from the facts surrounding the crime. *Lynch v. State*, 877 So.2d 1254, 1266 (Miss.2004) (collecting authorities).
>
> ¶ 82. In *Knox v. State*, 805 So.2d 527 (Miss.2002), Knox contended that the State presented insufficient evidence to prove that he intended to rob the victim when he killed her. Because of the alleged insufficiency of evidence, Knox argued that the State failed to prove the underlying felony of robbery, and, therefore, the charge of capital murder. *Id.* at 531. This Court disagreed with Knox's claims holding: " 'Intent to do an act or commit a crime is also a question of fact to be gleaned by the jury from the facts shown in each case.' " *Id.* (quoting *Shanklin v. State*, 290 So.2d 625, 627 (Miss.1974)). This Court found it most significant that Knox was in possession of the victim's personal belongings at the time he was arrested. *Id.* at 532. This Court held: "[W]hen the defendant is discovered with the personal property of the deceased on his person it is entirely within reason for the jury to find that this fact in itself constitutes robbery." *Id.*

Walker v. State, 913 So.2d at 224.

Goff was discovered with the personal property of the deceased in his car, mingled with his own and separate from evidence that he intended to conceal and/or destroy, making it entirely reasonable for the jury to find that this fact in itself establishes robbery. *Knox* at

532. The abundance of evidence to support the robbery element of capital murder was presented and was sufficient to support the guilty verdict reached by the jury. Therefore this issue argued by Goff is without merit and he is entitled to none of his requested relief.

IV. GOFF REPRESENTED HIMSELF AT TRIAL AND IS THEREFORE BARRED FROM ALLEGING INEFFECTIVE ASSISTANCE OF COUNSEL.

Goff lists eight areas wherein he claims to be the victim of ineffective assistance of counsel. Only in the first area raised does he reference a time period when he was not representing himself. As to the majority of the ineffective assistance of counsel claims, Goff represented himself at trial, therefore those claims are barred. The United States Supreme Court has held:

> [T]hus whatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'

Faretta v. California, 422 U.S. 806, 834 n. 46, 95 S.Ct. 2525, 45L.Ed.2d 562 (1975).

Goff cannot now claim ineffective assistance for his own actions nor the actions of his stand-by counsel as this Court, as quoted by our court of appeals, determined:

> ¶ 27. It has been established by the Mississippi Supreme Court that as stand-by counsel, a defense attorney is "without authority, discretion or control and the charge that he rendered constitutionally ineffective assistance is without merit." *Estelle v. State*, 558 So.2d 843 (Miss.1990). *Estelle* held that where a defendant declines appointed counsel and proceeds to represent himself with appointed counsel only standing by to provide assistance if called upon that the defendant will not be heard to complain on appeal of ineffective assistance of counsel. *Estelle*, 558 So.2d at 847. The case subjudice is one such case and therefore this issue is without merit.

Scarbough v. State, 893 So.2d 265, 273 (Miss.App.,2004).

As detailed in Issue II, *supra*, the trial court determined Goff was capable of exercising his Constitutional right to represent himself and his two previously privately retained attorneys were delegated to act as his stand-by counsel to assist in the case as little or as much as Goff determined. Tr. 254.

Alternatively, and without waiving any applicable bars, the State would address Goff's claims of ineffective assistance of counsel. Beginning the review regarding counsel's performance, the standard for determining if the petitioner was afforded effective assistance of counsel is well settled in *Strickland v. Washington*, 466 U.S. 688 (1984). "The benchmark for judging any claim of ineffectiveness [of counsel] must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* Ineffective assistance claims require a two-part analysis: petitioner must demonstrate trial counsel's performance was deficient and that the deficiency prejudiced the defense of the case. *Id.* at 687. "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Stringer v. State*, 454 So.2d 468, 477 (Miss.1984) (citing *Strickland*, 466 U.S. at 687). If the claim fails on either of the *Strickland* prongs, the proceedings end. *Neal v. State*, 525 So.2d at 1281; *Mohr v. State*, 584 So.2d 426 (Miss.1991).

The first inquiry - whether trial counsel's performance was deficient - is evaluated by whether or not counsel's legal advice to petitioner fell "outside objective parameters of reasonableness." *Strickland*, 466 U.S. at 678-88. The second inquiry - that of prejudice - concerns whether, but for counsel's alleged deficiency, there is a reasonable probability that the result would have been different. *Cole v. State*, 666 So.2d 767, 775 (Miss.1995). The prejudice inquiry focuses on whether there is a reasonable probability that, absent the alleged errors, the trial court would have concluded that petitioner did not deserve conviction. *Strickland*, 466 U.S. at 695.

This Court's scrutiny of trial counsel's performance is highly deferential. Trial counsel are presumed competent; the burden of proving otherwise rests on petitioner. *Hansen v. State*, 649 So.2d 1256, 1258 (Miss. 1994). This Court must focus on whether trial counsel's assistance was reasonable considering all circumstances, keeping in mind there is no constitutional right to errorless counsel. *Cabello v. State,* 524 So.2d at 315; *see Mohr v. State*, 584 So.2d at 430 (right to effective counsel does not entitle defendant to have a perfect attorney; defendant just has the right to competent counsel). With respect to the overall performance of trial counsel, their choice of whether or not to file certain motions, call witnesses, ask certain questions, or make certain objections falls within the discretion of planning a trial strategy. *Cole v. State*, 666 So.2d at 777.

To properly and fairly judge counsel's performance, this Court must make every effort, "[T]o eliminate the distorting effects of hindsight, to reconstruct the circumstances of

counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Stringer v. State*, 454 So.2d 468, 477 (Miss.1984) (citing *Strickland* at 689). Because of the difficulties inherent in making that type of evaluation, this Court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, petitioner must overcome the presumption that, under the circumstances, the action may be sound trial strategy.

Trial counsel have been held effective in the following cases: *See McGilberry v. State*, 843 So.2d 21 (Miss.2003) (counsel effective despite blanket assertions of inexperience, failure to pursue appointment of investigator, and failure to renew request for mental health expert; although counsel lacked experience in capital representation, they filed approximately 40 pretrial motions); *Brown v. State*, 798 So.2d 418 (Miss.2001) (counsel effective despite failure to investigate possibility murders might have been committed by someone other than defendant, absent showing additional investigation might have aided defense, or someone else might have been viable suspect); *Clark v. State*, 834 So.2d 747 (Miss.App.2003) (trial counsel effective even though he spent only ten minutes with defendant on two prior occasions to prepare for murder trial; defendant informed judge of satisfaction with counsel's services, and attorney's decisions not to file certain motions fell within the ambit of trial strategy).

Goff's first claim actually does reference a time in the proceedings before he requested and was granted the right to represent himself during the trial. Goff contends now

that his counsel at the time was ineffective for failing to have Goff evaluated by a mental health professional until after the time to assert an insanity defense had passed and for waiving that defense without knowing if evidence existed to support it.[7] Counsel at the time did file a motion for Goff to be mentally evaluated. C.P. 51-52. Counsel then approached the trial judge *ex parte* to explain his reasoning for filing the motion which was found to have been filed based on nothing more than the gruesomeness of the crime. Tr. 155. It was done without consultation with his client or a valid look into the facts of the case or Goff's mental history. Tr. 155-59. It was nothing more than a shot in the dark that counsel thought may turn out to be of benefit for his client.

Counsel then informed the court that after consultation with his client and a look at the facts of the case in conjunction with his own investigation as to the need for a mental evaluation for the purpose of finding factors to use in mitigation should he be convicted of the capital murder count of the indictment. Tr. 161-62. Counsel also informed the court of his past affiliations and representation of Goff in previous criminal matters. Counsel informed the judge there were no reasons for evaluating Goff based on the earlier motion but that he did desire he be evaluated for the purpose of mitigating factors and specifically informed the court that the defense had come to the conclusion neither an insanity defense or a determination for competency was warranted or would be sought. Tr. 161.

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[7]Goff's counsel at the time is the same counsel later appointed as stand-by counsel after Goff began to represent himself.

Goff cannot and has not shown counsel to be deficient in that he was intimately familiar with Goff, his family and family background, had conducted his own investigation into the issue and after consultation with his client he withdrew the request for the mental evaluation as originally filed and asked that one be conducted for the purpose of discovering mitigation issues. Tr. 164. After extensive investigation, counsel concluded there was no support for the motion and asked the court for the proper alternative. Counsel can not be held to be ineffective for failure to move forward on an issue for which he had no basis to proceed upon. *Powers v. State*, 883 So.2d 30, 31 ¶39 (Miss.2003).

This claim by Goff does not pass the standard set forth in *Strickland* and is therefore without merit.

The remainder of the ineffective assistance of counsel claims by Goff all reference times during the trial after Goff had taken over his representation pursuant to his rights under the Sixth Amendment.

On the next issue Goff claims that although the jury was asked during voir dire about whether or not gruesome photographs of the victim would affect their judgement as to Goff's guilt, error was made in that Goff did not specifically ask the venire if the photographs would effect them during deliberations for sentencing. Goff cites generally to the case of *Ross v. State*, 954 So.2d 968 (Miss.2007) in support of his argument. A complete reading of *Ross* does not reveal any such finding by this Court and as such Goff has failed to cite to relevant

authority in support of his argument and as such it should be deemed waived in this appeal. *Simmons v. State*, 805 So.2d 452, 487 (Miss.2001).

Goff next claims the prosecution improperly interjected character evidence and victim impact information during voir dire, opening statements and during the testimony of James Yates. Goff argues these same issues *infra* in Issue V which are discussed in detail as to the claim of prosecutorial misconduct. As discussed in Issue V, at no time did the prosecution commit misconduct by improperly eliciting evidence of Brandy Yates character as it relates to a victim under Mississippi Rule of Evidence 404. At voir dire the prosecution properly probed the venire for possibly bias and prejudice against Brandy Yates or the State. *West v. State*, 553 So.2d 8, 22 (Miss.1989). During opening statements the prosecution did nothing more than what it is properly allowed to do in informing the jury what it expected the evidence would show. *Slaughter v. State*, 815 So.2d 1122, 1131 ¶ 52 (Miss.2002). As to the testimony of James Yates, his statements to the jury never crossed the line of being anything but proper and admissible evidence. Yates testimony did nothing more than identify himself, and inform the jury of the nature of his wife's employment. He also identifies the children he and Brandy Yates shared. Yates never delved into testimony regarding the impact the death had on him or the children during the guilt phase of the trial. As there was nothing objectionable entered into the record regarding the voire dire questioning the opening statement by the prosecution or James Yates testimony it can not be said that counsel was

ineffective for failing to lodge objections. Goff has failed to meet the requirements of *Strickland* to show counsel was ineffective in this area.

Goff next asserts that he, Goff, was ineffective for failing to object to the composition of the venire which he claims had too many jurors with ties to law enforcement. Goff cites, generally, to *Mhoon v. State*,464 So.2 77, (Miss.1985) in support of his argument. With the inclusion of a bit of fuzzy math that does not include the entire venire, Goff concludes that a "statistical aberration" occurred that violated his right to a fair trial.

First, regarding jury selection in the context of an claim of ineffectiveness, this Court has held that "[C]ounsel's decisions that fall within the ambit of trial strategy cannot give rise to an effective assistance of counsel claim." *Cole v. State*, 666 So.2d 767, 777 (Miss.1995). And has further held that "[J]ury selection decisions clearly fall within the ambit of trial strategy." *Reynolds v. State*, 784 So.2d 929, 934 ¶16 (Miss.2001). Goff is precluded from claiming ineffective assistance of counsel in this area and cannot show *Strickland* deficiency or prejudice as this issue is without merit.

Goff's next issue is again also one covered in Issue V under the guise of prosecutorial misconduct. The issue is covered a bit more extensively *infra* and aids in showing there was no misconduct during the trial, which effectively rebuts the argument by Goff that the lack of objections to the conduct would constitute ineffective assistance of counsel.

Goff first wrongfully claims the prosecution asked the jury for a promise to convict even in the absence of evidence. He then claims the jury was reminded of this promise at

closing argument in violation of *Stringer v. State*, 500 So.2d 928, 938-39 (Miss.1986). No such promise was ever elicited by the prosecution which asked only that the jury base its verdict on the evidence that was actually provided to it during the trial. Tr. 340-41. On this issue the prosecution did not ask for a promise from the jury and therefore there was not an objectionable action by the prosecution. As there was no reason to lodge an objection to the statements there can be no prejudice to the defendant and no instance of ineffective assistance of counsel.

Also argued in Issue V is Goff's contention that the prosecutor's closing argument regarding Goff's bloody shirt, Exhibit S-49A, was improper as it was argument outside the record. Rather than being outside the record the prosecutor's closing comments were permissible as a clear and reasonable inference drawn from the evidence that was presented during the trial. *Walker v. State*, 913 So.2d 198, 239 (Miss.2005). The comment was not improper but was a reasonably drawn inference from the evidence allowed by *Wells v. State*, 698 So.2d 497, 506 (Miss.1997). "Counsel is allowed considerable latitude in the argument of cases, and is limited not only to the facts presented in evidence, but also to deductions and conclusions he may reasonably draw therefrom, and the application of the law to the facts". *Ivy v. State*, 589 So.2d 1263, 1266 (Miss.1991)

Again, the prosecutor was acting well within the boundaries of proper closing argument and there was no valid objection to be had regarding that argument, therefore the

defendant could not have been prejudiced and no *Strickland* violation was committed making this claim by Goff without merit.

Goff next claims ineffectiveness in the request for jury instruction D1-A, claiming the instruction allowed the jury to consider aggravating factors outside of those limited by statute. The standard of review employed by this Court regarding the denial or grant of a jury instruction the standard of review employed is as follows:

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

Byrom v. State, 863 So.2d 863, 874, ¶129, (Miss.2003) (quoting *Heidel v. State*, 587 So.2d 835, 842 (Miss.1991).

In addition to the complained of defense jury instruction the following instruction was also given to the jury:

> Consider *only* the following elements of aggravation in determining whether the death penalty should be imposed:
> 1. Whether the defendant was previously convicted of a felony involving the use or threat of violence to the person;
> 2. Whether the defendant knowingly created a great risk of death to many persons;
> 3. Whether the capital offense was committed while the defendant was engaged in the commission of robbery;
> 4. Whether the capital offense was committed for the purpose of avoiding or preventing a lawful arrest;
> 5. Whether the capital offense was especially heinous, atrocious or cruel.

> You must unanimously find, beyond a reasonable doubt, that one or more of *the preceding aggravating circumstances exists in this case* to return the death penalty. If none of these aggravating circumstances are found to exist, the death penalty may not be imposed . . .

C.P. 268. (Emphasis added).

taking the instructions as a whole, the jury was properly instructed that they could only take into consideration the listed aggravating circumstances there is no merit to Goff's contention that they were allowed to consider other aggravators based on instruction D-1A. As no error occurred no prejudice can be had and this issue raised by Goff is without merit in addition to the procedural bar.

Goff next claims ineffectiveness of counsel in the failure to object to Dr. Hayne's testimony regarding the pain suffered by Brandy Yates, inflicted by Goff. prior to her death. On this issue this Court has held:

> Holland II also held that discussion of pain by a forensic pathologist is admissible. Id. (citing *Whittington v. State*, 523 So.2d 966, 976 (Miss.1988) (allowing forensic testimony that a victim suffered a fatal heart attack as a result of trauma and stress induced by a beating and robbery)). *See also Mitchell v. State*, 792 So.2d 192, 215-16 (Miss.2001). "Thus, in Mississippi, a forensic pathologist may testify as to what produced [a victim's] injuries ... and what trauma such an injury would produce." *Holland II*, 705 So.2d at 341.

McGowan v. State, 859 So.2d 320, 335 ¶ 53 (Miss.2003).

This type of testimony is clearly admissible at trial. It was not error by counsel to not object to that which is not objectionable. *Powers* at ¶ 39. *Strickland* has not been violated in this issue and Goff's argument is without merit in addition to the procedural bar.

Finally, Goff contends that this Court should find cumulative error, taking into account not only the deficiencies he argues in this issue, but other errors which he does not bother to identify or name for review. As discussed above, Goff is procedurally barred from raising the claim of ineffective assistance of counsel and, in the alternative, none of his arguments have meritorious foundations which would lead to a finding of any *Strickland* violations which would require relief.

V. THERE WAS NO PROSECUTORIAL MISCONDUCT DURING THE TRIAL.

Goff alleges four instances of misconduct by the prosecution that he claims individually or in conjunction deprived him of a fair trial and sentencing. Goff never raised any objection at trial or in his motion for a new trial that the prosecution had engaged in misconduct of any kind and these claims are therefore barred on direct appeal. *Jackson v. State*, 684 So.2d 1213, 1226 (Miss.1996); *Chase v. State*, 645 So.2d 829, 854 (Miss.1994); *Hansen v. State*, 529 So.2d 114, 139-40 (Miss.1991).

Alternatively, and without waiving the applicable bar, the State addresses the merits of Goff's claims regarding allegations of prosecutorial misconduct. The standard of review for prosecutorial misconduct is: "Where prosecutorial misconduct endangers the fairness of a trial and the impartial administration of justice, reversal must follow." *Goodin v. State,* 787 So.2d 639, 653 ¶41 (Miss.2001). As discussed below, at no time did the prosecution engage in misconduct of any degree and certainly not to any degree warranting reversal.

Goff's first accusation of misconduct is that the prosecution improperly included victim character evidence during voir dire and opening statements. Character evidence, related to the victim in a case, is explained in the Mississippi Rules of Evidence Rule 404:

> CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES
>
> (a) Character Evidence Generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
>
> (2) Character of Victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution to rebut evidence that the victim was the first aggressor.

MRE 404.

During the voir dire process, the prosecutor asked the following of the prospective jurors:

> Q. She worked as a cocktail waitress at a bar in Alabama where she worked to help support her family. And you're going to hear that from her husband. And she left 24 days before her death with the defendant.
>
> Now, the question I have for ya'll is, will you hold that against the State of Mississippi that she worked in a bar? Some people just don't like that. Some people think you ought not work in a bar. Can everybody tell me her profession or her career that she was doing at the time will not affect your verdict? Can everybody tell me that? That you can follow the law?
>
> Because the law doesn't say you have the right to life unless you're a cocktail waitress, or you have the right to life unless you left your kids 24 days before with another man. It doesn't say that. It doesn't say that. And I need to know now. And it's all right. Again, as the Judge told you, this is America, we can believe what we want. And that's the great thing about our country. But we need to know now. Because if that's going to bother you, we have to

know now. So, can everybody tell me they can follow the law as given to you by the Court?

Tr. 326.

Later, during the prosecution's opening statement the district attorney made the following statement:

> BY MR. LAWRENCE: . . . [O]n August the 2nd, Brandy Stewart Yates was 29 years old. She had a husband named James. She had a son eight years old, James IV, and she had a daughter named Sissy. Her mother Carolyn, her father Jack, her sister Cyrstal, and her brother Jeff loved her dearly and cared for her greatly.
>
> On August the 2nd, they could not understand the decision Brandy had made, a decision to leave her family and go with that man right there, the defendant that you see in this courtroom.
>
> Now, Brandy, you will hear, was a cocktail waitress at a bar in Alabama. She worked there to help support the family. James worked construction.
>
> She met Mr. Goff at that bar, and for reasons we will probably never know, she made a decision to go with him. But at that time, all the concern, all the love, no one, no one ever dreamed that 24 days later she would lay dead in Room 121 of the Rocky Creek Inn here in Lucedale, Mississippi.

Tr. 448-49.

Clearly, the questions asked by the prosecution during voir dire and that portion of the opening statement were not improper or in violation of the prohibitions of character evidence being introduced by the prosecution. The complained of questions by the prosecutor during voir dire were clear and unambiguous. The prosecutor wanted to know if any prospective juror would be prejudiced against Brandy Yates or the State because she was a cocktail

waitress and/or that she had left her husband and children for another man. These questions were entirely permissible as "Mississippi law guarantees the right of either party in a case to probe the prejudices of prospective jurors and investigate their thought on matters directly related to the issues to be tried." *West v. State*, 553 So.2d 8, 22. The prosecution's opening statement did nothing to offend any prohibition of the improper introduction of character evidence at the trial. The prosecution merely did as it is allowed to do and set forth in its opening what it expected the proof to show. *Slaughter v. State*, 815 So.2d 1122, 1131 ¶ 52.

As to Goff's claim of victim impact and character evidence being included in the husband's testimony during the guilt phase the State again points out that Goff offered no contemporaneous objection at trial and he has therefore waived the right to bring the issue forward in this appeal. *Ballenger v. State*, 667 So.2d 1242, 1259.

In the alternative and without waiving the procedural bar, the State looks to the merits of this issue. The testimony of James Yates which Goff complains of is nothing more than identification of himself as Brandy Yates husband of eight years along with the names of their children and her place and type of employment. Tr. 568. The testimony in no way touched upon the character of Brandy Yates in violation of MRE Rule 404. Nor did the witness at any time testify during the guilt phaseas to the impact Brandy Yates murder had upon his life or those of their children or any other person. Such testimony can be proper as the Mississippi Legislature and this Court have recognized the necessity of victim impact testimony. This Court has adopted the *Payne v. Tennessee*, 501 U.S. 808 (1991) holding in

Hansen v. State, and noted, "A state may legitimately conclude the evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." *Hansen*, 592 So.2d 114, 146 (Miss.1991). Miss. Code Ann. § 99-19-157(2)(a) allows for an oral victim impact statement "at any sentencing hearing" with the permission of the courts. James Yates did in fact present victim impact testimony during the sentencing phase of the trial which is not complained of here on appeal. Tr. 985-88.

Goff's third complaint of prosecutorial misconduct is contained in a brief paragraph that alleges the district attorney improperly sought a promise from the jury to convict in the absence of evidence and then during closing argument reminded the jury of the promise to convict. The State would again point to the lack of a contemporaneous objection by the defense at trial therefore Goff has waived the right to bring the issue forward in his appeal. *Ballenger*, 667 So.2d 1242, 1259.

Alternatively, looking to the merits of the claim, the prosecution questioned the prospective jurors during voire dire as follows:

> BY MR. LAWRENCE: . . . [Y]ou know, if you watch TV a lot, you probably get to watch - - I don't know how many of you - - how many of you watch CSI? Well, raise your hand. See, there's a lot of you. A lot of you. It's a very popular show. My kids love it. All right. They're older and they love that show. They like Law and Order.
>
> But, can everybody tell me that they can separate what they see on TV from what you see in the courtroom? I know that sounds like a silly question, but some people go, oh, well, it was on CSI, so how come they don't do it in every case? All right.

> And I can tell you how I know, I know CSI and Law and Order are make-believe. If you flip the channel, you may see Scotty beaming somebody else up, and that's on TV. All right?
>
> So, can everybody tell me - - and, again, this kind of goes to the burden of proof, you know, about what evidence you have - - and can everyone tell me that they will listen to the evidence and not speculate because they don't have, say, DNA or they don't have fingerprints and things you may see or hear about on CSI? Can everybody tell me they can do that? Yeah?

Tr. 340-41.

During closing arguments the prosecution reminded the jurors of the earlier statements as follows:

> BY MR. BRADLEY: . . . [A]nd I want to talk about some of those things. The first one was something that the DA talked to you about in voir dire, forensic evidence. We heard a lot about that on cross examination. You didn't do any DNA, you didn't do fingerprints, you didn't do footprint analysis. Unnecessary.
>
> The DNA is to establish who was there. From the interview, from the tape you heard, we know who was there. From the evidence gathered, we know who was there. Joseph Goff.
>
> You were asked in voir dire, you all know about CSI. Can you set that aside if it's not needed and return a verdict, and you all said yes. So we ask you to hold to that. It's not necessary here, and it's not needed. The evidence was overwhelming.

Tr. 924-25.

Goff refers to the case of *Stringer v. State*, 500 So.2d 928 (Miss.1986) to support his argument. In *Stringer* the prosecution improperly and specifically requested a promise during voir dire for a verdict imposing the death penalty. *Id.* at 938. During closing argument the prosecution reminded the jury of that promise. *Id.* The facts in this case are in no way similar

to those of *Stringer*. Instead of a promise to convict, as put forth by Goff, the prosecutor asked of the jurors willingness to listen to the evidence and not return a verdict based upon speculation. This line of questioning and the later reminder of the questions during closing were in reference to questions about the television show, CSI, which figured quite prominently in voir dire[8].

The prosecution did not ask for any promise to convict or for the jurors to ignore any piece(s) of evidence but rather it was only asked that they return a verdict based on the evidence presented to them during the trial. Such a request can not possibly rise to the level of endangering the fairness or impartiality of the proceedings in this trial. *Goodin v. State*, 787 So.2d 639 (Miss.2001).

Goff's final complaint of prosecutorial misconduct involves the prosecution's closing argument related to Exhibit S-47A, Goff's blood soaked shirt he wore at the time of the murder. Goff claims the prosecutor improperly argued outside the record regarding the blood stains on the shirt. Goff's failure to contemporaneously object to the prosecutor's remarks is

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[8]The Fifth Circuit Court of Appeals has made note of the impact of forensic type television shows as found in: "FN39. The 'CSI effect' is a term that legal authorities and the mass media have coined to describe a supposed influence that watching the television show CSI: Crime Scene Investigation has on juror behavior. Some have claimed that jurors who see the high-quality forensic evidence presented on CSI raise their standards in real trials, in which actual evidence is typically more flawed and uncertain." Tom R. Tyler, Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction, 115 Yale L.J. 1050, 1050 (Mar.2006). Professor Tyler's article explains that the existence of a "CSI effect " is plausible but has not been proven empirically."
U.S. v. Fields, 483 F.3d 313(5th Cir.2007).

a bar to consideration of prosecutorial misconduct allegations now in this appeal. *Hodges v. State*, 921 So.2d 730, 751 ¶ 26 (Miss.2005).

During closing the prosecutor argued the following:

> BY MR. LAWRENCE: . . . [F]irst off, the shirt. You can bring the shirt up, please. This is his shirt. Just look at the stain on this shirt. She told you these were droplets. Droplets. All right. These are where the buttons are missing. Does that look like what you would get by laying on somebody? Now, I know he says he was there for an hour and a half, we're going to talk about that in a minute. But that's a lot of blood, members of the jury. That's a lot of blood.
>
> Could you flip to the back, please, sir? The back of the shirt, look at these droplets. That is blood in motion. That is this. (Motioned with arm in a slashing motion.) That's how that gets there. That ain't laying on top of her. How do you get blood on the back of a shirt if you're laying on top of a girl? What did he do? Lay on her and waddle on the back, too? Please. Please. It makes no sense. Use your common sense. That shirt right there tells you, he killed her.

Tr. 958-59.

In relation to closing arguments this Court has held:

> ¶ 152. " '[T]he very purpose of an advocate is to help the jury draw conclusions from the evidence and to make suggestions as to a proper conclusion.' " *Evans*, 725 So.2d at 671 (quoting *Blue v. State*, 674 So.2d 1184, 1208 (Miss.1996)). Furthermore, the prosecutor is entitled to argue inferences based upon evidence presented at trial, and it is appropriate for the prosecutor to draw inferences without stating his personal opinion. *Id.*
>
> Statements made by the prosecution must also be considered in light of this Court's observation that "counsel should be given wide latitude in their arguments to a jury[....] Courts should be very careful in limiting the free play of ideas, imagery and the personalities of counsel in their argument to a jury." *Johnson v. State*, 477 So.2d 196, 209 (Miss.1985). However, counsel is clearly limited to arguing facts introduced in evidence, deductions and conclusions he

> or she may reasonably draw therefrom, and the application of the law to the facts. *Ivy v. State*, 589 So.2d 1263 (Miss.1991).

Walker v. State, 913 So.2d 198, 239 (Miss.2005).

The prosecutor was clearly within established limits in his argument related to Goff's bloody shirt. The argument was related to Exhibit S-49A, placed into evidence without objection and by stipulation of the parties. The blood stains on the back of the shirt and the front of the shirt are clearly different. See Exhibit S-49A.. The prosecutor's statements during closing argument were a clear and reasonable inference drawn from the evidence presented at trial. *Id.*

None of the issues raised by Goff regarding prosecutorial misconduct rise to the level of error so that the Goff was not granted a fair trial or deprived of the impartial administration of justice. *Goodin v. State,* 787 So.2d 639.

As noted, with each of Goff's accusations of misconduct by the prosecution, the State has pointed out the lack of a contemporaneous objection to any of the perceived errors. Goff also failed to include any of these supposed errors in his motion for a new trial or JNOV. C.P. 280. Now, on appeal, Goff attempts to sidestep any bar by invoking "plain error"as a cause for review of the issues.

> "[A] party who fails to make a contemporaneous objection at trial must rely on plain error to raise the issue on appeal, because it is otherwise procedurally barred." *Williams v. State*, 794 So.2d 181, 187, ¶ 23 (Miss.2001) (citing *Foster v. State*, 639 So.2d 1263, 1288-89 (Miss.1994)). To rise to the level of plain error it must be so fundamentally wrong that it creates a miscarriage of justice.

Dixon v. State, 953 So.2d 1108, 1116, ¶ 22 (Miss.2007).

That is not the case in Goff's trial as no misconduct by the prosecution occurred at any time during the trial. No miscarriage of justice is found in this issue as, in addition to the procedural bars there is no merit to the claims as no error occurred, plain or otherwise.

Finally, Goff declares that his failure to object to "this improper argument" entitles him to add this to his list of ineffective assistance of counsel claims. As discussed *supra* in Issue IV, Goff is not entitled to now claim ineffective assistance of counsel as he invoked his right to represent himself at trial.

Goff's claims in this issue are procedurally barred and alternatively without merit therefore he is not entitled to his requested relief.

VI. THERE WAS NO TRIAL COURT ERROR IN THE DENIAL OF DEFENSE JURY INSTRUCTION D-16.

At trial, Goff submitted the following jury instruction:

> I charge you, members of the jury, that one charged with a crime is permitted to introduce evidence, in exoneration of himself, which if believed by the jury will tend to show that some other person committed the offense charged. In order to justify an acquittal, the totality of any evidence offered to show the guilt of another need not be of such strength as to warrant a finding by the jury that such other did, in fact, commit the crime charged. If the jury believes there is evidence which reasonably tends to show that some other person committed the crime charged, and this evidence, when considered with all the other evidence in the case, generates a reasonable doubt in the minds of the jury as to whether the Defendant is the perpetrator of the criminal act, the Defendant must be acquitted.

C.P. at 239.

The prosecution objected to the instruction and the following discussion was had between the prosecution, defense and the court:

BY THE COURT: . . . [D]-16.

BY MR. LAWRENCE: We object to this instruction, Your Honor. This instruction amounts to the Court sanctioning the argument of defense counsel. Everything in this instruction can be argued, and this gives their argument the force of law, and that's improper.

BY THE COURT: What's your authority for this instruction?

BY MR. DEEN: General principles, Judge. The burden is on the State to prove the guilt of the defendant. That burden never shifts. If the defense puts on evidence, the defendant testifying, puts on people, the burden never shifts. We wanted to point out to the jury that if there is evidence pointing to someone else doing the offense, that it would not be incumbent upon the defendant to prove that other person's guilt beyond a reasonable doubt, and to somehow shift the burden from the defendant, to have to present evidence, that he wouldn't have to do. So we wanted to make that clear in the instruction that they may not believe somebody else did it, but that could be enough to engender a reasonable doubt in their mind, and we think it's a proper statement of the law in its totality.

BY THE COURT: I'm going to refuse D-16. I believe it's improper comment by the Court upon the weight of the evidence. That will be refused.

Tr. 902-03.

Looking to the denial or grant of a jury instruction the standard of review employed by this Court, as previously stated, is as follows:

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

Byrom v. State, 863 So.2d at ¶129.

The trial judge's ruling was correct that the proposed instruction was an improper comment by the court on the weight of the evidence as it could have given undue prominence to specific portions of the evidence. See Miss.Code Ann. §99-17-35, *Ragan v. State*, 318 So.2d 879, 882 (Miss.1975). Additionally, the proposed instruction missed the mark on all three requirements for presenting a proper instruction as it is not a correct statement of the law, is covered elsewhere in the instructions and has no foundation in the evidence.

First, Goff admits the instruction has no basis in the law and is based merely on "general principles". The instruction is also confusing and an inaccurate statement of the law.

The jury was properly instructed elsewhere when the jury was told they could only convict Goff of capital murder if the State proved beyond a reasonable doubt each and every element of the crime in instruction S-2A. C.P. 212 Clearly, to find Goff guilty beyond a reasonable doubt negates the possibility the jury believed by less than a reasonable doubt that someone else may have committed the crime.

Neither is there an evidentiary foundation to support this instruction as Goff claims the instruction supports his "theory of the defense". Here on appeal Goff claims his theory to be that the husband killed Brandy Yates, but he offered no such evidence at trial and offers none here on appeal. Goff points to three spots in the record that he claims support his argument. First, Goff refers to his statement to the police. Exhibit S-70. In that exhibit Goff points to nothing more than his own statement that it must have been the husband that killed her. In the same breath Goff refers to "they" that killed her. Exhibit S-70.

Besides the above self-serving statement by Goff, he offers that James Yates admitted during his testimony to a past instance of domestic violence against Brandy Yates. Nothing could be further from the truth as shown in James Yates testimony. Goff goes so far as to falsely state "Yates admitted to past domestic violence that included police responding." Appellant's Brief at 32. The actual testimony debunks Goff's assertion as the following shows:

Q. You said you were having marital problems. Right?
A. Correct.
Q. And that you were on again, off again with her. Is that right?
A. We had split up one time before. This would be the second time.
Q. Was that in 2004 you had split up?
A. I would say 2003.
Q. Was that over domestic violence that ya'll split up?
A. No, Sir.
Q. It had nothing to do with that?
A. No, sir.
Q. Was that ever a problem in your household?
A. Direct problem, no.
Q. Sir?
A. Direct problem, no.
Q. A direct problem. But there was a problem with fights and stuff with ya'll, wasn't there.
A. There was disagreements and arguments, yeah.
Q. Physical fights.
A. Physical fighting, no.
Q. The law never was called to your house?
A. One time.
Q. How close was that to when, to August of 2004 that the law was called to your house because of fighting going on there.
A. Three or four years ago.

TR. 583-84.

Rather than an admission to domestic violence the testimony is a clear repudiation of any such violation. Goff goes further in mischaracterizing the evidence by claiming the falsity of the above referenced statement was somehow bolstered through "elaboration" by Detective Lambert. Detective Lambert testified:

Q. Did he tell you about the law being called to their house?
A. No, sir.
Q. Did he tell you anything about domestic violence or anything?
A. No, sir. He said he'd had . . . Well, I'll rephrase. He said he did have a misdemeanor charge on him one time. I mean . . .
Q. Okay. I wasn't actually getting into the charge. I was just wondering if he had said they'd had some domestic violence in their house?
A. He didn't explain to me what it was. He said he'd had a misdemeanor charge one time.

Tr. 785-86.

This so called elaboration is a further repudiation of the allegation Goff makes here on appeal. Goff's attempt to connect the mere mention of domestic violence with James Yates name is spurious as Goff has twisted and mischaracterized the evidence that was put before the jury.

Finally, in an attempt to further support this theory, Goff states that James Yates provided the detective with contradictory information. Goff directs the reader to page 843 of the transcript in support of his contention. Not surprisingly, whatever information that may be considered contradictory is not specified. The entire testimony of Detective Ronnie Lambert, as called by the defense, is contained in pages 835-843 of the transcript and a review does not reveal what, if any, contradiction of anything would be present.

Goff's "theory" is nothing more than the slinging about of innuendo and conjecture to see if it would stick on someone else. It does not as the jury did as instructed and based its verdict on the facts presented to it.

This proposed instruction was properly refused by the court and Goff is not entitled to any relief on this issue.

VII. THERE WAS NO TRIAL COURT ERROR IN DENIAL OF THE DEFENSE'S REQUESTED CIRCUMSTANTIAL EVIDENCE INSTRUCTION.

Goff next contends the trial court erred in denial of his request for a two-theory jury instruction. Once again, as previously stated:

> Jury instructions are to be read together and taken as a whole with no one instruction taken out of context. A defendant is entitled to have jury instructions given which present his theory of the case; however, this entitlement is limited in that the court may refuse an instruction which incorrectly states the law, is covered fairly elsewhere in the instructions, or is without foundation in the evidence.
>
> *Byrom*, 863 So.2d at ¶129.

Regarding the two-theory instruction this Court has held:

> This is the often-requested two-theory instruction in popular use by defense attorneys. *There is, however, a prevalent misconception as to the proper use of the instruction. In the first place, before this instruction is applicable, there must be two theories in the trial of the case.* For example: murder or alibi; homicide or an accident; homicide guilt or mistaken identity. Moreover, the two-theory instruction is only applicable where the case rests entirely upon circumstantial evidence. *Coward v. State*, 223 Miss. 538, 78 So.2d 605 (1955). In Coward we said:
> 'Moreover, even in a case based entirely on circumstantial evidence, if an instruction is allowed that the evidence must exclude every reasonable theory other than that of guilt, that is held to embody the essentials of the two-theory

> instruction, and refusal of the latter is not reversible error.' 223 Miss. at 249-250, 78 So.2d at 610.

Kitchens v. State, 300 So.2d 922, 926 (Miss.1974).(Emphasis added.)

In further support of the trial court's ruling on the matter this Court has made clear that a separate two theory instruction need not be given if a circumstantial evidence instruction is given. *King v. State,* 421 So.2d 1009, 1016 (Miss.1982).

Goff relies on the case of *Parker v. State*, 606 So.2d 1132 (Miss.1992), to support his argument in this issue. However, *Parker* is distinguishable from the case at hand as it is a case that agrees with the holding announced in *Kitchens* in that it requires there be an evidentiary basis for the for the two-theory instruction to be offered. *Parker* at 1141. As discussed in Issue VI above, Goff's "theory" that the murder was committed by someone else is without foundation.

In Parker, the Court found there to be two competing story lines containing facts susceptible to two interpretations. *Id.* That is not the case with Goff. There are no competing evidentiary facts. There is only Goff's self serving statements made to the police that claim the husband did it; it had to be him; "they" did it. *See* Exhibit S-70. Goff has nothing more to offer up in support of his bid to include this instruction than mischaracterized statements regarding the testimony of James Yates and Detective Lambert discussed *supra* in Issue IV.

Goff lacks the evidentiary basis required to meet the threshold requirement of actually having two separate theories to compete against one another for the jury's consideration and

the instruction is therefore inapplicable to this case and was correctly denied by the trial court. *Kitchens v. State*, 300 So.2d at 926.

VIII. MISSISSIPPI'S METHOD OF EXECUTION BY LETHAL INJECTION IS NOT UNCONSTITUTIONAL.

Goff claims the method of execution employed by Mississippi constitutes cruel and unusual punishment in violation of the Eighth Amendment. This Court has declared the lethal injection procedures employed by the State of Mississippi to be constitutional and not an exercise in cruel or unusual punishment. *Russell v. State*, 849 So.2d 95, 144-45 (Miss.2003). Additionally, Goff failed to submit any sworn proof as required by Mississippi Code Annotated § 99-39-9(1)(e), nor was any affidavit which legitimately questions the lethal injection protocol employed by the Mississippi Department of Corrections submitted.

Goff also makes note of the case of *Baze v. Rees*, as being controlling in this case[9]. As noted by Goff in his brief, "Mississippi's protocols are similar in all material respects to Kentucky's." Appellant Brief at 36. This admission by Goff precludes his argument as to the constitutionality of Mississippi's lethal injection protocol. As stated by Chief Justice John Roberts:

> JUSTICE STEVENS suggests that our opinion leaves the disposition of other cases uncertain, *see post*, at 1, but the standard we set forth here resolves more

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[9]Although not decided at the time Goff filed his brief in this case, the United States Supreme Court has rendered it's decision that Kentucky's lethal injection protocol is not in violation of the constitution. Additionally, Goff's determination that should the Court have ruled that Kentucky's lethal injection protocol was not constitutional it would have followed that Goff's death sentence would be voided is erroneous.

> challenges than he acknowledges. A stay of execution may not be granted on grounds such as those asserted here unless the condemned prisoner establishes that the State's lethal injection protocol creates a demonstrated risk of severe pain. He must show the risk is substantial when compared to the known and available alternatives. A State with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard.

Baze v. Rees, 553 U.S. ___, 128 S.Ct. 1520, 170 L.Ed2d 420 (2008).

As Mississippi's protocol is substantially similar to that employed by the State of Kentucky Goff is not able to establish that he would be subjected to a demonstrated risk of severe pain and therefore does not meet the standard set forth in the *Baze* decision to forego this state's lethal injection protocol. This issue is without merit and Goff is entitled to no relief.

As to the First Amendment claim made by Goff in the heading of this issue there is no mention, discussion or citation to authority in support of the claim. Goff offers no argument to answer to. As Goff has failed to address or put forth any issue related to the First Amendment claim it is procedurally barred from review. This Court has held that failure to cite to relevant authority relieves it of the duty of reviewing the issue. *Brawner v. State*, 947 So.2d 254, 265 ¶ 32 (Miss.2006); *Glasper v. State*, 914 So.2d 708, 726 (Miss.2005).

IX. THE INDICTMENT PROPERLY AND SUFFICIENTLY CHARGED GOFF WITH THE CRIME OF CAPITAL MURDER.

Goff presents this Court with a claim that the indictment in this capital murder case is insufficient because it does not contain the aggravating circumstances to be relied on by the

state at the sentencing phase of the trial or the *mens rea* element. The charge of capital murder is contained in Count I of the indictment. Count I, charging the appellant with capital murder under Section 97-3-19(2)(e) reads as follows:

> . . . that
>
> JOSEPH BISHOP GOFF
> COUNT I: CAPITAL MURDER
> in George County, Mississippi, on or about August 27, 2004, did then and there willfully, unlawfully and feloniously, and with or without any design to effect the death, kill and murder Brandy S. Yates, a human being, while in the commission of the crime and felony of Robbery, as defined by Section 97-3-73, Miss. Code of 1972, as amended, . . .
>
> C.P. at 6.

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

This Court has held that the decisions in *Ring* and *Apprendi* have no application to the Mississippi capital sentencing scheme. The Court has addressed this exact question in *Hodges v. State*, 912 So.2d 730, 775-76 (Miss.2005), wherein this Court held:

> **7 & 14. Death Penalty Eligibility.**
>
> ¶ 101. Hodges argues that *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), require that his sentence be vacated. Since both of these issues deal with the application of *Apprendi* and *Ring*, these two issues will be combined.
>
> ¶ 102. First, Hodges contends that his indictment was improper as it failed to enumerate the aggravating factors and the mens rea element. Hodges claims that *Williams v. State*, 445 So.2d 798, 804 (Miss.1984), which held that the indictment in a death penalty case need not include aggravating circumstances, must be reconsidered in light of *Apprendi* and *Ring* in which the

Court held unconstitutional a sentencing scheme where a judge rather than a jury determined whether there were sufficient aggravating circumstances to warrant imposition of the death penalty. Hodges also argues that Ring prohibits the duplicative use of the burglary aggravator at the penalty phase when the jury had previously found that Hodges had committed the crime at the culpability phase. This Court has previously discussed all of these issues as they relate to *Ring* and *Apprendi*. As this Court has continuously held, these cases have no application to Mississippi's capital murder sentencing scheme. Therefore, these issues are without merit. *See Berry v. State*, 882 So.2d 157, 170-73 (Miss.2004) (We have previously discussed these cases at length and concluded that they address issues wholly distinct from our law, and do not address indictments at all).

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

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

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

Berry, 882 So.2d at 173. In *Stevens v. State*, 867 So.2d 219 (Miss.2003), the defendant argued that his death sentences should be vacated because the aggravating circumstances which charged capital murder were not included in his indictment. In *Stevens*, the defendant also relied on *Ring* and *Apprendi*. *Id.* at 225. This Court held that:

> The State is correct in its assertion that a defendant is not entitled to formal notice of the aggravating circumstances to be employed by the prosecution and that an indictment for capital murder puts a defendant on sufficient notice that the statutory aggravating factors will be used against him. *Smith v. State*, 729 So.2d 1191, 1224 (Miss.1998) (relying on *Williams v. State*, 445 So.2d 798 (Miss.1984)).

> We believe that the fact that our capital murder statute lists and defines to some degree the possible aggravating circumstances surely refutes the appellant's contention that he had inadequate notice. Anytime an individual is charged with murder, he is put on notice that the death penalty may result. And, our death penalty statute clearly states the only aggravating circumstances which may be relied upon by the prosecution in seeking the ultimate punishment. *Id.* at 804-05. This issue is without merit.

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

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

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

> ¶ 46. Knox next argues that his indictment was defective because the aggravating factors were not included in the indictment. He cites *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct 2428, 153 L.Ed.2d 556 (2002); *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct 2348, 147 L.Ed.2d 435 (2000); *Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999); and *United States v. Allen*, 247 F.3d 741 (8th Cir.2001).
>
> ¶ 47. The State answers that this issue was raised, considered and found to be without merit by this Court in *Simmons v. State*, 869 So.2d 995 (Miss.2004), *Puckett v. State*, 879 So.2d 920 (Miss.2004) and *Berry v. State*, 882 So.2d 157 (Miss.2004). This Court found that Ring's holding was that juries must find aggravating factors; that in Mississippi, only juries can find aggravating factors in capital cases; and that none of the cases cited by Petitioners mandated that indictments for state capital defendants include all aggravating factors. This issue is without merit.
>
> 901 So.2d at 1269.

This Court has rejected Goff's argument in every instance it has been raised. *See Loden v. State*, 971 So.2d 548, 564-65, ¶¶35-36 (Miss.2007); *Powers v. State*, 945 So.2d 386, 396, ¶¶ 19-23 (Miss.2006); *Havard v. State*, 928 So.2d 771, 800-02, ¶¶ (Miss.2006); *Jordan*

v. State, 918 So.2d 636, 661, ¶¶ 77 (Miss.2005); *Knox v. State*, 901 So.2d 1257, 1269, ¶¶ 46-47 (Miss.2005); *Berry v. State*, 895 So.2d 85, 104-05, ¶¶ 44-45 (Miss.2004); *Brown v. State*, 890 So.2d 901, 917-18, ¶¶ 60-62 (Miss.2004); *Gray v. State*, 887 So.2d 158, 173-74, ¶¶ 45-48 (Miss.2004); *Mitchell v. State*, 886 So.2d 704, 710-11, ¶¶ 15-21 (Miss.2004); *Berry v. State*, 882 So.2d 157, 170-73, ¶¶ 57-69 (Miss.2004); *Puckett v. State*, 879 So.2d 920, 944-47, ¶¶ 86-97 (Miss.2004); *Holland v. State*, 878 So.2d 1, 7-9, ¶¶ 21-27 (Miss.2004); *Simmons v. State*, 869 So.2d 995, 1008-1011, ¶¶ 43-53 (Miss.2004); *Stevens v. State*, 867 So.2d 219, 225-27, ¶¶ 21-27 (Miss.2003).

Goff's claim that he is entitled to have aggravating circumstances and the mens rea element set forth in the indictment is totally without merit. Goff is entitled to no relief on this assignment of error.

X. ALL APPLICABLE AGGRAVATING CIRCUMSTANCES WERE PROPERLY SUBMITTED TO THE JURY.

At trial the jury found there to be five aggravating circumstances regarding Goff's sentencing. The jury found Goff (1) to have previously been convicted of a felony involving the use or threat of violence to the person; (2) knowingly created a great risk of death to many persons; (3) committed the offense while engaged in the commission of a robbery; (4) committed the capital offense for the purpose of avoiding or preventing a lawful arrest; (5) and that the capital offense was especially heinous, atrocious and cruel. C.P. 276.

Goff now takes issue here in his appeal with the aggravators; that the killing took place in the commission of a robbery, creating a great risk of death to many persons, and committed for the purpose of avoiding or preventing his arrest.

Goff does not contest the aggravator regarding his prior violent felony conviction. Neither does Goff challenge the aggravator that the killing was especially heinous, atrocious or cruel (HAC) but, he does dispute the constitutionality of the HAC limiting instruction.

As to the issue of the HAC limiting instruction, the jury was charged in sentencing instruction S-12 as follows:

> The Court instructs the Jury that in considering whether the capital offense was especially heinous, atrocious, or cruel; heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked or 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 the crime apart from the norm of capital murders - the conscienceless or pitiless crime which is unnecessarily tortuous 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 lingering or torturous death was suffered by the victim then you may find this aggravating circumstance.

C.P. 271.

This instruction in the case sub judice has repeatedly been found legally sufficient to satisfy constitutional requirements. *See Bennett v. State,* 933 So.2d 930, 955-56 (Miss. 2006); *Havard v. State*, 928 So.2d 771, 799-800 (Miss.2006); *Knox v. State*, 805 So.2d 527, 533 (Miss.2002); *Stevens v. State*, 806 So.2d 1031 (Miss.2001); *Edwards v. State*, 737 So.2d 275

(Miss.1999); *Crawford v. State*, 716 So.2d 1028 (Miss.1998); *Jackson v. State*, 684 So.2d 1213, 1236-37 (Miss.1996); *Carr v. State*, 655 So.2d 824, 851-52 (Miss. 1995).

The defendants in *Bennett, Havard* and *Stevens* took issue with the exact HAC instruction given in appellant's case. In *Bennett* this Court found the same limiting instruction to meet with its approval and by granting this limiting instruction, "The trial judge in Bennett's case followed the law in granting the HAC aggravating instruction." *Bennett* at 956. In *Havard* this Court found that "Havard invites us to overturn firmly entrenched Mississippi precedent on this issue. We decline to do so." *Havard* at 800. In *Stevens*, this Court rejected the defendant's claim that the HAC aggravator was unconstitutional noting that the HAC provision of Miss. Code Ann. § 99-19-101(5)(h) "is not so vague and overbroad as to violate the United States Constitution." *Stevens* at 1060.

Moreover, the HAC instruction as given in Goff's case has been upheld by the United States Supreme Court. *See Clemons v. Mississippi*, 494 U.S. 738, 110 S.Ct 1441, 108 L.Ed.2d 725 (1990) (United States Supreme Court upheld as constitutionally firm the giving of an HAC instruction which included this language).

The HAC instruction given in this case has been repeatedly upheld by this Court and by the U.S. Supreme Court. As such, the trial court's decision to grant this instruction was clearly in accordance with established precedent. There was no error in submitting this instruction to the jury.

As to the issue of the aggravator that the killing took place during the commission of a robbery, that a robbery occurred is fully discussed and well established in the discussion of Issue III, *supra.* Goff was found with Brandy Yates property mingled with his possessions at the time of his arrest and the evidence clearly shows her death occurred in the commission of the robbery. *Id.*

Goff contends, generally, that there is insufficient evidence to support the avoiding arrest aggravator. The State points out that Goff did not object to the consideration of the "avoiding arrest" aggravating circumstance at trial when the instruction was presented by the district attorney. There was no objection raised regarding the sufficiency of the evidence related to this aggravator made at trial. Further, in his motion for a new trial Goff did not raise this issue either. Since Goff did not object to the consideration of this aggravating factor and did not challenge the sufficiency of the evidence to support it at trial this claim is waived and barred from consideration by this Court for the first time on appeal. *See Woodward v. State*, 726 So.2d 524, 540-41, ¶¶ 66-67 (Miss.1997); *Foster v. State*, 687 So.2d 1124, 1139-40 (Miss.1997) (appellant precluded from raising issue on appeal, where no objection exists to the entry of the aggravator).

Alternatively, and without waiving the procedural bar the State would address the merits of Goff's claim. This Court has held that the mere killing of the victim does not automatically give rise to this avoiding or preventing arrest aggravating circumstance. Other factors must be presented to show that the defendant was killing the victim to "cover his

tracks." If there is evidence from which it may be reasonably inferred that a substantial reason for the killing was to conceal the identity of the killer to 'cover their tracks' so as to avoid apprehension and eventual arrest, it is proper for the court to allow the jury to consider this aggravator. *See Mitchell v. State* 737 So.2d 192, 219-20, ¶¶103-07 (Miss.2001); *Walker v. State*, 740 So.2d 873, 888, ¶¶63-65 (Miss.1999); *Puckett v. State*, 737 So.2d 322, 361-62, ¶¶123-26 (Miss.1999). In *Grayson v. State*, 879 So.2d 1008 (Miss.2004), this Court reiterated its previous holdings with regard to his aggravator stating:

This Court has held:

> Each case must be decided on its own peculiar facts. If there is evidence from which it may be reasonably inferred that a substantial reason for the killing was to conceal the identity of the killer or killers or to 'cover their tracks' so as to avoid apprehension and eventual arrest by authorities, then it is proper for the court to allow the jury to consider this aggravating circumstance.

Wiley v. State, 750 So.2d at 1206 (quoting *Chase v. State*, 645 So.2d 829, 858 (Miss.1994) (quoting *Hansen v. State*, 592 So.2d 114, 153 (Miss.1991)).

It was proper for the trial court to allow the jury to consider this aggravating circumstance, and this issue is without merit. The facts particular to this case show a clear attempt by Goff to "cover his tracks" and avoid arrest. After brutally murdering Brandy Yates, Goff, by his own admission removed all items from the motel room that he thought may contain his fingerprints. Exhibit S-70. By his own admission he did this for the purpose of not getting caught because he didn't want to go back to prison and/or be blamed for the

murder. Exhibit S-70. By his own admission he set fire to the room and to Brandy Yates to avoid detection of his crime. Exhibit S-70. This issue is procedurally barred and alternatively, there was overwhelming evidence presented for the trial court to allow the jury to consider the avoiding arrest aggravating circumstance, therefore, this issue is without merit in addition to the procedural bar.

Goff also claims, generally and without elaboration, that there was insufficient evidence to support the great risk of death to many persons aggravator. Again, Goff offered no contemporaneous objection at trial when the instruction was offered. There was no objection raised regarding the sufficiency of the evidence related to this aggravator made at trial nor in Goff's motion for a new trial. Since Goff did not object to the consideration of this aggravating factor and did not challenge the sufficiency of the evidence to support it at trial this claim is waived and barred from consideration by this Court for the first time on appeal. *See Woodward v. State*, 726 So.2d 524, 540-41; *Foster v. State*, 687 So.2d 1124, 1139-40. (appellant precluded from raising issue on appeal, where no objection exists to the entry of the aggravator).

Alternatively, and without waiving the procedural bar the State would address the merits of Goff's claim. Goff admitted to having set fire to Room 121 of the Rocky Creek Inn. Exhibit S-70. Testimony at trial showed that in addition to the clerk that was on duty that there was an unknown number of other guests staying in the motel. Tr. 466, 483. Although the exact number of persons put in peril by Goff's actions are unknown the use of this

aggravating circumstance does not require application to only those crimes where very large numbers of persons are placed in harm's way. *Simmons v. State*, 805 So.2d 452, 495, ¶ 117 (Miss.2001). Had the fire been detected earlier or had the fire burned as intended by Goff, presumably to consume every scrap of potential evidence of his crime, there would also have been the danger to responding firefighters or to any person that may have risked life and limb to combat the fire or to make an attempt to evacuate guests. Goff's act of deliberately setting fire to the motel unequivocally meets the standard of proof to have included the instruction to the jury to have considered the aggravating circumstances of knowingly putting others at risk.

Finally, Goff cites to the case of *Meeks v. State*, 604 So.2d 748, 752 (Miss.1992), and without elaboration makes the claim that since he was also convicted of the second count of the indictment for second degree arson that the prosecution could not use the avoiding arrest and risk of death to many persons aggravators. The *Meeks* case used by Goff in support of his argument is instead the opposite of what he proposes and actually validates the use of the aggravators. As stated in *Meeks*:

> [T]he federal constitution tells us Meeks may not "be twice put in jeopardy" for the kidnapping of Tana Renee Meeks, and when it tells us this, we see how simple the present point is. The State of Mississippi placed Alvin Meeks in jeopardy for the kidnapping of Tana when it charged him in Count I with capital murder. Not only did that jeopardy include trial and a finding of *verdicto*. For the kidnapping of Tana Meeks, he was placed in jeopardy of the penalty of death. That the prosecution's reach exceeded its grasp does not diminish the de facto and de jure jeopardy in which it put Alvin Meeks. Having done this, the state could not at once put Meeks in further jeopardy in the form of consecutive punishment for that legally discrete combination of conduct

> constituting the kidnapping of Tana. Yet it did so in Count II, and that the jeopardy was not precisely the same-only exposure to "life imprisonment" and actual sentence of thirty years, hardly operates to take the case out of the rule.
>
> It may well be that the prosecution could have achieved the practical end it here defends through other means. Had it selected burglary as the underlying felony incident to the capital murder charge, *see* Miss.Code Ann. § 97-3-19(2)(e) (Supp.1988), and left the kidnapping of Tana wholly aside from that charge, likely separate prosecution and double conviction would stand. Further, had the prosecution not been so intent on seeking the penalty of death, it could have indicted and prosecuted Meeks for murder under Section 97-3-19(1) and separately prosecuted him for the kidnapping of Tana and, upon conviction of each, obtained consecutive sentences that would likely withstand review. Neither of these courses was chosen. The record before us reflects that Meeks was indicted, tried and found guilty of capital murder, with the kidnaping of Tana Meeks as the underlying felony, and thereafter exposed to trial for his life. By reason thereof, the Constitution precludes the state punishing him further for the kidnaping of Tana Meeks via Count II of the indictment.

Meeks at 753-54.

Meeks clearly stands for the opposite proposition of what Goff proclaims. In *Meeks* the prosecution charged the defendant with capital murder committed in the commission of a kidnaping and included a separate count of the indictment for the same kidnaping. *Id.* Goff's case stands as a further example of the Courts suggestion of how Meeks charges could have been properly handled. Goff was properly charged in the indictment with an underlying felony of robbery. The arson charge was not presented as the underlying felony of the capital murder of Brandy Yates. The trial court did not err in allowing the jury to consider this aggravating circumstance.

In any event, if the Court were to find that any one or a combination of the contested aggravating circumstances not to be supported by the evidence, the provisions of MISS. CODE ANN. § 99-19-105 (3)(d) would become applicable. This code subsection (3) (d) reads:

> (d) Should one or more of the aggravating circumstances be found invalid on appeal, the Mississippi Supreme Court shall determine whether the remaining aggravating circumstances are outweighed by the mitigating circumstances or whether the inclusion of any invalid circumstances was harmless error, or both.
>
> This Court clearly has the authority to conduct such an analysis according to § 99-19-105 (5)(b), which reads:
> (5) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:
>
> . . .
>
> (b) Reweigh the remaining aggravating circumstances against the mitigating circumstances should one or more of the aggravating circumstances be found to be invalid, and (i) affirm the sentence of death or (ii) hold the error in the sentence phase harmless error and affirm the sentence of death or (iii) remand the case for a new sentencing hearing; . . .

Considering the aggravating circumstances found in this case, it cannot be said that the death sentence would not have been returned based on the remaining aggravating circumstances found by the court. To the extent that this Court reweighs the aggravating and mitigating factors presented by the appellant, it cannot be said that the mitigating evidence would outweigh the aggravating circumstances.

The State would submit that the claim relating to the aggravating circumstances is barred from consideration for the failure to raise an objection at trial. Alternatively, the aggravators are fully supported by the record as the underlying crime of robbery was

sufficiently proven and that Goff took actions to cover his tracks and avoid detection of this crime and that he put many persons at risk of death by his actions. Further, even if one or both of these aggravators is invalid when the other factors are reweighed, there is no reasonable probability that the sentence would have been anything other than death. This claim is barred and alternatively without merit.

XI. GOFF'S DEATH SENTENCE IS NOT DISPROPORTIONATE.

This Court is required by statute to review the proportionality of the death sentence in every direct appeal, including: whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factor; whether the evidence supports the finding of a statutory aggravating circumstance; and, whether the sentence of death is excessive or disproportionate to the penalty in similar cases, considering both the crime and the defendant. *See* Miss. Code Ann. § 99-19-105; *Cabello v. State*, 471 So.2d 332, 350 (Miss.1985); *Locket v. Ohio*, 438 U.S. 586 (1978).

Goff contends only that the sentence of death imposed in his case is disproportionate to the crime based on his mental disabilities. Besides a passing reference to the alleged lack of evidence of the robbery discussed *supra* in Issue III, Goff argues only that he should be re-sentenced to life imprisonment due to his "mental illness".

As discussed previously in Issues II and IV, Goff has submitted no proof of any mental defect of any degree, with the exception of Dr. C. Van Rosen's testimony which is admittedly based on Goff's unverified self reporting of past problems.

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

The death penalty has been upheld in cases involving capital murders during the commission of a robbery. *See Doss v. State*, 709 So.2d 369 (Miss.1997)(death sentence proportionate where defendant robbed and shot victim); *Cabello*, 471 So.2d 332 (death sentence proportionate where defendant strangled and robbed victim); *Evans v. State*, 422 So.2d 737 (Miss.1982)(death penalty proportionate where defendant shot and robbed victim).

The death penalty has been upheld in cases involving capital murders committed by defendants that have claimed to have mental problems. *See Berry v. State*, 703 So.2d 269 (Miss.1997)(death sentence proportionate where defendant claimed to be paranoid schizophrenic, functioning with brain damage and having impaired intellectual capability);

McGillberry v. State, 741So.2d 894 (Miss.1999)(death sentence proportionate where defendant was diagnosed with a significant mental defect, "sociopathic personalty structure.").

Goff assaulted and murdered Brandy Yates during the commission of a robbery. After consideration of the evidence, including mitigation evidence from several witnesses, the jury was correctly instructed upon both the aggravating and mitigating circumstances put forward by both parties. Goff has presented no argument, and has presented no evidence that the death sentence in his case was in violation of § 99-19-105. The death sentence in this case is neither disproportionate or excessive, nor was it imposed arbitrarily. Accordingly this assignment of error by Goff is without merit.

XII. THERE WAS NO CUMULATIVE ERROR IN THIS CASE.

Finally, Goff argues that the cumulative error in this case warrants reversal. However, he has presented no list nor does he point to specific errors which should be cumulated or aggregated to show error. This Court has condemned this practice. *See McGilberry v. State*, 741 So.2d 894, 924, ¶ 124 (Miss.1999); *Foster v. State*, 639 So.2d 1263, 1303 (Miss.1994). The State respectfully submits that there is no error in this case, cumulative or otherwise. Moreover, to the extent that the issues raised by Goff are barred, this issue is also barred. That is, this Court has held that capital murder convictions and death sentences will not be reversed on grounds of cumulative error, where the alleged errors, if any, are procedurally barred. *See Simmons v. State*, 805 So.2d 452 (Miss.2001)(citing *Doss v. State*, 709 So.2d 369, 401 (Miss.1996)). Without waiving any applicable bars, the substance, if any, of each issue

raised by Goff has been refuted by substantial authority outlined above. Based on this authority, the State submits that Goff's assignments of error on appeal are without merit. "Where there is no reversible error in any part, ... there is no reversible error to the whole." *Doss*, 709 So.2d at 400 (quoting *McFee v. State*, 511 So.2d 130, 136 (Miss.1987)).

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

> A criminal defendant is not entitled to a perfect trial. *Sand v. State*, 467 So.2d 907, 911 (Miss.1985). The evidence of guilt in this case was overwhelming and . . . our independent review of the sentencing phase reveals no errors. [The defendant/appellant] received all that he was entitled to a fair trial. This assignment of error is without merit.
>
> *See McGilberry v. State*, 741 So.2d 894, 924 (Miss.1999).

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

CONCLUSION

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

Respectfully submitted,
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CERTIFICATE

I, Pat McNamara, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing Brief of Appellee to the following:

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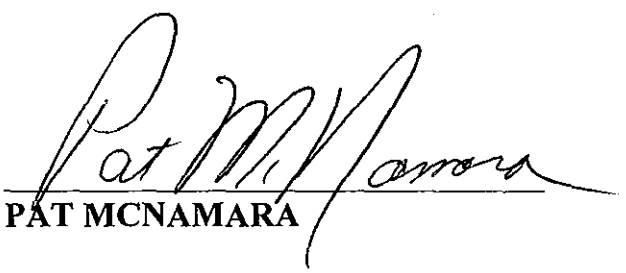
This the 25th day of June, 2008.



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