IN THE SUPREME COURT OF MISSISSIPPI

CURTIS GIOVANNI FLOWERS ***Appellant***

versus **No. 2010-DP-01348-SCT**

STATE OF MISSISSIPPI, ***Appellee***

BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Regulations

Mississippi Rules of Evidence

STATEMENT OF THE CASE

This case arises from the July 16, 1996, execution-style murders of Bertha Tardy, Robert Golden, Derrick Stewart and Carmen Rigby, at the Tardy Furniture store in the city of Winona, Montgomery County, Mississippi. In 1997 Appellant, Curtis Flowers, was indicted for the capital murders of Tardy, Golden, Stewart and Rigby, with the underlying felony of robbery, pursuant to Mississippi Code Annotated Section 97-3-19(2)(e).

A special venire was drawn on April 20, 2010. R. 348. Pretrial hearings in this case took place on April 20, 2010, and June 4, 8-9, 2010. On April 20, 2010, the court heard argument and testimony regarding Appellant's Motion for Disclosure and Supplementation of Discovery. The court heard argument on Appellant's Motion to Bar Retrial Under the Double Jeopardy Clause of the Mississippi Constitution. R. 443-46. Appellant renewed his speedy trial motion, with no further argument. R. 446. Appellant urged the trial court to reconsider its ruling on the Motion for Recusal of Circuit Court Judge. R. 454. The court also heard argument on Appellant's Supplemental Motion to Preclude Death Penalty Procedure, and Appellant's Vindictiveness Misconduct Motion. R. 458. The court heard argument on Appellant's Notice of Renewal and Adoption of Motions from the Previous Five Trials. R. 463. Finally, the court heard argument on Appellant's Motion for Setting of Reasonable Bail. R. 470.

Prior to the commencement of voir dire, on June 4, 2010, the court granted the State's Motion to Quash the subpoena of the assistant district attorney, which defense counsel issued in order to prevent the ADA from participating as an attorney for the State during Flowers's trial. R. 560, 565. The court also granted the State's Motion to Compel the summary report of proposed defense expert witness Robert Johnson. R. 566, 67.

On June 4, 2010, jury selection began in the Montgomery County Circuit Court, the Honorable Joseph A. Loper, Jr., presiding. On June 8, 2010, Appellant renewed his motion to

bar imposition of the death penalty in this case, on the basis of racial discrimination by the State and vindictiveness by the prosecutor. R. 1096, 1098. Appellant also renewed his Motion to Bar Any Retrial Under the Double Jeopardy Clause. R. 1102-03.

After jury selection and trial, on June 18, 2010, the jury returned verdicts finding Flowers guilty of the capital murders of Tardy, Rigby, Golden and Stewart. R. 3245. That same day the Circuit Court proceeded into the sentencing phase of the trial. On June 19, 2010, the jury returned the following:

> We, the jury, unanimously find from the evidence beyond a reasonable doubt, that the following facts existed at the time of the capital murder:
>
> 1. That the defendant actually killed Bertha Tardy
>
> 2. That the defendant attempted to kill Bertha Tardy
>
> 3. That the defendant intended the killing of Bertha Tardy
>
> 4. That the defendant contemplated that lethal force would be employed.
>
> We, the jury, unanimously find that the aggravating circumstances of:
>
> 1. The defendant knowingly created a great risk of death to many persons
>
> 2. Capital offenses were committed while the defendant was engaged in the commission of armed robbery for pecuniary gain
>
> 3. Capital offenses were committed for the purpose of avoiding or preventing lawful arrest or effecting an escape from custody
>
> exists beyond a reasonable doubt and is sufficient to impose the death penalty and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances, and we further find unanimously that the defendant should suffer death.
>
> Barron N. Davis
> Foreman of the Jury

The jury made the same findings and returned the same judgment with respect to the other victims Rigby, Golden and Stewart. R. 3480, C.P. 2925-2929.

On August 4, 2010, the trial court denied Flowers's Motion for a New Trial and Motion for Judgment Notwithstanding the Verdict. Flowers now appeals, *in forma pauperis*, represented by the Office of the State Public Defender, Capital Defense Counsel Division. Flowers raises the following twelve (12) claims of error for this Court's consideration:

I. The evidence presented at Flowers' trial was Constitutionally insufficient to support a finding of guilt beyond a reasonable doubt, as mandated by the Fifth and Fourteenth Amendments to the United States Constitution, and Section Fourteen of the Mississippi Constitution.

II. Flowers' right to a fair trial as guaranteed by Mississippi law and the Fourteenth Amendment to the United States Constitution, was violated when the prosecution repeatedly argued material facts not in evidence during its guilt-or-innocence phase closing argument.

III. The in and out-of-court eyewitness identifications of Flowers by Porky Collins were Constitutionally unreliable and the trial court erred in overruling Flowers' objections to their admission.

IV. The trial court's exclusion of expert testimony explaining the deficiencies in law enforcement's investigation, and the defects in the composition of the photo lineups shown to Porky Collins, violated Mississippi Law and Flowers' right to present a defense as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

V. The trial court erred in refusing to exclude prosecution testimony that a single particle of gunshot residue had been detected on Flowers' hand.

VI. The jury selection process, the composition of the venire and the jury seated, and pervasive racial and other bias surrounding this matter violated Flowers's fundamental Constitutional rights protected by the Sixth and Fourteenth Amendments.

VII. The State's six attempts to convict Flowers of the same offense violated the Double Jeopardy Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment.

VIII. The trial court reversibly erred in refusing Flowers' requested circumstantial evidence instructions as the culpability phase.

IX. The trial court reversibly erred in the penalty phase instructions to the jury.

X. The convictions and death sentences in this matter were obtained in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their counterparts in the Mississippi Constitution.

XI. This Court should set aside its prior order denying Flowers's Motion for Remand and Leave to File Supplemental Motion for New Trial.

XII. The death sentence in this matter is Constitutionally and statutorily disproportionate

XIII. The cumulative effect of the errors in the trial court mandates reversal of the verdict of guilt and/or the sentence of death entered pursuant to it.

As the following analysis demonstrates, each of these issues is either procedurally barred or is devoid of legal merit. Thus, Appellant's convictions and sentences should be affirmed.

STATEMENT OF FACTS

This case arises from four brutal slayings that occurred during a robbery of the Tardy Furniture Store in Winona, Mississippi, on July 16, 1996. R. 1839, 1901. On that day, store owner Bertha Tardy and three of her employees—Robert Golden, Carmen Rigby and sixteen-year-old Derrick "Bo Bo" Stewart—were killed by .380 caliber gunshot wounds to the head. R. 1847. Golden, Rigby and Stewart were each discovered lying near one another, by the front counter of Tardy Furniture. R. 1846-47. Bertha Tardy was discovered lying a short distance away, in the aisle of the store. R. 1835.

Missing from the register at Tardy Furniture was approximately three hundred eighty-nine dollars ($389.00) in cash. R. 2659. An empty money bag was found lying open on top of a pile of fabric swatches in the store; Mrs. Tardy's daughter, Roxanne Ballard, confirmed that the bag, which was used to take money to the bank every day, was not normally placed on top of those swatches. R. 2650-52. According to Ballard, the bag was normally located in the drawer of the cash register, on Rigby's desk or at the bank. R. 2651.

Expert forensic pathologist Dr. Steven Hayne conducted the autopsies of the victims in this case. R. 2008. Dr. Hayne concluded that Bertha Tardy died from a single gunshot wound to the right side of her head, near her right ear. R. 2011. The gun used to kill Bertha Tardy was fired no closer than 2-2 ½ feet away. R. 2013. Carmen Rigby died from a single gunshot wound

to the back of the head. R. 2014. Robert Golden suffered two lethal gunshot wounds. The first was a "near-contact" wound on the left side of Mr. Golden's head. R. 2023. The second was a distant wound to the top of Mr. Golden's head. R. 2024. The fourth victim, Derrick Stewart, died after being shot "execution style" in the back of the head. R. 2031, 2037.

Dr. Hayne concluded that all four victims were immediately incapacitated. R. 2039. Tardy, Rigby and Golden died at the scene; Stewart was hospitalized for a week before succumbing to his injuries. R. 2030.

Curtis Flowers became the prime suspect in this case. Police focused on Flowers after speaking with Bertha Tardy's husband, Tom, and her daughter, Roxanne Ballard. R. 2923. These individuals informed police that Flowers had worked for Tardy Furniture, but had been fired just a few days prior to the murders. R. 2482. Bertha Tardy personally fired Flowers after he broke several golf cart batteries belonging to the store; Mrs. Tardy also docked Flowers's paycheck to cover the cost of the broken equipment. R. 2495.

Officer John Johnson testified that, "the Tardy family had considered Curtis a threat and they were concerned about their safety dealing with him." R. 2922. Mississippi State Highway Patrol Officer Jack Matthews testified that the police decided to interview Flowers after discovering he had recently been fired from Tardy Furniture. R. 2482. According to Matthews, "we asked if there was anybody that they'd had any problem with or anybody that had been fired from there, and that was the—Curtis was the only one." R. 2563. Matthews confirmed Flowers was the only individual "that had been fired that [Tardy] had problems with." R. 2591.

Roxanne Ballard testified that the reason Stewart and Golden were hired was because Flowers had been fired from the store; these victims had replaced Flowers after his termination. According to Ballard, Tardy Furniture "wanted someone more reliable, and [Flowers] had damaged the property, so they replaced him." R. 2676. Ballard confirmed her mother had no

employees other than Flowers who had damaged Tardy Furniture property; she confirmed Tardy Furniture had "no unusual issues" with customers or anyone other than Flowers. R. 2685.

While not being allowed to testify to what he heard, Doyle Simpson testified that Flowers had "problems" with Tardy. R. 2338. Additionally, although Flowers denied any bad blood between himself and the furniture store, Flowers conceded that Bertha Tardy held him financially responsible for breaking the store's equipment. Flowers told police that Bertha Tardy had chastised him prior to her death, saying, "You're responsible for the batteries. You should have tied them down. And if they can't do anything, you have to pay for them out of your check." R. 2495. Flowers also told police that Bertha Tardy had fired him after he ditched work for several days, and that she held Flowers responsible for an outstanding loan she made to him:

> When did you find out that they had terminated you? Answer: Tuesday. Tuesday that next week […] Question: Did you even call in? Answer: Uh-huh, and then on that Tuesday I got up and I was going to go. I got to my mama's house, and I called and I asked her did Mike come back to work? She said no. I asked her did I still have a job? She said no. I said did I get a one-day paycheck? She told me my check was pretty much covered up with them batteries. That was it. Question: I understand that before you got off on the 3rd that she loaned you some money, $30. Question: $30? Answer: Uh-huh. Question: did you have to pay that $30 back? Answer: She told me my check was used up and that was it. She told me I could pay the $30 back out of my check when she gave it to me. When I called her, she said, well, my check was used up.

R. 2496-97.

Further police investigations revealed additional evidence connecting Flowers to the Tardy Furniture murders. First, paperwork, in the name of Curtis Flowers, was the only document item found disturbed in the store. R. 2661-63, 2680. The counter area and all drawers were neat and closed. R. 1985. The safe located in Bertha Tardy's back office was closed as well, but unlocked, the contents neat and not ransacked. R. 1957. However, lying on the desk in Ms. Tardy's office were two items: a paycheck in the name of Curtis Flowers in the amount of $82.58; and Mr. Flowers's time card for work performed at Tardy Furniture, which included the

notation "Paid 30 cash on 6/29." R. 2480. Roxanne Ballard confirmed it was irregular for such paperwork to be lying around her mother's office. Ballard testified that Flowers's time card, "was lying by itself with his check on my mother's desk, which is very unusual." R. 2680.

Police recovered two hundred thirty-five dollars ($235.00) from the headboard of Flowers's bed. R. 2519. In his statement to police, Flowers confirmed that "other than mowing yards and working on cars and stuff like that," he was not receiving another paycheck from Tardy Furniture, and had received only one hundred nineteen dollars ($119.00) from his last unemployment check (which had been issued a week earlier). R. 2497, 2499-2500.

Second, three witnesses saw Flowers near Tardy Furniture around the time of the murders. Mary Fleming had just dropped off her car at Weed Brothers auto repair shop and was walking back home at approximately 9:00 a.m. when she saw and spoke with Flowers on Campbell Street; Flowers was walking to town near Tardy Furniture. R. 2309-11. At approximately 10:00 a.m. that morning Charles Collins was returning from Wal Mart when, driving in front of Tardy Furniture, he saw Flowers standing on the street, arguing with another individual. Exh. Vol. 1, R. 1606, 1610. Collins drove around the block and then watched as Flowers and his companion headed "across the street in the direction of Tardy Furniture Company." Exh. Vol. 1, R. 1609. Clemmie Flemming arrived at Tardy Furniture at approximately 10:00 a.m. before, feeling ill, deciding to return at a later time. R. 2367. Her companion, Roy Harris, turned their car alongside the furniture store. Flemming then spotted Flowers "about 90 feet" from the back of Tardy Furniture, running across the yard of a pink house. Flemming testified Flowers was running so hard she thought someone was after him. After seeing Flowers running away from Tardy Furniture, Flemming told Roy Harris, "There goes Curtis." R. 2367-70.

Third, a bloody shoe print found at the crime scene was found to have been consistent with Fila's Grant Hill tennis shoes worn by Curtis Flowers. The bloody print had a distinctive, wide zig-zag pattern. R. 1995. At 7:30 a.m. on the morning of the murders Flowers's next door neighbor, Patricia Odom, saw[1] Flowers walking "in a fast motion" from the direction of Powell Street. R. 2044-45. Odom noticed that Flowers was wearing black pants, a white shirt, and Fila's Grant Hill tennis shoes. R. 2046. Odom remembered the shoes because Flowers "kept them all bright and the designs and stuff on them, and I bought my kids some so that's why I knew that." R. 2063. Elaine Golden also confirmed Flowers owned Fila's Grant Hill tennis shoes; Golden testified she did not know of any other male who wore those shoes. R. 2208, 2218. The shoes could not be bought locally in Winona.

Police recovered an empty MS Fila's Grant Hill No. 2, size 10 ½, tennis shoe box from the home Flowers shared with his girlfriend, Connie Moore. R. 2104-06. Police then confirmed that Flowers wore a size 10 ½ shoe. R. 2518, 2598. Mississippi State Crime Lab Analyst Joe Andrews conducted forensic trace evidence tests on the bloody shoe prints found at the scene. R. 2596. Andrews testified at trial that he contacted Fila and requested a set of outsoles consistent with those used on the shoes from the empty box in Flowers's home. Fila sent the actual outsoles, along with a picture of the shoe itself, and a design drawing of the pattern of the outsoles used to make the mold for the outsoles. R. 2600-03. Andrews confirmed that the shoes originating in the empty, size 10 ½ Fila's Grant Hill box found in Flowers's home were "consistent in design and size" with the distinctive bloody shoeprint found at the crime scene. According to Andrews, "There is nothing inconsistent." R. 2608-11.

[1] Odom testified that she saw Appellant two other times on the day of the murders: once at 4:45 a.m., when Flowers was sullenly smoking on the front porch, and once sometime after 7:30 a.m. R. 2042-43, 2047.

Fourth, the gun used to commit the murders was linked to Curtis Flowers. The gun in question, a .380 automatic pistol, belonged to Flowers's friend[2] Doyle Simpson. R. 2090, 2123-50. Police recovered bullets from Simpson's house and compared them with ballistics evidence taken from the crime scene by Melissa Schoene (with the Mississippi Crime Lab). R. 2125 Independent forensic expert David Baldash testified that the five cartridges and the hulls recovered from the crime scene were all fired from Doyle Simpson's gun. The bullets recovered from the mattress and love seat at Tardy Furniture were fired from Simpson's gun. Bullet fragments recovered from the crime scene were either consistent with a .380 automatic or were found to have been fired from Simpson's gun. R. 2123-2150.

Around 11:00 a.m. on the morning of the murders, Mr. Simpson reported that gun stolen from his car, which was parked at the Angelica plant (on the east side of Highway 51) where Simpson worked. R.2332, 2336-37. Mr. Simpson had left his .380 automatic pistol in the glove compartment of his car before going in to work. *Id*. Simpson told police the glove compartment was locked when he arrived at work that morning; Simpson realized something was wrong when, as he was leaving work, the door to the glove compartment fell open. R. 2335. Police Officer Bill Thornburg confirmed that the glove compartment had been broken into; according to Thornburg, it appeared someone had used a screw driver or tire iron to pry open the door. R. 2092. Officer James Williams confirmed that it appeared the glove compartment had been pried open. R. 2777. Crime Lab analyst Melissa Schoene testified there appeared to be defects or marks on the upper edge of the glove box lid. R 1962.

Simpson testified that it was unusual for him to have the gun in his car. R. 2356. However, Simpson confirmed that Curtis Flowers had seen the gun in Simpson's car on previous occasions. R. 2363.

[2] Simpson referred to himself during the trial as Flowers's uncle; he clarified that Flowers's uncle is Simpson's brother. R. 2336, 2353.

Katherine Snow, who worked at the Angelica plant, testified that Doyle Simpson had parked close to her on the morning of the murders. R. 2221. At 7:15 a.m., Snow left Angelica, walked to the parking lot, and saw Flowers leaning against Simpson's car; Snow and Flowers briefly spoke to each other. R. 2222-23. Several other witnesses also testified they saw Flowers near Angelica. James Kennedy, who lived at 635 South Applegate, saw, recognized and spoke with Flowers, as Flowers was walking off of Highway 51 and turning onto Angelica. R. 2289-91. Kennedy confirmed that at approximately 7:15 a.m., he saw Flowers headed east, on the east side of Highway 51, walking toward the Angelica Plant. *Id*. Edward McChristian, who lived at 605 Academy Street, on the east side of Highway 51, was sitting on his front porch on the morning of the murders, when between 7:30 and 8:00 a.m., he saw Flowers walking in front of his house, headed north. R. 2297-2303. With McChristian were Clem Forrest and Bernard Seals; McChristian believed Forrest and Flowers briefly spoke to one another at that time. *Id*.

Fifth, a gunshot residue test revealed a particle of gunpowder on the back of Flowers's hand less than four hours after the murder. Joe Andrews of the Mississippi State Crime Lab, performed the gunshot residue analysis in this case. R. 2611. Andrews found a single gunshot residue particle on the sample taken from the back of Flowers's right hand. R. 2615. According to Andrews, that is the area "you would normally expect to find gunshot residue if they were firing a weapon, in close proximity or actually had the weapon in their hand." R. 2616.

Sixth, Flowers confessed to his cellmate, Odell Hallmon, that he committed the Tardy Furniture murders. Hallmon testified that he and Flowers had become friends after being on lockdown in adjacent cells for almost a year. According to Hallmon, Flowers confessed to killing the four victims of the Tardy Furniture murders. Flowers also asked Hallmon to discredit the testimony of Patricia Odom—Hallmon's sister—who had recognized Flowers's distinctive

Fila's Grant Hill tennis shoes. According to Hallmon, Flowers stated that if Odom's testimony could be thrown out, Flowers's case would be overturned. R. 2413-17.

Finally—just as incriminating—Flowers's version of events failed to comport with a single witness's testimony, thereby making his version suspect. Flowers gave differing versions of the events that transpired on the day of the murders. R. 2485-2515. In one version, Flowers told police he woke up at 6:30 a.m. and watched Connie Moore's children until a little after 9:00 a.m., at which point he sent the children to their grandmother's home. At 9:00 a.m., Flowers walked to his sister's house on Dennis Street, located on the west side of Highway 51, where he stayed for approximately 20 minutes. At 10:30 a.m., Flowers walked to Jeff's One Stop store. Flowers specifically denied going to Angelica or across Highway 51 to the east side at any point that day.

In another version, Flowers told police he did not wake up at 6:30 a.m. with Connie Moore. *Id*. Instead, he stayed in bed until around 9:30 or 10:00 a.m. Sometime between 11:00 a.m. and noon, Flowers went to his sister's house; by 12:30 p.m., Flowers had walked to Jeff's One Stop. Flowers denied walking Moore's children to their grandmother's, stating that he "just sent them over the hill because their grandmamma stays behind us." Flowers denied going anywhere other than his sister's house.

When confronted with witness statements placing Flowers on the east side of Highway 51, with statements placing Flowers awake and away from home prior to 9:00 a.m., and with statements placing Flowers near Tardy Furniture on the morning of the murders, Flowers's only response was to suggest each and every witness was lying:

> Question: And if anybody says they saw you at any other place but your apartment and your sister's house or Kelly's store—answer: Kelly's store. Question: -- or walking in between these places, then that wouldn't be the truth? Answer: Walking between Kelly's, my house and my sister's house? Question: Right, if they saw you any other—and other place other than those places.

> Answer: Oh, yeah. He a lie. Question: That'd be a lie? Answer: Uh-huh. Question: Okay. Answer: Sure would.

R. 2504-05.

SUMMARY OF THE ARGUMENT

Consideration of Issues II, III, IV, VII, X, XI, XII, and XIII is procedurally barred in whole or in part. Notwithstanding those procedural bars, and without waiving any applicable bars, as set forth herein each and every issues raised by Appellant is without merit. Accordingly, Appellant's convictions and sentences should be affirmed. Because Appellee's brief provides a full explanation of each of the arguments presented, Appellee requests leave to dispense with a more detailed Summary of the Argument.

LEGAL ANALYSIS

I. THE EVIDENCE WAS SUFFICIENT TO SUPPORT APPELLANT'S CAPITAL MURDER CONVICTION.

> This Court's standard for reviewing the sufficiency of the evidence is well-settled: [W]e must, with respect to each element of the offense, consider all of the evidence—not just the evidence which supports the case for the prosecution—in the light most favorable to the verdict. The credible evidence which is consistent with guilt must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. Matters regarding the weight and credibility to be accorded the evidence as to be resolved by the jury. We may reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty.

West v. State, 503 So. 2d 803, 807 (Miss. 1987) (citations omitted).

In deciding whether the State presented legally sufficient evidence to support a jury's verdict, this Court must determine whether, when viewing the evidence in the light most favorable to the State, any rational juror could have found that the State had proved each element of the crime charged beyond a reasonable doubt. *Bush v. State*, 895 So. 2d 836, 843 (Miss.

2005). Under this inquiry, all evidence supporting the guilty verdict is accepted as true, and the State must be given the benefit of all reasonable inferences that can be drawn from the evidence. *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993).

The State respectfully submits that, when considering the evidence in the light most favorable to the verdict, such evidence is sufficient to warrant a conviction for capital murder. Appellate counsel spend forty-one pages of argument going, detail by detail, through the evidence presented at Flowers's trial. However, counsel present their argument entirely in the light most favorable to Flowers himself. Indeed, it appears appellate counsel are more interested in simply re-trying this case before the Mississippi Supreme Court, than in having this Court examine the case as it was presented to the jury. This is not the proper standard of review.

Taken in the light most favorable to the verdict, the evidence shows as follows:

Just days prior to the murders Bertha Tardy fired Curtis Flowers, and docked his pay, after he broke eight golf cart batteries belonging to the store, and then ditched work for several days. Mrs. Tardy was forced to hire two new employees—Golden and Stewart—after Flowers stopped coming to work. When Flowers finally surfaced, he called to ask Mrs. Tardy if he still had a job, and if he would be getting paid for the time he worked. Mrs. Tardy's answer was "no." Ms. Tardy also informed Flowers he still owed her $30 for a loan she had extended to him.

On the morning of the murders Doyle Simpson's gun was stolen from his car at the Angelica plant. Curtis Flowers had seen Simpson's gun in his car on a previous occasion. Witnesses saw Flowers both at Simpson's car and near the Angelica plant the morning of the murders. Simpson's gun was used to commit the Tardy Furniture murders and, less than four hours after the murders, Flowers tested positive for gunshot residue on his right hand.

On the morning of the murders witnesses saw Flowers away from his home prior to 9:00 a.m.; witnesses also saw Flowers standing by and running from Tardy Furniture prior to the 911

call reporting the murders (which occurred at 10:20 a.m.). Flowers owned Fila's Grant Hill tennis shoes, size 10 ½; Flowers was seen wearing those shoes on the morning of the murders; and those shoes were consistent with the distinctive zig-zag pattern of the bloody shoe prints found at the crime scene.

The only paperwork disturbed at Tardy Furniture was paperwork showing when Flowers himself had worked, and how much Flowers had earned for that work. The only item missing from Tardy Furniture was money. Flowers confirmed he was not receiving another paycheck from Tardy Furniture, and had received only one hundred nineteen dollars ($119.00) from his last unemployment check (which had been issued a week earlier). And yet, two hundred thirty-five dollars ($235.00) was found hidden in the headboard of Flowers's bed after the murders.

Finally, Flowers confessed to Odell Hallmon that he committed the Tardy Furniture murders.

To contradict the State's case, Appellant argued that Flowers's statements, while themselves contradictory, confirmed that each State witness was lying when placing Flowers near Tardy Furniture or Angelica on the morning of the murders. Appellant argued that the police investigation—comprised of hundreds of witness interviews, 2000 pages of documents, video of the crime scene, crime scene expert analysis, 40 taped statements and the participation of at least three law enforcement agencies—was sloppy, resulting in evidence being overlooked and the real killer going free. Appellant argued that the police too easily dismissed Doyle Simpson as a suspect, when they accepted at face value the word of Simpson's co-workers and supervisor, who confirmed Simpson was at work at the time of the murders. Appellant argued

that the police too easily dismissed Emmett Simpson as a suspect, when Simpson was seen running while at work at Angelica.[3]

Appellant argued the ballistics evidence only "consistently" connected Doyle Simpson's gun to the Tardy Furniture murders—not "positively," as the State's witness testified. Appellant argued that the State's witnesses only testified because an unidentified individual had offered a reward for information about the case—a reward which none of the witnesses ever claimed. Appellant argued that Odell Hallmon was an unreliable snitch who lied when he testified to Flowers's confession. Finally, Appellant suggested the police and the District Attorney attempted to frame Flowers for the murders, by coercing and threatening witnesses into testifying on behalf of the State[4].

The State provided substantial evidence—not suggestions or allegations, but actual evidence—placing Appellant near the murder weapon, near the crime scene, in the bloody shoes, with the missing money, with gunpowder on his hand, and with a reason to kill the employees of Tardy Furniture. Appellant is correct that no fingerprint or DNA evidence ties him to the crime. Appellant is also correct that portions of the witnesses' testimony—for both the State and the defense—were inconsistent. However, the jury is in the best position to determine the credibility of the witnesses and the merits of the case. *Sherrell v. State*, 662 So. 2d 1233, 1236 (Miss. 1993). The evidence as a whole, taken in the light most favorable to the State, was sufficient for the jury to find Flowers guilty. On appeal, Flowers does nothing more than compare the State's

[3] Officer James Taylor Williams testified it appeared Simpson was "having a little nip" on the job, R. 2782, and hurrying back to his station.

[4] Witnesses such as Latarsha Blissett, who testified that the State essentially kidnapped her, and then offered her thirty thousand dollars ($30,000.00), if she would testify that Curtis Flowers wore a size 10 ½ shoe—a fact the police already knew after simply looking at Flowers's shoes. R. 2814-2824. Witnesses such as Mary Ella Flemming, who testified that Clemmie Flemming did not see Flowers running by Tardy Furniture—but who also testified that she personally did not want Clemmie Flemming to testify at trial. R. 2846-48.

case to his own, painting the case in the light most favorable to the defense, in an attempt to have this Court consider the sufficiency claim *de novo*. This issue is without merit.

II. THERE WAS NO PROSECUTORIAL ERROR DURING THE GUILT PHASE OF CLOSING ARGUMENT.

Attorneys are afforded wide latitude in arguing their cases to the jury. *Galloway v. State*, 2013 WL 2436653 (Miss. 2013); *McGilberry v. State*, 741 So.2d 894, 910 (Miss.1999). The standard of review which this Court must apply to lawyer misconduct during opening statements or closing arguments is "whether the natural and probable effect of the improper argument is to create unjust prejudice against the accused so as to result in a decision influenced by the prejudice so created." *Sheppard v. State*, 777 So.2d 659, 661 (Miss.2000) . Any allegedly improper prosecutorial comments must be considered in context, considering the circumstances of the case, when deciding on their propriety." *McGilberry, id.* (citing *United States v. Bright*, 630 F.2d 804, 825 (5th Cir.1980)); *United States v. Austin*, 585 F.2d 1271, 1279 (5th Cir.1978); *Batiste v. State*, 121 So. 3d 808 (Miss. 2013) (prosecutor can urge jury to draw inference from the evidence).

"The prosecutor may comment upon any facts introduced into evidence, and he may draw whatever deductions and inferences that seem proper to him from the facts." *Bell v. State*, 725 So.2d 836, 851 (Miss.1998). In analyzing the prosecutor's closing argument, "it is necessary to examine the surrounding circumstances and be careful not to take a statement out-of-context." *Spicer v. State*, 921 So.2d 292, 318 (Miss.2006) (citing *Williams v. State*, 522 So.2d 201, 209 (Miss.1988)). "[T]he court cannot control the substance and phraseology of counsel's argument; there is nothing to authorize the court to interfere until there is either abuse, unjustified denunciation, or a statement of fact not shown in evidence." *Grayson v. State*, 118

So. 3d 118 (Miss. 2013). To violate Due Process, the prosecutorial misconduct must be "of sufficient significance to result in the denial of the defendant's right to a fair trial." *Grayson, id.*

Appellant claims the State repeated past mistakes in misrepresenting material evidence at trial. According to Appellant, the State's misrepresentations occurred in four separate areas. The State addresses each of these allegations herein:

A. Sam Jones's Testimony Regarding His Arrival at Tardy Furniture

Appellant argues the State repeated past mistakes when, during the direct examination of Sam Jones in the case *sub judice*, the State attempted to change Jones's attested arrival at Tardy Furniture on the day of the murders, from 9:15 to 10:00 a.m. The State then allegedly compounded its past mistakes when it argued, during closing, that Jones testified he arrived at Tardy at 10:00 a.m.

Appellant's argument is procedurally barred twice-over and moreover, is without substantive merit. Appellant, in his argument to this Court, omits key information. First of all, Sam Jones did not personally testify at the trial of the case *sub judice*. Sam Jones died prior to Flowers's 2010 trial. In lieu of live testimony, the State read into the record a transcript of Sam Jones's testimony from Flowers's 2007 trial. R. 1895. During that 2007 trial Jones testified he arrived at Tardy Furniture at approximately 9:15 a.m. on the morning of the murders. The State, in response, asked Jones if his arrival was "going to be closer on up to 10 o'clock." Exh. Vol. 2, R. 9. The trial court overruled defense counsel's objection to the question; however, Jones never answered the question.

This is the only portion of Flower's 2007 trial which Appellant has made part of the record of the case *sub judice*. Absent from the present record includes the State's closing argument from 2007. This would include both the State's comments about Jones's time line, and

any objections Flowers's own defense team did, or did not, make. The burden rests upon the Appellant "to see to it that the record contain[s] all data essential to an understanding and presentation of matters relied upon for reversal on appeal." *Shelton v. Kindred*, 279 So. 2d 642, 644 (Miss. 1973) (citing *Willenbrock v. Brown*, 239 So. 2d 922, 925 (Miss. 1970)).

Also conveniently omitted from Appellant's present argument is the fact that, during the appeal of his 2007 conviction and sentence, Flowers did not argue the State's questioning of Jones constituted reversible error. Flowers did not argue that the State's subsequent closing argument constituted reversible error. Nor did this Court find such error to have existed.

Therefore, although Appellant classifies the State's actions as "past mistakes," not even Appellant himself felt those mistakes worthy enough to bring to this Court's attention when they first occurred in 2007. This issue was procedurally barred as of 2007, when Appellant failed to bring to this Court's attention the exact testimony as was re-submitted in the instant trial.

Appellant's contention is procedurally barred a second time as well. The State, in the instant case, read Jones's 2007 testimony into the record. As shown above, Flowers did not allege in 2007 that such testimony, or any resulting closing argument, constituted error. Relevant here is the fact that Flowers <u>also</u> did not make any such allegations at the trial of the case *sub judice*. In his current direct appeal brief Flowers admits to knowing, as of 2007, that the State's attempt to lead Jones into changing his arrival time from 9:15 to 10:00 a.m. was reversible error. Why then, when Jones's transcript was being read into evidence in this most recent trial, did Flowers not seek to redact the relevant portion of that testimony? Further, why did Flowers not object to the State's comment during closing argument? Flowers, when presented with this allegedly critical issue in 2007, made no attempt to appeal that issue to this Court. When the fact pattern allegedly repeated itself in 2010, Flowers made no objection during the testimony itself, or during the closing argument.

A trial court cannot be put in error on matters not presented to it for decision. *Moawad v. State*, 531 So. 2d 632, 634 (Miss. 1988). *See Walker v. State*, 823 So. 2d 557 (Miss. App. 2002) (failure to raise issue at trial level bars consideration at appellate level). Failure to lodge a contemporaneous objection constitutes a procedural bar. *Hughes v. State*, 90 So. 3d 613, 624 (Miss. 2012). This assignment of error is barred from review. *Howard v. State*, 507 So. 2d 58, 63 (Miss. 1987).

Notwithstanding any controlling procedural bars, Appellant's claim is substantively without merit. Appellant, in an attempt to characterize the State as a wicked entity, sneaking in past mistakes when it thinks this Court will not notice, leapfrogs over Jones's 2007/2010 testimony, back to the testimony Jones presented in 2003, and back to the State's closing arguments in 2003. In Flower's 2003 trial, the issue on appeal was whether Jones had testified to receiving the call from Bertha Tardy at 9:30, or arriving at Tardy at 9:30 (again, factually distinct from this ten-years post issue, and also factually different from the testimony Jones gave in 2007—the testimony at issue in this case). This Court summarized the relevant facts:

> Flowers cites to at least fourteen different comments by the State which he believes are improper. Over one-half of the comments relate to the State's accusing the defense witnesses of either changing their stories or trying to get prosecution witnesses to lie for the defendant.
>
> ***
>
> The remaining comments cited by the defense concern alleged misstatements of facts by the prosecution. Two examples cited by Flowers involve the prosecutor's closing arguments to the jury about the testimony of Sam Jones and Robert Campbell. The prosecutor argued [during closing] Jones had testified that at 9:30 a.m., he received a call from Bertha Tardy to come to the store, while defense counsel asserted in his objection that Jones had testified that he received the call at 9:00 a.m. and arrived at the store at 9:30 a.m. After the trial judge ruled that the jury would recall the evidence and that "[t]his is argument," the prosecutor fired the last shot by stating before the jury, "[Jones] said he received a call around 9:30. I recall; I wrote it down."
>
> ***

> After a thorough examination of the record, it is clear from Jones's testimony that he testified he arrived at Tardy's at 9:30. He never once stated he was called at 9:30 on the morning of July 16, but he did testify he arrived at the store around 9:30. On direct examination, the State never questioned Jones about a specific time. He only stated he received a call from Mrs. Tardy on the morning of July 16. On cross-examination, Jones was asked what time he arrived at Tardy's, and he answered that it was around 9:30.

Flowers v. State, 842 So. 2d 531, 555-56.

Neither Jones's 2003 testimony nor the State's 2003 closing argument were presented to the instant jury or contained in the record of the case *sub judice*. Moreover, Jones's 2003 testimony and the State's 2003 closing argument were a single part of a cumulative pattern of prosecutorial misconduct which necessitated reversal: "Flowers lists several other instances where the State misstated testimony of witnesses. The cumulative effect of the State's repeated instances of arguing facts not in evidence was to deny Flowers his right to a fair trial." *Flowers*, 842 So. 2d at 556 (emphasis added). Thus, in 2003 Flowers objected when the State made no less than fourteen mischaracterizations of evidence; and this Court held that such cumulative instances of misconduct constituted error. Yet, not one of those fourteen mischaracterizations occurred in the case *sub judice*. Thus, nothing from the 2003 trial suggests that the State's current actions (for not even the State can be convicted twice for the same crime) are improper or justify reversal of Flowers's current conviction or sentence.

Accordingly, the only relevant issues here on direct appeal are whether the State erred in asking Jones if he actually arrived at Tardy at 10:00 instead of 9:15, and whether the State erred in stating, during closing argument, that Jones arrived at Tardy at 10:00.

The State submits the answers to each of those questions is "no," and that the true reason for Flowers's failure to object to this testimony in 2007, failure to appeal on this issue in 2007,

and failure to object or move to redact this event in 2010, is that the issue itself is meritless. The substance of Jones's 2007 testimony (read to the jury in the case *sub judice*) is thus:

Jones, who was 87 years of age at the time he testified, told the jury that Bertha Tardy called him "about 15 minutes after 9:00, I think, when she called, somewhere along in there." Exh. Vol. 2, R. 7. He then told the jury that, after receiving the call from Ms. Tardy, he left his home on Harper Street, drove to Tardy Furniture, and reached the store "between 9:15 and 9:30." Exh. Vol. 2, R. 8. Jones then corrected himself and said that "it wasn't 9:30" when he reached the store; instead he arrived "between 9:15 or right around that time." Id. Jones's confusing account to the jury was, therefore, that the call from Bertha Tardy, the drive from his house to Tardy, and his arrival at Tardy, all occurred at approximately 9:15 a.m.

Jones then testified that he stayed at Tardy no more than 10-15 minutes before he left the store, hurriedly walked three doors down to another business, and asked the store owner to call 911. Exh. Vol. 2, R. 21, 25-26. Flowers's own defense team suggested to Jones that he had not stayed at Tardy for that full 10-15 minutes, as Jones had testified; defense counsel asked Jones, "Is it fair to say that you probably didn't stay in there that long, or do you know?" Exh. Vol. 2, R. 31. Jones responded, "I didn't look at my watch standing there. I just went in there, you know, just to, looked at each one of them. And then I left out to go get help for them." *Id*.

This line of questioning further muddled Jones's own timeline. Why? Because 911 records show the Tardy Furniture call was made at 10:20 a.m. If Jones had, indeed, arrived at 9:15, stayed by what even defense counsel suggested was less than 15 minutes, walked three doors down and immediately secured someone to call 911, then that 911 call would have come in roughly 40 minutes earlier than it actually did. This suggests Jones was incorrect when he testified that he was called to Tardy, drove to Tardy, and arrived at Tardy, all at 9:15 a.m.

Is the State allowed to ask Jones if he, in fact, arrived at Tardy at 10:00 instead of 9:15? Yes. The State is not allowed to engage in leading questions. However, Appellant has presented no case which suggests asking a witness a single leading question warrants reversal in a capital case. Moreover, the State can use direct examination to clarify a witness's testimony, especially when that testimony appears contradicting. Mississippi Rule of Evidence 611(c), which generally prohibits leading questions, states that "[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop [the witness's] testimony." *See generally Anderson v. State*, 62 So. 3d 927 (Miss. 2011) (leading on direct allowable where witness was young, and question was used to clarify testimony regarding dates alleged in the indictments).

When Jones provided a timeline that appeared self-contradictory, and did not match up with the timing of the 911 call, the State was justified in attempting to clarify that contradiction, asking Jones whether some of his testimony was wrong. Therefore, there is no error in the State asking Jones whether, in light of the testimony as a whole, he arrived at Tardy closer to 10 a.m.

Is the State allowed to argue, during closing, that Jones "said" he arrived at 10 a.m.? No. However, the State did not do this. The State made a singular point: it argued that Jones "came into the store slightly after 10:00 a.m." This is not what Jones himself testified. Yet, it is arguable based on both Jones's own testimony and the other evidence presented to the jury. The evidence as a whole shows that the 911 call came in at 10:20. Mary Fleming saw Flowers headed to Tardy Furniture at 9:00 a.m. Charles Collins saw Carmen Rigby at the post office shortly after 9:00 a.m.; the two spoke for ten to fifteen minutes before Rigby left for Tardy Furniture. Collins then saw Flowers in front of Tardy Furniture, walking toward that store, at around 10:00 a.m. Clemmie Flemming saw Flowers running away from Tardy at 10:00 a.m., forty-five minutes after Jones testified he arrived at the crime scene.

The timeline outlined by the State during closing also was supported by Jones's testimony as a whole. Despite Jones's statement that he arrived at Tardy at 9:15 a.m., his testimony as a whole showed that 1) he could not have received a call to drive to the store, driven to the store, arrived and entered the store, all at the exact same time, and 2) he could not have arrived at 9:15, stayed no longer than 15 minutes, and then, at approximately 9:30, hurriedly walked three doors down to make a 911 call which occurred forty minutes later.

To the extent this Court feels the prosecution did mischaracterize the evidence, the State submits this was harmless error. While the State made a singular comment about Jones's arrival at Tardy, it was the defense, in fact, which capitalized on Jones's statement. During closing argument, defense counsel reminded the jury that Jones had actually testified to arriving at Tardy as early as 9:00 a.m.:

> [Y]ou know, his testimony, I looked it up as they [the State] were saying that. His original testimony was he might have gotten there, started his voyage to go in to—as early as 9:00. He, he thought maybe he got there closer to 9:30. But we know from the police that the call came in at 10:20. And if you will remember, Mr. Jones also told you he thought it might have been 15 minutes before he recovered himself enough to go and actually make the report. So there is a bunch of time in there.

R. 3228-29.

Thus, while the State characterized the cumulative evidence as showing Jones entered Tardy Furniture at 10:00, Appellant countered by arguing that she "looked it up" and what Jones actually <u>said</u> was that he arrived at Tardy Furniture "as early as 9:00," or "closer to 9:30." To the extent the State's comment was intended to mischaracterize Jones's testimony, any mischaracterization became harmless after defense counsel cured the alleged error[5].

Moreover, even if the State had conceded during closing that Jones testified to arriving at 9:15, it would not have caused the jury to acquit Flowers, based on the overwhelming evidence

[5] Notwithstanding the fact that defense counsel's characterization of Jones's testimony, having "looked it up," also was inaccurate.

against him. There was enough time missing in Jones's own timeline as to make any comment by the State negligible in terms of jury deliberations. Taken in context, the State's single comment was proper.

Finally, any error which did occur, and was not harmless, was both harmless and cured by the limiting instruction in C-1 given by the trial court:

> It is your duty to determine the facts and to determine them from the evidence produced in open court. You are to apply the law to the facts and in this way decide the case. You should not be influenced by bias, sympathy or prejudice. Your verdict should be based on the evidence and not upon speculation, guesswork or conjecture. […] The evidence which you are to consider consists of the testimony and statements of the witnesses and the exhibits offered and received. You are also permitted to draw such reasonable inferences from the evidence as seem justified in light of your own experience. Arguments, statements, and remarks of counsel are intended to help you understand the evidence and apply the law, but are not evidence. If any argument, statement, or remark has no basis in the evidence, then you should disregard that argument, statement, or remark.

C.P. 2782.

In *White v. State*, 542 So. 2d 250 (Miss. 1989), the State inferred that the defendant had been stealing from his company, in order to suggest a motive for the charged shooting. No evidence was presented that White, in fact, stole any money. This Court held that while the inference was inappropriate without supporting proof, any error was cured by the giving of a limiting instruction—exactly like the one given to Flowers's jury—to disregard statements which have no basis in the evidence. *White*, 542 So. 2d at 254. According to White, "it being a presumption that jurors follow instructions presented to them, any error was harmless." *Id.*

B. Flowers's Reaction to Being Fired from Tardy Furniture

Flowers argues the State misrepresented evidence when suggesting that Flowers was upset about being fired from Tardy Furniture. According to Flowers, no evidence was presented suggesting Flowers had a "beef with the store," as the State alleged during closing.

Flowers is incorrect. Consider the following testimony presented at trial. Both John Johnson and Jack Matthews testified that they began focusing on Flowers after speaking with Roxanne Ballard and Tom Tardy. Ballard and Tardy disclosed that Bertha Tardy fired Flowers a few days prior to the murders. Bertha Tardy also docked Flowers's paycheck to cover the cost of the broken equipment.

John Johnson testified, "the Tardy family had considered Curtis a threat and they were concerned about their safety dealing with him." R. 2922. Jack Matthews asked the family if Bertha Tardy or the store had any problems with in individual, or had fired anyone recently, and Flowers "was the only one." R. 2563. Flowers was the only individual with whom Tardy had problems. R. 2591. Roxanne Ballard confirmed that her mother had no employees other than Flowers who had damaged Tardy Furniture property; she confirmed Tardy Furniture had "no unusual issues" with customers or anyone other than Flowers. 2685. Doyle Simpson knew about the "problems" Flowers had with Tardy. R. 2591.

And Flowers, while denying any bad feelings (why would he admit them?) conceded that Bertha Tardy held him financially responsible for breaking the store's equipment. Flowers also conceded that Tardy had fired him. He even conceded that Bertha Tardy believed Flowers still owed her more money, to repay the $30 loan extended to him.

These statements were sufficient for the prosecution to comment, during closing, that police focused on Flowers because Bertha Tardy fired him, docked his pay, and held him responsible for an outstanding $30 IOU. Such evidence is sufficient to suggest that Flowers did, in fact, have a "beef" with the store. The State was allowed to argue, and the jury was entitled to draw a reasonable inference that Flower's motive to kill was due to his being fired and losing money. The State was allowed to support that inference with witness testimony regarding the "problems," "threats," and "unusual issues" between Flowers and the furniture store. *See Howell*

v. State, 860 So. 2d 704 (Miss. 2003) (inferences for the motive of robbery in capital case accepted when reasonable; in Howell's case, inference supported by Howell's statements that he needed money to pay his probation officer, and that an individual Howell saw standing outside a gas station looked like "an easy lick right there"); *see also Duplantis v. State*, 708 So. 2d 1327, 1342 (Miss. 1998) ("Duplantis was an escapee from jail. He had no money, nor did he have access to it. It is not beyond the realm of inference to believe that Duplantis first developed the intent to rob Gary thrash of his truck and money, and then killed Mr. Thrash when he did not cooperate. The jury apparently drew this inference, or one similar thereto, from the facts. We accept the jury's finding").

C. Charles Collins's Reaction to the Simpson Pretrial Lineup

Appellant takes issue with a comment the State made, during closing argument, regarding Charles "Porky" Collins's identification of Curtis Flowers as the man he saw outside Tardy Furniture on the morning of the murders. The relevant statement, in context, is as follows:

> I'm going to refer to this some more in a minute but I just want you to—you've seen these. We had them passed to y'all. Here are two line-ups. These line-ups were shown to Porky at the same setting. First was this one that has Doyle Simpson's picture on it. Because later on when they did this line-up, they already knew that the gun came out of Doyle's car. And so they gave this thing to Porky first and said is the guy that you saw in front of Tardy's in this group.
>
> Now, if he was going to make a misidentification, ladies and gentlemen, that would have been the perfect time for him to pick one of these guys and say yeah, there he is right there. But you know what? Porky did not misidentify anybody. He said the guy ain't in there. They took another six photographs and said look at this second set. He said that's him right there. You heard Mr. Miller talk about Porky, said he was positive. He made a positive identification.
>
> Now, why is Porky's i.d.—Porky doesn't know him. Porky wasn't able to say yeah, I know who it was and that's him. Porky said he didn't know him. When he saw the photograph of Curtis Flowers, he pointed him out.
>
> So you have got two different kinds of identifications and they agree. You've got identification by all of these witnesses who knew him, Porky, who didn't know

> him, and they both agree. And he was offered—Porky was offered a prime chance to mess up. The perfect chance to make a mistake. He almost--- it didn't develop out the way it, but it was almost like a trick.
>
> You know, see if he is in there. No, he is not. Is he in this second group? Yeah. That's him right there. So that's pretty strong identification, isn't it.

R. 3193-94.

According to Appellant the fault in the State's comment lay in the fact that Collins, when presented with the first of two pretrial lineups, initially identified Doyle Simpson as "looking like the person he'd seen." Thus, suggests Appellant, the State lied when commenting that Collins did not pick anyone from the first lineup as matching the description of the person he saw outside Tardy Furniture.

The State's argument was an entirely proper comment on the evidence. As will be discussed in greater detail in Issue III, *infra.*, Collins was shown two "six-pack" lineups: the first contained a picture of Doyle Simpson, the second contained a picture of Curtis Flowers. At all times, Collins has positively identified Flowers as being the person he saw outside Tardy Furniture. During the trial of the case sub judice, Collins's March 24-25, 1999, testimony was read into the record (Collins having died in 2002). According to that testimony, Collins identified Flowers at trial, stating, "I will always believe it's that man right there." Exh. Vol. 1, R. 1609, 1700. Collins stated that he picked Flowers's picture out of a lineup, and that he initialed that picture to denote his positive identification. *Id*. at 1716-17. Collins testified that, in selecting Flowers from the lineup, he told the police, "I think that's him. I believe that's him. I am sure that's him." *Id*. at 1709. According to Collins, "The man I picked out of the lineup [Flowers] there was the man I seen there in front of Tardy Furniture Company." *Id*. at 1720. Collins's testimony was supplemented by the testimony of Wayne Miller, who was present

during these pretrial lineups. According to Miller, Collins positively identified Flowers during the lineup. R. 3042.

During closing argument in the instant trial, the State argued that Collins made a positive identification. He did. Therefore, the State's comment was not in error. Nor did the State err in arguing that Collins did not identify anyone from the first lineup (the one containing the picture of Doyle Simpson). Repeatedly during Collins's original examination (from 1999), defense counsel tried to get Collins to admit that he picked Simpson out of the first lineup; such attempts were unsuccessful. Consider the following colloquy between defense counsel and Collins, related to the Simpson lineup. Defense counsel began the questioning by pointing out two other photos in the Simpson lineup that, in addition to Simpson, Collins also believed resembled the perpetrator:

> Q: First of all, Mr. Collins, the first set of pictures that they showed you were pictures where you pointed to two of the men in the picture photo and say that resembles the person but the hairline is different; isn't that right? You pointed to one and three in the photos and said that resembles the person, but the hairline is different. Isn't that correct?
>
> A: I think the words I said was that the complexion is, you know, is similar.
>
> Q: Okay.
>
> A: But the hairline is different, yes.
>
> Q: Then you pointed to a person and that you said that that looks like the person or that, let me see. I don't want to get your words—

Exh. Vol. 1, R. 1675.

At this point the State objected to defense counsel's line of questioning. When it was determined that defense counsel was not referring to the actual lineup exhibit, or to Collins's recorded statements, but to police notes from that lineup, the trial court instructed defense counsel to stop reading from the notes and ask Collins about his memory of the identification.

To that end, Collins stated that he had "no idea" whether he pointed to Simpson's picture; and he "really didn't know" whether he stated that Simpson's hairline was similar, but his complexion darker, than the person he saw outside Tardy Furniture. *Id*. at 1676. Defense counsel continued in his questioning:

> Q: Did you in that particular first lineup indicate in pointing to Doyle Simpson that even though the picture appeared to be, that it could have been a little lighter than the person, but that looked like the person that you saw. Did you say that?
>
> A: I cannot say, I cannot, I can't answer that. I don't know.
>
> Q: Didn't you, in fact, say that the shape of the face was the same face; is that correct?
>
> A: I could not tell you. I don't remember that.
>
> Q: And then after saying, then didn't you say that you weren't quite sure. Didn't you say that? That you had pointed to Simpson, but you said you weren't quite sure? Didn't you say that?
>
> A: I don't know. I cannot remember saying that.

Id. at 1677. Defense counsel tried again, later on in cross-examination, to trip up Collins about the Simpson lineup:

> Q: For instance, you picked out two people. One you said looked like the person. You actually picked out two people on that day, two different people that you said looked like the person on that day; is that correct?

Collins responded, "I don't think that's what I said." Exh. Vol. 2, R. 1700.

Collins's testimony was again supplemented by Wayne Miller, who testified that Collins did not identify anyone from the Simpson lineup: "he compared some complexions and some hairlines, and that was it." Miller did remember Collins stating that Simpson "looked like" the perpetrator; however, ultimately Collins did not identify Simpson as being the person he saw (according to Miller because Simpson had a different hairline). R. 3042-43.

The State's comment was entirely proper. Collins, by his own defense counsel's concession, considered three individuals from the first lineup as being "possibilities." One of those was Doyle Simpson. However, Collins carefully considered each photograph and did not select any of these individuals as being the man he saw outside Tardy Furniture. Collins specifically testified that Doyle Simpson did not physically match the person he saw outside Tardy Furniture. Collins also carefully considered the second lineup and specifically testified that Curtis Flowers did match the person he saw outside Tardy Furniture; Collins made a positive and in-court identification of Flowers, and only Flowers. The State argued that Collins looked at the Simpson lineup and said, "the guy ain't in there." That is entirely correct; it is an accurate comment on Collins's testimony. Thus, the Appellant's argument is unsupported by the record.

D. The Location of the Victims

During closing argument, the State argued that, on the morning of the murders "Sam Jones entered Tardy Furniture, walked up close enough to see what was going on, and there he discovered the bodies of all four victims laying in a pile, in a group right at the front counter in Tardy Furniture store." R. 3188. As the State had shown to the jury both in pictures and sketches, and through witness testimony, three of the victims were located at the front counter; Bertha Tardy was a short distance away from the counter, in the aisle leading from the front of the store back to her office. Thus, the State was incorrect when it stated that all four victims were grouped at the front counter, as only three of the victims were there. However, such error does not amount to misconduct and is insufficient to warrant error.

First, there is no dispute that three of the four victims were found at the front counter at Tardy Furniture. R. 1835, 1846-47, 1858, 1904-06, 1958; C.P. 1942. The State's reference to those victims being in a "pile" or "group" is a proper comment on the evidence. The bodies

were not lying on top of one another, but they were all in the same location, next to one another at the front counter of the store. This phraseology is a proper comment on the evidence. Appellant wishes to focus specifically on the word "pile" to suggest the State's comment amounted to misconduct; however, taken in context, the prosecutor used the words "pile" and "group"; his suggestion was nothing more than a description of the bodies being found in a single location, lying together "at the front counter" of the store.

Moreover, that the State inadvertently stated that all four bodies were found at the front counter (in a pile or a group) is not inflammatory, highly prejudicial, or reasonably calculated to unduly influence the jury." *Hiter v. State,* 660 So.2d 961, 966 (Miss.1995)). Appellant argues the State made such comment in an effort to prove its "single assailant theory." This is a curious allegation, as the State had no such theory. Obviously, the State believed Curtis Flowers was the only individual involved in these murders; none of the evidence pointed to anyone else. However, there was no debate between the parties at trial as to whether Flowers was capable of singlehandedly committing a quadruple homicide. The State made no such argument during its case-in-chief; and while Appellant argued during the guilt phase that someone else could have committed the murders, it does not appear Appellant ever argued against a "single assailant theory" or in favor of a "double assailant theory." Appellant's only argument was an "it's not Flowers" theory.

Thus, Appellant's suggestion that this comment was made to show the jury it was "easier" for Flowers [instead of multiple killers] to shoot all four victims is unsupported by the record. Neither of the parties argued this during the guilt phase or during closing. Moreover, after making the statement that Sam Jones found the bodies, the State moved on, making no comment or argument on that particular piece of evidence:

> Mr. Sam Jones who had worked for Tardy Furniture—I think he was like 87 years old at the time—worked for Tardy Furniture for many years. He walked into that store on the morning of July 16, 1996, and he heard the labored final breaths of Derrick Stewart laying on the floor gurgling in his own blood. He walked up close enough to see what was going on, and there he discovered the bodies of all four victims basically laying in a pile, in a group right at the front counter in Tardy Furniture store.
>
> We are going to talk about connections. There is a lot of things that connect this defendant. That's what you look for in criminal investigation. You look for connections. What connected this defendant to these crimes?
>
> Well, let's look. First of all is we have here a timeline […]

R. 3188. The State then proceeded to examine the timeline of the case, and the identification of Flowers by the witnesses.

The State's comment, therefore, did not amount to prosecutorial misconduct. While incorrect in how many people were found at the front counter, the remainder of the statement was accurate and supported by the evidence. The addition of a fourth victim, when taken in context, and considering the jury instructions, the evidence and arguments presented to the jury—including dozens of exhibits and photos, in which the jury was instructed on the location of the victims—did not make the comment reversible error.

III. THE TRIAL COURT DID NOT ERR IN ALLOWING THE PRE-TRIAL AND IN-COURT IDENTIFICATIONS BY PORKY COLLINS.

On the morning of the murders Charles Collins saw two men arguing outside of Tardy Furniture; Collins saw the face of one of those men. Prior to Flowers's first trial, Collins identified Flowers as the man he saw outside Tardy Furniture. Collins also made an in-court identification of Flowers as the man whose face Collins saw the morning of the murders.

Having died in 2002, Charles Collins's testimony was read into the record for the instant trial. Appellant submits the introduction of Collins's pretrial and in-court identifications constitutes reversible error. According to Appellant, Collins's identifications were unreliable

because Collins suffered from memory problems; the pretrial lineup did not occur until a month after the murders; and the photographic array was skewed toward Flowers. Appellant also submits the lineup itself was suggestive, as Flowers's picture was larger, and his physical features different from the others in the lineup.

The trial court did not err in admitting this evidence. This Court has set forth a two-part test to assess the validity of a pretrial identification procedure. "Specifically, the court must determine (1) whether the procedure used to obtain the identification was unduly suggestive and (2) if the identification was unduly suggestive, the court must determine, under the totality of the circumstances, whether the identification is nevertheless reliable." *Latiker v. State*, 918 So. 2d 68, 74 (Miss. 2005).

If the trial court determines the pretrial lineup was not suggestive, the analysis ends. If the court determines the lineup was unduly suggestive, it uses the reliability factors set forth in *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972): the opportunity of the witness to view the criminal at the time of the crime; the witness's degree of attention; the accuracy of the witness's prior description of the criminal; the level of certainty demonstrated by the witness at the confrontation; and the length of time between the crime and the confrontation.

With respect to in-court identifications predicated on suggestive pretrial lineups, pursuant to *York v. State*, 413 So. 2d at 1383, this Court holds that:

> An impermissibly suggestive pretrial identification does not preclude in-court identification by an eyewitness who viewed the suspect at the procedure, unless: (1) from the totality of the circumstances surrounding it (2) the identification was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

The totality of the circumstances must show a substantial likelihood that Charles Collins "irreparably" misidentified Appellant in-court. *Howell v. State*, 860 So. 2d 704, 729 (Miss. 2003).

With respect to in-court identifications based on lineups that were not suggestive, or in-court identifications where no pretrial identification occurred, trial courts are not required to conduct a second *Biggers* analysis to determine whether the in-court identification passes constitutional muster. *Galloway v. State*, 2013 WL 2436653. Instead, this Court has held that such credibility issues must be left to the jury:

> A majority of courts have concluded that *Biggers* does not apply to strictly in-court identifications. *Byrd v. State*, 25 A.3d 761, 767 (Del.2011). *See also State v. Lewis*, 363 S.C. 37, 609 S.E.2d 515, 518 (2005), where the South Carolina Supreme Court concluded, "as the majority of [courts] have," that *Biggers* "does not apply to a first-time in-court identification because the judge is present and can adequately address relevant problems; the jury is physically present to witness the identification, rather than merely hearing testimony about it; and cross-examination offers defendants an adequate safeguard or remedy against suggestive examinations."
>
> The Georgia Supreme Court has reasoned:
>
> > Because pretrial identification procedures occur beyond the immediate supervision of the court, the likelihood of misidentification in such cases increases, and courts have required that pretrial identification procedures comport with certain minimum constitutional requirements in order to ensure fairness. These extra safeguards are not, however, applicable to ... the in-court identification ... [here]. Rather, [such] testimony is subject to the same rules of evidence, witness credibility, and cross-examination as all testimony in a criminal trial.
>
> ***
>
> Here, we see no reason to expand the *Biggers* two-step inquiry to an in-court identification where no impermissibly suggestive pretrial identification is alleged to have preceded it. The trial itself affords the defendant adequate protection from the general inherent suggestiveness present at any trial. The defendant receives the full benefit of a trial by jury, presided over by an impartial judge, with representation by counsel, and witnesses subject to oath and cross-examination. The extent to which there were inconsistencies between Brimage's pretrial identification and her subsequent in-court identification goes to the weight of the evidence, not to its admissibility. This issue is without merit.

Galloway, id. at 40-41.

A lineup is suggestive if the defendant is "conspicuously singled out." *Butler v. State*, 102 So. 2d 260, 264-65 (Miss. 2012). That did not happen in this case. Less than two hours after the murders Charles Collins gave a description to the police of the two individuals he saw arguing outside of Tardy Furniture. R. 107. Collins did not know the individuals but he felt he could identify them. R. 2753. Collins described both individuals as black males, one taller than the other, both with medium complexions. R. 96.

Police showed Collins two separate "six pack" photographic lineups. After looking at the first photographic lineup, in which Flowers was not depicted, Collins could not identify any of the individuals as being the man he saw outside Tardy Furniture. After looking at the second photographic lineup, in which Flowers's picture was included, Collins identified Flowers as being one of the men he saw outside the furniture store the morning of the murders. Collins initialed Flowers's picture as capturing the image of the individual he saw outside Tardy's. Collins then identified Flowers at trial as the person he saw outside Tardy's[6].

Appellant claims he was conspicuously singled out in the photographic lineup, in that he was the only individual matching the description Collins gave to the police, and in that his photograph was a more "close up" shot than the others. Appellant's first claim—that he was the only individual in the six pack matching Collins's description—is factually incorrect. Collins's

[6] As the State argued during the January 6, 1999 suppression hearing,

> I think it is very important that they showed him two separate photo lineups. If this were a person that was attempting to come in and just say I saw who did it, when they showed him that first lineup, he would have picked somebody out and said, that is him. He didn't do that. He looked at one and said, this person has some of the same characteristics. He did not say that was the person. He said they had some of the same characteristics.
>
> He was shown the second lineup which had this Defendant's picture in it, number 4, a random number in there. He wasn't put number one or anything like that to try to draw attention to him. Mr. Collins went straight to that picture, and he said, "I think that's him. It looks like him," and he later said, "That is the person that I saw in front of Tardy Furniture." And he told this Court that that is the person, and he will always believe that that is the person that he saw in front of Tardy Furniture. If that is not positive, I don't know what could be.

R. 162.

somewhat general pre-lineup description of the perpetrator was of a black male with a medium complexion. Police also knew Flowers had facial hair, and a receding hairline. As such, the "fillers" on the lineup were chosen for those physical features. R. 3025.

According to Collins's own statements made during the suppression hearing, Flowers was one of three individuals who had among the darkest complexions in the lineup. R. 40. Flowers was one of three individuals who had "some sort of a receding hairline." R. 43. Although Collins did not remember describing the perpetrator as having a beard, Flowers is one of four individuals photographing with facial hair. R. 41. Thus, Flowers, as one of three darker skinned black males with a receding hairline and a beard, did not stand out in terms of the general description Collins gave to police—of a black male with a medium complexion.

The only distinguishing feature Collins noted was that Flowers had the biggest head. And the State agrees with Appellant that his head appears larger in the lineup photo than the other individuals represented. However, Collins never described the perpetrator as having a large head, and he did not select Flowers because of the size of his facial image. R. 43. Moreover, this Court has held that minor differences between pictures do not render a lineup suggestive. In *Batiste v. State*, 2013 WL 2097551 (Miss. 2013), this Court held that "the use of a different photographic technique and a white background around the suspect's photo were minor differences that did not create a 'very substantial likelihood of irreparable misidentification.'" *Batiste, id*. (quoting *York*, 413 So. 2d at 1384)).

In *Butler v. State*, 102 So. 2d 260, 265 (Miss. 2012) this court held that one facial image appearing larger than others did not make a lineup impermissibly suggestive:

> On the other hand, "minor differences" with the suspects or differences in the photograph backgrounds will not render a lineup impermissibly suggestive. *See Jones v. State*, 993 So.2d 386, 393 (Miss.Ct.App.2008)(where defendant was the only one wearing a coat, difference was minor and not impermissibly suggestive); *Dennis v. State*, 904 So.2d 1134, 1136

> (Miss.Ct.App.2004)(where defendant's picture was slightly larger than the others and the others were marked "Carroll Co. Det. Center," the differences were minor and lineup was not impermissibly suggestive) […]

In *Dennis v. State*: 904 So.2d 1134 (Miss. App. 2004), which this Court cited in *Butler*, the Court of Appeals gave further discussion to the issue of the enhanced size of a particular facial image in a pretrial lineup. Dennis argued that his picture stood out like a "sore thumb" from the rest of the lineup photographs. Dennis's photo was a driver's license picture, which included some identifying information in the caption; the other photographs were mug shots which included captions reading "Carroll Co. Det. Center." Dennis further argued "that his facial image [was] larger on his photograph than are the facial images on the other pictures." *Dennis*, 904 So. 2d at 1135-36.

The Court of Appeals, in rejecting Dennis's argument, held as follows:

> In [*Anderson v. State*, 724 So. 2d 475 (Miss.Ct.App. 1998)], the defendant argued that evidence concerning his identification by the robbery victim in a photographic lineup should have been excluded because of its improper suggestiveness. *Id.* at 477-78. The defendant specifically pointed out that the remaining five photographs in the lineup appeared to be developed and printed commercially whereas his photo was a self-developed Polaroid picture with a white border. *Id.* at 478. In rejecting Anderson's argument, we stated:
>
> > This Court has reviewed the photographs used in the lineup. The physical characteristics of the persons themselves are sufficiently similar to avoid suggestiveness. The backgrounds of the various photographs indicate quite clearly that they all involve persons in the custody of law enforcement. The only noticeable difference is the different photographic technique used to capture Anderson's likeness. We conclude that the existence of a white border on Anderson's photograph does not, of itself, make that photograph so distinctive as to improperly single it out. The other photographs have minor distinctions in shape and size and show different backgrounds. In some of them, the individuals are holding up identification placards and in some they are not. All of these considerations tend to indicate that all of the photographs were taken at different times and possibly with different cameras. Thus, the minor differences in the appearance of Anderson's photograph are not so distinctive as to improperly single him out. There is, in our opinion, no possibility of "a very substantial likelihood of irreparable misidentification." (citation omitted).

Id.

> Dennis argues that *"Anderson* is helpful ... because it points out the difference between 'minor distinctions' and photos that are suggestive." He concludes that, in Anderson, "all of the photos had some differences" while here all the photos were alike except his.
>
> Upon review of the photographs used in this case, we do not find that the minor differences in the appearance of Dennis's photograph are so distinctive as to improperly single him out. While the other photographs are marked with "Carroll Co. Det. Center" and Dennis's photograph seems to be slightly larger than the others, all pictures of the lineup have the same format, that is, the picture and biographical information of each person. Moreover, the men in the photographs seem to be of similar complexion. We consequently do not find that the photographic identification lineup in this case is impermissibly suggestive.

Dennis, id.

In light of this Court's existing precedent, the trial court did not err in ruling that the lineup was not suggestive[7]. Thus, as the lineup itself was not impermissibly suggestive, there was no legal requirement for the court to engage in the reliability prong of the *Biggers* test. Nevertheless, the trial court did review Collins's identification pursuant to the *Biggers* requirements; the court then properly determined that Collins's identification was reliable.

As the trial court recognized, it is evident that: (1) Collins had a time in which to view Appellant. He saw Appellant, from approximately thirty feet away, as he was slowly driving past the two men arguing outside Tardy Furniture. (2) Collins was paying attention and able to describe what Appellant looked like. Collins told both the police and the jury that he was "nosy" and paid attention to these two men because it looked as if they were about to fight. Collins's initial description to the police was not very specific (black male, medium complexion); however, Collins used his memory of the event—including the hairline characteristics of the perpetrator—to assist in his identification of Flowers from the lineup. (3) Collins provided a

[7] In ruling the pretrial identification was not suggestive, the trial court (in 1999) held there was no evidence to suggest the police influenced Collins, who never attempted to have Collins select a particular suspect; never told Collins they had a suspect; and never told Collins any suspects were in the lineup itself. R. 59, 90, 143-44, 167.

description of Appellant that he then reaffirmed in-court. (4) Collins was certain of Appellant's identity when he saw him in the lineup and in-court. Collins stated during the lineup, "I think that's him. I believe that's him. I am sure that's him." Collins testified at trial, "I will always believe it's that man [Flowers] right there." (5) The lineup took place a little more than a month after the shooting, the delay occurring due to a prolonged hospitalization in Collins's family. *See e.g., Burton v. State*, 970 So. 2d 229, 237 (Miss. 2007) (eight months is "long enough period of time to weigh against the admissibility of the identification"); *Christmas v. State*, 10 So. 3d 413 (Miss. 2009) (trial judge, not this Court, found a 43-day delay between crime and identification weighed in favor of defendant). (6) Collins has never wavered in his identification of Appellant as the man he saw arguing outside Tardy Furniture on the morning of the murders.

As to the particular issue of whether Collins's memory was made unreliable as a result of illness or old age, such issue does not go to the admissibility of the lineup itself-- which hinges here on the judge's ruling that the lineup was not unduly suggestive. Appellant's argument goes only towards the credibility of Collins as a witness. This Court has repeatedly held that "the jury is the final arbiter of a witness's credibility." *Williams v. State*, 794 So. 2d 1019, 1028 (Miss. 2001); *Morgan v. State*, 681 So. 2d 82, 93 (Miss. 1996). The jury alone determines the weight and worth of any conflicting testimony. *Hicks v. State*, 812 So. 2d 179, 194 (Miss. 2002).

For the above and foregoing reasons, this issue is without merit.

IV. THE TRIAL COURT DID NOT ERR IN EXCLUDING THE TESTIMONY OF PROPOSED DEFENSE EXPERTS ROBERT JOHNSON AND JEFFREY NEUSCHATZ.

Appellant claims the trial court erred in refusing to allow expert testimony from retired police chief Robert Johnson, to discuss the deficiencies in the police investigation of the Tardy Furniture murders, as well as "proper protocols" which should have occurred. Appellant claims Johnson would have highlighted the lack of leadership and proper documentation, and the

potential spoliation of evidence. According to Appellant, Johnson's proposed testimony was reliable under the *Daubert* standard, was not cumulative in nature, and would have assisted the jury in understanding facts at issue.

Appellant also takes issue with the trial court's refusal to allow expert testimony from Dr. Jeffrey Neuschatz, an alleged expert in the area of eyewitness identification.

The admission of expert testimony is governed by Mississippi Rule of Evidence 702, which provides that,

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Pursuant to Rule 702, a properly qualified witness may testify "in the form of an opinion or otherwise," if three criteria are met. First, the witness's testimony must be based upon sufficient facts or data. Second, the testimony must be the product of reliable principles and methods. Finally, the witness, in testifying, must apply the principles and methods "reliably" to the facts of the particular case. Miss. R. Evid. 702. In determining the admissibility of Rule 702 testimony, courts must consider whether the expert opinion is based on scientific knowledge, and whether the opinion will assist the trier of fact to understand or determine a fact in issue. *Edmonds v. State*, 955 So. 2d 787, 791 (Miss. 2007) (citing *Miss. Transp. Comm'n v. McLemore*, 863 So. 2d 31, 38 (Miss. 2003)).

Stated another way, in interpreting Rule 702 trial courts retain authority and are vested with a "gatekeeping responsibility" to review scientific evidence and determine its admissibility. *McLemore*, 863 So. 2d at 36 (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993)). The trial court must engage in a two-pronged inquiry, determining whether the

expert's testimony rests on a reliable foundation and whether his testimony is relevant to the matter. *McLemore*, 863 So. 2d at 38.

Regarding the "reliability" prong, in order for expert testimony to be admissible under Rule 702, such testimony must be grounded in the methods and procedures of science, and not merely a subjective belief or unsupported speculation. *McLemore, id*. at 36 (citing *Daubert*, 509 U.S. at 590). The United States Supreme Court, in *Daubert*, adopted a nonexhaustive, illustrative list of reliability factors for determining the admissibility of expert testimony. The factors include,

> [W]hether the theory or technique can be and has been tested; whether it has been subjected to peer review and publication; whether, in respect to a particular technique, there is a high known or potential rate of error; whether there are standards controlling the technique's operation; and whether the theory or technique enjoys general acceptance within a relevant scientific community.

Daubert, 509 U.S. at 592-95; *see Gillett v. State*, 56 So. 3d 469, 495 (Miss. 2010).

"The applicability of these reliability factors varies depending on the nature of the issue, the expert's particular expertise, and the subject of the testimony." *Gillett, id*. (citing *Kumho Tire Co., Ltd. v. Carmichaell*, 526 U.S. 137, 151 (1999)). A *Daubert* analysis "is flexible, and the factors considered by the trial court will depend on the circumstances of the case." *Parvin v. State*, 2013 WL 1459252, *3 (Miss. April 11, 2013). Moreover, the reliability factors "do not constitute an exclusive list of those to be considered in making the determination; *Daubert's* list of factors was meant to be helpful, not definitive." *Howard v. State*, 853 So. 2d 781, 804 (Miss. 2003) (quoting *Kumho Tire*, 526 U.S. at 151)). Finally, whatever the factors considered by the trial court, "self-proclaimed accuracy by an expert [is] an insufficient measure of reliability." *Parvin, id*. (quoting *McLemore*, 863 So. 2d at 37). Rule 702 does not relax the traditional standards for determining that a witness is indeed qualified to speak an opinion on a matter within a purported field of knowledge. Miss. R. Evid. 702 cmt.

Regarding the relevancy prong, testimony is relevant if it will assist the trier of fact in understanding or determining a fact at issue. *Gillett v. State*, 56 So. 3d at 526; *McLemore*, 863 So. 2d at 38. The requirement that the testimony must "assist the trier of facts means the evidence must be relevant," as that word is defined by Mississippi Rule of Evidence 401:

> "Relevant Evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

In line with the reliability and relevancy requirements, the opinions of an expert must also be stated with "reasonable certainty, given the state of knowledge in the field in which the expert is qualified." Such opinions "must rise above mere speculation." *West v. State*, 553 So. 2d 8, 20 (Miss. 1989); *Williams v. State*, 544 So. 2d 782, 786 (Miss. 1987). In *Goforth v. City of Ridgeland*, 603 So. 2d 323, 329 (Miss. 1992) this Court held that the offering of a "reasonable hypothesis" by an expert was insufficient, explaining that "[e]xpert testimony should be made of sterner stuff." In *West*, this Court held that "indefinite expert opinions, or those 'expressed in terms of mere possibilities,' are not admissible":

> The Mississippi Rules of Evidence effective January 1, 1986, have enlarged upon these views but retained their essentials. Where a party offers expert opinion testimony, the case as a whole—as distinguished from that of each individual expert witness who testifies—must satisfy the predicate and reasonable probability standards.

West, id. at 20.

The reason to take such care with a Rule 702 analysis is that courts must also be mindful of Mississippi Rule of Evidence 403. In *Howard v. State*, 853 So. 2d 781, 805-06 (Miss. 2003), this Court used the cautionary language of *Daubert*, stating, "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses." *Daubert*, 509 U.S. at 595.

Therefore, the trial court must be ever mindful of the possibility that expert testimony could "confuse the jury or cause it to substitute the expert's credibility assessment for its own." *U.S. v. Kime*, 99 F.3d 870, 884 (8th Cir. 1996).

Expert testimony is admissible under Rule 702 regardless of whether the testimony is in the form of opinion or exposition. *West v. State*, *id*. Moreover, "There is no invalidity to an expert witness's testimony even if the answer is in effect also a legal conclusion," so long as

> what underlies that conclusion is within the witness's specialized area of expertise. Another evidentiary rule provides that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." M.R.E. 704. The comment to the rule states that an "opinion is no longer objectionable solely on grounds that it 'invades the province of the jury.' "

Mississippi Baptist Foundation, Inc. v. Estate of Matthews, 791 So. 2d 213, 218 (Miss. 2001) (citing *McBeath v. State*, 739 So. 2d 451, 454 (Miss. App. 1999). Thus, expert testimony under Rule 702 is not excludable simply because it embraces something within the province of the jury's decision making. *Matthews, id.*; *Branch v. State*, 998 So. 2d 411, 415 (Miss. 2008).

However, none of this means that a witness may properly be asked to tell the jury what result to reach. *Hart v. State*, 637 So. 2d 1329, 1339 (Miss. 1994). And none of this means that an expert witness should be allowed to provide testimony which "embraces something within the province" of the judge's decision making; this includes expert "scientific" opinion that a judge's legal ruling is erroneous. Moreover, while experts have been allowed to address issues involving credibility[8], the general rule is that credibility issues are the sole province of the jury. *Flowers v. State*, 2013 WL 264583 at *1 (Miss. January 24, 2013). "In reviewing the weight of the evidence supporting a verdict, this Court will not 'pass upon the credibility of witnesses and, where the evidence justifies a verdict, it must be accepted' that the jury found such witness

[8] *Hobgood v. State*, 926 So. 2d 847 (Miss. 2006); *Smith v. State*, 925 So. 2d 825 (Miss. 2006).

'worthy of belief.'" *Jones v. State*, 95 So. 2d 641, 647 (Miss. 2012) (quoting *Massey v. State*, 992 So. 2d 1161, 1163 (Miss. 2008) (citing *Moore v. State*, 933 So. 2d 910, 922 (Miss. 2006)).

See also Hicks v. State, 812 So. 2d 179, 194 (Miss. 2002) ("jury alone" determines the weight and worth of conflicting testimony); *Williams v. State*, 794 So. 2d 1019, 1028 (Miss. 2001) (jury is "final arbiter" of a witness's credibility); *Hughes v. State*, 735 So. 2d 238, 276 (Miss. 1999) (jury entitled to weigh credibility of witness's identification); *Jones v. State*, 381 So. 2d 983, 989 (Miss. 1980) (jury has "duty to determine the impeachment value of inconsistencies or contradictions as well as testimonial defects of perception, memory and sincerity"); *Kimbrough v. State*, 379 So. 2d 934, 936 (Miss. 1980) ("any inconsistencies of the in-court identification go only to the credibility and weight of the evidence, which is a factual determination to be made by the jury"). *See generally Brown v. State*, 829 So. 2d 93 (Miss. 2003); White v. State, 722 So. 2d 1242, 1246 (Miss. 1998).

In any event, the keys to a Rule 702 analysis hinge on reliability and relevancy. Thus, in order for expert testimony to be admissible it must be helpful to a determination of the case and not just address facts within the jury's common knowledge. *West, id.*; *May v. State*, 524 So. 2d 957, 964 (Miss. 1988). It must be scientifically methodological. And the party seeking to introduce expert testimony must provide a "competent evidentiary predicate" on which the testimony is based. *West, id*. at 21. This somewhat simplistic analysis of Rule 702 boils down to a simple precept: the expert's testimony must "fit" the facts of the case. *Daubert, id*. at 591.

With particular respect to issue at hand, a *per se* proscription against any particular expert testimony is, of course, irreconcilable with *Daubert*; there, the Court "eschewed such categorical prohibitions of entire classes of expert conclusions." *U.S. v. Smith*, 621 F. Supp. 2d 1207, 1211 (M.D. Ala. 2009) (citing *Daubert, id*. at 595). The State submits that police investigation or eyewitness identification—to the extent either constitutes a methodological area of scientific or

technical expertise—is neither categorically admissible nor categorically inadmissible. Admissibility is, simply put, a discretionary matter.

For indeed, this Court reviews all alleged errors in the admission of evidence, including expert testimony, for an abuse of discretion. This Court must uphold a trial court's refusal to allow an expert to testify unless it finds such ruling to be "arbitrary and clearly erroneous." *Parvin v. State*, 113 So. 3d 1243, 1247 (Miss. 2013); *Bishop v. State*, 982 So. 2d 371, 380 (Miss. 2008). As the Fifth Circuit held in *U.S. v. Moore*, 786 F.2d 1308, 1312-1313 (5th Cir. 1986), the issue of whether to admit expert testimony in the area of eyewitness identification,

> [I]s squarely within the discretion of the trial judge and properly so. Although admission of expert eyewitness testimony is proper, there is no federal authority for the proposition that such testimony *must* be admitted. The district judge has wide discretion in determining the admissibility of this evidence, and we hold that the district judge did not abuse his discretion in this case.

See Gillett v. State, 56 So. 3d 469 (Miss. 2010) (while Mississippi courts have allowed expert testimony regarding credibility issues, such decisions are not required but fall within trial court's discretion).

A. Robert Johnson

The trial court properly refused the testimony of proposed defense expert Robert Johnson, as Mr. Johnson's testimony was not reliable pursuant to Rule 702, was cumulative in nature, and would not assist the jury in determining facts essential to the case.

Robert Jonson, the former police chief of Jackson, Mississippi, now serves as an expert witness on issues related to criminal liability, safety, law enforcement practices, corrections and federal security issues. R. 3049. Mr. Johnson, who has years of experiences investigating criminal cases (including homicides), testified that he has developed protocol for use in murder investigations. R. 3053. He also testified that there are "generally accepted" standards for

conducting homicide investigations. R. 3059. Apparently, according to Mr. Johnson, there are a number of different standard operating procedures or accepted standards, used by law enforcement agencies across the country. R. 3060.

Johnson, who reviewed "some" of the discovery in this case[9], and was present for "some" of the trial, was prepared to offer three expert opinions to the jury. R. 3066. First, the Tardy Furniture murders investigation was disorganized and mismanaged, lacking both an identifiable lead investigator and a comprehensive, written "case file". Second, the police investigation failed to maintain the integrity of the crime scene, resulting in the possibility that evidence was overlooked, deposited after the murders or spoliated. R. 3070-71. Third, the police investigation improperly focused on a single suspect (Flowers) to the exclusion of all others. Johnson testified that each of these opinions were based on a single premise: the police investigation did not conform to required standards. R. 3067.

Critically problematic with such testimony is that Mr. Johnson conceded there are no minimum or required standards employed in Mississippi or any other state, which govern how police investigations should be conducted. R. 3092. Accordingly, there was no basis, scientific or technical, against which the jury could consider either Mr. Johnson's testimony, or the actions of the law enforcement which Mr. Johnson called into doubt. Mr. Johnson was very clear in stating that there are no set standards in Mississippi or anywhere in the United States, as to what procedures or protocols are necessary for a criminal investigation. R. 3092, 93. Johnson was very clear in stating that other than general practices, there were no guidelines which should have governed the investigation of the Tardy Furniture murders. *Id*.

With respect to Johnson's testimony regarding "generally accepted" standards of police procedure, Johnson admitted those were only suggestions from the U.S. Department of Justice,

[9] According to Mr. Johnson, he only reviewed what documents the defense gave to him. R. 3097.

and that they were not required for law enforcement agencies to follow. R. 3093. Johnson also acknowledged that while he had drafted his own protocol for use in murder investigations, he never drafted policies or procedures for the Mississippi State Highway Patrol, the Mississippi Bureau of Investigations, or the Winona Police Department—the agencies investigating the Tardy Furniture murders. R. 3094.

Thus, armed with no minimum standards, Johnson stated that the Tardy furniture murders investigation was deficient because the police did not comply with the common practices of keeping complete written records, designating a lead investigator, and carefully rejecting suspects. However, Johnson agreed with the State that the following investigatory techniques were also "generally accepted" (R. 3094) common practices among law enforcement:

- To routinely perform investigations without using written reports. R. 3093.
- For agencies in small towns and rural communities to band together to investigate homicides (which are typically rare occurrences)—as opposed to larger communities, which have larger police departments, more resources, additional manpower. R. 3096.
- To canvas the crime scene, look under manhole covers for evidence, talk to possible suspects and their co-workers to rule out suspects, and perform gunshot residue tests. R. 3095.
- To use a task force (not only common but "commendable" as well). R. 3100.
- For each law enforcement officer to "respond to their own individual agency head," and to follow their own individual agency practices. R. 3100.
- To review documents, conduct interviews, procure video of the crime scene, gather notes from the investigators, collect physical evidence, and use the scientific assistance of the Mississippi Crime Lab. R. 3097.

Each of these investigatory techniques occurred in the Tardy Furniture murders case. Johnson's only real argument, therefore, was that law enforcement's investigation was "less" complete, "possibly" missing information, and fell below generally accepted, but not standard, practices. R. 3094-96.

Mr. Johnson himself recognized that such opinion was problematic when operated in the real world context of the Tardy Furniture murders investigation. Mr. Johnson could not say with reasonable certainty that the investigation would have turned out differently had there been more, different, or better, documentation. R. 3098. Johnson stated there was no way to empirically test his opinion; according to Johnson, "you can surmise certain things," but nothing more. R. 3098. While Appellant's expert testified it was a disservice not to investigate "properly", Johnson acknowledged there are no definitive scientific or technical guidelines as to what constitutes a "proper" investigation. Accordingly, Mr. Johnson also acknowledged he would only be speculating as to whether, with his recommended changes to the investigation, the case would have turned out differently. *Id.*

Moreover, while Johnson targeted law enforcement's failure to keep more written documentation of the investigation, Johnson refused to offer any opinion regarding the law enforcement officers who testified to taking certain investigatory steps, despite failing to keep written documentation. Johnson did so despite the urging of defense counsel, who questioned the truthfulness of those officers.[10] Johnson qualified that his testimony would not "go to the

[10] Using Mr. Johnson to attack the credibility of these witnesses was improper, pursuant Mississippi Rule of Evidence 608(a). "The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation." However, such opinion evidence is subject to the limitation that it can refer only to the witness's character for truthfulness or untruthfulness. Johnson refused to opine that the law enforcement officers were being truthful (or not) when testifying to taking certain steps in their investigation; he stated only that having a record to support their testimony would bolster their memories.

Mr. Johnson refused (properly) to offer testimony regarding the credibility of the law enforcement officers. However, Flowers's attorneys had no problem using Mr. Johnson's testimony to attack the character of the

credibility of the officers that were testifying." R. 3099. He stated that documentation would substantiate the officers' testimonial recollections, but limited that statement by noting "I do not question any person's testimony, veracity of any of the investigators' testimony, no." R. 3106.

Johnson could not say that the focus on Flowers as a suspect was made prematurely given the facts and circumstances at the time it was made. Johnson also could not offer any comment as to how his opinion served to shed light on the propriety of the specific details of the investigation: "I'm not here to—to hindsight or those kind of things, to Monday morning quarterback, so to speak. My purpose here is to offer an opinion regarding what I think some inadequacies were in that investigation." R. 3077. Johnson submitted his purpose was to offer an opinion "that the lack of adherence to certain protocols led to problems in this case." *Id.* However, when asked by defense counsel to use his opinions to speak to specific, alleged problems in the investigation, Johnson refused: "So, you know, you can keep asking the performance of individual kind of things, and I can tell you, yeah, but that appears to be hindsight. I think anybody could hindsight and tell you that." Id.

The trial court, in refusing to allow Johnson to testify, offered no less than a treatise on the applicable law, and ruled as follows:

> Rule 702 of the Mississippi Rules of Procedure states that if scientific, technical or other specialized knowledge will assist the trier of fact in understanding the evidence or to determine a fact in issue a witness qualified as an expert by knowledge, skill, experience training or education must testify therein forming of an opinion or otherwise if 1) the testimony is based on sufficient facts or data; 2) the testimony is a product of reliable principles and methods and 3) the witness has applied the principles and methods reliably to the facts of the case.
>
> In [*McLemore*], the Mississippi Supreme Court held that the testimony of expert witnesses should be admitted only if a witness is qualified by virtue of his or her knowledge, skill, experience or education and the witness's scientific, technical or other specialized knowledge must assist the trier of fact in understanding or deciding the fact in issue.

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investigating officers. Therefore, Flowers's attorneys intended to use evidence which their own "expert" conceded was not in conformity with Rule 608(a), as a backdoor attack on credibility.

In determining whether expert testimony is admissible, the courts must also make a determination as to whether the testimony is reliable. The factors include whether the theory or technique can be and has been tested, whether it has been the subject of peer review and publication, whether with respect to a particular technique there is a high known or potential rate of error, whether there are standards controlling the technique's operation and whether the theory or technique enjoys general acceptance within a relevant scientific community. And that was in *McLemore* at page 37, citing *Daubert versus Merrell Dow*.

In *Palmer versus Volkswagen America,* Inc., 904 So. 2d 1077, the Supreme Court held—Mississippi Supreme Court held that if a witness is testifying about a subject that requires scientific, technical or other specialized knowledge that is beyond the common knowledge of a random adult, the testimony must be treated as expert testimony.

Chief Johnson is being offered as a witness to show that the investigation in the murders that are subject to this case was flawed. More specifically, he claims the investigation was flawed because there was never a lead investigator and central repository of information and evidence that was gathered, that the integrity of the crime scene was not properly preserved causing the possibility of evidence contamination and overlooking of evidence, the evidence was not properly documented and the investigation focused too early on one suspect.

Chief Johnson stated that there were commonly accepted investigative standards throughout most of the country; however, he never articulated what they are. He even went so far as to say that if something is not documented, it did not happen. He stated there were no minimum standards for police investigation in Mississippi and therefore was unable to say that the investigation of the Tardy murders fell below minimum standards for police procedures and protocols in Mississippi.

In *Ross v. State*, 954 So. 2d 968, the Mississippi Supreme Court held that the testimony of an expert in the field of police investigatory techniques must meet the standards required under Daubert and McLemore. Court will note that this Court has heard testimony from experts in the field of ballistics, pathology, fingerprints, shoe print identification, gunshot residue and identification and trace evidence.

In each of those fields a properly trained expert could analyze the evidence gathered and reach the same or similar conclusion as any other expert […] Although there were minor disagreements in the expert opinions, the methodology they used in—to reach their opinions was the same.

In the field of criminal investigations there are no established investigatory techniques that if followed will lead to the same results. If so, then every police department would have a manual, if you will, a criminal investigation for dummies book that, if followed, would lead to the arrest and conviction of all

> criminal perpetrators. However, that is not the case because no two crimes are the same. And thus no two criminal investigations are the same. Because there is no valid way of testing the field of police investigatory techniques, this Court finds the proposed expert testimony in the field fails to meet the reliability standards required under Rule 702.
>
> Now, every police officer that has testified has admitted that he could and maybe should have done things differently. Bill Thornburg testified that he probably should have taken a photograph of that fence post at the home of Doyle Simpson's mother. Jack Matthews testified that perhaps photos of the fence post should have been taken, and he probably should have written down the description that Catherine Snow offered of the individual she had seen at Doyle Simpson's car. James Taylor Williams admitted he thought he had written a complete report on his activities for the day of the murder and if he didn't, he should have.
>
> John Johnson admitted that there were reports he probably should have made during the course of the investigation that were not made. Wayne Miller admitted that he had no record of where the photos came from in the photo line-up shown to Porky Collins. And by no means is this an exhaustive list of the things that different police officers testified that they could or should have done and maybe were wrong in not doing.
>
> This Court only uses these illustrations to point out that all police officers that were investigating the crime were questioned vigorously. They were questioned in minute detail about the investigations and deficiencies in the investigation. Thus, this Court finds that even if the proper testimony met the reliability standards of Rule 702 it would be cumulative in nature and would not assist the jury.

R. 3119-3123.

The trial court did not abuse its discretion in making such a ruling. In *Ross v. State*, 954 So. 2d 968 (Miss. 2007), the defense proffered the testimony of an "expert on police investigatory techniques." The expert testified to his experience in securing crime scenes and collecting evidence; he "opined that in those areas the investigation into Yancey's murder was deficient." *Ross*, 954 So. 2d at 997. This Court held that such proffer "failed to establish the reliability of [the expert's] testimony," such that the trial court did not commit any error in excluding it. *Id.*

In *Thorson v. State*, 895 So. 2d 85, 120-23 (Miss. 2004), the defendant requested funds for an expert to testify that his confession was a police-induced false confession. This Court upheld the trial court's refusal to order the funding of such expedition. This Court noted that Thorson's expert was set only to testify that Thorson—based on his intelligence level—was susceptible to influence, not that he was in fact influenced. This Court found, therefore, that such expert only offered Thorson the possibility of assistance. More importantly, this Court held that the field of false confessions goes to the credibility of a witness, was inappropriate for expert testimony and was best left to the jury.

In *Edmonds v. State*, 955 So. 2d 787 (Miss. 2007), this Court upheld the trial court's decision to exclude the defendant's proposed expert on false confessions. The court's reasoning was that, during the extensive *Daubert* hearing, the expert "admitted that her theories could not be empirically tested." *Edmonds*, 955 So. 2d at 791. This is exactly what happened with the testimony of Robert Johnson. Also in *Edmonds*, this Court held that the trial court had erroneously admitted the expert testimony of Dr. Stephen Hayne, regarding the doctor's "two-shooter" theory of the case. *Edmonds*, *id*. at 791-92. This Court held that, while an accepted expert in forensic pathology, Dr. Hayne's two-shooter theory was unreliable. This Court rejected Dr. Hayne's testimony under Rule 702, because "there was no showing that Dr. Hayne's testimony was based, not on opinion or speculation, but rather on scientific methods and procedures." *Edmonds*, *id*. at 792.

In *Parvin v. State*, 113 So. 3d 1243, 1248-50 (Miss. 2013) this Court again rejected the admission of Dr. Hayne's testimony regarding the trajectory of the bullet which killed the victim. This Court noted that Dr. Hayne was not qualified to testify on this matter, because he cited no scientific principle or method by which his testimony could be measured. Dr. Hayne's only

support for his testimony was his self-proclaimed accuracy and experience, an expert basis this Court rejected. *Parvin*, 113 So. 3d at 1251.

Pursuant to Rule 702 and the modified *Daubert* standard for considering proposed expert testimony, Johnson's opinions were, while based on experience, not quantifiable such that they constituted a minimum accepted standard by which the jury could judge whether the investigation stood or fell. Johnson's opinions on proper police practices were not peer reviewed, published, tested or mandatory. His opinions on proper practices were recommended, but concededly not universally followed or employed. His opinions could not be used to determine whether the investigation would have been "better" had those practices been followed. His opinions could not be used to determine whether the investigators from the Mississippi State Highway Patrol, the Mississippi Crime Lab, and the Winona Sheriff's Department were themselves "good" or "bad". Johnson was an experienced officer, true. That does not make his science reliable, as that term is defined by this Court or by Rule 702.

The cases Appellant cites in support of his position are both distinguishable and without merit. Citing to a single Mississippi Court of Appeals case, *Alqasim v. Capitol City Hotel Investors*, 989 So. 2d 488 (Miss. App. 2008), Appellant claims that the use of expert testimony regarding police procedures is "regularly entertained by courts." Appellant's attempt to analogize his case to *Alqasim* is akin to analogizing apples to Paris. In *Alqasim*, the plaintiff attempted to prove a negligence claim, in part, by submitting an affidavit from a former Jackson Police Officer, who "made general statements and broad conclusions as to Hampton Inn's negligence" in failing to provide a secure parking lot at their hotel.

The *Alqasim* officer was never presented as an expert. The Court of Appeals was never asked to consider—and did not consider—whether the officer's testimony was admissible under Rule 702. The Court of Appeals was never asked to consider—and did not consider—whether

experts in police investigation would be admissible in Mississippi. Moreover, the appeals court found that the plaintiff's allegations as a whole were

> not sufficient to show that any action or inaction of Hampton Inn caused Alqasim's injury. Alqasim has not shown that if the security was somehow different, the incident would not have occurred. Therefore, we find that Alqasim has failed to present any evidence sufficient to create a genuine issue of material fact, thereby avoiding summary judgment.

Alqasim, 989 So. 2d at 493.

Appellant also cites *Brooks v. State*, 748 So. 2d 736 (Miss. 1999) for the argument that a lack of minimum standards does not make Robert Johnson's testimony unreliable under 702. In *Brooks*, this Court determined that bite-mark evidence was admissible in Mississippi. In coming to such conclusion, this Court recognized that the "opinions concerning the methods of comparison employed in a particular case may differ." *Brooks*, 748 So. 2d at 739. Appellant uses *Brooks* to suggest that expert testimony is reliable despite the absence of any underlying science, empirical basis or minimum standards of review.

The State submits Appellant's analogy again fails. *Brooks* dealt with competing methods of comparing bite marks (specifically, how many teeth points must match before an identification became possible), an issue this Court held could be properly attacked by examining "the methods and data used to compare the bite marks to persons other than the defendant […]" *Brooks, id*. *Brooks*, however, did not hand down a blanket "get into court free" pass for bite mark testimony (testimony which, at the very least, is more scientific and empirical than the areas of false confessions and police procedures). Bite mark testimony, while admissible, still has to be determined both reliable and relevant to the case at hand, pursuant to Rule 702; the trial court is required to make such determination before admitting the expert. In *Brooks*, this Court

held that the trial court did not abuse its discretion in allowing the testimony, because Brooks was allowed to bring in his own expert to dispute the findings of the State's expert[11].

This of course goes back to the general rule: admissibility is discretionary. That the *Brooks* trial court did not abuse its discretion in allowing competing experts to testify regarding comparative methods of analyzing bite marks, does not mean that the trial court in Flowers's case abused its discretion in refusing to hold Johnson's testimony reliable. Such findings are not in conflict with one another.

Johnson was not attempting to make a scientifically positive identification of a suspect based on the number of matching teeth imprints; Johnson was preparing to offer a general opinion about best practices in police techniques. Missing from that opinion were actual methods, data or standards by which Johnson's testimony could be compared to other "expert" opinions. This was a fact that even the trial court recognized, when it noted that while the accepted ballistics experts in Flowers's case disagreed over results, their testimony was still admissible because they employed methodologies by which to judge their results. R. 3119-23.

These disagreeing ballistics experts (mentioned by the trial court) had the same methodology, different results. In *Brooks*, the experts had comparative methodologies, different results. Robert Johnson had no methodologies. This crippled his testimony, forcing him to make statements such as: that while police investigations are routinely conducted without written documentation, the Tardy Furniture murders investigation was lacking because not enough of the case had been documented in writing. R. 3093.

[11] Allowing Robert Johnson and the law enforcement officers to offer comparing ideas of acceptable police practices would have been unfair. *Brooks*, while lacking a single method of examining bite marks, pitted expert against expert. Flowers suggests the trial court should have pitted expert against the lay witnesses, despite the fact that both were law enforcement officers, and each had their own way of conducting an investigation. To the jury, this would suggest that, while there were no minimum standards, Johnson's testimony was somehow more reliable. This again reveals the merits of the trial court's ruling.

According to Johnson, the investigation should have been conducted one way; however, another officer might testify to a different practice; and another officer might testify to another different practice; and so on, and so forth. This goes well beyond the scope of the ruling in *Brooks*. Moreover, as must be repeated, because there are few *per s*e rules when it comes to admissibility, the focus here must be on the discretion of the trial court, and any potential abuse thereof. The trial court's decision to exclude Johnson's testimony was neither arbitrary nor clearly erroneous. *Bishop v. State*, 982 So. 2d at 380. Robert Johnson, while an experienced officer, could offer no accepted standards by which this investigation could be empirically analyzed. His theories could not be empirically tested to show whether the investigation would have been any different. His testimony, while attempting to avoid the credibility issue, went to the credibility of the officers because the defense intended to use it for that purpose. This improperly invades the province of the jury.

In a sense, because Johnson's testimony was based only on personal experience, his opinion was more akin to lay testimony that the police investigation was sloppy. In that vein, however, such testimony had not only been presented to the jury, it was, in fact, one of the primary bases of the defendant's case. Thus, as the trial court found, such evidence was cumulative to that already presented to the jury. The defense spoke at length about the holes in the police investigation. The defense secured a testimonial concession, from each law enforcement witness, that the police could have done a better job in investigating and documenting that investigation.

The officers testified to the actions they took during the Tardy Furniture murders investigation. They were cross-examined, at length, as to whether their actions were sufficient. They admitted the investigation could have been cleaner, neater. That's not a subject for expert

exams. Such invades province of jury to determine credibility[12] and is cumulative. Mississippi Rule of Evidence 403 expressly allows a trial judge to exclude evidence which he finds to be cumulative. *See Knotts by Knotts v. Hassell*, 659 So. 2d 886 (Miss. 1995) (Rule 403 allows the trial court discretion to exclude cumulative expert testimony). The exclusion of expert testimony is not prejudicial where such testimony is cumulative to that evidence presented at trial—either by other experts or other lay witnesses. *See O'Keefe v. Biloxi Casino Corp.*, 76 So. 3d 726 (Miss. App. 2011); *Mississippi Federation of Colored Women's Club Housing for Elderly in Clinton, Inc. v. L.R.*, 62 So. 3d 351 (Miss. 2010) (no prejudice in limiting expert testimony,

[12] Appellant offers several analogies. Now, the State makes one. The State submits the use of one police officer to offer "expert" opinion that another police officer's investigation was insufficient, is no different than lawyers submitting affidavits against one another, asserting that they have violated the precepts of *Strickland*. While a *Strickland* analysis is a question of law, and the sufficiency of a police investigation a question of fact, the remainder of the analogy holds firm. These so called "experts" are doing nothing more than second-guessing colleagues based on their version of how things should be done. At least *Strickland* provides some "best practice" standards to guide attorneys.

In *Johnson v. Quarterman*, 306 Fed.Appx. 116, 128-29 (5th Cir. 2009), the Fifth Circuit found disfavor with attorney affidavits regarding claims of ineffective assistance of counsel:

> This court is intimately acquainted with the legal standards governing ineffective assistance of counsel claims. Expert testimony purporting to tell the court how those legal standards apply to the facts of a particular case invade the court's province as a trier of the law, and are not helpful to the court in determining the facts of the case. Because the proposed expert testimony both moves beyond the appropriate boundaries of expert testimony and is unhelpful to the court in its role as a trier of fact, the affidavits will not be considered.
>
> We conclude that, for the reasons given by the district court, the district court did not abuse its discretion in refusing to consider the attorney affidavits. We agree with the reasoning of the Eleventh Circuit in *Provenzano v. Singletary*, 148 F.3d 1327, 1332 (11th Cir. 1998):
>
> [I]t would not matter if a petitioner could assemble affidavits from a dozen attorneys swearing that the strategy used at his trial was unreasonable. The question is not one to be decided by plebiscite, by affidavits, by deposition, or by live testimony. It is a question of law to be decided by the state courts, by the district court, and by this Court, each in its own turn.
>
> The decision by the lower court was clearly not unreasonable nor in contradiction to any federal law.

Just as each crime scene is different, each case is different. Just as a "how to" manual would not result in a lawyer winning every single case, a "how to" manual in a criminal investigation would not result in the police catching the bad guy every time. Moreover, one lawyer suggesting that another lawyer is ineffective does not help this Court to determine whether that lawyer violated *Strickland*; one police officer suggesting that another is ineffective does not help the jury to determine whether that investigation, or that officer, lacked credibility.

where such testimony would have "been cumulative evidence," as other lay and expert witnesses "testified on the same subject matter").

See Snow v. State, 875 So. 2d 188 (Miss. 2004) (failure to present expert testimony not prejudicial to defendant where such testimony would have been cumulative of testimony from defendant's family and friends, "which adequately set forth claims at issue"); *Woodward v. State*, 843 So. 2d 1 (Miss. 2003) (failure to present medical records not prejudicial where such records cumulative of testimony from defendant's father, other lay witnesses and an expert witness); *see generally Le v. State*, 913 So. 2d 913 (Miss. 2005) (any error in allowing lay witness to testify as an expert was harmless, in light of cumulative nature of witness's testimony).

Appellant's only argument at trial, and here on appeal is that expert police procedure testimony is "not never accepted under *Daubert*." R. 3115. For argument's sake only, taking that premise as true, does that mean the trial court abused its discretion in rejecting that testimony here? Armed with no supporting Mississippi case law, and in light of the facts and evidence presented to the trial court (and the jury), there is a simple answer. No.

B. Jeffrey Neuschatz

Curtis Flowers first sought to have Dr. Neuschatz testify in 2007, when Flowers's case was proceeding capitally. In 2008, when the State announced it would proceed non-capitally, Flowers withdrew his motion to have Dr. Neuschatz testify. When the State subsequently resumed capital proceedings, prior to Flowers's fifth trial, Flowers resubmitted his Motion to Determine the Admissibility of Expert Testimony in Eyewitness Identification.

The hearing to determine the admissibility of Dr. Neuschatz's testimony occurred during Flowers's fifth trial, in September of 2008 (not during Flowers's instant trial). R. 285. In support of his Motion, Flowers's then-attorney, Andre DeGruy, submitted an affidavit from Dr. Neuschatz in which the doctor attached his *curriculum vitae* and stated that his role in testifying

was "simply to examine the identification evidence and, if necessary inform the Court about the current state of knowledge regarding eyewitness memory and its influences." C.P. 1371-98, 1582-1611. Neuschatz testified that relevant to Collins's identification were issues relating to memory, exposure time, changes in appearance, unconscious transference of one memory to another, cross-race identification and post identification feedback. *Id*. Neuschatz offered zero testimony as to how Collins's identification was affected by any of these issues. The only opinion Neuschatz offered relative to Charles Collins was that the police lineup was impermissibly suggestive. *Id*.

During the motion hearing itself, Mr. DeGruy did not present any proffer from Dr. Neuschatz. He did not present the doctor for questioning by the court, or for cross-examination by the State. He did not attempt to lay an evidentiary predicate for the doctor's hypothetical testimony by pointing to any specific problems with Collins's identification. He did not attempt to suggest, for instance, how the doctor could testify to the theory of unconscious transference, when Collins had never met or seen Flowers before the day of the murders. He did not attempt to suggest how the doctor could testify to the theory of cross-race identification[13]. He relied solely on the doctor's affidavit. Therefore, Appellant provided the trial court with nothing but generic statements that identifications can be affected by outside influences. R. 293-305.

Appellant also failed to present any legal support for the Motion to Determine the Admissibility of Dr. Neuschatz's testimony. Mr. DeGruy, in fact, began the hearing by "conceding" that eyewitness identification experts are not accepted in Mississippi. R. 293. Mr. DeGruy's sole case in support of his position was the Tennessee case of *State v. Copeland*, 226

[13] The State has been unable to find a reference to whether Collins was white or black. If both Flowers and Collins were black, cross-race identification would be inapplicable. If Collins was white, cross-race identification would only apply if Collins had not spent much time interacting with members of the African-American race. There is no evidence in the record to suggest the level of Collins's interactions with the black community and, therefore, no evidentiary predicate on which to base Dr. Neuschatz's theory.

S.W. 3d 287 (Tenn. 2007); Mr. DeGruy argued that *Copeland* supported the position that eyewitness identification testimony is admissible, but only in capital cases. R. 295.

Mr. DeGruy could not rebut, however, the fact that *Copeland* was not binding precedent on Mississippi. Nor could he rebut the fact that *Copeland* was factually distinguishable. In *Copeland*, a white woman was the only individual to identify the black defendant as the man who entered her home and forced the victim outside. However, that same witness initially stated that she thought another man had entered her home; she also gave contradicting statements as to whether the lights were on or off inside her house when the perpetrator arrived. *Copeland*, 226 S.W. 3d at 303. In Flowers's case, several witnesses had seen Flowers at Tardy Furniture that morning; moreover, Collins had not given contradicting statements or identifications. When the State pointed out the differences between the instant case and *Copeland*, the court offered Mr. DeGruy a chance to respond. Mr. DeGruy stated, "Nothing further." R. 300.

Mr. DeGruy also could not rebut the fact that *Copeland* did not hold expert eyewitness testimony admissible. Indeed, the holding of *Copeland* was simply that such testimony was not *per se* inadmissible. *Copeland, id*. at 307 ("In summary, we hold that the test in *McDaniel* is sufficient to allow the trial court to properly evaluate the admissibility of expert testimony on the reliability of eyewitness identification"). Finally, Mr. DeGruy could not rebut the trial court's finding that nothing in *Coleman* hinged the admissibility of expert eyewitness testimony on whether the case was capital or not.

Ultimately, the trial court denied Flowers's motion. First, and most importantly, the court found that Flowers had failed to make his case under Rule 702 or *Daubert*. As the court noted, "It is kind of difficult for this Court to make preliminary rulings on testimony that hasn't been proffered." R. 301. To the court, Dr. Neuschatz's affidavit consisted primarily of common

sense generalizations (e.g., "if you are wearing a cap it is harder to identify you")[14], none of which had been applied to the case itself. R. 303. Combined with the fact that Dr. Neuschatz was not available for examination, the trial court properly held that, "the defense has not offered to this court the idea that the theories or area of expertise are generally accepted." R. 304. Specifically, the court did not know "whether the testimony has a potential or known rate of error." R. 304. The court did not know "anything about the principles or methods used to come to the conclusions." *Id*. And the court did not see how Dr. Neuschatz applied "the principles or methods to the facts of this case." *Id*.

The court also took notice of the fact that Collins's identification was confident, and the hearing on the motion to suppress Collins's identification examined that identification in the most minute of details. R. 302-03. This included cross-examining Collins about his memory of the event, and his memory in general. According to the court, "I mean I do not think there could be a more thorough cross-examination of a witness than was done with Mr. Collins." R. 303.

Finally, the court took issue with the fact that, to the defense, Dr. Neuschatz was only a critical witness when the State was seeking the death penalty. Mr. DeGruy argued that *Copeland* limited its findings to capital cases, which was why the defense did not seek to produce Dr. Neuschatz when Flowers was proceeding non-capitally. R. 295 But, the court flatly rejected that argument, stating that nothing in *Coleman* hinged the admissibility of expert eyewitness testimony on whether the case was capital. According to the court,

> The Court: But I still don't see where in *Copeland* it made a distinction between whether it was a death penalty or not. I mean as I just mentioned previous, the guilt phase of the trial is the very same, whether the death penalty is a possibility of possible sentence or not. And I don't—you know, I'm kind of—this will be the fifth time this case has been tried. And I'm trying to understand why this witness would be helpful to the fact finder, the jury, when in the previous trials, and

[14] Collins never testified that Flowers was wearing a hat—yet another example of failing to relate Dr. Neuschatz's testimony via an evidentiary predicate.

> especially Flowers IV, it was something that you obviously decided would not be helpful to the jury.
>
> Mr. DeGruy: We absolutely didn't decide that it wouldn't be helpful to the jury.
>
> The Court: Well, you withdrew your motion [to determine the admissibility of Dr. Neuschatz's testimony].
>
> ***
>
> The Court: And again, I'll come back around to the idea that I was questioning counsel about earlier that, you know, that this wasn't important enough a witness to call when it was just strictly a non-death penalty case. And so I'm of the opinion the defense didn't value the testimony of this witness very much or they would have sought to call him in November.

R. 296, 303.

Appellant "renewed" this motion in the instant trial, only in the loosest of terms. During the trial of the instant case, defense counsel did nothing more than renew every single one of its previous motions, from all five of the previous trials. C.P. 1928-31; R. 463-66. The Motion to Determine Admissibility was one of those motions; and the trial judge renewed his rulings on all of the Motions he originally granted or denied. However, once again, defense counsel did not present Dr. Neuschatz for proffer. They did not present a single new case or piece of argument. They did not do anything to further their objection to the trial court's 2008 denial of the motion. Consider the "argument" Appellant made, in the instant trial, in support of his Motion to Determine the Admissibility of the testimony of Dr. Neuschatz:

> Ms. Steiner: The next one we shall call up is our Notice of Renewal and Adoption of Motions from the Previous Five Trials, which includes within it making any objections that would be continuing, you know, continuing into this trial.
>
> This is—we filed this trial before the—certainly before the fifth trial for the other four. We rely on the prior Court's rulings and on our own arguments, the defense arguments, all of them, with one exception, on page 2 of 4. In the second trial, there was a motion to suppress statement that, that was heard by Judge Morgan in the course of the trial outside the presence of the jury. We have nothing factual to add to that. But I would add here that with respect to Mr. Flowers, the case of

> *Missouri v. Siebert* had not yet come down when Mr. Lumumba and Mr. Evans argued the law on suppression of statements […]

R. 463-66.

The issue of whether to allow Dr. Neuschatz's testimony wasn't even identified by name, simply lumped in with a motion to renew every single motion ever filed in these six trials. Further, although defense counsel supplemented a previous motion to suppress Flowers's statements with additional case law, defense counsel took no action to supplement the argument regarding Dr. Neuschatz (or any other argument forming the basis of any other motion in any other trial). The State would submit this constitutes a procedural bar.

In the case sub judice, and in light of the binding legal precedent set forth above, the trial court acted properly when it determined that—however, qualified Dr. Neuschatz represented himself to be—his testimony was unreliable and irrelevant to the issue of whether Charles Collins misidentified the Appellant. Appellant failed to bring Neuschatz to testify to the court regarding his methodology, his experiments and his research, his rates of error, his minimum standards, and the general acceptance of such science in the community; Appellant failed to offer the State an opportunity to cross-examine Dr. Neuschatz. Armed with nothing more than an affidavit, the trial court could not determine reliability simply because Dr. Neuschatz encouraged the court to take his word for it.

Moreover, Dr. Neuschatz had never met or spoken with Collins (who was deceased); he had not sat in on the trials; he had no opinion as to whether Collins himself misidentified Flowers; and his only testimony consisted of general comments regarding misidentification. The State is not suggesting that Dr. Neuschatz's failure to offer opinions on how his science applied to Charles Collins made those opinions inadmissible under Rule 702. The State is not even suggesting it was Dr. Neuschatz who was responsible for the irrelevance of his testimony. What

the State is saying is that Appellant, in order to have the court accept his expert, was required to provide a "competent evidentiary predicate" which produced Collins's misidentification. *West v. State*, 553 So. 2d 8, 21 (Miss. 1989). Dr. Neuschatz's testimony was irrelevant because it violated a singular principle of law: essential facts had to be in evidence. *See* Miss. Rule Evid. 703. Appellant failed to make those connections during the pretrial hearing before the trial court in *Flowers V*. Therefore, there was no abuse of discretion, and there is no error.

The State must submit one final note with respect to the reliability of Dr. Neuschatz's "scientific" testimony. Dr. Neuschatz offered an opinion as to the suggestiveness of the photographic lineup of Curtis Flowers. While questions regarding the credibility of a victim's identification are for the jury, questions regarding the admissibility of that identification are questions of law—reserved for the court. Dr. Neuschatz attempted to invade the province of the trial judge when he offered his scientific opinion that the lineup was suggestive-- thereby calling into doubt the previously-settled question regarding the admissibility of such lineup.

Dr. Neuschatz, an expert in eyewitness identifications, had no opinion as to the credibility of Charles Collins's testimony. The only opinion he gave was whether the police followed proper protocol, such that the lineup itself was suggestive. Thus, to reach his scientific argument regarding, the doctor began with the legal conclusion of *York v. State*, 413 So. 2d 1372 (Miss. 1982), which he addressed as a scientific opinion. By consistently focusing on the "suggestiveness" of the lineup, defense counsel intended to use Dr. Neuschatz as a backdoor argument challenging the trial judge's pre-trial ruling that the lineup was admissible. This was improper[15]. The trial court had already ruled the lineup was not suggestive. Therefore, the trial

[15] Defense counsel attempted to introduce the same type of opinion evidence via Robert Johnson, arguing that expert opinions on the suggestiveness of the lineup were empirical in nature and in no way commented on the legal admissibility. R. 3117. This argument is one of semantics.

court was justified in refusing the doctor's testimony, as it was nothing more than a repeated attempt by Appellant to attack the admissibility of the lineup itself.

Appellant has failed to cite authority showing that expert *Daubert* testimony is allowable before a jury for the purpose of disputing a trial court's ruling on the admissibility of a pretrial photographic lineup. Appellant also has failed to cite authority showing that questions of law can be converted into questions of fact so long as an expert is available to testify that the trial judge erred. Therefore, this issue is procedurally barred. *See Batiste v. State*, 2013 WL 2097551 (Miss. 2013).

Appellant used Dr. Neuschatz in an attempt to attack the trial court's pretrial ruling in front of the jury, and turn a question of law (admissibility) into a question of fact (credibility). What greater confusion could occur than a jury being presented with a photo lineup that the judge had deemed admissible, and then simultaneously presented with an expert who testified that the lineup was suggestive (and, therefore, inadmissible)? The first question a reasonable juror would ask is, "If the lineup photo was suggestive, why is it being admitted for consideration?" The State submits that for the trial judge to have allowed such testimony would have been in direct contradiction of Mississippi Rules of Evidence 401, 403 and 702.

For all these reasons, and in addition to all applicable procedural bars, the trial court's ruling was not in error. This issue is due to be denied.

V. THE TRIAL COURT DID NOT ERR IN ITS EVIDENTIARY RULING DURING THE GUILT PHASE OF TRIAL.

Appellant takes issue with the trial court's decision to admit, over Appellant's objection, the results of a Mississippi Crime Lab gunshot residue test, which show a particle of gunpowder was located on the back of Flowers's right hand less than four hours after the Tardy Furniture murders. According to Appellant, the State used this evidence to prove that Flowers fired the

weapon used in the Tardy Furniture murders, something Appellant claims is unfairly prejudicial. Appellant claims that because the presence of gunshot residue does not definitely mean Flowers used the gun, the results of the gunshot residue test "supplied precisely nothing" to suggest that Flowers committed the Tardy Furniture murders. Therefore, the introduction of the test results violated Mississippi Rule of Evidence 403.

Appellant seems to believe there is no place in a criminal trial for a jury to weigh the evidence, and no place for the State to argue that circumstantial evidence can, in fact, be used to connect a defendant to a murder. The State respectfully submits the trial judge did not abuse his discretion in allowing the introduction of the gunshot residue test results. Accordingly, Appellant's claim is due to be dismissed.

First and foremost, Appellant notes in his direct appeal brief that his challenge at trial was made on the basis of two Mississippi Rules of Evidence: Rules 403 and 702[16]. However, on appeal Flowers only addresses error under Rule 403. Accordingly, to the extent Flowers attempts to assert any future argument against the introduction of the gunshot residue evidence, based on Rule 702, Flowers is procedurally barred from doing do.

With respect to Flowers's allegation that the introduction of the gunshot residue evidence violated Rule 403, the trial court's ruling was not in error. Mississippi Rule of Evidence 403 provides, in pertinent part, that relevant evidence "may be excluded if its probative value is

[16] The trial court rejected Appellant's Rule 702 argument, finding he had failed to refute expert testimony that gunshot residue is unique in its "size, shape and morphology and elemental composition" and that "the only time you get those three elements in a spherical shape is if it's gunshot residue." According to Joe Andrews, "There have been no other single source of material anywhere that have all of those combination of characteristics. So therefore, if you find those characteristics, it allows you to positively identify a particle as gunshot residue." R. 2615. Andrews was 100% certain there was gunshot residue on back of Flowers's right hand. *Id.*

The trial court specifically found that the scientific issue, accepted under *Daubert* and Rule 702, was whether the residue found on Flowers's hand was actually gunshot residue (which it was). What was not a scientific issue was how the residue got on Flowers's hand; it was this issue Appellant asks this Court to address under Rule 403. R. 2279-80.

substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of ... needless presentation of cumulative evidence." As this Court held in *Puckett v. State*, 737 So. 2d 322, 353 (Miss. 1999) the prosecution is "required to prove that [the defendant] committed this crime beyond a reasonable doubt *and* to the exclusion of every reasonable hypothesis consistent with innocence."

In this case, the probative value of the gunshot residue test was significant. The State was required to prove Appellant killed the four victims in this case. The State, bearing this high burden of proof, used the gunshot particle to provide circumstantial evidence within which the particulars of its case could be developed: that Flowers, within the accepted four-hour time window[17] for testing for the presence of gunshot residue, tested positive for gunpowder. The State also used the residue to corroborate the testimony of Odell Hallmon, who testified that Flowers admitted to shooting Tardy, Rigby, Golden and Stewart. Finally, the State used the collection of the gunshot residue from Flowers's hand to explain the actions of law enforcement in investigating these murders.

Evidence that Flowers, less than four hours after a quadruple homicide, was found with gunshot residue on his hand, was probative. This is especially true in that every one of the experts presented at trial testified that gunshot residue is unique in its chemical makeup and appearance. Both Joe Andrews and David Baldash testified there is only one place in nature "where antimony, lead and barium are found together in a spherical morphology, and that's in a discharged firearm." R. 2272. Thus, a spherical particle of antimony, lead and barium found on Flowers's right hand was unique to gunshot residue. Moreover, the particle was found on Flowers's right hand—his dominant hand. R. 2541. And the particle was taken from the top of

[17] According to Andrews, four hours is the normal accepted cutoff time for collecting samples from the suspect is up to four hours after the suspected time of the shooting. Such is the accepted standard in the field for how long after a person fires a gun that an expert would expect to still find residue on their hands. R. 2612.

Flowers's hand; Joe Andrews confirmed that, "If a person is right handed and holds the gun normally, you would expect to find residue deposited on the back side of their first finger/thumb area, the top of the thumb and the top of the first finger." R. 2613.

The question for Appellant, then, becomes, was that evidence prejudicial? Well, of course it was. The State used that evidence to prove Appellant committed the Tardy Furniture murders. This, however, is an unavoidable construct of the adversarial system itself: virtually all evidence offered by the State will be prejudicial to the defendant. Thus, as Rule 403's purpose is not to exclude all prejudicial evidence, the real question is whether the results of the residue test improperly prejudiced Appellant.

They did not. The Fifth Circuit has both addressed and rejected this exact same claim. In *U.S. v. Bonugli*, 162 Fed. Appx. 326 (5th Cir. 2006), the defendant was convicted of conspiring to possess drugs with intent to distribute. Evidence related to a separate shooting, for which defendant was not charged, was nevertheless admitted after being found "inextricably intertwined" with the conspiracy—to wit, such evidence also tended to place defendant at the location of the drug cache. On appeal, defendant argued the district court erred in admitting evidence related to that shooting: in particular, gunshot residue particles detected on the back of defendant's hand. The Fifth Circuit rejected the defendant's contention:

> Moreover, the district court's admission of evidence related to the shooting did not violate FED R. EVID 403. Bonugli's contentions that no witness directly placed him at the house and that the gunshot residue particles likely came from the hands of the officers who handcuffed him go to the weight of the evidence rather than its admissibility.

Bonugli, 162 Fed. Appx. at *1. That there was an alternative explanation for the presence of gunpowder on the defendant's hand did not render the results of the test inadmissible under Federal Rule of Evidence 403.

The trial judge in the case *sub judice* relied on *Simmons v. State*, 813 So. 2d 710 (Miss. 2002), in ruling the test results admissible under Mississippi Rule of Evidence 403. In *Simmons*, the defendant took issue with expert testimony that particles consistent with gunshot residue were present on Simmons, but that those particles did not meet the "strict definition of gunshot residue." *Simmons*, 813 So. 2d at 713. Simmons argued that such inconclusive testimony and evidence were inadmissible under Rule 403. This Court disagreed. According to *Simmons*,

> In *Foster*, this Court held that in reviewing a M.R.E. 403 balancing process the appellate court's task is not to engage anew in a 403 balancing process but simply to determine "whether the trial court abused its discretion in weighing the factors and admitting or excluding the evidence." *Foster*, 508 So.2d at 1118.

Simmons, *id*. at 714. The *Simmons* Court agreed with the State that the residue testimony was properly admitted, that the results of the test were not speculative, and that the results were probative because the test did not produce a negative result. This Court also recognized that the State's expert testified the test results could not determine conclusively if someone fired a weapon, only that if they were in the "environment" of a discharged weapon (just as was testified to in the instant case). *Id*. As noted by this Court, the expert "never testified that the GSR test established that Simmons had fired a weapon. In fact, Whitehead only testified that characteristic particles were identified in the sample, but he could not say positively whether or not Simmons had fired a weapon." *Id*. at 715. Thus, there was no Rule 403 violation, and the trial court did not abuse its discretion in admitting the gunshot residue testimony into evidence. *Id*.

Simmons recognized that Rule 403 provides for the exclusion of relevant evidence where it would "produce prejudice, confusion, or waste of time." *Id*. If an inconclusive gunshot residue (*Simmons*) test does not violate Rule 403, surely a conclusive test (*Flowers*) does not violate it either. Thus, *Simmons* and *Bonugli* are factually and legally on point. Appellant moved to suppress the gunshot particle evidence; however, the trial court's refusal to do so was,

considering the totality of the circumstances and the governing case law, supported by "substantial credible evidence." *Gore v. State*, 37 So. 3d 1178, 1187 (Miss. 2010) (quoting *Moore v. State*, 933 So. 2d 910, 914 (Miss. 2006)).

Appellant asserts that the presence of the residue did not mean Flowers actually committed the Tardy Furniture murders. Appellant suggests that Jack Matthews, who performed the gunshot residue collection on Flowers's hands, and who had been performing such collections for nine years[18], was unqualified to do so because he had not taken a specialized class. Appellant suggests that Flowers's interactions with the police—who had been present at the crime scene and in the presents of weapons—could have resulted in a transference of gunpowder from the police to Flowers himself. Appellant speculates (without evidentiary support) that he signed his acknowledgment of rights form with a police department pen, thereby transferring gunpowder from the pen's owner to himself.

However, each of those suggestions was also presented to Flowers's jury, who were responsible for weighing the evidence and making an independent determination as to how that gunpowder found its way to Flowers's hand. Additionally, just as in *Simmons*, not a single one of the State's experts testified that the presence of gunshot residue on Appellant's hand meant he held a weapon, fired a weapon or killed any of the Tardy Furniture victims. David Baldash, the State's independent firearms expert, agreed that simply because someone does or does not have gunshot residue on him does not mean he fired a weapon. R. 2181. Balash stated that the presence of gunpowder on Flowers's hand meant only that he was "in an environment that had primer residue available to be deposited." R. 2183-84.

Joe Andrews of the Mississippi Crime Lab testified that a gunshot residue test collects samples from a person who is believed to have been in the "environment" of a discharged

[18] Matthews also described to the jury, in detail, the process by which he collected the samples from Flowers's hand, using a gunshot residue kit. R. 2489-91.

weapon. R. 2612. Mr. Andrews was careful to say that the presence of gunpowder does not mean the individual actually fired a weapon. Andrews, in fact, offered three explanations for the presence of gunpowder on a person's hand: that the person discharged a weapon, had been in close proximity to a discharged weapon, or handled an object that had gunpowder residue on it. R. 2630. Thus, the experts were careful not to invade the province of the jury, but to let them decide how to interpret the presence of gunpowder on Flowers's hand.

Appellant took advantage of every opportunity to inform the jury that the presence of gunpowder on Flowers's hand did not mean he killed the Tardy Furniture victims. That the jury chose to reject this theory does not make the evidence itself inadmissible. The gunshot residue was probative. It was not unfairly prejudicial; this is especially true in that the State's own experts conceded that the mere presence of gunshot residue on the Appellant's hand did not mean he held a weapon, fired a weapon, or shot any of the Tardy Furniture victims. Accordingly, this issue is spurious and without merit.

VI. THE PROSECUTION DID NOT ENGAGE IN RACIAL DISCRIMINATION DURING JURY SELECTION; NOR WERE APPELLANT'S CONSTITUTIONAL RIGHTS VIOLATED AS THE RESULT OF RACIAL BIAS.

Peremptory strikes challenged on *Batson v. Kentucky*, 476 U.S. 79 (1986), grounds should proceed as follows. First, the defendant must establish a *prima facie* case of discrimination in the selection of jury members. If a *prima facie* case is established, the State then bears the burden of providing racially neutral reasons for the challenged strikes. If the State gives racially neutral explanations, the defendant is allowed to rebut those explanations; if the defendant fails to provide rebuttal, the trial judge must base his decision on the reasons given by the State. Finally, the trial court must make a factual finding to determine if the prosecution

engaged in purposeful discrimination. *Berry v. State*, 802 So. 2d 1033, 1037-38 (Miss. 2001); *Howell v. State*, 860 So. 2d 704, 725 (Miss. 2003).

The State submits Appellant's *Batson* claim is without substantive merit. For these reasons, Appellant's claim is due to fail.

A. Although the Trial Court Found Otherwise, Appellant Did Not Make a *Prima Facie* Case of Purposeful Discrimination.

In *Batson v. Kentucky*, 476 U.S. 79, 96 (1986), the United States Supreme Court stated:

> In order to establish a prima facie case of purposeful discrimination in the selection of a jury, a defendant must show that: "(1) he is a member of a cognizable racial group; (2) that the prosecutor exercised peremptory challenges to excuse a venire person of the defendant's race; and (3) that there is an inference that the venire persons were excluded on account of their race."

In order to succeed on a claim of bias, a defendant must first establish a *prima facie* case that race or gender was the criteria for the exercise of the peremptory challenge. The critical inquiry is whether "the opponent has met the burden of showing that the proponent has engaged in a pattern or practice of strikes based on race or gender." *Hardison v. State*, 94 So. 3d 1092, 1098 (Miss. 2012) (citing *Powers v. Ohio*, 499 U.S. 400 (1991)). When determining whether a defendant has established a *prima facie* case of discrimination, courts must consider "all relevant circumstances." *States v. State*, 88 So. 3d 749, 755 (Miss. 2012) (quoting *Powers*, 499 U.S. at 416).

In succeeding on a *Batson* challenge, the ultimate "burden of persuasion rests with, and never shifts from, the opponent of the strike." *Johnson v. California*, 545 U.S. 162, 171 (2005). "[A] defendant satisfies the requirements of *Batson's* first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." *Johnson, id*. at 170. If the defendant fails to make out a prima facie case showing a discriminatory purpose, the inquiry ends. *See Pruitt v. State*, 986 So. 2d 940, 942-43 (Miss. 2008); *Scott v. State*, 981 So. 2d

964, 968 (Miss. 2008). This Court's longstanding requirement is that it must decide each case "by the facts shown in the record, not assertions in the brief." *Smith v. State*, 90 So. 3d 122, 133 (Miss. 2012). It is Flowers who bears the burden to make sure "the record contains sufficient evidence to support his assignments of error on appeal." *Id.*

In this case, a special venire was called; approximately six hundred (600) individuals were called for voir dire on the first day of Appellant's trial. Jury selection comprised thirteen hundred twenty-six (1326) pages of trial record; defense counsel asserted a *Batson* challenge after the State used a second peremptory strike against an African-American. R. 371-72. The trial court found that the use of five out of six peremptory challenges against African-American jurors was sufficient to raise a *prima facie* claim of discrimination under *Batson*.

Accordingly, Appellant can make no objection on appeal with respect to the trial court's ruling on that element of a *Batson* claim. Nevertheless, the State would dispute the trial court's determination that Appellant made a *prima facie* case for discrimination based on the simple number of strikes used against African Americans. The State would also dispute Appellant's characterization of the *prima facie* case as strong. Legally, this characterization is incorrect; the State submits that the number of strikes used against African-Americans, standing alone, was insufficient to support a *prima facie* finding of discrimination.

In *Estate of Jones v. Phillips ex rel. Phillips*, 992 So. 2d 1131, 1143-44 (Miss. 2008) this Court held that while a showing that the State used seventy-five percent of its peremptory strikes against minorities would "strengthen" a *prima facie* case of discrimination, "the complaining party must go further," as a *prima facie* case requires a defendant to produce sufficient evidence to permit the trial judge to infer purposeful discrimination." In *Strickland v. State*, 980 So. 2d 908, 917 (Miss. 2008) this Court found that "exercising seven peremptory strikes against African-Americans, standing alone, absent any other facts or circumstances… fails to establish a

prima facie showing that race was the criteria for the exercise of the peremptory challenge." If striking seven black jurors does not, by itself, establish a *prima facie* case, striking five black jurors does not either.

Appellant notes the percentage of the State's peremptory strikes exercised on African Americans was higher than the percentage of members of the protected class in the venire (42%).[19] The State does not dispute that the final jury consisted of eleven white jurors, one black juror, and a single black alternate. The State does not dispute that the State used its peremptory challenges to strike five black jurors from the regular panel.

However, numbers alone are not enough to prove, as a matter of law, a *prima facie* finding of discrimination. In *Pitchford v. State,* 45 So. 3d 216 (Miss. 2010), the trial judge found that the defendant had, in fact, made a *prima facie* showing of discrimination in the State's use of its peremptory strikes against African Americans. In Pitchford's case, the racial makeup of the venire was 74% white, and 26% black. However, the State struck blacks from the jury at a rate of 57%.[20] This Court agreed with the trial court in *Pitchford* that there was *prima facie* evidence of discrimination. However, this Court qualified that statement in a critical way: it held that,

[19] Respectfully, the State finds this mathematical formula illogical. In *Pitchford*, the racial makeup up the venire was 74% white and 26% black. This Court held that, "statistically speaking," the State's peremptory strikes should approximate those percentages. Pursuant to this *Pitchford* formula, the State should have struck one or two African Americans from the jury. Doing that math, however, although the total venire pool was 74% white and 26% black, if the State had struck only two African Americans, and the defense had struck none, the final jury would have been 16% white and 84% black. The State does not believe such quota system serves the intended purpose of *Batson*.

Put another way, if the racial makeup of the venire in *Pitchford* was reversed (74% black and 26% white), and the State struck 10 black jurors and only two white jurors (according to this Court's statistical formula), the final jury would have been almost entirely white. Surely, this too would trigger a *Batson* challenge by the defense. All of this is to say that such formula places the State in a no-win "numbers" situation, when the purpose of *Batson* is not to implement affirmative action in jury selection, but to uncover insidious, purposeful discrimination.

[20] At trial, Pitchford provided statistical numbers (of the racial composition of the county) in support of his *Batson prima facie* argument. Of course, no such evidence was provided to the trial court in Mr. Flowers's case. Indeed, Flowers presented no evidence whatsoever regarding the racial makeup of the venire pool; he simply argued that blacks were struck from that pool.

"the difference in these percentages is not so great as to constitute, as a matter of law, a *prima facie* finding of discrimination." *Pitchford, id*. at 225-26.

The key here is that numbers are not quota requirements. They are a part of the "totality of the relevant facts" the trial court is to consider; numbers alone do not constitute, "as a matter of law," a *prima facie* case under *Batson*. *Batson*, 476 U.S. at 94. The principle that a *prima facie* case determination, under *Batson*, is not to be based on numbers alone but is to be made in light of the totality of the circumstances, is generally accepted across this country. *See U.S. v. Hill*, 643 F.3d 807, 839 (11th Cir. 2011); *U.S. v. Bergodere*, 40 F.3d 512, 516 (1st Cir. 1994); *State v. Holland*, 2011 WL 6153193, *cert. denied*, 132 S.Ct. 2682 (2012) ("Bare statistics" insufficient); *U.S. v. Lewis*, 892 F.2d 735, 736 (8th Cir. 1989) (percentages insufficient), *Strickland v. State*, 980 So. 2d 908 (Miss. 2008) (number of African-Americans struck insufficient to prove *prima facie* case); *People v. Gutierrez*, 932 N.E. 2d 139, 164 (Ill. 2010) (same); *Thompson v. U.S.*, 509 U.S. 931 (1993) (same); *U.S. v. Branch*, 989 F.2d 752, 755 (5th Cir. 1993) (same); *U.S. v. Davis*, 40 F.3d 1069 (10th Cir. 1994) (same); *U.S. v. Canoy*, 38 F.3d 893 (7th Cir. 1994) (same); *Williams v. Woodford*, 385 F.3d 567, 583-84 (9th Cir. 2004), *cert. denied*, 546 U.S. 934 (2005) (same); *Moran v. Clark*, 443 F.3d 646, 652 (8th Cir. 2006) (same); *Brown v. Kinney Shoe Corp.*, 237 F.3d 556, 562 (5th Cir. 2001) (same). *See also U.S. v. Clemons*, 843 F.2d 741, 746 (3rd Cir.) *cert. denied*, 488 U.S. 835 (1988) ("magic number" to trigger Batson inquiry "would short-circuit the fact specific determination expressly reserved for trial judges").

There is a reason why *Batson* does not base itself in mathematics. In *Powers v. Ohio*, 499 U.S. 400, 410 (1991), the U.S. Supreme Court stated that, "A person's race simply is unrelated to his fitness as a juror. We may not accept as a defense to racial discrimination the very stereotype the law condemns." Thus, a *Batson* argument based solely on percentages

"ironically reinforces the very racial stereotypes" *Batson* was meant to prevent: namely, that if enough blacks serve on the jury, or if enough whites are struck from the jury, then there is no discrimination[21]. *Carrera v. Ayers*, 670 F.3d 938, 950 (9th Cir. 2011). Indeed, this Court, in *Strickland v. State*, held that *Batson,*

> [I]s not concerned with racial, gender, or ethnic balance on petit juries, and it does not hold that a party is entitled to a jury composed of or including members of a cognizable group. Rather, it is concerned exclusively with discriminatory intent on the part of the lawyer against whose use of his peremptory strikes the objection is interposed.
>
> ***
>
> Exercising seven peremptory strikes against African-Americans, standing alone, absent any other facts or circumstances related to (1) racial composition of the venire, empaneled jury, or community, or other non-exclusive factors such as (2) the prosecutor's conduct, (3) the habitual policies of these prosecutors, (4) the stated policies of the district attorney's office, or (5) the nature of the case itself, *see f*ails to establish "a *prima facie* showing that race was the criteria for the exercise of the peremptory challenge."

Strickland, 980 So. 2d at 916-17.

In *State v. Duncan*, 802 So. 2d 533, 550 (La. 2001) (*cert. denied, Duncan v. Louisiana*, 536 U.S. 907 (2002)), the court reasoned that,

> Such number games, stemming from the reference in *Batson* to a "pattern" of strikes, are inconsistent with the inherently fact-intense nature of determining whether the *prima facie* requirement has been satisfied. Indeed, such attempts to fashion absolute, per se rules are inconsistent with *Batson* in which the court instructed trial courts to consider "all relevant circumstances."

The State disagrees with the trial court's finding that a *prima facie* case of discrimination had been shown. Nevertheless, the benefit here went to Appellant. The trial court found the existence of *prima facie* discrimination based solely on numbers, and allowed the State an opportunity to provide race neutral reasons for those strikes.

[21] Or if not enough African Americans serve, or not enough Caucasians are struck, there is discrimination.

B. The Trial Court Correctly Ruled the State's Peremptory Strikes were Race-Neutral and Not Indicative of Pretext.

Should the defendant make a *prima facie* showing of purposeful discrimination—which, of course, did not occur here—the State then bears the burden of providing a race-neutral explanation for the challenged strike. The State's explanation need not rise to the level of justification as required for a challenge for cause. *Harper v. State*, 635 So. 2d 864, 867 (Miss. 1994). "The issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Hernandez v. New York*, 500 U.S. 352, 360 (1991).

In *Batson*, the Court pointed out, "there are any number of bases on which a prosecutor reasonably may believe that it is desirable to strike a juror who is not excusable for cause." *Batson*, 476 U.S. at 98, fn. 20. The State's reasons for a strike "need not be persuasive, or even plausible; so long as the reasons are not inherently discriminatory, they will be deemed race-neutral." *Batiste v. State*, 2013 WL 2097551 at * 26 (quoting *Rice v. Collins*, 546 U.S. 333, 338, 126 S.Ct. 969 (2006); *Chamberlain v. State*, 989 So. 2d 320, 337 (Miss. 2008). The limitation on such peremptory challenges, therefore, is that the State, in showing it did not have a racially discriminatory purpose, must give a "clear and reasonably specific explanation of his legitimate reasons for exercising the challenges." *Batson*, 476 U.S. at 98; *see Harper, id*.; *Chisolm v. State*, 529 So. 2d 635 (Miss. 1988).

If the State offers a neutral explanation, the defendant may provide a rebuttal. If the defendant offers none, the court must examine only the reasons given by the State. *Edwards v. State*, 737 So. 2d 275, 318 (Miss. 1999) ("If a defendant makes no rebuttal to the state's race-neutral reason for exercising a peremptory challenge, the trial judge must base his decision on only the reasons given by the state"). If the defense fails to provide rebuttal to those reasons in support of its pretext argument, this Court will not entertain such rebuttal arguments on direct

appeal. *See Pitchford, id.* Indeed, while this Court must consider pretext under a totality of circumstances argument, "those circumstances and facts do not include arguments not made by" defense counsel—that includes arguments not made in rebuttal. This Court "will not fault the trial judge with failing to discern whether the State's race-neutral reasons were overcome by rebuttal evidence and argument never presented." *Pitchford*, 45 So. 3d at 227.

"In the absence of an actual proffer of evidence by the defendant to rebut the State's neutral explanations, this Court may not reverse on this point." *Woodward v. State*, 726 So. 2d 524, 533 (Miss. 1997); *see Flowers v. State*, 947 So. 2d 910, 921-22 (Miss. 2007), (where defendant failed to rebut race-neutral reasons for striking juror at trial, defendant "should be procedurally barred from challenging the peremptory challenge" as trial court "was not afforded the opportunity to rule on the issues that Flowers now attempts to raise on appeal").

This Court has identified five "indicia of pretext" that Appellant may use, in rebuttal, to belie a race-neutral reason for a strike. Those are: disparate treatment; failure to voir dire as to the characteristics cited; the characteristic cited is unrelated to the facts of the case; lack of record support for the stated reason; and group-based traits. *Hughes v. State*, 90 So. 3d 613, 626 (Miss. 2012). Disparate treatment is an identifier of possible pretext. However, this is not an automatic reason for finding a strike to be pretextual. *Berry v. State*, 802 So. 2d 1033, 1038 (Miss. 2001); *Manning v. State*, 765 So. 2d 516, 519 (Miss. 2009). Where the State is able to demonstrate that the jurors do not share the same characteristics, there is no disparate treatment shown. Where the State is able to articulate additional race-neutral reasons for striking the juror in question and strikes jurors based on that same reason there is also no disparate treatment demonstrated. *Manning, id*. at 519-20; *Woodward v. State*, 726 So. 2d 524, 531 (Miss. 1997).

Once neutral reasons are offered and rebuttal is, at least, afforded, the court is vested with substantial discretion "in assessing whether facially neutral reasons for peremptory challenges to

potential jurors are actually serving to mask hidden motivations in shaping a jury." *Lawrence v. State*, 2001 WL 379934 at *2 (Miss. App. 2001) (citing *Davis v. State*, 767 So. 2d 986 (Miss. 2000)). Whether facially neutral reasons for peremptory challenges are accurate statements or pretext is a decision left to the discretion of the trial court. *Thomas v. State*, 818 So. 2d 335 (Miss. 2002); *Thorson v. State*, 721 So. 2d 590 (Miss. 1998).

A trial court must determine whether discriminatory intent is inherent in the State's explanation and, thus, whether the defendant has proved purposeful discrimination. *Aguilar v. State*, 2002 WL 31112352 at *2 (Miss. 2002) (citing *Magee v. State*, 720 So. 2d 186, 188 (Miss. 1998)); *Lockett v. State*, 517 So. 2d 1346, 1350 (Miss. 1987). On appeal, the trial court's findings are accorded great deference. Such findings will not be reversed unless they are clearly erroneous or against the overwhelming weight of the evidence. *Lockett, id*.

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

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

A finding of discrimination "largely turns on credibility." *Lockett*, 517 So. 2d at 1349. In *Lockett*, this Court held,

> [T]hus *Batson* states that "ordinarily," a reviewing court should give the trial court "great deference." *Id*. at 98, 106 S.Ct. at 1724, 90 L.Ed. 2d at 89, n. 21. "Great deference" has been defined in the Batson context as insulating from appellate reversal any trial findings which are not clearly erroneous. We today follow the lead of other courts who have considered this issue and hold that a trial judge's factual findings relative to a prosecutor's use of peremptory challenges on minority persons are to be accorded great deference and will not be reversed unless they appear clearly erroneous or against the overwhelming weight of the evidence. This perspective is wholly consistent with our unflagging support of

> the trial court as the proper forum for resolution of factual controversies […] We place our trust in the trial judges to determine whether or not a discriminatory motive underlies the prosecutor's articulated reasons."

Lockett, id. at 1349, 1352.

The judge is required to make a ruling on the *Batson* claim. *Batson*, "which originally defined the three-step analysis required in a jury-discrimination challenge, did not articulate a particular means of accomplishing the third step. *Pruitt, id*. (citing *Batson,* 476 U.S. at 98). *Batson* held only that the trial court, if race-neutral reasons are articulated after a finding of prima facie discrimination, "will have the duty to determine if the defendant has established purposeful discrimination." *Pruitt, id*. at 946.

Pruitt is dispositive:

> Where a trial judge fails to elucidate such a specific explanation for each race-neutral reason given, we will not remand the case for that *Batson*-related purpose alone. This Court is fully capable of balancing the *Batson* factors in cases such as this one. Continued remand of such cases only wastes the trial court's limited resources and acts to further delay justice.

Id. at 946-47 (citing *Burnett v. Fulton*, 854 So. 2d 1010, 1016 (Miss. 2003).

As this Court stated,

> The Supreme Court has not since required trial courts to employ any specific process in carrying out steps two and three of the *Batson* procedure. On the contrary, in addressing a *Batson* claim, the Supreme Court has stated, "[w]e adhere to the proposition that a state court need not make detailed findings addressing all the evidence before it." *Miller-El v. Cockrell,* 537 U.S. 322, 347, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). A number of courts have used this statement to reject the argument that a trial court must make specific findings of fact regarding the proffered race-neutral reasons. *See e.g., State v. Frazier,* 115 Ohio St.3d 139, 152, 873 N.E.2d 1263 (2007) (while more thorough findings would have been helpful, "the trial court is not compelled to make detailed factual findings to comply with *Batson* "); *Lamon v. Boatwright,* 467 F.3d 1097, 1101 (7th Cir.2006) (where a trial court failed to make findings on each proffered reason, it is sufficient if the appellate court can infer from the record that the trial judge engaged in the step-three inquiry); *Messiah v. Duncan,* 435 F.3d 186, 198 (2d Cir.2006) ("As long as a trial judge affords the parties a reasonable opportunity to make their respective records, he may express his *Batson* ruling on

> the credibility of a proffered race-neutral explanation in the form of a clear rejection or acceptance of a *Batson* challenge.")
>
> Moreover, in *Burnett v. Fulton,* this Court held that "[t]he trial judge was not required to state on-the-record 'specific explanations' for accepting race-neutral reasons for striking a juror." *Burnett,* 854 So.2d 1010, 1016 (Miss.2003). In *Burnett,* "[a]lthough the [trial] judge allowed the reasons to stand, he did not make 'specific explanation' on the record." *Burnett,* 854 So.2d at 1013. This Court cited *Hatten* for the proposition that "trial court judges *should* make on-the-record factual determinations of race-neutral reasons in cases involving *Batson* challenges." *Burnett,* 854 So.2d at 1014 (citing *Hatten,* 628 So.2d at 298) (emphasis added). However, this Court explained that "[t]he trial judge need only have submitted to the court [sic] a basis in fact so as to permit a reasonable judgment to be made that the reason is not contrived." *Burnett,* 854 So.2d at 1016 (citing *Hatten,* 628 So.2d at 299).

Pruitt, id.

In the case *sub judice,* the State provided the following reasons for using its peremptory strikes against five African-American jurors[22]. Juror 14, Carolyn Wright, was sued by Tardy Furniture after the murders. Wright also worked with Flowers's father, Archie. R. 1763. Juror 44, Tashia Cunningham, stated in her jury questionnaire that "she would not consider death or life." Cunningham was then "back and forth in questioning on what her opinion was on the death penalty," so much so that the State "could not keep her." R. 1775-76. Cunningham also worked with Flowers's sister, Sherita Baskin, on an assembly line. Cunningham stated that she "worked on the complete opposite end of the line" from Baskin, however, Cunningham's HR representative testified during voir dire that Cunningham and Baskin worked "right next to" each other "practically every day." *Id.*

Juror 45, Edith Burnside, stated that Flowers was "very good friends with both of her sons." Ms. Burnside also was sued by Tardy Furniture. Finally, Ms. Burnside "at one point said she could not judge." Ms. Burnside stated the "fact that she knew the Defendant so well, he had

[22] The State also provided a race-neutral reason for using a peremptory strike against white Juror Julia Nail, who stated that she preferred life without parole.

visited in her home, and was such close friends with her sons might affect her decision in this case." R. 1783-84. Juror 53, Flancie Jones, was related to Flowers. "She admitted that she was related—she was cousin—or the Defendant's sister, Angela Jones, is her niece." R. 1786. Jones also was approximately thirty minutes late for court on two separate occasions. *Id.* Moreover, Ms. Jones was "back and forth all over the place on her opinion about the death penalty[23]." She stated during voir dire that she was in favor of the death penalty; on her jury questionnaire she stated she was strongly against the death penalty. When asked about that inconsistency, Jones admitted to lying on the questionnaire. R. 1786-87. Finally, Juror 62, Diane Copper, worked with Flowers's father. She also worked with Flowers's sister at a shoe store. Moreover, she stated "that she leaned toward favoring [Flowers's] side of the case." R. 1794.

As shown herein, the State's explanations were race-neutral under Mississippi law. Appellant's strategy at trial was to rebut the State's race-neutral reasons by claiming that the State engaged in disparate treatment, tendering white jurors who had the same characteristics as the black jurors struck. However, the trial court properly found that Appellant's claims of disparate treatment were unsupported by the record. Accordingly, the trial court did not err in finding no *Batson* violations in this case.

Carolyn Wright

Carolyn Wright worked with Flowers's father at what the trial judge characterized as the "smallest Wal-Mart in existence." In *Higgins v. Cain*, 720 F.3d 255, 268 (5th Cir. 2013), the Fifth Circuit held that a juror's familiarity with the defendant or his family is a race-neutral reason for a strike. Striking a juror who worked with the defendant or a member of his family is

[23] Flowers argues the State engaged in disparate questioning of black and white jurors, noting that the State asked more questions of the black jurors than they did of the whites. However, the white jurors Flowers identifies each stated that they would have no problem following the law and were able to impose either death or life. There was nothing for the State to question when the answers were satisfactorily clear. The State questioned jurors whose answers to the court were unclear or needed further elaboration. That the State failed to ask redundant questions, simply to meet a quota for "length of questioning", does not indicate pretext.

a race-neutral reason for a strike. *See Manning v. State*, 735 So. 2d 323, 340 (Miss. 1999) ("We have condoned a peremptory challenge against a juror who was acquainted with the defendant's family"). Wright also was sued by Tardy Furniture. In *Webster v. State,* 754 So. 2d 1232, 1236 (Miss. 2000) this Court held that the exercise of a peremptory strike was race-neutral, where the juror in question was struck because he had worked for a company sued by defense counsel. A juror's history of litigation with any of the parties or their attorneys is, therefore, a race-neutral reason for a strike.

In rebuttal, Appellant claimed the State engaged in disparate treatment by failing to ask white jurors if they had ever been sued by Tardy Furniture. However, both the State and the trial court pointed out Appellant's claim was incorrect. The State noted that it checked every prospective juror on the list to see if anyone had been sued by Tardy, or had any sort of "run-in" with the store. R. 1772. The trial court then reminded defense counsel that the entire venire panel had been asked if any of them had a charge account with Tardy; the entire venire also had been asked if any of them had ever been sued by Tardy. According to the trial court, that question, "was not just asked of African-American jurors, as you claimed." R. 1773. The trial court pointedly asked defense counsel whether any of the white jurors tendered had been sued by Tardy Furniture. Defense counsel responded, "no." R. 1765.

In additional rebuttal of the strike against Wright, Appellant claimed the State tendered white Juror Pamela Chesteen, who also had acquaintances with witnesses and with the Flowers family. R. 1765 However, of critical distinction is the fact that Chesteen did not work with anyone in Flowers's family, as Wright did. The trial court asked defense counsel if any white jurors tendered worked with Flowers's father. Defense counsel responded, "no." R. 1765. The trial court, accordingly, found the State's reasons to be race-neutral and non-disparate:

> Wal-Mart here in Winona is not like some of these giant mega stores. It's a relatively small—smallest Wal-Mart, actually, that I know in existence. So she had worked with Mr. Flowers's father. She has been sued by Tardy Furniture. I find those to be race neutral reasons. You are correct in pointing out that some of the other State—the other jurors that have been tendered by the State—some of these, you know, white jurors know some of these people. But I have not found, looking through my notes, any white jurors that worked with Mr. Archie at Wal Mart. I have not seen any indication that Tardy sued any of those. And so I think the State has offered race-neutral reasons, and I find that the Defense has failed to rebut the reasons offered by the State.
>
> ***
>
> If—if the only reason the State offered was that she knows some of these Defense witnesses, then there might be something there. But the fact is knowing these Defense witnesses that you're intending to call, plus the fact that Tardy had to sue her, plus the fact that she worked with Archie, in my mind, creates race-neutral reasons for striking her. And that is the finding of this Court.

R. 1773-75.

Tashia Cunningham

During individual voir dire Tashia Cunningham stated that she was against the death penalty. However, she then equivocated on the issue:

> By the Court: Would you or would you not be able to consider the death penalty? I mean, what's your view on even considering the death penalty?
>
> A [by Cunningham]: I would not.
>
> By the Court Reporter: I'm sorry. What?
>
> A: I would not.
>
> By the Court: Are—are you saying you would not consider it?
>
> A: No, sir.
>
> Q: Even if the law allowed it and the facts justified it, you just could not even consider it?
>
> A: No, sir.
>
> […]
>
> Q: So—but again, just tell me again what your feelings are on the death penalty?

A: I don't believe in the death penalty.

Q: And would there be a possible—could you consider it?

A: I don't think so.

Q: You don't think so?

A: I don't think so.

Q: But there's—in our own mind, you might could—are you saying you could possibly?

A: I don't think so.

Q: See, I'm not asking you to make a—you know, you haven't heard anything. And all we want to know is whether you could consider that as a possibility—that as a sentencing possibility […]

A: I might. I might. I don't know. I might.

Q: So you might be able to consider that?

A: (Nodding head).

R. 1293-95.

After the conclusion of this voir dire by the court, the State asked the question again:

Q: Could you consider the death penalty yourself if the facts justified it and the law allowed it?

A: I don't think so.

R. 1296.

This Court has held that inconsistencies in a juror's statements are race-neutral reasons for a strike. *Hicks v. State*, 973 So. 2d 211, 220 (Miss. 2007). Moreover, a juror's views on the death penalty are a race neutral reason for a strike. *Pitchford v. State*, 45 So. 3d 216; *Batiste v. State*, 2013 WL 2097551 (Miss. 2013). Peremptory challenges may be used against venire persons who expressed reservations against the death penalty, but were not excluded for cause.

Jordan v. State, 464 So.2d 475, 480-81 (Miss. 1985). This is a race neutral reason. *Underwood v. State*, 708 So.2d 18, 27-28 (Miss. 1998); *Mack v. State*, 650 So.2d 1289, 1300 (Miss. 1994); *Turner v. State*, 573 So.2d 657, 663 (Miss. 1990).

Tashia Cunningham also lied during voir dire. Cunningham repeatedly stated that while she worked with Flowers's sister (alone a sufficient reason to strike her) on an assembly line, the two did not work in close contact with another. According to Cunningham, "She works at the front of the line, and I work at the end of the line." R. 987.

However, Cunningham's quality control clerk, Crystal Carpenter, confirmed that Cunningham and Flowers's sister, in fact, worked "side by side," less than ten inches from each other nearly every day. R. 1328, 29. Ms. Carpenter confirmed there were records kept as to the particular locations of the employees. Lying during voir dire is a sufficiently race-neutral reason for a strike. *Murphy v. Dretke*, 416 F.3d 427, 433 (5th Cir. 2005). That Cunningham's lie served to downplay a relationship between herself and Flowers's sister further supports the State's race-neutral reason for the strike.

With respect to alleged disparate treatment of Ms. Cunningham, defense counsel claimed the State tendered white Juror 30, Whitfield, who also had mixed feelings about the death penalty. R. 1778-79. However, as the trial court found, while Cunningham's statements were "all over the map," Mr. Whitfield's situation was "greatly different […he] said from the beginning on his questionnaire that he generally favored the death penalty and could consider it." R. 1781-82. Defense counsel also claimed that the State's decision to strike Cunningham based on the testimony of Cunningham's quality control representative (Crystal Carpenter) was pretext, because the State didn't "verify" the woman's statements with documents—they simply took her word for it. R. 1777. The court dismissed such argument by defense counsel, noting that counsel had presented no legal authority to support the claim that the State was required to prove

Ms. Carpenter's testimony—given under oath—was true. According to the court, "In my mind, the State had shown race-neutral reasons for that strike and the Defense has failed to rebut that race-neutral reason that was given." R. 1782.

Edith Burnside

With respect to Edith Burnside, she too was sued by Tardy Furniture. This was a sufficiently race-neutral reason to strike her from the jury. *See Webster v. State*, 754 So. 2d 1232, 1236 (Miss. 2000). Burnside also equivocated on whether she could impose the death penalty:

> By the Court: And so I want to know if the facts justified it and the law allowed it, could you consider the death penalty as a sentencing possibility?
>
> A [by Burnside]: That I don't think I could do. I don't know if I could do that […] I don't—I don't know if I could consider it, sending anybody to death. I don't know if I could do that.

R. 1300-01. The court continued to investigate the issue on voir dire:

> Q: And would you consider the imposition of the death penalty, if you were on the jury and it got to the second phase?
>
> A: If I was on there, yeah, I guess I'd have to.
>
> Q: So if the facts justified it and the law allowed it, you would consider it?
>
> A: Yes.

R. 1301.

During individual voir dire by the State, the district attorney asked Ms. Burnside about an earlier statement she made, in which she said she did not want to sit in judgment:

> Q: When I was asking the questions the other day about jurors that could judge other people, you stated at that time that you could not judge anyone. Why did you state that?
>
> A: Well, because I—you know, I prefer not to judge anyone. But when they come back and say could I be fair. My thing is I prefer not to judge anyone. But now, I will be fair.

R. 1305. The State followed up on this answer by asking the obvious question:

> Q: So you've changed your mind, and you say now that you could judge someone; is that correct?
>
> A: Well, basically, I haven't changed my mind. I just prefer not to be in a predicament where I have to judge somebody.
>
> Q: So you still have a problem with judging someone?
>
> A: I still have a problem with that.
>
> Q: Would that problem be such that you would think about it if you were picked on a jury?
>
> A: Well, I'd have to say yes.
>
> Q: It would? So that might affect your judgment in this case; is that right?
>
> A: It could, possibly, yes, sir.

R. 1306.

The State's reason for striking Ms. Burnside was race-neutral pursuant to the case law of this Court. A juror's views on the death penalty are a race neutral reason for a strike. *Pitchford v. State,* 45 So. 3d 216; *Batiste v. State*, 2013 WL 2097551 (Miss. 2013). A juror's reluctance to serve is a race neutral reason for a peremptory challenge. *Hughes v. State,* 90 So. 3d 613, 626 (Miss. 2012).

In rebuttal Appellant again erroneously claimed (as he did with the strike on Carolyn Wright) that only African-Americans had been asked about being sued by Tardy Furniture. However, the record already belied that allegation. Defense counsel also argued Burnside stated she could be fair even though she had been sued. However, as the court noted, her promise to be fair was at war with her reluctance to serve, her reluctance to judge, and her belief that such reluctance might affect her judgment:

> She first stood up when the district attorney asked her if she could judge, and she said she could not. I have seen no white person that was left on this panel that responded in a similar fashion. And I've got a note here that said she stated that she'd preferred not to judge. Again, I don't have any notes that would indicate that there was any white person that said that. She was sued by Tardy Furniture." "But I think the State has offered numerous race-neutral reasons for this strike, and there are not white jurors that were left on the panel that have the race-neutral reasons the State has offered for striking Ms. Burnside."

R. 1785-86.

Flancie Jones

The State proffered three race-neutral reasons for striking Flancie Jones. First, she was late twice to court; her reasoning was that she didn't like to get up in the morning. This Court has held that lack of respect for the court proceedings is a race-neutral reason for a strike. *Lockett v. State*, 517 So. 2d 1346 (Miss. 1987) (citing *U.S. v. Matthews*, 803 F.2d 325 (7th Cir. 1986) (juror arrived late, indicating a lack of commitment to the importance of the proceedings). Second, Jones is related to Curtis Flowers. The relationship appeared to be through two different veins, both through marriage. Both the State and Appellant categorized that relationship differently; the trial court described the relationship as follows:

> She said that Angela Ward Jones was married to Mark Jones, and she said that was her nephew. She's not directly related to Mr. Flowers. She's related by marriage to Mr. Flowers's sister. Id. And then Hazel Jones is her husband's brother's wife and, you know, that's another family connection there.

R. 1789-90. A familial relationship to the Defendant is a race-neutral reason for a strike. *See Higgins v. Cain*, 720 F.3d 255, 268 (5th Cir. 2013) (juror's familiarity with the defendant or his family is a race-neutral reason for a strike).

Third, Jones admitted to lying on her jury questionnaire. In that document she said she was strongly against the death penalty. During voir dire by the court, however, Jones testified that she had "an open mind," and that she "could consider both" sentencing options. R. 1362. The State investigated this discrepancy by asking why her answers differed:

> Q [by the State]: Okay. And I think on your questionnaire, you said you were strongly against the death penalty.
>
> A: I guess I'd say anything to get off.
>
> Q: Okay. Well, are you saying that you didn't tell the truth?
>
> A: No, that's not that. It's just that if I didn't have to be here, I wouldn't want to be here.
>
> Q: Well, I want to know when you put down you were strongly against the death penalty—
>
> A: I was trying not to be—I—really and truly, I don't want to be here. I'll say it like that.

R. 1364. This Court consistently holds that equivocation and lying are independent race-neutral reasons to strike a member of the venire. *Lockett v. State,* 517 So. 2d 1346 (citing *Rodgers v. State,* 725 S.W. 2d 477 (Tex. App. 1987)). Additionally, a juror's views on the death penalty are a race neutral reason for a strike. *Pitchford v. State,* 45 So. 3d 216; *Batiste v. State,* 2013 WL 2097551 (Miss. 2013).

Attempting to rebut the State's reasoning, Appellant argued that Flancie Jones was only related to Hazel Jones by marriage. Defense counsel argued the State's treatment of Jones was disparate because the State "didn't seem to have any problem with" Juror 111, who was related to someone in the District Attorney's Office. R. 1788. Of course, the State never tendered nor struck Juror 111; moreover, that Juror was not related to someone in Flowers's family. The trial court agreed that the reasons for striking Jones were, therefore, independently sufficient and not indicative of disparate treatment. R. 1788-90.

Defense counsel also argued the State engaged in disparate treatment by striking Jones for lying on her questionnaire, but not striking Juror 51, Mr. Huggins, who initially stated that he had no knowledge of the Flowers case, but then later admitted to being in the 2007 voir dire panel. R. 1791. The trial court rejected Appellant's argument, holding that Ms. Jones was the

only juror, black or white, who admitted to lying to the court for the purpose of being struck from the venire:

> The court was somewhat dumbfounded—and this is the only juror of any race that made this statement. But she got up here from this witness stand and said, 'I lied on my questionnaire.' And I think that, in and of itself, if a race neutral reason. She said, 'I lied. You know, I don't want to be here. And so I lied.' And so, you know—I don't—she's totally been dishonest in something that she filed with this Court, and that is race neutral. There's not another person that has said, 'I lied on my questionnaire.'"

R. 1789.

Referring to Juror 51—whom the State did not strike—the court recognized that Huggins initially stated he had not been involved in the case, only to later volunteer that he had been in the venire panel in one of Flowers's previous trials. However, rightfully, the court recognized that Huggins never admitted to intentionally lying, as Jones did[24]. Accordingly, it was just as likely that Huggins forgot, or misspoke, or failed to understand the question. Moreover, in yet another distinction, Juror 51's response had to do with his familiarity with the case—and not with whether he was for or against the death penalty. Rejecting claims of disparate treatment, the trial court properly noted,

> Well, I have made my ruling, but I'll reiterate that she [Jones] said up here from this stand, "I lied on that questionnaire." I never did hear Mr. Huggins say he lied, and you didn't ask him. You know, you didn't ask him when he was called back in, Did you lie when you said that? So I can't know his frame of mind of why he didn't originally point out he was in the original voir dire. But he clearly did not say that he lied. And again, the statement on the questionnaire [that she lied about was totally different] she said she could not under any circumstances consider the death penalty. And now she, in court, is saying that she can. That is vastly different. And also, again, these relationships she's got. I do not have any white juror that has been allowed to remain on that had those issues.

R. 1792.

[24] Defense counsel questioned Huggins about the fact that he had been summonsed as a juror for the Flowers case in 2008, and that he "sat through a similar process" but was excused because he was "so far down in the list" and wasn't needed. R. 1727. Defense counsel asked Huggins if he was mistaken when he told the court that the first time he'd heard anything about this was when he reported for the instant summons. Mr. Huggins responded, "Well, it happened in '96. I mean what I meant was since then I have heard a little off and on when I would come in, you know, into home." R. 1728.

Diane Copper

Finally, with respect to Diane Copper, she (like Cunningham and Wright) worked with Flowers's family members. She worked with Flowers's father at Wal Mart, and with Flowers's sister at Shoe World. R. 1794. This was a race-neutral reason to strike her from the jury. *See Higgins v. Cain*, 720 F.3d 255, 268 (5th Cir. 2013); *Manning v. State*, 735 So. 2d 323, 340 (Miss. 1999). Moreover, while Copper stated she could be fair, she also stated that she would lean towards voting in favor of Flowers's family. Copper stated that "it's possible" the fact that she knew many of Flowers's family members could affect her and make her "lean toward [Flowers]." R. 1404-06. The State asked Copper if those relationships would, "make it to where you couldn't come in here and, just with an open mind, decide the case, wouldn't it?" Copper answered, "Correct." R. 1407. Both Copper's preference for one side of the case, and her equivocation between fairness and bias, are sufficient, race-neutral reasons for a peremptory strike.

Finally, Copper agreed with defense counsel's statement, "I get the impression you're saying that you'd rather not be a juror." R. 1409. Reluctance to serve is a sufficiently race neutral reason to lodge a peremptory challenge. *Hughes v. State*, 90 So. 3d at 626.

Just as with Wright and Cunningham, defense counsel attempted to argue disparate treatment based on the fact that the State accepted "almost every white juror who had some sort of connection to this case." However, defense counsel conceded that none of the white jurors struck worked with a member of Flowers's family—as Copper did. The trial court, accordingly, rejected Appellant's claim of disparate treatment:

> Also, she had stated that she worked with Archie at Wal-Mart, and she worked with Cora at Shoe World. She's had close working relationship with those two individuals in Mr. Flowers's family. I see that greatly different than No. 17, Ms. Chesteen, who was the bank teller and has people that's come into the bank.

> There's no indication that Ms. Chesteen has ever worked with Archie Flowers, ever worked with Cora or anybody else. And so there is a huge difference between the—S-6 with Ms. Copper and any white juror that was left on the panel."

R. 1796-97.

The trial court properly found a difference between being acquainted or friendly with the victims, the defendant, or their families—and working with the defendant's father and sister. As Appellant himself recognizes, nearly all the jurors had some sort of connection to the individuals involved in this case. The State could not strike everyone with a connection. It had to limit its strikes in some way; it started with the closest connections (relatives) and stopped at a point in which it felt bias or prejudice would no longer be an issue (employed with relatives). As the State accepted no juror, black or white, who worked with the victims, the defendant, or the parties' families, there was no disparate treatment, no pretext. Thus, the court's ruling was proper.

Defense counsel also argued the State engaged in disparate treatment of Ms. Copper by accepting Jurors 40 and 50, each of whom stated that they had formed an opinion about the case (which they did not disclose); and yet struck Copper without ever asking her if she could lay that aside. R. 1797. However, factually Appellant was once again incorrect. Ms. Copper noted that she could be fair—thus suggesting she could set aside her feelings. However, she then equivocated by stating that she would lean toward the Flowers' family—a statement Jurors 40 and 50 never made. The trial court found Appellant's argument to be erroneous:

> The Court: Well, the Court—neither No. 40 or No. 50 stated that they were leaning towards the Flowers' family in this case. And she did. There—there wasn't anything for them to rehabilitate because they didn't say they were leaning towards the Flower family. And—
>
> Ms. Steiner: They didn't say—

> The Court: I'm making my ruling now, ma'am. I'm tired of you interrupting me constantly.
> ***
>
> Ms. Steiner: Your Honor raised in your ruling the fact that the opinions expressed—the opinions of 40 and 50 were not opinions in favor of the Flowers family. Your Honor, neither of these jurors advised as to what that opinion was. It is equally likely if you have an opinion it could be for either side. These jurors did not express an opinion and—
>
> The Court: You're absolutely correct. They did not, and she [Copper] did. That makes it different. That is the difference. She said, "I would tend to lean toward favoring the family." And that—that is different than somebody that expresses no statement to that.

R. 1796-98.

Appellant's *Batson* argument, in its entirety, is due to fail. The reasons offered by the State were race-neutral and have been consistently accepted and approved of by this Court. Further, there was no disparate treatment. None of the white jurors accepted by the State worked with a member of Flowers's family. None of the white jurors accepted by the State were related, by blood or marriage, to Flowers. None of the white jurors accepted by the State equivocated on the death penalty. None of the white jurors accepted by the State admitted to lying in order to get off the jury. None of the white jurors accepted by the State lied about their opinion on the death penalty; none lied about their work relationship with a member of Flowers's family. None of the white jurors accepted by the State admitted to lying to the court. None of the white jurors accepted by the State had ever been sued by the victim's company. None of the white jurors accepted by the State were against the death penalty.

Thus problematic with Appellant's approach is that the jurors struck by the State were unique in their characteristics. The State proffered race-neutral reasons for the strikes; reasons which this Court has accepted time and time again as valid. And none of the white jurors tendered had these characteristics. There was no disparate treatment in the State's actions, and

Appellant failed to rebut the legally accepted race-neutral reasons for striking these jurors. Therefore, there was no *Batson* violation.

C. The Jury Adequately Deliberated and was not Influenced by Racial Bias; Nor was Appellant Denied a Fair Trial.

In Issue VI.B., Appellant contends the fact that the jury only deliberated 29 minutes during the guilt phase, and 1 ½ hours during the sentencing phase, shows they were influenced by racial bias. While not affirmatively stating as such, Appellant seems to suggest that African Americans were somehow too afraid to serve, or did not want to serve on his jury. Although failing to explain how the State or trial court caused this fear or apathy, Appellant offers the following factual allegations—almost all of which have nothing to do with the instant case—which he claims resulted in the selection of a biased jury:

- During Flowers's third trial, Prosecutor Doug Evans engaged in racial discrimination.
- Flowers's fourth trial was a hung jury "by all reports split on racial lines."
- Flowers's fifth trial also was a hung jury, with one identified holdout being black.
- Two black jurors from Flowers's fifth trial were arrested for perjury.
- During Flowers's fifth trial, the trial judge urged the State to legislatively seek the right to change venue "over the objection of the defendant."
- The instant venire had "pervasive knowledge" that the State tried to change venue.
- The facts of the case itself were reported to the press and "pervaded" the instant venire.
- In the instant case Flowers requested the trial judge recuse himself, and he refused.
- The instant venire was aware that the judge had ordered the arrest of two black jurors serving in Flowers's fifth trial.
- In the instant case only one African American served on Flowers's jury [along with a black alternate].

In Issue VI.C., Appellant contends he has a 6th and 14th Amendment right to a fair trial, of which the bedrock is the right that the venire and jurors, and the environment surrounding the trial itself, be free from bias or outside influences. Appellant presents the following facts/allegations in support of his claim that he did not receive a fair trial:

- Implied bias was pervasive in Montgomery County.

- 73% of the venire had personal acquaintance with the defendant or his family, or the victims or their families.
- 61 venire members were acquainted with the victims or their families.
- 56 venire members were acquainted with Flowers or his family.
- 70 venire members said they could not be fair or impartial, and were struck for cause.
- The venire members who knew Flowers said they couldn't be fair at a higher rate than those who knew the victims. Thus, the venire members who knew Flowers were struck at a disproportionately higher rate, resulting in a more State-friendly jury.
- Virtually all of the prospective jurors (at the conclusion of initial juror disqualification) "acknowledged having some prior knowledge of the case."
- Flowers, wanting to preserve his right to be tried in Montgomery County, attempted to remedy pervasive community bias by challenging fifteen jurors for cause, by moving to quash the venire, and by moving for a mistrial.
- The court granted only two of Flowers's cause challenges.
- Flowers requested that the trial court discharge him until a fair venire could be found in the district in which he was legally entitled to be tried. The court refused.
- There was a large law enforcement presence at the trial.
- Some venire members were seen speaking with law enforcement in the parking lot or the lobby of the courthouse.
- The jury did not wait to eat pizza but proceeded into the night to deliberate.
- The jury, during sentencing, interrupted a mitigation witness.
- The jury was impatient to get through the sentencing phase.

In both Issues VI.B and C., Flowers's argument is simple, factually illogical and without merit. The true crux of Flowers's argument is thus:

- The Constitution prohibits trying Flowers in an environment where the community from which the jury is to be drawn may already be permeated with hostility toward him. Montgomery County is just such a community.
- The Constitution also guarantees Flowers the right to be tried in this environment if he voluntarily chooses. Flowers so chooses to be tried in Montgomery County.
- The prejudice resulting from such paradox is the State's fault.
- Therefore, Flowers can never receive a fair trial.
- The possible remedies for this problem are 1) Flowers must be set free; 2) Flowers must be discharged for at least several years, or until such time that <u>he believes</u> racism no longer exists in Winona (such that his jury would be fair); or 3) Flowers should be tried

> again immediately, but his instant jury must be quashed, and substituted with a new jury, (again comprised of hostile Montgomery County citizens).[25]

The State apologizes if this analysis seems glib or disrespectful. However, there is no kind way to address the spuriously transparent basis of Appellant's position. Flowers concedes knowing, since at least 2004, that he could not receive a fair trial in Montgomery County, Mississippi. Armed with that knowledge, Flowers nevertheless refuses to move for a change of venue, citing his constitutional right to be tried in Montgomery County. Flowers also refuses to have the trial occur in Montgomery County, but the jury chosen from elsewhere. Flowers even refuses to use his peremptory strikes to remove the biased jurors (he had four challenges remaining at the end of jury selection). Acknowledging his inability to secure an impartial jury, his refusal to be tried elsewhere, his refusal to be tried by a jury selected from another county, and his refusal to remove jurors peremptorily, Flowers then blames the State and the trial court for failing to remedy a problem which he admits cannot be remedied. This is fallacy.

1. Flowers waived his right to a fair jury.

Flowers is procedurally barred from any claims regarding his entitlement to a fair and impartial jury, as Flowers has, by his own admission before this Court, waived such right. Mississippi, both in case law and by statute, recognizes that the remedy to a circumstance in which the defendant fears he will not be afforded an impartial jury is to select a jury elsewhere:

> On satisfactory showing, in writing, sworn to by the prisoner, made to the court, or to the judge thereof in vacation, supported by the affidavits of two or more credible persons, that, by reason of prejudgment of the case, or grudge or ill will to the defendant in the public mind, he cannot have a fair and impartial trial in the county where the offense is charged to have been committed, the circuit court, or the judge thereof in vacation, may change the venue in any criminal case to a convenient county, upon such terms, as to the costs in the case, as may be proper.

Miss. Code Ann. Section 99-15-35.

[25] While Flowers repeatedly seeks the remedy of a new trial, the State would point this Court to Issue VII, in which Flowers claims his multiple trials are unconstitutional. The State must presume that, in the event this Court grants Flowers a new trial—at his request—Flowers's Issue VII will be deemed waived.

This is not to say that Flowers must seek a change of venue. Indeed, in *Maye v. State*, 49 So. 3d 1140 (Miss. App. 2009), *vacated on other grounds*, 49 So. 3d 1124 (Miss. 2010) the Mississippi Court of Appeals reversed a defendant's conviction after the trial judge was found to have denied the defendant his right to be tried in the county where the offense was committed. *See* Miss. Const. art. 3, section 26. Maye originally argued he could not get a fair trial in Jefferson Davis County because the victim was a local police officer. The trial judge moved venue to Lamar County, upon Maye's request. Prior to trial, Maye reconsidered the venue change and asked the trial court to return the case to Jeff Davis County; the judge refused.

The Court of Appeals, in holding fast to the defendant's right to be tried in the county of the offense, held that if the defendant wanted to be tried in the venue where he originally feared a biased jury, such choice was well within the defendant's right:

> A defendant has the right to withdraw a prior waiver of a constitutional right in the absence of valid justification to refuse him the right. *See Stevens v. Marks*, 383 U.S. 234, 243-44, 86 S.Ct. 788, 15 L.Ed.2d 724 (1966); *United States v. Marcello*, 423 F.2d 993, 1005 (5th Cir.1970). Maye argues that the trial court failed to suggest a "proper justification" for refusing his request to have the case tried in the original venue of Jefferson Davis County; instead, the court just changed the venue to Marion County. Indeed the only justification offered by the trial court was a belief that it lacked the authority to return the case to Jefferson Davis County. The failure to offer adequate justification is a ground for reversal.
>
> Once Maye requested that the trial court return venue to Jefferson Davis County, the court was under a constitutional obligation to grant his request or at the very least to offer clear justification for its decision to deny the request and change venue to another county. In this case, the trial judge offered no analysis or conclusions of law or findings of fact as to why Maye could not revoke his prior motion and seek venue in Jefferson Davis County. This was error; consequently, this Court must reverse and remand this case for a new trial.

Maye, id. at 1149.

Thus, the State is not faulting Flowers for choosing to remain in Montgomery County to be tried. Flowers states he cannot be made, as a matter of principle, to choose between that right

to home venue, and his right to a fair jury. At its core, this is correct. However, it is not the State forcing Flowers's hand. Under these circumstances, where Flowers admits a Montgomery County jury will never be fair, and yet still refuses to seek a change of venue, he has, in fact, voluntarily chosen between those rights—thereby voluntarily waiving his right to a fair jury.

For indeed, not only does Flowers refuse to change venue, Flowers also refuses to stay in Montgomery County but select a jury from another county. Flowers even refuses to use all of his peremptory challenges during trial. Flowers has been convicted three times in Montgomery County. Flowers has never been acquitted in Montgomery County. Flowers admits the entire county of Montgomery—other than his own family and friends—are biased against him. Thus, Flowers's statement that he has some deep seated desire to continue to be tried in Montgomery County is suspect—the State cannot conceive that Flowers, facing a possible death sentence, would want to stay in Montgomery Country strictly based on a belief in constitutional principles.

Accordingly, Flowers's actions speak louder than his words-- Flowers wants to stay in Montgomery County for one of two reasons. Either he hopes to secure a jury with his "unbiased" family and friends, so as to be acquitted. Or he wants to force this Court to declare an impasse: citing Flowers's unmitigated right to both a fair jury and a trial in Montgomery County, recognize a no-win situation, and send Flowers home.

The State absolutely refuses to stoop to this level of loophole law. If Flowers wants to stay in Montgomery County, that is his right. But something has to give; indeed, the situation begs the question: if Flowers concedes he cannot secure an impartial jury in Montgomery County, because the county itself is biased, where exactly has the prosecution committed error, in doing nothing more than trying cases in that county as they are required to by law, and in honoring Flowers's request to have the case tried locally? Moreover, what remedy does Flowers believe he is entitled to by backing the State into a constitutional paradox of his own making?

According to Flowers, the options are to set him free permanently; set him free until the fires of racism cool; or pick a new jury—again from "pervasively biased" Montgomery County—and start this process over again. The interests of justice dictate against that.

The Sixth Amendment right to an impartial jury, like any constitutional right, may be waived. *McCamey v. Epps*, 658 F.3d 491, 498-500 (5th Cir. 2011). A waiver is the intentional relinquishment of a known right or privilege. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Waivers of constitutional rights not only must be voluntary but must also be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. *Brady v. United States*, 397 U.S. 742, 748 (1970); *Brookhart v. Janis*, 384 U.S. 1 (1966).

Flowers's acknowledgement that he chose Montgomery County, all the while *recognizing* it is biased, is—by its very nature—both a knowing and voluntary waiver of his right to any impartiality in his venire. *See U.S. v. Martin*, 704 F.2d 267, 273 (6th Cir. 1983) (defendant must have some knowledge of nature of the jury trial to make valid waiver). While defendants do not need to be specifically told of their right to an impartial jury before a waiver can be deemed knowing and intelligent, Flowers not only knows his rights, he also professes to knowing those rights would be violated—and to choosing Montgomery County anyway.[26]

According to Flowers, implied bias is pervasive in Montgomery County, such that no fair jury can be drawn from it. When Flowers, armed with that knowledge, refused to seek a jury elsewhere, he knowingly and voluntarily relinquished his rights. Indeed, such decision can also be seen as an intelligent, tactical relinquishment, undertaken for the purpose of intentionally

[26] That this appears to be a tactical advantage (to force this Court's hand into dismissing the case altogether) constitutes yet another waiver of Flowers's Sixth Amendment right. *See U.S. v. Joshi*, 896 F.2d 1303 (11th Cir. 1990), *cert. denied*, 498 U.S. 986 (1990), (defendants waived their Sixth Amendment challenge to trial bifurcation by virtue of counsel's tactical decision to consent to such a procedure).

sabotaging the case itself[27]. Mississippi affords Flowers the opportunity to avoid the very impartiality he admits to being fully aware of for the past nine years. Flowers chose to do nothing except blame the State. This constitutes waiver.

The State would go one step further. If Flowers claims he cannot secure an impartial jury in Montgomery County (which the State disputes), the State submits Flowers has not simply waived his right to a fair jury—he has also actively participated in the securing of that biased panel. Flowers only used eight of his twelve peremptory challenges. He did not ask for additional peremptory challenges. Thus, he has both passively and actively waived his right to challenge the fairness of his jury.

Flowers was afforded twelve peremptory challenges, pursuant to Mississippi Code Annotated Section 99-17-3. Before an appellant may challenge a trial court's refusal to excuse a juror for cause, he must show he utilized all of his peremptory challenges. *Berry v. State*, 575 So. 2d 1, 9 (Miss. 1990); *Chisolm v. State*, 529 So. 2d 635, 639 (Miss. 1988); *Johnson v. State*, 512 So. 2d 1246, 1255 (Miss. 1987); *Billiot v. State*, 454 So. 2d 445, 457 (Miss. 1984).

> The reason for the rule is that the appellant has the power to cure substantially any error so long as he has remaining unused peremptory challenges. We would put the integrity of the trial process at risk were we to allow a litigant to refrain from using his peremptory challenges and, suffering an adverse verdict at trial, secure

[27] Something even the trial court recognized. When defense counsel claimed that the venire was so blaringly disproportionate to the racial population of the county, the trial court responded (R. 1736-38),

> Counsel should have known that was going to happen from the first two or three trials—first three trials that had occurred over here. Counsel had an opportunity—because the first two trials, as you know, were tried somewhere else. But Mr. Flowers, as he had every right to do, and has an opportunity to be tried in his home county. The law allows that. But he cannot then come around and complain because people are excused because they know him.
>
> ***
>
> So you know, there is—nothing the State has done has caused this statistical abnormality. It is almost chiefly because Mr. Flowers' family are such prominent people, and he had got so many relatives and so many friends and so many of his family members that have friends. But it is not anything that, you know, has shaken out that way. And as I say, this should not be a surprise to defense counsel, because that has been the way that has happened the past three trials. And so to claim surprise now about what you knew was going to occur was somewhat disingenuous.

> reversal on appeal on grounds that the Circuit Court did not do what appellant wholly had power to do.

Hansen v. State, 592 So. 2d 114, 129 (Miss. 1991).

Flowers's decision to remain in Montgomery County was free and voluntarily, and obviously knowingly made. Flowers may not have had enough peremptory challenges to remedy every single juror he claims improperly remained in the venire; however, the fact that he did not use all of those challenges suggests he was not concerned with even trying to remedy the problem. This deprives Flowers's argument of integrity. *See Shell v. State*, 554 So. 2d 887 (Miss. 1989), *rev'd on other grounds*, 498 U.S. 1 (1990), *on remand*, 595 So. 2d 1323 (Miss. 1992) (*Mhoon* "statistical aberration" argument distinguishable where defense counsel failed to use remaining peremptory challenges to strike objectionable jurors); *Jaco v. State*, 574 So. 2d 625, 633-34 (Miss. 1990) (in capital murder case, defendant who failed to challenge for cause or peremptorily, juror who stated he could not be fair, "waived this point"); *Mack v. State*, 650 So. 2d 1289, 1308 (Miss. 1994) (in capital murder case, "when defendant fails to timely challenge the juror, either for cause or peremptorily, he waives this point"); *Smith v. State*, 989 So. 2d 973 (Miss. App. 2008) (failure to contemporaneously object to or challenge venireman's presence on jury constitutes procedural bar on appeal); *Smith v. State*, 729 So. 2d 1191, 1210 (Miss. 1998); *Simmons v. State*, 805 So. 2d 452 (Miss. 2001).

On appeal, Flowers suggests that, in order to preserve Flowers's right to be tried in a biased county, the trial judge should have simply discharged Flowers, and waited until the case cooled before recalling it for trial. Flowers also suggests the trial court could have quashed the venire as a whole, and selected an entirely new jury pool (at trial Flowers's attorney also suggested "reshuffling" the venire and selecting the jury from the order in which they appeared in the new draw—a motion the judge called "absurd," stating, "I suppose if we randomly

reshuffled them again and you didn't like the shuffle, then you would ask for it again"). R. 1747-48. These suggestions are, like the rest of Flowers's actions regarding voir dire, tokens.

Flowers fails to suggest how quashing this particular jury, and selecting a new one, would remedy a pervasive bias throughout Montgomery County. Indeed, taking Flowers's argument as true, would that not simply be switching out one set of biased jurors for another? Flowers also fails to suggest how long it would take for the "fires of prejudice" to cool in a case that is already sixteen years old, a case where numerous witnesses have died, numerous judges have been called to preside, numerous attorneys have been appointed to represent the defendant, and numerous memories of that tragic day in 1996 have, by the mere passage of time, faded. Indeed, in *Groppi v. Wisconsin*, 400 U.S. 505, 510 (1971) the U.S. Supreme Court stated that the hope of cooling the fires of prejudice, "may not be realized, and continuances, particularly if they are repeated, work against the important values implicit in the constitutional guarantee of a speedy trial." Moreover, a closer look at Flower's argument reveals his concern is less about the alleged racial prejudices of this particular case, and more about the fires of race relations in the community of Winona—an entirely different matter, which cannot justify a cooling off period for Flowers's case without also necessitating the same for all other criminal cases in the county.

In conclusion, this issue is procedurally barred. Flowers has waived any argument that the State failed to afford him with an impartial jury; he has waived any argument that the jury itself was empaneled as the result of pervasive community racial bias. Flowers concedes unfairness. Flowers participated in that unfairness, for his own strategic reasons, even to his own detriment. Flowers failed to correct that unfairness. And then Flowers, citing unfairness, blames the State, offers token (sometimes ridiculous) remedies, and demands to be sent home.

This issue is without procedural and substantive merit.

2. Notwithstanding Flowers's waiver, the jury was fair and impartial.

The State has proceeded above—accepting Flowers's "pervasive bias" premise as true—for purposes of argument only. However, the State respectfully submits that Flowers's argument is flawed in a serious respect: both the venire and the jury members were fair and impartial, and properly served pursuant to Mississippi law. Mississippi Code Annotated Section 13-5-79 (Rev. 2002) provides:

> Any person, otherwise competent, who will make oath that he is impartial in the case, shall be competent as a juror ..., if it appears to the satisfaction of the court that he has no bias or feeling or prejudice in the case, and no desire to reach any result in it, except that to which the evidence may conduct. Any juror shall be excluded, however, if the court be of opinion that he cannot try the case impartially, and the exclusion shall not be assignable for error.

On one point the parties must be absolutely clear: there is no presumption of bias in Flowers's jury. Such presumption only arises where the defendant moves for a change of venue—something Flowers refuses to do. *Holland v. State*, 705 So. 2d 307, 336 (Miss. 1997). "A presumption of inability to conduct a fair trial in a venue arises with an application for change of venue, supported by two affidavits affirming the defendant's inability to receive a fair trial." *Porter v. State*, 616 So.2d 899, 905 (Miss.1993). In *Johnson v. State*, 476 So.2d 1195, 1210 (Miss.1985), this Court held that the filing of the motion for change of venue, with its two affidavits, raises "a presumption that such sentiment exists. Only at that point does the State 'bear the burden of rebutting that presumption.'"

Because Flowers failed to seek a change of venue, there is no presumption of unfairness which the State is required to rebut. Nevertheless, the facts of this case clearly show the trial court, using the vehicle of voir dire, impaneled a fair and impartial jury in this case. *Harris v. State*, 537 So.2d 1325, 1329 (Miss.1989); *United States v. Harrelson*, 754 F.2d 1153 (5th Cir.1985)." Appellant has failed to offer the name of a single juror who stated he or she could not be fair and impartial if chosen to serve. *Simon*, 688 So.2d at 804. To the contrary, the record

indicates the impaneled jury members affirmatively stated that they could fairly and impartially serve as jurors. The record indicates the panel members were asked repeatedly by the judge, the State's attorneys, and Flowers's attorneys if they could be fair and impartial. The record indicates the jury members affirmatively stated they would be able to equally consider the alternate sentences of life in prison and capital punishment; they affirmatively stated they would be able to set aside any preconceived ideas or opinions and judge the evidence fairly and objectively.[28]

The trial judge in this case found no evidence to suggest the jury was biased or partial:

> The Court: Well, I have made no finding that he could not get a fair jury in this county. I, I don't know where that comes from, but I certainly made no finding that he could not get a fair jury. We've got 45 people that have said they could be fair and impartial, and they would consider the evidence and base their decision on the evidence as presented here in court. So, you know, I thought the other motion earlier [to reshuffle and redraw the special venire] was from left field. But this one trumps it. There, there is just nothing that indicates that this jury cannot be fair and impartial. There is no basis for dismissing.
>
> Again, it seems like the entire purpose of your motion is you are saying well, I don't like the potential jurors so I want—I want to dismiss the case because I don't like who might be on the jury. Well, you know, that is not a basis for

[28] This includes each juror Appellant sought to challenge for cause. The judge, in denying such challenges, held:

> But I have on all of these that stated they had an opinion, I have sat less than three feet away from them. I have had an opportunity to look in their eyes, and understand what they are saying. And believe me, if I had any belief at all that any of them were being untruthful to the Court or had any hesitation, I would strike them for cause. But they have all unequivocally stated that it would not in any way influence them. It would not have any effect on them and that they will lay aside any views, any opinions they may have.
>
> They—I believe all of them acknowledged they don't know all the facts of the case, and different jurors have stated they read or saw something about it. But every one of them said that they would listen to the evidence, they would decide the case based on the evidence presented and not let any factors outside of the courtroom affect them in their deliberations. And I don't think you can ask for more than that. I think that is all that is required of any juror.
>
> And again, on every one of these that have been individually questioned. I have had the opportunity, because of my perspective where I am sitting above them but right next to them and leaning forward, so I could look and find out and understand and hear as well. And I just do not see any grounds for, for these you just raised or for the other ones.

R. 1745-46.

> dismissing the charge. It is not a basis for dismissing the death penalty portion of the case.

R. 1752. Such ruling was in proper accordance with the law.

Flowers, in alleging bias, reasserts his cause challenges against those jurors who expressed knowledge or opinions about the case; notes there was a large law enforcement presence during the trial; points out that jury deliberations were short; and suggests the jury's attention during sentencing was attenuated. However, Appellant fails to show—as he is required to do (there being no presumption of unfairness)—how any of these allegations shows that the jurors were, in fact, biased against him.

The trial judge has wide discretion in determining whether to excuse prospective jurors, including those challenged for cause. *Scott v. State*, 595 So. 2d at 849. With respect to the jurors Flowers unsuccessfully challenged for cause, as noted above, and as the court found on the record, each of those individuals stated they could be fair and impartial. Moreover, only five (Jurors No. 17, 40, 50, 51 and 54) of the thirteen individuals Flowers identifies were high enough on the list to be considered as potential jurors; Flowers used peremptory challenges against each of those jurors, as he was required to do where there was no rise for the court to strike them for cause. The court's refusal to grant cause challenges against the remaining eight jurors on Flowers's list had no bearing on whether Flowers's actual jury was fair and impartial.

Additionally, that there were a number of law enforcement personnel present during the trial does not prove juror bias. That the trial court empaneled jurors who disclosed having knowledge or opinions about the case was not unconstitutional, where those jurors affirmatively stated they could be fair and impartial (and where Flowers himself failed to use all of his peremptory strikes). In *Simmons v. State*, 805 So. 2d 452, 503 (Miss. 2001) this Court held that where each juror testified they could put aside their personal views about the death penalty and

follow the law, by these admissions they rehabilitated themselves. This language of "putting aside" personal beliefs was approved in the following passage of *Leatherwood v. State,* 435 So. 2d 645, 654 (Miss. 1983):

> [We] are of the opinion that the trial court's ruling was in full compliance with *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). When questioned by counsel both jurors said that they could put aside their personal feelings, follow the law and instructions of the court and return a verdict based solely upon the law and the evidence and not vote for the death penalty unless the evidence warranted it.

That a large majority of the venire knew about the case does not make the venire itself characteristically biased. This is especially true where the trial court questioned "each member of the venire about their ability to be impartial, and defense counsel asked each member of the venire if those relationships would prevent them from being 'fair and impartial' toward the defendant […]." *Mhoon v. State,* 464 So. 2d 77, 80 (Miss. 1985); Bevill, 556 So. 2d 699, 713 (Miss. 1990); *Shell v. State,* 554 So. 2d 887, 891-92 (Miss. 1989), *rev. on other grounds*, *Shell v. Mississippi*, 498 U.S. 1 (1990); *see also U.S. v. Corbo*, 555 F.2d 1279 (5th Cir. 1977) (where jurors state they did not hold preconceived notions of defendant's guilt, there is no evidence that pretrial publicity denied him a fair trial)).

Nor do disproportionately short deliberations suggest a failure to deliberate.[29] Mississippi case law is "well-settled that short deliberations do not automatically evidence bias or prejudice." *Ekornes-Duncan v. Rankin Medican Center,* 808 So. 2d 955, 962 (Miss. 2002) (citing *Gray v. State,* 728 So.2d 36 (Miss.1998) (upholding a seven minute jury verdict in a capital murder case); *Smith v. State,* 569 So.2d 1203 (Miss.1990) (upholding a three minute jury verdict); and *Johnson v. State,* 252 So.2d 221 (Miss.1971) (upholding ten minute jury verdict)).

[29] *Maury v. State,* 9 So. 445 (Miss. 1891) on which Appellant relies, is a single page case in which the court held that the evidence was "inconceivably" insufficient to convict the defendant, and noting that the "wonder" that the jury found the defendant guilty was either due to their complete misunderstanding of the case or their failure to sufficiently deliberate. *Maury* makes no mention of how long the jurors deliberated.

In *Ekornes-Duncan*, this Court stated, "There is no yardstick of time which a jury should use before reaching a verdict." *Johnson,* 252 So.2d at 224. Also, we have developed "no formula" for calculating the length jury deliberations should last. *Smith,* 569 So.2d at 1204.For these reasons, we find no error.

In *Gray v. State*, 728 So. 2d 36 (Miss. 1998) this Court refused to adopt any sort of per se rule on the length of deliberations in capital cases. Gray claimed his jury deliberated just long enough to "walk around the table"; he offered no evidence other than the length of deliberations to argue for a finding of jury bias. *Gray*, 728 So. 2d at 62. Gray also argued that this Court should offer guidelines for deliberation, at least for capital cases. In rejecting his argument, this Court held that, "there is no formula to determine how long a jury should deliberate." *Gray, id.* at 62; *Smith v. State,* 569 So.2d 1203, 1205 (Miss.1990) (citing *Johnson v. State,* 252 So.2d 221 (Miss.1971)).

In *Johnson*, 252 So. 2d at 224, this Court stated as follows:

> Because the jury's time of considering their verdict did not exceed seven minutes, it does not follow that the jurors did not carefully consider the testimony and the exhibits. It is not only possible but probable that when the state and the defendant had rested and the summations had been made each juror had decided in his mind the issue of innocence or guilt. After the brief deliberation with each other, the jurors found that they were of a single mind as to the guilt or innocence of the appellant and found him to be guilty.
>
> Under the facts of this case this Court is unwilling to lend its authority to the establishment of any formula or guideline relating to the time a jury must deliberate before delivering its verdict. This Court is cognizant of the fact that in the past in occasional cases, as in the case at bar, rather brief deliberations have taken place in the jury room and verdicts have been returned with unusual rapidity. There is no yardstick of time which a jury should use before reaching a verdict. No two cases are similar as to facts and therefore the law varies in its application thereto. Therefore, we cannot hold that in the time utilized by the jury it could not reach a proper verdict of guilty.

The *Gray* Court relied on *Johnson* in finding no reversible error based on the length of time the jury deliberated:

> Gray offers no evidence to suggest the jury did not consider the testimony and exhibits as they were presented. The jury was read the instructions prior to closing arguments by the trial judge. "It is presumed that jurors follow the instructions of the court. To presume otherwise would be to render the jury system inoperable." *Chase*, 645 So.2d at 853 (quoting *Johnson v. State*, 475 So.2d 1136, 1142 (Miss.1985)).
>
> The Court notes that this case was not overly complex, given that it was a capital murder case. The record before the Court provided the jury with ample evidence with which to consider Gray's guilt or innocence and subsequent sentence. There is nothing in the record to suggest the jury considered anything other than the evidence presented. Likewise, the record does not indicate a need for extended deliberations.

Gray, id. at 62-63.

In *Smith v. State*, 569 So. 2d 1203 (Miss. 1990) this Court characterized a sexual battery case, like a capital murder case, as simple and concise. "The jury heard the evidence, heard the instructions of the court on the law and found a verdict of guilty as charged. We cannot say that the length of the jury's deliberation indicated bias or prejudice toward the appellant on its part. Issue number two is resolved against the appellant." *Smith, id*. at 1205.

Appellant submits the short deliberations suggested a dismissive attitude of the jury, when combined with the fact that the jury refused a cooling off period between the guilt and sentencing phase. There is neither support for nor merit to this argument. The trial of this case took ten days (exclusive of voir dire), during which the jury respectfully paid attention, asking questions and taking notes. After denying Appellant's request for a cooling off period, the trial judge allowed the jury to set the schedule and offered to provide food if they wanted to continue the proceedings. R. 3341. The jury, after conferring, responded with a note: "Judge we would

like to stay and finish up tonight if possible. Pizza as soon as possible would be great." R. 3345. This is not dismissive; it indicates the jury wanted to proceed with the business of sentencing.

Appellant also submits the jury "restlessly interrupted an important mitigation witness" when learning that the pizza had arrived. This is untrue. Appellant cites to pages 3341-47 of the record for this argument; those pages indicate that after defense counsel tendered a witness, the court took a ten-minute recess, and asked the jury whether they wanted to continue on and order pizza, or whether they wanted to take a break. The court then sent the jury back to the deliberations room to decide on "setting the schedule." During the jury's conferral, defense counsel renewed her argument for a cooling off period. At some point during defense counsel's argument, the jury returned with a note stating they wanted to proceed. Ms. Steiner is not an "important mitigation witness." Moreover, the jury interrupted Ms. Steiner's argument to the court by knocking at the door and alerting the trial judge that they had decided to continue the proceedings; this was just as the court had asked them to do and was neither rude nor improper.[30]

The trial court held that the jury listened attentively and did not rush to judgment. Thus, there was no showing that the verdict was prejudiced. R. 3256. The trial court's ruling was not in error. While there was no DNA to connect Flowers to the murders, the evidence taken in the light most favorable to the jury's verdict shows that Flowers confessed to the crime, Flowers was at the scene of the crime, Flowers was in the presence of the murder weapon, Flowers was wearing the distinctive shoes which left bloody footprints at the crime scene, Flowers had large amounts of cash, for which he had no explanation, hidden in his bed, and Flowers stated that every witness connecting him to this crime was lying. Just as this Court recognized in *Gray*, this

[30] In the event Appellant accidentally cited to the wrong page numbers, the State would note that the only other time proceedings were interrupted was during the playing of the videotape of Flowers singing gospel music. Again, however, it was not the jury who interrupted. The trial judge announced that the pizza had arrived and asked the attorneys to take a break. Defense counsel agreed, stating, "Your Honor, if the jurors' food is here, I don't want to stand in the way of that." R. 3359. Indeed, defense counsel herself also requested a break at this point, apparently, to tend to some issues with her blood pressure. *Id*.

capital murder case was simple[31]. Either Flowers was telling the truth or he wasn't. Either Flowers was guilty or he wasn't.

Flowers also suggests bias evident in an alleged interaction between a juror and a law enforcement officer[32]. However, again Flowers's desire to prove bias seems to take a backseat to Flowers's desire to argue bias (a very different goal). During the trial, an intern for defense counsel informed the court that she had seen one of the jurors speaking with an individual from the Mississippi Highway Patrol. R. 3257. The intern testified that while she did not hear inappropriate conversation, she overheard the juror asking the officer if she could call her fiancée after the verdict. The intern confirmed this conversation took place in the presence of the bailiff. R. 3259.

The trial court offered defense counsel the opportunity to investigate the possibility of impropriety, by calling the bailiff and questioning him about the incident. Defense counsel refused. In defense counsel's exact words, further investigation would be "cumulative." R. 3259. Where defense counsel failed to investigate the possibility of bias in the jury, the trial court took up the torch, personally calling the bailiff to the stand. *Id*. The bailiff confirmed that a juror called out to a member of the Highway Patrol and asked if the officer would contact the juror's fiancée after the verdict and arrange for her to get a ride home from the courthouse. R. 3260. The bailiff also stated, "The highway patrolman to—as far as to my knowledge—he did not answer her one way or the other [...] as well as I can remember, there was no response." R.

[31] The State encourages this Court to consider the factual similarities, including the experts utilized, in both *Gray* and *Flowers*. Perhaps the only real difference, factually, between *Gray* and *Flowers* is that Gray had DNA evidence linking him to the crime. The State submits the absence of DNA evidence does not make a simple case suddenly complex.

[32] Flowers also argues there were several veniremen having some sort of improper contact with law enforcement in the lobby of the courthouse. A review of the record shows that, prior to trial, all visitors had to proceed through the security checkpoints of the courthouse; apparently, defense counsel took issue with the veniremen having to interact with others as they entered the building. The court allowed defense counsel the opportunity to question the jurors as to whether they had interacted with law enforcement when entering the building. No issue was ever brought to light.

3262. The bailiff, in conclusion, confirmed "there was nothing pertaining to this case or the decision that this jury reached," and that, "to the best of my ability there has been no improper conduct on the part of the MS Highway Patrol, the Montgomery Co. Sheriff's Dept, the City of Winona or any other law enforcement as far as this jury is concerned." R. 3263.

Thus, the trial court only allowed the jury to proceed in its duties after finding there to be no impropriety, no bias, no unfairness or partiality (thereby protecting Flowers's constitutional rights):

> From what I have heard, I do not find there to be any impermissible contact or anything that would indicate that the juror in question could not continue to be fair and impartial during this process. In fact, the testimony I have heard indicates that there was not a conversation. A juror may have made some statement that the trooper was walking by. So there has been nothing that has, I would say, polluted the jury pool or in any way impermissible or improper.

R. 3263.

It is important for this Court to recognize that Flowers concedes each juror stated he or she could be fair and impartial. Flowers also concedes he did not seek a change of venue, such that there is a presumption of unfairness for the State to rebut. Flowers's only argument in support of his claim of bias is that, when the jurors stated they could be impartial, such assurances were both false and insufficient to support the court's finding that the jury was fair. *Fisher v. State*, 481 So. 2d 203 (Miss. 1981); *Seals v. State*, 44 So. 2d 61 (Miss. 1950). According to Flowers, the judge should have recognized the "implied bias" in his jury and disqualified the lot of them. *Smith v. Phillips*, 445 U.S. 209, 222 (1982).

This argument requires more record evidence support than Flowers is able to present. Flowers argues that jurors' oaths to be impartial can be fallible. Such argument has been recognized by both this Court and the U.S. Supreme Court. *Sheppard v. Maxwell*, 384 U.S. 333, 351, 86 S.Ct. 1507, 1516, 16 L.Ed.2d 600 (1966); *Irvin v. Dowd*, 366 U.S. 717, 728, 81 S.Ct.

1639, 1645, 6 L.Ed.2d 751 (1961); *Groppi v. Wisconsin*, 400 U.S. 505, 91 S.Ct. 490, 27 L.Ed.2d 571 (1971); *Seals v. State*, 208 Miss. 236, 249, 44 So.2d 61, 67 (1950)).

However, the cases on which Flowers relies to support his claim that implied or presumptive bias necessitates a new trial all contain a singular element missing from this case: a motion for a change of venue. In each case Flowers cites, the courts began with a presumption of bias, which the defendant proved by presenting evidence (at trial) of publicity, knowledge and bias in the community—evidence which clearly showed bias, despite the jurors' affirmations of impartiality. The courts began with that presumption of bias—a presumption which the State could not overcome—when each of the defendants moved for, and was denied, a change of venue. *See Groppi v. Wisconsin*, 400 U.S. 505, 509 (1971) (statute prohibiting a change of venue for misdemeanor crimes unconstitutionally deprives defendant of a fair trial and impartial jury); *Hickson v. State*, 707 So. 2d 536, 544 (Miss. 1997), (under certain circumstances publicity can entitle defendant to change of venue even where jurors say they could be fair and impartial).

In *Sheppard v. Maxwell*, 384 U.S. 333, 351 (1966) trial judge refused to grant the defendant's motions for change of venue, continuance and mistrial, based on "inherently prejudicial publicity." Such publicity included the defendant being tried by the media before a non-sequestered jury; the case occurring during the November general election, in which the prosecutor was running for a judgeship; and anonymous letters and phone calls being made, in favor of the prosecution, to all veniremen, after their names and addresses were published in the newspapers. The Court held that, with such bitter prejudices, the refusal to change venue, upon the defendant's request, denied him a fair trial.

In *Irvin v. Dowd*, 366 U.S. 717, 728 (1961), the U.S. Supreme Court ruled that a law prohibiting a defendant from seeking more than one change of venue deprived that defendant of a fair trial. The Court dismissed the idea that jurors must, by law, be "totally ignorant of the

facts and issues resolved;" however, it found that under the circumstances of the case, the prejudice in the venire was sufficient to merit a second change of venue.

> In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Dowd, 366 U.S. at 722-23.

The test for bias, according to *Dowd*, was "whether the nature and strength of the opinion formed are such as in law necessarily * * * raise the presumption of partiality." *Id*. at 724. It is up to the trial judge to evaluate the testimony of the jurors. In *Dowd*, the court found a pattern of deep and bitter prejudice throughout the community. Two-thirds of the veniremen admitted, prior to trial, that they thought defendant was guilty. *Id*. at 728. The Court held, "The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man." *Id*. at 727. While each juror was no doubt sincere when agreeing to be impartial, "where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight." *Id*. at 728.

In *Fisher v. State*, 481 So. 2d 203 (Miss. 1985), this Court held the trial judge erred in refusing the defendant's motion for a change of venue. Even though most of the jurors insisted that Fisher could receive a fair trial, and that they would set aside their opinions and knowledge about the case, and judge Fisher impartially, the pervasiveness of the pre-trial publicity suggested that Fisher could never receive a fair trial in that venue. Specifically, this Court found that every juror called for service had heard about the charges; that the community had been bombarded with news reports of the murder charge, as well as with reports that Fisher had been

charged with another murder. Those news reports attempted to convict Fisher prior to his trial; they also discussed at length the evidence the State had against Fisher—including that which was ultimately inadmissible at trial. *Fisher*, 481 So. 2d at 215-224. This Court also noted that, "more likely than not, the quantity *and* quality of the media publicity impressed upon the minds of the average citizen that Fisher had raped and murdered both victims." *Hickson v. State*, 707 So. 2d at 542-43.

Thus, the State does not dispute that promises of impartiality can be, in light of external circumstances, pie crust promises: easily made, easily broken. Nevertheless, Flowers cannot rely on *Groppi*, *Dowd*, *Fisher*, or *Sheppard*, to seek relief, because he did not seek a change of venue, and the trial judge cannot order one without Flowers's consent. Moreover, while Winona is a small community, and this case a known tragedy, Flowers failed (at trial and here on appeal) to present evidence rising to the levels of bitter prejudice as found in his "supporting" case law. Flowers did not present the trial court with multiple news reports attempting to convict him in the press[33]; he did not present the trial court with evidence that every juror had heard about the charges; he did not present the court with evidence that a majority of the venire already thought Flowers was guilty; he did not present the court with evidence that the venire had heard about the evidence in the case, or about evidence which was inadmissible at trial; he did not present the court with evidence that the State had been in improper contact with any of the venire.

Thus, the trial court did not—could not—abuse its discretion in refusing to grant a change of venue which was never requested. It did not abuse its discretion in refusing to "reshuffle" the venire draw or quash the venire, when Flowers's argument was that the entire county was biased (thus making either of those remedies insufficient). The court did not abuse

[33] The news articles Flowers cites in his brief appear more focused on the prosecution of two jurors for perjury after the first mistrial.

its discretion in finding, on the record, this jury to be fair and impartial, when Flowers failed to present sufficient evidence of implied bias, and when Flowers failed to use his peremptory challenges to strike those jurors who were unfair or biased.

Flowers's argument is circular in its flaw. Flowers's only evidentiary support for the claim that his jury was unfair, is Flowers's contention that he knew the county as a whole suffered from pervasive bias resulting from poor race relations and the negative impact of multiple trials of this case. Such knowledge, if true, serves to waive Flowers's right to a fair and impartial jury, where Flowers refused to protest his innocence elsewhere[34]. Such knowledge, if false, serves to negate Flowers's claim that his jury was biased. Therefore, Flowers's claims are both procedurally barred and without substantive merit. This issue is due to be dismissed.

VII. THERE IS NO VIOLATION OF THE DUE PROCESS OR DOUBLE JEOPARDY CLAUSE AS A RESULT OF APPELLANT'S CAPITAL MURDER TRIALS.

Curtis Flowers has been tried six times for the same murders. This Court reversed three of Flowers's convictions: the first two cases, which were tried almost simultaneously, were reversed on the same grounds; the third case was reversed on independent grounds. Two of Flowers's trials resulted in hung juries. These six trials did not violate the Double Jeopardy Clause or the Due Process Clause. Courts have held that in order to implicate the Double Jeopardy Clause, there must be either an acquittal or conviction on the merits. However, when a conviction is set aside on appeal, if there is a state-requested mistrial, or if there is a hung jury, a defendant can still be tried again for the same offense.

[34] *See Fisher v. State*, 481 So. 2d at 223, fn. 21 ("Fisher's motion for change of venue effectively waives his right to trial in the county where the crime occurs. *See* Miss. Const. Art. 3, Section 26 (1890); *see also* U.S. Const. Amndts. VI and XIV").

"Both the Fifth Amendment to the United States Constitution and Article 3, Section 22 of the Mississippi Constitution state that no person shall be placed in jeopardy twice for the same offense." *Spann v. State*, 557 So.2d 530 (Miss. 1990). Despite a conviction, however, "a defendant can be tried a second time for an offense when his prior conviction for that same offense had been set aside on appeal." *Green v. United States*, 355 U.S. 184, 189 (1957)(citing *Ball v. United States*, 136 U.S. 662(1896)). In *United States v. Ball*, 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300 (1896), the Supreme Court held, "it is quite clear that a defendant who procures a judgment against him upon an indictment to be set aside may be tried anew upon the same indictment, or upon another indictment, for the same offense of which he had been convicted."

Moreover, double jeopardy does not bar reprosecution of an accused after a hung jury. *United States v. Sanford*, 429 U.S. 14, 16, 97 S.Ct. 20, 21 (1976). "A failure of the jury to agree on a verdict was an instance of 'manifest necessity' which permitted a trial judge to terminate the first trial and retry the defendant...." *Richardson v. United States*, 468 U.S. 317, 323-24, 104 S.Ct. 3081, 3085 (1984) (quoting *United States v. Perez*, 22 U.S. 579 (1824)). The *Richardson* Court observed that "[the Supreme Court has] constantly adhered to the rule that a retrial following a hung jury *does not violate the Double Jeopardy Clause." Id.* at 324 (citations omitted) (emphasis added).

Finally, in *Keerl v. Montana*, 213 U.S. 135 (1909), the Supreme Court held that the Double Jeopardy Clause is not violated by retrial after a jury deadlock and an appellate reversal of a conviction.

In *Wade v. Hunter*, 336 U.S. 684, 688-89 (1949), the U.S. Supreme Court addressed the issue of multiple trials as an alleged violation of double jeopardy:

> The double-jeopardy provision of the Fifth Amendment, however, does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed. There may be unforeseeable circumstances that arise during a trial making its completion impossible, such as the failure of a jury to agree on a verdict. In such event the purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again. And there have been instances where a trial judge has discovered facts during a trial which indicated that one or more members of a jury might be biased against the Government of the defendant. It is settled that the duty of the judge in this event is to discharge the jury and direct a retrial. What has been said is enough to show that a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments.

See Com. v. Perrin, 272 Pa. Super. 24 A.2d 650 (1979) (fourth trial did not violate the Double Jeopardy clause where defendant granted a new trial after conviction in his first trial, his second trial resulted in mistrial due to a hung jury, and the conviction in his third trial was set aside); *State v. Preston*, 175 S.E. 2d 705 (N.C. Ct. App. 1970) (five trials for armed robbery did not violate the Double Jeopardy clause; *see also United States v. Persico*, 425 F.2d 1375, 1385 (2nd Cir.), *cert. denied*, 400 U.S. 869, 91 S.Ct. 102, 27 L.Ed.2d 108 (1970), (fifth trial, following two appellate reversals and two mistrials did not violate the Eighth Amendment or right to a speedy trial); *see generally Roberson v. State*, 856 So. 2d 532, 534 (Miss. Ct. App. 2003)(citing *Oregon v. Kennedy*, 456 U.S. 667, 672 (1982) (state-requested mistrial does not violate double jeopardy rights unless "the governmental conduct in question is intended to 'goad' the defendant into asking for a mistrial").

Appellant's Double Jeopardy claim has been repeatedly rejected by the United States Supreme Court and is, therefore, without legal support or merit.[35]

[35] At trial Appellant suggested the Mississippi Constitution's prohibition of Double Jeopardy was somehow more comprehensive than its federal counterpart. Appellant offers no supporting authority for his argument that Double Jeopardy law in Mississippi offers more protection than the provisions afforded by the U.S. Constitution.

The only remaining issue, therefore, is whether multiple prosecutions following hung juries and appellate reversals can withstand a Double Jeopardy claim and yet still fall under the weight of Due Process. The State submits the answer to that question is no. Mississippi, and indeed most other states, are silent on this issue. Some states hold that multiple prosecutions do not violate due process unless they also violate double jeopardy. In *People v. Sierb*, 581 N.W. 2d 218, 221-22 (Mich. 1998), the court stated:

> The defendant relies on five cases in support of the contention that retrial would violate the substantive guarantees of due process: *United States v. Ingram,* 412 F.Supp. 384 (D.D.C., 1976), *State v. Witt*, 572 S.W.2d 913 (Tenn., 1978),*State v. Moriwake,* 65 Haw. 47, 647 P.2d 705 (1982), *State v. Abbati,* 99 N.J. 418, 493 A.2d 513 (1985), and *People v. Thompson,*424 Mich. 118, 379 N.W.2d 49 (1985). However, none of these cases except *Thompson* addresses the Due Process Clause in the context of a retrial after a properly declared mistrial, and *Thompson* does so only in dicta. The prosecutor may not abort a trial over a defendant's objection absent manifest necessity, *People v. Dawson,* 431 Mich. 234, 252, 427 N.W.2d 886 (1988), retry a defendant on higher charges after mistrial in an effort to penalize the defendant, *People v. Ryan,* 451 Mich. 30, 545 N.W.2d 612 (1996), nolle prosequi charges at trial without leave of court, M.C.L. § 767.29; M.S.A. § 28.969, or retry a defendant after having one full and fair opportunity at obtaining a conviction. *Dawson, supra* at 250, 427 N.W.2d 886.
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> ***
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> The contention that the Court should infer a remedy precluding retrial because of "the anxiety, stress, humiliation, and cost to the defendant of continual reprosecution where no new evidence exists" is a general claim of governmental unfairness. "Every prosecution ... 'is a public act that may seriously ... disrupt [the defendant's] employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends,' " *Albright, supra* at 296, 114 S.Ct. 807 (Stevens, J, dissenting), quoting *United States v. Marion*, 404 U.S. 307, 320, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971). Further, if recognized, guidelines for responsible decision making in applying the new remedy would be scarce and open-ended. If three trials are too many under substantive due process, why are not two? It could follow that either any retrial after a mistrial is barred as a violation of substantive due process, or that the theory as applied would result in arbitrary assertion of judicial authority.

Other states suggest that the trial judge can determine whether successive prosecutions may go forward, either in the exercise of his sound discretion, or in the interests of justice and

fairness, taking into consideration the competing state interest that encroaches on the individual liberty or property right of the defendant. *See State v. Witt*, 572 S.W. 2d 913 (Tenn. 1978); *State v. Huffman*, 215 P.3d 390 (Ariz. App. 2009) (while evidence sufficient to support finding that third trial would not violate due process or double jeopardy, as a matter of first impression trial court vested with authority to dismiss charges on grounds successive retrial after hung jury would be prejudicial).

Appellant fails to offer a single mandatory or persuasive authority which states that, after three reversals and two hung juries, due process mathematically dictates against trying Flowers a sixth time. Appellant relies on *State v. White*, 209 N.W. 2d 15, 16 (Iowa 1973), for his proposition that at some point, "the pursuit of justice must end." However, *White* held that "No court has attempted to arbitrarily fix the permissible number of times a defendant may be retried after mistrials." *Id.* at 17. Due to the fact that there is no rule in place that determines the specific number of times a defendant may be tried absent a conviction on the merits or an acquittal, a sixth trial does not offend constitutional protections.

Moreover, Appellant takes this "pursuit of justice" statement out of context, in that *White's* holding was strictly limited to a consideration of Double Jeopardy, not due process. In *White*, the Iowa Supreme Court held that a third trial resulting in the defendant's conviction did not violate Double Jeopardy where the defendant's first two trials resulted in hung juries. *White* cited the case of *U.S. v. Jorn*, 400 U.S. 470 (1971), in which the U.S. Supreme Court recognized that the State should not be allowed to repeatedly seek a conviction, thereby subjecting a defendant "to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity." *White, id*. at 16-17. The U.S. Supreme Court, however, afforded a remedy for such a problem:

> These considerations have led this Court to conclude that a defendant is placed in jeopardy in a criminal proceeding once the defendant is put to trial before the trier of the facts, whether the trier be a jury or a judge. *See Green v. United States*, supra, at 188, 78 S.Ct., at 223; *Wade v. Hunter*, 336 U.S. 684, 688, 69 S.Ct. 834, 836, 93 L.Ed. 974 (1949).

U.S. v. Jorn, 400 U.S. 470, 479 (1971).

White does not address multiple prosecutions from the standpoint of due process. *White* recognizes a defendant's constitutional right to be free from Double Jeopardy, nothing more. *See Sierb*, 581 N.W. 2d at 224 ("The rationale of *Green* is inapposite [to a due process claim] because *Green* involved not a case of continuing jeopardy, as is involved here, but rather a case of double jeopardy. Moreover, the Supreme Court expressly recognized that jeopardy does not bar a second trial under circumstances where a jury has failed to reach a verdict").

Flowers was not subjected to Double Jeopardy any more than White was. Nor was Flowers deprived of his due process rights. For indeed, even if this Court were to conduct some sort of test to balance Flowers's dissatisfaction over being re-prosecuted, with the State's interest in holding Flowers responsible for killing four people, the scales tip in favor of the State.

In *State v. Witt*, 572 S.W. 2d 913, another case on which Appellant relies, the Tennessee Supreme Court upheld a trial judge's decision to dismiss murder charges against the defendant after three mistrials had been declared. The Supreme Court specifically recognized that neither double jeopardy or due process issues were present:

> We do not think that the relief applicable here can be accurately labeled double jeopardy, cruel and unusual punishment or due process. However, we think that trial judges have the inherent authority to terminate a prosecution in the exercise of a sound judicial discretion, where, as here, repeated trials, free of prejudicial error, have resulted in genuinely deadlocked juries and where it appears that at future trials substantially the same evidence will be presented and that the probability of continued hung juries is great.

Witt, 572 S.W. 2d at 917. Thus, the only issue considered was whether the dismissal was within the trial judge's "sound discretion," considering the possibility that future trials would also result in hung juries. *Id*.

The Arizona Court of Appeals, Division 2, appears to be one of the few courts recognizing a claim of due process with respect to multiple prosecutions. In *State v. Huffman*, 215 P.3d 390, 394 (Ariz. App. 2009) the Arizona court held:

> Our courts have not addressed whether a successive prosecution that does not violate double jeopardy principles may still violate a defendant's due process rights. Other jurisdictions treat double jeopardy and due process considerations separately and, regarding the latter, permit trial courts to consider a wide variety of factors in determining whether, in the interests of justice, a successive prosecution may go forward.

Huffman held that while a trial court may indeed have the power to dismiss a prosecution as violating due process standards, it may not do so absent a finding that "the interests of justice" require it. *Huffman*, 215 P.3d at 394-96. *Huffman* suggested that "interests of justice" should be defined as a balance, between the additional expense, prejudice and anxiety experienced by the defendant, and the competing state interest in seeking justice and serving the citizens of the state. *Id*. *See State v. Moriwake*, 647 P.2d 705, 712 (Haw. 1982) (Simply put, "(i)t is a matter of balancing the interest of the state against fundamental fairness to a defendant with the added ingredient of the orderly functioning of the court system").

The underlying purpose of substantive due process is to secure a defendant from the arbitrary exercise of governmental power. *Foucha v. Louisiana,* 504 U.S. 71, 78, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992). The State submits that such has not occurred in this case. Appellant has failed to produce a single legal authority which requires this Court to consider his claim of multiple prosecutions as a potential violation of due process. The State submits that if

Flowers's multiple prosecutions do not violate Double Jeopardy, for those same reasons his multiple prosecutions do not violate due process.

Nevertheless, in the event this Court determines that due process dictates balancing the defendant's desire to be free from prosecution against the State's desire to bring this case to a conclusion, the State would submit the interests of justice tip the scales in favor of the prosecution. Appellant has never been acquitted of the capital murders of Tardy, Rigby, Golden or Stewart. He has already been convicted four times; the idea that "the probability of a jury reaching a verdict is almost nonexistent" is itself unreliable. *See State v. Witt*. Thus, there is no question that the evidence is sufficient to convict Flowers.

Moreover, while the State may previously have committed reversible error in these cases, the State is not actively trying to delay, gain tactical advantage or sabotage this case[36]. Flowers's latest trial was not some carbon copy of his previous cases. The State followed this Court's direction and admonishment, working to correct the previous errors which resulted in reversal. The State provided witnesses such as Odell Hallmon, who did not testify for the State until after Flowers's first three trials. The State produced testimony to bolster past credibility issues with their witnesses. And the defense has been afforded the opportunities to impeach the witnesses, and provide witnesses of their own.

Thus, after four convictions and sixteen years of failing to hold Flowers accountable for the murders of Tardy, Golden, Rigby and Stewart, the scales of justice—if some sort of precedent indeed requires a due process balance—certainly weigh in favor of the State. That Flowers is understandably unhappy at being convicted, yet again, cannot outweigh the interests of the State of Mississippi in holding a convicted quadruple murderer responsible for his actions.

[36] Rest assured, although wanting to get justice for the Tardy Furniture murders, the State did not wish to try Flowers VI any more than Flowers wanted to defend against it. The State certainly intended for Flowers's trials to have been concluded years ago.

VIII. THE TRIAL COURT DID NOT ERR IN REFUSING APPELLANT'S PROPOSED CIRCUMSTANTIAL EVIDENCE INSTRUCTION.

At trial Appellant requested two circumstantial evidence instructions, D-6, and D-7. Proposed Instruction D-6 stated as follows:

> Each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt.
> Proposed Instruction D-7 stated as follows:
>
> The Court instructs the jury that the prosecution has used circumstantial evidence to show that Curtis Flowers committed the charged crimes, then the evidence must be so strong as to establish guilt beyond a reasonable doubt, and must also be so strong as to rule out any other reasonable explanation except that of guilt. Circumstantial evidence is anything other than direct evidence, such as, to give one example, testimony of someone who witnessed an event. In other words, you may not return a verdict of guilty if you could reasonably interpret the facts in a way that would show Mr. Flowers to be not guilty.

C.P. 2720-2723.

The standard for reviewing a denial of a proposed jury instruction is well-settled:

> 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.

Austin v. State, 784 So. 2d 186, 193 (Miss. 2001) (quoting *Humphrey v. State*, 759 So. 2d 368, 380 (Miss. 2000) (citing *Heidel v. State*, 587 So. 2d 835, 842 (Miss. 1991)).

"A trial judge is under no obligation to grant redundant instructions. The refusal to grant an instruction which is similar to one already given does not constitute reversible error." *Montana v. State*, 822 So. 2d 954, 961 (Miss. 2002) (citations omitted); *see Edwards v. State*, 737 So. 2d 275, 316 (Miss. 1999) (trial court is within its authority to deny instructions covered

by other instructions). Finally, before an instruction may be granted, there must be in the record an evidentiary basis for it. *Neal v. State*, 525 So. 2d 1279, 1288 (Miss. 1987) (citing *Johnson v. State*, 416 So. 2d 383, 388 (Miss. 1982) and *Dunaway v. State*, 157 Miss. 615, 617, 120 So. 770 (1930)); *see also Bell v. Watkins*, 692 F.2d 999 (5th Cir. 1982) (due process requires judge to give a lesser included offense instruction if evidence permits jury rationally to find the defendant guilty of the lesser offense and acquit him of the greater; however, no due process violation unless there is some evidence to support an instruction on the lesser included offense).

A two-theory instruction provides that when a jury has considered facts and circumstances along with all other evidence, and every reasonable theory of innocence has been excluded, the jury must resolve the case in favor of the defendant. *Pitts v. State*, 241 So. 2d 668, 670 (Miss. 1970). A two theory instruction "is a specific type of circumstantial evidence instruction." *McInnis v. State*, 61 So. 2d 872, 875 (Miss. 2011). For the purposes of a two-theory instruction, "[a] circumstantial evidence case ... is one in which there is neither an eyewitness nor a confession to the crime." *State v. Rogers*, 847 So. 2d 858, 863 (Miss. 2003):

> A two-theory instruction directs the jury on what to do when "the record supports two or more hypotheses of the crime committed and all the evidence of the crime is circumstantial. The considerations for giving a circumstantial-evidence instruction or a two-theory instruction are the same are the same. If any direct evidence is presented, the trial court may properly refuse a circumstantial-evidence instruction. […] Stated differently, "[a] circumstantial evidence case (for the purposes of granting a "two-theory" instruction) is one in which there is neither an eyewitness nor a confession to the crime."

Rogers, id.

Appellant's other proposed instruction stems from *Sandstrom v. Montan*a, 442 U.S. 510 (1979), wherein the U.S. Supreme Court held that a jury instruction, to wit, that the law presumes a person intends the ordinary consequences of his voluntary acts, violates due process. Sandstrom was convicted of deliberate homicide, by purposely or knowingly causing the

victim's death. The defendant argued that the giving of the presumptive instruction shifted the burden of proof on the knowledge element of the crime. The U.S. Supreme Court agreed, recognizing a defendant's constitutional right to have his conviction supported by proof of every fact necessary to constitute the crime charged. The Court held that such instruction violated constitutional protections by burden shifting or conclusively presuming intent.

Appellant's proposed instructions are, in light of the factual circumstances of this case, unsupported by the law. Where there is direct evidence, circumstantial instructions are unnecessary. *Gray v. State*, 549 So. 2d 1316, 1324 (Miss. 1989). Circumstantial evidence instructions should only be given when the prosecution can produce neither an eyewitness nor a confession. *Stringfellow v. State*, 595 So. 2d 1320, 1322 (Miss. 1992). In *Ladner v. State*, 584 So. 2d 743. 750 (Miss. 1991), this Court held that a confession which constitutes direct evidence is not limited to a confession to law enforcement. *See also Taylor v. State*, 672 So. 2d 1246, 1270 (Miss. 1996). Indeed, a confession to a jail-house informant nevertheless removes a case from the circumstantial realm. *Manning v. State*, 735 So. 2d 323, 337-39 (Miss. 1999).

Flowers's reliance on *McNeal v. State*, 551 So. 2d 151 (Miss. 1989) is both misplaced and obsolete. Appellant argues that the direct evidence in this case—Appellant's confession to Odell Hallmon—was legally insufficient to be labeled "direct evidence." This was, according to Appellant, due to Hallmon's palpably non-existent credibility as a jailhouse snitch. Appellant cites both *McNeal* and *Moore v. State*, 787 So. 2d 1282 (Miss. 2001) for the proposition that some direct evidence can be so weak as to warrant the giving of a circumstantial evidence instruction.

In *McNeal*, this Court refused to address the trial court's denial of a circumstantial evidence instruction where the only direct evidence was the defendant's confession to a fellow inmate. This Court did note that the snitch in *McNeal* was given a reduced sentence in exchange

for his testimony, and also that the snitch was uncertain of the source of his own factual testimony[37]. However, while this Court recognized the existence of a problem with jail-house snitch testimony,[38] it chose not to act at that time. *McNeal v. State*, 551 So. 2d at 157-59.

In *Ladner v. State*, 584 So. 2d 743 (Miss. 1991) this Court resolved the *McNeal* issue of using informant testimony as direct evidence[39]. Ladner claimed the trial court erred in not giving a circumstantial evidence instruction, where the only direct evidence against him was the testimony of a jailhouse snitch. This Court disagreed:

> Ladner has attacked the testimony of Eddie Prevost in preceding issues. This Court has affirmed the action of the lower court in declining to suppress that evidence and the statement received from Ladner by Prevost. The present issue amounts to a continuation of the contention.
>
> A circumstantial evidence instruction must be given only when the prosecution can produce neither an eyewitness nor a confession/statement by the defendant. *Clark v. State,* 503 So.2d 277, 279 (Miss.1987). The "confession" which constitutes direct evidence of a crime is not limited to a confession to a law enforcement officer but also includes an admission made to a person other than a law enforcement officer. *Mack v. State,*481 So.2d 793, 795 (Miss.1985). In *Holliday v. State,* 455 So.2d 750, 752–53 (Miss.1984), a witness testified that he had overheard the defendant say to another person that he had killed his wife. This Court held that the circumstantial evidence instruction was not required. *See Foster v. State,* 508 So.2d 1111, 1115 (Miss.1987)(Court held that without "jailhouse confession" the case would have been entirely circumstantial).[FN1]
>
> > FN1. *McNeal v. State,* 551 So.2d 151 (Miss.1989), is not authority for Ladner's position on this issue. *McNeal* was decided on other grounds and is not authority here.
>
> The trial judge conducted a thorough suppression hearing and gave the defense every opportunity to put on evidence in support of the motion to suppress

[37] Factually, neither of those things occurred in Hallmon's situation. There is no evidence Hallmon received a benefit for his testimony. Hallmon also was very clear as to where he received his information about the crime—from Flowers, and only from Flowers.

[38] The reference to an "unholy alliance" was made by the California Attorneys for Criminal Justice, not by this Court, as Appellant suggests. *McNeal*, 551 So. 2d at 158, fn. 2.

[39] The *Ladner* court also specifically held, with respect to the circumstantial instruction issue, that "*McNeal* was decided on other grounds and is not authority here." *Ladner*, 584 So. 2d at 750, fn. 1.

Prevost's testimony. He granted the defense instructions which charged the jury to view that testimony with caution:

> Eddie Prevost has testified in this case and his testimony is to be considered and weighed with great care and caution. In making this determination you may consider the witness' bias or interest. You may give it such weight and credit as you deem it is entitled.

The lower court did not err in refusing to grant a circumstantial evidence instruction.

Ladner, id. at 750-51.

In *Moore v. State*, 787 So. 2d at 1288, this Court relied on *Ladner* in rejecting the defendant's argument that informant testimony does not constitute direct evidence:

> Moore alleges that the trial court erred in refusing to give four requested jury instructions on circumstantial evidence, asserting that the only direct evidence of his guilt consisted of his alleged jailhouse confession to Andre Bully. This Court finds no error by the trial court in refusing these instructions.
>
> This Court has held that a confession constitutes direct evidence and that the existence of a confession precludes the need to provide circumstantial evidence instructions, stating that:
>
> > A circumstantial evidence instruction must be given only when the prosecution can produce neither an eyewitness nor a confession/statement by the defendant. *Clark v. State,* 503 So.2d 277, 279 (Miss.1987). The "confession" which constitutes direct evidence of a crime is not limited to a confession to a law enforcement officer but also includes an admission made to a person other than a law enforcement officer. *Mack v. State,*481 So.2d 793, 795 (Miss.1985). In *Holliday v. State,* 455 So.2d 750, 752–53 (Miss.1984), a witness testified that he had overheard the defendant say to another person that he had killed his wife. This Court held that the circumstantial evidence instruction was not required. *See Foster v. State,* 508 So.2d 1111, 1115 (Miss.1987) (Court held that without "jailhouse confession" the case would have been entirely circumstantial).
>
> *Ladner v. State*, 584 So.2d 743, 750 (Miss.1991). As Moore points out, prior to *Ladner,* this Court expressed doubt as to whether a jailhouse informant's testimony "should be considered as direct evidence which would prevent the granting of a circumstantial evidence instruction." *McNeal,* 551 So.2d at 159. While *McNeal* declined to answer that question, *Ladner* settled the matter, holding that when the type of testimony given by Bully in the case sub judice is present, circumstantial evidence instructions are not necessary. Thus, Moore's second assignment of error is without merit.

The trial court was justified in refusing Appellant's two theory instruction, as this was not a circumstantial case. In addition to the circumstantial evidence, Appellant confessed to the crime. That Odell Hallmon was allegedly a snitch, or that his testimony was allegedly unreliable, was fully explored on cross-examination[40]. Moreover, the jury was instructed that "the law looks with suspicion and distrust on the testimony of a jailhouse informant, and requires the jury to weigh the same with great care and suspicion," and "look on it with district and suspicion." C.P. 2796 (Instruction 10). The trial court followed the existing precedent of this Court in refusing a circumstantial evidence instruction. Accordingly, there is no error.

With respect to Appellant's request for a *Sandstrom* instruction, the State is uncertain as to the application of this U.S. Supreme Court case to the case *sub judice*. *Sandstrom* did not proffer a particular instruction; it prohibited presumptive instructions that shift the burden of proof to the defendant. *Sandstrom v. Montana*, 442 U.S. 510 (1979). Flowers does not argue that the State was improperly granted an instruction which violated *Sandstrom*. Moreover, Flowers does not explain how a case dealing with intent or deliberate homicide applies to his capital murder case, in which intent is not an element of capital murder. Flowers has failed to cite any authority, relevant to the facts at hand, which justifies the giving of his proposed "*Sandstrom*" instruction. Appellant's "failure to cite relevant authority obviates [this Court's] obligation to review such issues." *Byrom v. State*, 863 So.2d 836, 866 (Miss. 2003) (quoting *Simmons v. State*, 805 So.2d 452, 487 (Miss. 2001) (citing *Williams v. State*, 708 So.2d 1358, 1362-63 (Miss. 1998)). This Court has held that issues raised on appeal, where the "defendant . . . failed to cite any relevant authority to support . . ." them, were procedurally barred from review. *Fulgham v. State*, 46 So.3d 315, 341 (Miss. 2010); *see Thorson*, 46 So.2d 85, 110 (Miss. 2004).

[40] No testimony was presented to the jury as to whether Hallmon received a benefit in exchange for his testimony.

Finally, to the extent Flowers is arguing that because the evidence of robbery was circumstantial (or because the robbery required a finding of intent) he was entitled to a circumstantial instruction for capital murder, this argument is unsupported. The intent to rob necessary to prove the underlying felony of robbery can be shown from the facts surrounding the crime. *Mackbee v. State*, 575 So. 2d 16, 33-34 (Miss. 1990); *Wheat v. State*, 420 So. 2d 229, 238-39 (Miss. 1982); *Voyles v. State*, 362 So. 2d 1236, 1242-43 (Miss. 1978). Furthermore, if the issue of intent to rob is the only element that is proved entirely by circumstantial evidence, there is no requirement that a circumstantial evidence instruction be given—as the case itself is not wholly circumstantial. *Williams v. State*, 445 So. 2d 798, 808 (Miss. 1984).

This issue is procedurally barred and without merit.

IX. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AT THE PENALTY PHASE OF APPELLANT'S TRIAL.

A. Jury Instructions

Instruction D-34 stated as follows:

> This Court instructs the jury that if you cannot, within a reasonable time, agree as to punishment, the Court will dismiss you and impose a sentence of imprisonment for life without the benefit of parole.

C.P. 2842.

Appellant submits the omnibus instruction did not appropriately encompass the elements of D-34, as the omnibus instruction failed to explain the legal consequences of being unable to agree on sentencing[41]. Appellant submits it was insufficient to simply allow counsel to argue that Flowers would receive life in prison if the jury couldn't agree on sentencing, as arguments

[41] Appellant references "errors in the omnibus sentencing instruction noted elsewhere in this Brief." Brief of Appellant, pp. 152-53. The State notes that the omnibus instruction given was the standard, long-form omnibus instruction.

of counsel are deemed "advocacy" statements. Thus, according to Appellant, the failure to give D-34 left the jury with the impression that a hung jury would result in a new trial.

Appellant was not entitled to this instruction and fails to cite any relevant authority entitling him to such an instruction. For that reason, his claim should be barred from consideration. *See Fulgham v. State*, 46 So. 3d 315, 341 (Miss. 2010). Additionally, this Court has held that the giving of such instruction is unwarranted. *See Gillett v. State*, 56 So. 3d 469, 515-16 (Miss. 2010) (no error in denying instruction stating, "If you cannot, within a reasonable time, agree as to punishment, [judge] will dismiss you and impose a sentence of life without the benefit of parole").

In *Edwards v. State*, 737 So. 2d 275, 316 (Miss. 1999), this Court held the there was no error in denying a jury instruction which stated, "This court instructs the jury that if you do not agree upon punishment the court will sentence the defendant to life imprisonment without possibility of parole or early release." According to *Edwards*, when read as a whole the jury instructions made clear the jury could sentence defendant to death or to life in prison, or inform the court of their inability to unanimously agree on punishment. Therefore, the instruction was cumulative and the failure to give it not in error. The *Edwards* Court also held there would have been no error even if the jury had not been instructed on what would happen if they could not agree. *Edwards*, 737 So. 2d at 316-17. *Edwards* cited to *Stringer v. State*, 500 So. 2d 928, 945 (Miss. 1986), wherein this Court ruled that a trial judge did not err in failing to instruct the jury that if "they were unable to agree within a reasonable time on the punishment to be imposed, [the defendant] would be sentenced to life imprisonment." *Edwards, id*.

There was no error in the denial of this instruction.

Instruction D-12 stated as follows:

> The Court instructs the jury that if the State has relied on circumstantial evidence to establish an aggravating circumstance, then the evidence for the State must be so strong as to establish the aggravating circumstance not only beyond a reasonable doubt, but must exclude every other reasonable hypothesis other than establishment of the aggravating circumstance.

C.P. 2884.

> Instruction D-33 stated as follows:
>
> During the penalty phase, I instruct you that if there is a fact or circumstance in this case which is susceptible to two interpretations, one favorable and the other unfavorable to Mr. Flowers and if, after considering all the other facts and circumstances, there is a reasonable doubt regarding the correct interpretation, then you must resolve such doubt in favor of Mr. Flowers and place upon such fact or circumstance the interpretation most favorable to Flowers.

C.P. 2844.

The trial court did not abuse its discretion in denying either Proposed Instruction D-12 or D-33. Appellant characterizes this as an issue of first impression in this Court[42]; it is not. These same instructions were proposed by a capital defendant, and rejected by this Court, in *Fulgham v. State*, 46 So. 3d 315, 340 (Miss. 2010):

> Contrary to Fulgham's argument, we have held that a defendant (under the proper circumstances) is entitled to a circumstantial-evidence instruction at the *guilt* phase. We find no authority to support such an instruction at sentencing. We find the trial court did not abuse its discretion by excluding these circumstantial-evidence instructions from the jury's consideration at the sentencing phase.

The *Fulgham* Court relied on the following language from *King v. State*, 960 So. 2d 413 (Miss. 2007), in rejecting the defendant's contention that she was entitled to circumstantial evidence instructions at sentencing:

> King argues that the trial court erred in refusing to give jury instruction DSP-19, which required that the State's evidence be strong enough "to exclude every other reasonable hypothesis, or supposition" and that "facts or circumstances in this

[42] Brief of Appellant, p. 156.

> case acceptable to two reasonable interpretations" be resolved in the defendant's favor, because the State's case rested entirely on circumstantial evidence. King argues that while he confessed to the burglary, he did not confess to Patterson's killing or any of the facts supporting the HAC and "avoiding arrest" aggravators. Therefore, King argues that the jury's finding of those aggravators could have been based only on inferences from circumstantial evidence, amounting to reversible error by the trial court in refusing to give instruction DSP-19. The State submits that this case is not entirely circumstantial, as King's admission to being in Patterson's home and burglarizing it took this case out of the realm of pure circumstance.
>
> In *Lynch v. State*, 877 So.2d 1254, 1268 (Miss.2004), this Court discussed the issue of whether circumstantial evidence language is required in a sentencing instruction. This Court held that:
>
> > [I]t is true that in circumstantial evidence cases the state must prove the defendant's guilt beyond a reasonable doubt and to the exclusion of every other hypothesis consistent with innocence. *See, Jones*, 797 So.2d at 927; *Henderson*, 453 So.2d at 710;*Jackson v. State*, 684 So.2d 1213, 1229 (Miss.1996) (*quoting Isaac v. State*, 645 So.2d 903, 909 n. 7 (Miss.1994)). However, this Court has never held that circumstantial evidence language is required in charging the jury as to the requirements of Miss.Code Ann. § 99-19-101(7).
>
> […] Accordingly, we find this issue devoid of merit.

King v. State, 960 So. 2d at 446. Appellant's contention is without legal support and is, thereby, due to be dismissed.

> Instruction D-38 stated as follows:
>
> A mitigating factor is anything that in fairness or mercy may reduce blame or that may justify a sentence less than death. Even if a factor does not justify or excuse the crime it may still be a mitigating factor. It is for each of you to decide if a factor is mitigating.
>
> Mercy alone can be a mitigating factor you can consider in deciding not to impose the death penalty and to impose a sentence of life without parole.

C.P. 2835.

> Instruction D-39 stated as follows:

> The death penalty is never required. You may always find that Mr. Flowers should be sentenced to life in prison or life in prison without the possibility of parole.

C.P. 2833.

The trial court did not abuse its discretion in denying either Proposed Instruction D-38 or D-39. In *Foster v. State*, 639 So. 2d 1263 (Miss. 1994), the defendant requested the jury be instructed that it could impose a sentence of life for any or no reason at all. The State classified such instruction as a mercy instruction and this Court, in response, stated, "Insofar as the State contends Foster is not entitled to a mercy instruction, the State cannot be refuted." *Foster*, 639 So. 2d at 1300. Foster clearly held that, "upon close examination" the instruction was, in fact, a mercy instruction. *Id*. The *Foster* Court found "no basis for requiring the jury to specifically be instructed that they may ignore the balancing of aggravating and mitigating circumstances and vote for life imprisonment based on their decision to be merciful." *Foster, id*. at 1301; *see Hansen v. State*, 592 So. 2d 114, 150 (Miss. 1991) ("our cases have consistently refused to hold that the Court is required to grant a mercy instruction").

Mercy instructions and instructions on jury nullification are not allowed. *See Manning v. State*, 735 So. 2d 323, 351-52 (Miss. 1999); *Foster v. State*, 639 So. 2d 1263, 1300-01 (Miss. 1994), *Ballenger v. State*, 667 So. 2d 1242, 1264-65 (Miss. 1995). Moreover, instructions which inform the jury that they can return a sentence of life regardless of whether or not aggravating factors are found are fully covered in the standard long form instruction. No additional or separate instruction is required. *Edwards v. Thigpen*, 595 F. Supp. 1271 (S.D. Miss. 1984), aff'd sub nom, *Edwards v. Scroggy*, 849 F.2d 204 (5th Cir. 1988), cert. denied sub nom, *Edwards v. Black*, 489 U.S. 1059 (1989).

Additionally, "This Court has clearly established that while a jury does indeed have the power to acquit for any reason whatsoever, a defendant is not entitled to an instruction that it can

ignore the law to do so." *Brengettcy v. State*, 794 So. 2d 987, 999 (Miss. 2001). A jury cannot be instructed that it can acquit for any reason if the evidence supports a conviction. Although Appellant's jury was entitled to choose life over death regardless of the facts, it was not entitled to an instruction on this right. *See Hansen v. State*, 592 So. 2d 114, 140 (Miss. 1991).

The rationale for denying mercy instructions is discussed in *Jenkins v. State*, 607 So. 2d 1171 (Miss. 1992). According to *Jenkins,* mercy instructions directly violate the rule of law set forth by the United States Supreme Court:

> The recent decisions of this Court and of the United States Supreme Court enumerate that a mercy instruction is not required at trial. In *Ladner,* we held that a defendant "has no right to a mercy instruction." *Ladner*, 584 So. 2d at 761. In *Saffle v. Parks*, 494 U.S. 484, 492-93, 110 S.Ct. 1257, 1262-63, 108 L.Ed. 2d 415, 427-28 (1990), the U.S. Supreme Court stated that the giving of a mercy instruction results in a decision based upon whim and caprice. Thus, the lower court was within its discretion when it denied the mercy instruction below.

Jenkins v. State, 607 So. 2d at 1181. In *Saffle*, 494 U.S. at 1263, the U.S. Supreme Court held that it would be "difficult to reconcile a rule allowing the defendant's fate to turn on emotional sensitivities with our longstanding recognition that above all, capital sentencing must be reliable, accurate and nonarbitrary."

Moreover, there is no merit to Appellant's argument that, in failing to give D-38 and 39, the jury was never instructed what action to take in the event they found the mitigators and aggravators to be equally weighted. As this Court held in *Foster v State*, Miss. Code Ann. Section 99-19-101(2)(c) "clearly requires the jury to find that the mitigating circumstances outweigh the aggravating circumstances." *Foster*, 639 So. 2d 1263, 1301. Instructions D-38 and 39 were unwarranted, and the trial court did not err in refusing such instruction.

Instruction D-4 stated as follows:

> You are to begin your deliberations with the presumption that there are no aggravating circumstances that would warrant a sentence of death, and the presumption that the appropriate punishment in this case would be life

> imprisonment. These presumptions remain with Mr. Flowers throughout the sentencing hearing and can only be overcome if the prosecution convinces each one of you, beyond a reasonable doubt, that death is the only appropriate punishment.

C.P. 2908.

The trial court did not abuse its discretion in denying Proposed Instruction D-4. This Court rejects such "presumption of life" instructions. In *Gillett v. State*, 56 So. 3d 469, 514-15 (Miss. 2010), this Court held:

> Next, Gillett argues that the trial court erred in denying his "presumption-of-life" instructions: DA–10, DA–11, DA–19, and DA–39. This Court addressed the issue of whether a defendant is entitled to presumption-of-life instructions in *Brown v. State*, where it held:
>
> We have repeatedly said that we reject the "proposition that a defendant should go into the sentencing phase with a presumption that life is the appropriate punishment." *Watts v. State*, 733 So.2d 214, 241 (Miss.1999) (internal quotes and citation omitted); *see also Jackson v. State*, 684 So.2d 1213, 1233 (Miss.1996). We adhere to that standard today. Because the judge did not abuse his discretion in excluding the proposed instructions, this assignment of error is without merit.
>
> *Brown v. State*, 890 So.2d 901, 920 (Miss.2004).

B. Instructions on the Aggravating Circumstances

The trial court instructed Flowers's jury on three aggravating circumstances: the great risk of harm aggravator (Miss. Code Ann. Section 99-19-101(5)(c); the pecuniary gain while in the commission of a robbery aggravator (Subsection 101(5)(d) and (f)); and the avoiding arrest aggravator. Appellant argues the evidence was insufficient to support these aggravators, and that the aggravators as given were unconstitutional.

1. Great Risk of Harm Aggravator

Appellant asserts the jury should not have been instructed on the "great risk of harm" aggravator. Appellant submits that the only individuals at risk were the victims themselves; as

the indictment included a criminal count related to each of these victims, the aggravator improperly duplicated elements of the indicted charges. Appellant submits this duplication is unconstitutional "for the same reasons that the dual use" of the underlying felony as aggravator is unconstitutional. Problematic with that argument is that this Court holds that it is not unconstitutional to use the underlying felony as the aggravator; thus, by extension, Appellant fails to cite any authority by which the "great risk" aggravator would unconstitutionally duplicate an element of the indicted charge.

In *Flowers v. State*, 842 So. 2d 531 (Miss. 2003), this Court rejected such argument, holding that the use of the "great risk" aggravator did not violate the *Blockburger* test for violations of protections against Double Jeopardy. According to the *Flowers* court, the use of the "great risk" aggravator did not punish the defendant twice based on the same set of facts. This Court relied on precedent from *Wilcher v. State*, 697 So. 2d 1087 (Miss. 1997):

> Wilcher argues that, by having his conviction in the capital murder of Moore considered as an aggravating circumstance, the jury was improperly required to weigh the same facts twice against the mitigating evidence, in violation of the double jeopardy clause of the Fifth Amendment. Wilcher correctly states that a capital murder defendant cannot be convicted of both capital murder and the underlying felony; the reason being that the defendant cannot be twice prosecuted for the same actions. *See Meeks v. State*, 604 So.2d 748, 753 (Miss.1992). By analogy, Wilcher argues that the "same elements" or "*Blockburger*" test precludes the introduction of his conviction of the capital murder conviction of the second victim as an aggravator at the sentencing hearing on the first murder victim. *See Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932).
>
> Wilcher's analogy does not hold true. In this case, the court is not faced with one action for which Wilcher could be prosecuted on either the underlying crime or the capital murder. Rather, there are actually two murder victims-the product of two separate criminal actions by Wilcher. Even though the same facts surround the murder of each victim, there are undeniably two victims, and two counts of capital murder arising from Wilcher's actions. Therefore, the "same elements" test does not apply.

Flowers, 842 So. 2d at 561-62.

This Court, in *Flowers*, also observed the precedent of the Fifth Circuit:

> [C]onsideration of other crimes at sentencing does not implicate the Double Jeopardy Clause because the defendant is not actually being punished for the crimes so considered. Rather, the other crimes aggravate his guilt of, and justify heavier punishment for, the specific crime for which defendant has just been convicted. *See United States v. Bowdach*, 561 F.2d 1160, 1175 (5th Cir.1977) (rejecting virtually identical double jeopardy argument).

Flowers, id. at 562.

To successfully use the "great risk" aggravator, the risk must be to someone other than the intended victim. *Flowers, id*. at 561 (citing *Porter v. State*, 732 So. 2d 899 (Miss. 1999)). That evidence was present and sufficient in this case. The evidence showed Flowers had a motive to kill Bertha Tardy: she fired him and docked his paycheck after he damaged store equipment. Flowers entered Tardy Furniture for the purpose of killing Bertha Tardy—with a single, execution style gunshot wound to the head. In the process, Flowers shot and killed three other people—including Derrick Stewart and Robert Golden, who had just started working at Tardy Furniture that very morning. Such evidence is sufficient to support the aggravating circumstance that Stewart, Golden (and even Rigby) were killed, not because Flowers had any sort of problem with them, but simply because they were in the wrong place at the wrong time. As the evidence was sufficient, and the aggravator itself is constitutional, there is no error.

2. Avoiding Arrest Aggravator

Appellant next argues that the definition of avoiding arrest is unconstitutionally overbroad, and that the only evidence of his avoiding arrest was the fact that he killed four people. Appellant submits such evidence, by itself, is insufficient to warrant the jury's finding of the commission of the avoiding arrest aggravator.

As to Appellant's general contention that the aggravator itself is unconstitutional, this Court pointed out in *Brawner v. State*, 947 So. 2d 254, 266 (Miss. 2006),

> This Court has addressed this exact argument numerous times and found it without merit. *Doss v. State,* 882 So.2d 176, 195 (Miss.2004); *Wiley v. State,* 750 So.2d 1193 (Miss.1999); *Puckett v. State,* 737 So.2d 322, 362 (Miss.1999); *Carr v. State,*655 So.2d 824, 854 (Miss.1995); *Walker v. State,* 671 So.2d 581, 611 (Miss.1995); *Chase v. State,* 645 So.2d 829, 858 (Miss.1994). Briefly stated, our death penalty statute does not equate every murder with an attempt to eliminate witnesses, but rather narrowly defines to whom the avoiding arrest aggravating factor may be applied. *Wiley,* 750 So.2d at 1207.

In *Wiley,* this Court addressed the issue of whether the avoiding arrest aggravator was overly broad:

> Wiley also argues that, if the "avoiding arrest" aggravator is applicable to this case, then it is unconstitutionally overbroad. He contends that, if all that is required to support an instruction on the "avoiding arrest" aggravator is the killing of a victim, then all felony murders would, by definition, be committed for the purpose of avoiding arrest. That is, Wiley asserts that the "avoiding arrest" aggravator does not genuinely narrow the class of persons eligible for the death penalty. Wiley places great emphasis on the fact that the second gunshot victim (the decedent's daughter) was not killed. That is, one of the witnesses to the crime was left alive.
>
> A similar argument was considered and rejected in *Walker v. State,* 671 So.2d 581, 611 (Miss.1995):
>
> Walker argues that because every murder necessarily eliminates a witness to that crime, the avoiding arrest aggravator must be given with a limiting instruction channeling the jury's focus to those situations where there is specific evidence demonstrating that one of the purposes behind the killing was the killer's desire to avoid detection and apprehension for an underlying crime. *See State v. Williams,* 304 N.C. 394, 284 S.E.2d 437, 455 (1981). However, Walker compares our law to that of surrounding jurisdictions and concedes, "Mississippi, like our sister States, does not equate the killing of the victim with the elimination of a witness in every case."
>
> Walker's contention that this aggravator must be accompanied by a limiting instruction has been repeatedly rejected by this Court. In *Hansen v. State,* 592 So.2d 114, 152 (Miss.1991). The Court stated:
>
> > It is argued some sort of limiting instruction need be given to narrow this aggravator. In *Leatherwood v. State,* 435 So.2d 645, 651 (Miss.1983), we rebuffed this contention, stating, 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.

Id. at 152-53.

Walker, 671 So.2d at 611.

> In *Gray v. Lucas*, the Fifth Circuit rejected almost identical contentions to those made here. 677 F.2d [1086] at 1109-1110 [(5th Cir.1982)]. It noted that the Mississippi courts had limited the application of the circumstances "to refer to purposefully killing the victim of an underlying felony to avoid or prevent arrest for that felony." So construed, the court observed that this factor was directed to a legitimate state interest and was "not so broad that it comprehends an impermissibly large group of murders." *Id.* at 1110.
>
> *Chase v. State*, 645 So.2d 829, 858 (Miss.1994). Therefore, this aggravating factor, as construed, is not overly broad.

Wiley v. State, 750 So. 2d at 1207.

As the aggravator itself is not unconstitutionally overbroad, the only remaining question is whether the evidence was sufficient to prove that "a substantial reason for the killing was to conceal" Flowers's identity, or to cover his tracks, "so as to avoid apprehension and eventual arrest by authorities." The State submits the evidence was sufficient for such a finding; therefore, it was proper for the court to allow the jury to consider this aggravator. *Gillett v. State, 56 So. 3d 469, 505-06* (quoting *Leatherwood v. State*, 435 So.2d 645, 651 (Miss.1983)).

Consider the evidence presented against Curtis Flowers. As the jury found, this was not a botched robbery, or an accidental killing during the commission of a robbery. Each of these victims were killed, execution style; each died from a single gunshot wound to the head[43]. Such evidence clearly demonstrates Flowers had no intent to leave a single witness alive. Flowers also knew at least two of the victims, having worked with both Tardy and Rigby prior to the murders.

Flowers took other steps to cover his involvement in these murders, including using his cousin's gun to commit the murders, in an effort (as the defense so capitalized on) to place suspicion on another individual. Flowers disposed of his Fila's Grant Hill shoes (failing to

[43] Golden was shot twice, but each shot was lethal.

realize that the empty box and several witnesses could nevertheless tie him to those bloody prints found at the crime scene). Flowers attempted to hide the money stolen from Tardy Furniture in the headboard of his bed. Flowers lied to the police, twice, when denying he had been on the east side of Highway 51 on the morning of the murders, when denying he had been near Tardy Furniture on the morning of the murders. Flowers asked Odell Hallmon to discredit Patricia Odom's testimony, so that the case against Flowers would be thrown out.

Efforts to dispose of and/or conceal evidence of a crime are sufficient to support an avoiding arrest instruction. *Wiley v. State*, 750 So. 2d 1193, 1206 (Miss. 1999); *Hodges v. State*, 912 So. 2d 730 (Miss. 2003) (*habeas corpus granted, in part, on other grounds, Hodges v. Epps*, 2010 WL 3655851). Evidence that the defendant knew the victim can be considered when determining whether the avoiding arrest aggravator is proper. And while lying to the police does not by itself constitute evidence that a murder was committed to avoid arrest, such fact can be considered as part of the evidence as a whole, so that the jury can infer Flowers's intent to leave Tardy Furniture without detection or suspicion, thereby avoiding arrest. *Taylor v. State*, 672 So. 2d at 1275; *King v. State*, 960 So. 2d 413, 444-45 (Miss. 2007). The evidence was sufficient to support the avoiding arrest aggravator, and the aggravator itself was constitutional. Therefore, this issue is without merit.

3. Pecuniary Gain/Robbery Aggravator

The evidence was sufficient to support a finding that Flowers committed these murders for pecuniary gain while in the commission of a robbery. Tardy Furniture was, in fact, robbed of three hundred eighty-nine dollars ($389.00) at the time of the murders. Bertha Tardy had told Flowers days earlier that he would be receiving no paycheck for the days he had worked, as his check was being used to cover the damaged equipment and a thirty dollar ($30.00) loan Tardy had extended to Flowers. Flowers told police, two days after the murder, that the only money he

had was what was left[44] from mowing yards and a $119.00 unemployment check he had received six days earlier. And yet, suspiciously hidden in the headboard of Flowers's bed was two hundred fifty-five dollars ($255.00) in cash. When combined with the fact that, beside the missing money, the only other paperwork found disturbed at Tardy Furniture was paperwork—in Flowers's name—identifying how much money Tardy Furniture owed Flowers, such evidence is sufficient to support the pecuniary gain/robbery aggravator.

Appellant also argues that it is unconstitutional for the jury to be allowed to consider the aggravator of robbery and pecuniary gain and that, in light of *Ring v. Arizona*, 536 U.S. 584 (2002) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000) this Court should reconsider its prior rulings. Appellant fails to suggest how *Ring* or *Apprendi* invalidate this Court's longstanding rule regarding the use of a robbery/pecuniary gain aggravator. The pecuniary gain aggravator cannot be used as a separate aggravating circumstance in a murder/robbery where the underlying felony of robbery is also used as an aggravator. *Turner v. State*, 732 So. 2d 937, 954-55 (Miss. 1999). That did not happen here.

In a murder/robbery case the aggravating circumstance should read, "the capital offense was committed for pecuniary gain while the defendant was engaged in the commission of a robbery." Miss. Code Ann. Sections 99-19-105(d), (f). Flowers's jury received that instruction. This Court has repeatedly upheld the giving of such instruction as proper. *See Howell v. State*, 860 So. 2d 704, 755-56 (Miss. 2003); *Simmons v. State*, 805 So. 2d 452, 499 (Miss. 2001); *Turner v. State, id*. Accordingly, the trial court did not abuse its discretion in giving the combined instruction.

Appellant's reliance on *Ring* and *Apprendi* is misplaced, and does not change the law allowing use of a robbery/pecuniary gain aggravator. Neither case stands for the proposition for

[44] Flowers told police that he used part of that money to purchase beer and food. R. 2499.

which Appellant cites them, and Appellant's reliance on *Ring* and *Apprendi* is misplaced. Appellant claims that, without aggravators, the maximum penalty for capital murder is life imprisonment. This is incorrect. The maximum penalty for capital murder in Mississippi is death. Miss. Code Ann. Section 1-3-4 states:

> The term "capital murder" when used in any statute shall denote criminal cases, offenses and crimes punishable by death, or imprisonment for life in the state penitentiary.

See Miss. Code Ann. 99-19-101(1) (setting forth capital sentencing procedures to be employed "[u]pon conviction or adjudication of guilt of a defendant of capital murder…"). The charge of capital murder, in Appellant's case, was based on the underlying felony of robbery. Once Appellant was indicted for capital murder he was immediately eligible upon conviction for the maximum sentence: death.

Apprendi is inapplicable to Appellant's case for the simple reason that in Mississippi, death—not life—is the statutory maximum, and is submitted to the jury for determination beyond a reasonable doubt. See Miss. Code Ann. 1-3-4. Therefore, a sentence of death is not beyond the prescribed statutory maximum for Appellant's crimes, making *Apprendi* inapplicable. In *Ring*, what made Arizona's statute unconstitutional was that criminal defendants were only death eligible if the jury found that aggravating circumstances existed[45]. Because Mississippi's law defines certain crimes as death eligible, the statute does not place the sentence of death beyond the statutory maximums. Therefore, the holding of *Apprendi* and Appellant's attempt to extend it through *Ring* have no application to the Mississippi capital sentencing scheme.

[45] Under Arizona's sentencing scheme, once the jury determined Ring's guilt, the judge could set the sentence as either life in prison or death; Ring could only receive death if the judge determined there was at least one aggravator. Absent additional findings, "[b]ased solely on the jury's verdict finding Ring guilty of first degree felony murder, the maximum punishment he could have received was life imprisonment." *Ring*, 122 S.Ct. at 2437. This is not the case in Mississippi. From the time a person is charged with capital murder he is eligible for death upon conviction.

In the case sub judice, Appellant's jury unanimously found the aggravating circumstances beyond a reasonable doubt. *Ring* simply does not apply to Mississippi's statutory scheme for capital sentencing, because the concerns expressed in *Ring* (and by Appellant) are fully answered by the statute itself, which requires the jury to find aggravators beyond a reasonable doubt. *See Pitchford v. State*, 45 So. 3d 216, 258 (Miss. 2010); *Goff v. State*, 14 So. 2d 625, 665-66 (Miss. 2009); *Loden v. State*, 971 So. 2d 548, 565 (Miss. 2007) (all finding *Ring* and *Apprendi* inapplicable to Mississippi's capital murder sentencing scheme).

4. Harmless Error Analysis

Finally, Appellant argues that even if a single aggravator is invalid, such finding by this Court necessitates a new sentencing proceeding. Appellant argues the Sixth Amendment requires this Court to remand his case rather than reweighing for harmless error pursuant to Mississippi Code Annotated Section 99-19-105(3)(d). This Court has rejected Appellant's argument. In *Gillett v. State*, 56 So. 3d 469, 508, this Court held that, pursuant to Section 99-19-105(3)(d), if an aggravator is found invalid, this Court will conduct a reweighing process to determine whether the remaining aggravators are outweighed by the mitigators, whether the inclusion of the invalid aggravator was harmless, or both. *Gillett* specifically held *Ring* and *Apprendi* do not apply to this reweighing process. *See Moffett v. State*, 49 So. 3d 1073, 1115 (Miss. 2010) (*Apprendi* and *Ring* do not apply to Mississippi's capital sentencing scheme); s*ee generally Brown v. Sanders*, 546 U.S. 212, 126 S.Ct. 884 (2006) (in "weighing states"—like Mississippi—use of invalid aggravator skews balance of mitigators and aggravators and requires reversal of the defendant's sentence, except where appellate court determines error was harmless or reweighs the mitigators against the valid aggravators).

Appellant's request for relief is due to be denied.

X. APPELLANT'S CONVICTION AND SENTENCE ARE CONSTITUTIONAL.

A. The Trial Court Did Not Err in Allowing the State to Try Flowers Under a Sentence of Death.

Citing not a single legal authority, Appellant submits the State should be precluded from seeking the death penalty in this case because 1) the evidence was insufficient to convict Flowers to begin with; 2) the prosecution was "out to get" Flowers; 3) the prosecution committed *Batson* error during voir dire[46]; and 4) Flowers has been tried too many times for the State to be entitled to pursue capital punishment[47]. Flowers suggests the proper remedy is for this Court to remand the case for a new trial, prohibiting the State from seeking the death penalty[48].

As the State has shown in response to Appellant's Issues I, II, VI and VII, none of these allegations of error have merit. Accordingly, none of these allegations can lead to any "sentencing" remedy for Flowers. This, of course, leads to the fact that Appellant's argument is, itself, incongruous. For indeed, if the evidence had been insufficient to convict Flowers, if the prosecution had committed misconduct or *Batson* error, if Flowers's multiple trials were constitutionally impermissible, the remedy would not be resentencing. The remedy would not be to preclude the State from seeking the death penalty. The only remedy would be for this Court to reverse Flowers's conviction and/or sentence.

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[46] Flowers also argued against death qualification during voir dire. However, pursuant to *Witherspoon v. Illinois*, 391 U.S. 510 (1968), the State has a right to question jurors as to their views regarding imposition of the death penalty).

[47] Appellant's reliance on motions and hearings which technically preserved these issues is somewhat disingenuous. The motions Flowers cites in his Brief of Appellee were filed prior to his fifth trial. Appellate counsel attempts to paint a picture of the parties engaging in extensive deliberations over these issues. However, during Flowers's pending trial—the only trial currently "on trial"— appellate counsel re-submitted all 61 motions, filed in all five of Flowers's previous trials and, at one time, asked the judge for a new ruling on each motion. C.P. 1928; R. 463. All but two of the "hearings" appellate counsel referenced in the Brief of Appellee, were conducted two trials ago, by Flowers's former attorneys.

[48] The State is curious as to how Appellant's request for a new trial, *sans* death penalty, comports with his argument in Issue VII that the number of times Appellant has already been tried for these murders violates Due Process and the prohibition against Double Jeopardy. The State must presume that, should this Court provide Appellant the sentencing remedy requested herein in Issue X, it must also find Appellant has waived his right to assert (as he did in Issue VII) that multiple trials are unconstitutional.

As Flowers has cited no authority for the premise that error sufficient to reverse a conviction or sentence is independently sufficient to preclude the State from seeking the death penalty at a future trial, this issue is without supporting legal authority and due to be dismissed. Appellant's "failure to cite relevant authority obviates [this Court's] obligation to review such issues." *Byrom*, 863 So.2d at 866 (quoting *Simmons v. State*, 805 So.2d 452, 487 (Miss. 2001) (citing *Williams v. State*, 708 So.2d 1358, 1362-63 (Miss. 1998)). This Court has held that issues raised on appeal, where the "defendant . . . failed to cite any relevant authority to support . . ." them, were procedurally barred from review. *Fulgham v. State*, 46 So.3d 315, 341 (Miss. 2010); *see Thorson*, 46 So.2d 85, 110 (Miss. 2004).

Further, this is not a matter of State entitlement to seek the death penalty. This is a matter of whether or not Flowers is eligible for the death penalty. He is. Mississippi Code Annotated Section 97-3-19(2)(e) defines capital murder as:

> [t]he *killing of a human being without the authority of law* by any means or in any manner ... *in the following cases:* ... [w]hen done with or without any design to effect death, by any person engaged in the commission of the crime of rape, burglary, *kidnapping*, arson, robbery, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or in any attempt to commit such felonies ....

Miss. Code Ann. Section 1-3-4 sets the penalties for capital murder as:

> The term "capital murder" when used in any statute shall denote criminal cases, offenses and crimes punishable by death, or imprisonment for life in the state penitentiary.

As Flowers was indicted for capital murder, upon his conviction he was eligible for death.

The U.S. Supreme Court has recognized a state's right to seek the death penalty, even after multiple prosecutions. In *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 1862 (1981), the U.S. Supreme Court held that double jeopardy protections may extend to capital sentencing proceedings; however, a defendant must have secured an acquittal of the death

penalty in order to successfully contest the later imposition of the death penalty on double jeopardy grounds. In *Sattazahn v. Pennsylvania*, 537 U.S. 101, 123 S.Ct. 732 (2003), the defendant's jury deadlocked at the penalty phase of trial, resulting in the trial court discharging the jury and entering a default life sentence. After the defendant's conviction was reversed, defendant was convicted a second time—and this time sentenced to death. The U.S. Supreme Court held that because the defendant's first jury did not acquit him of death, Double Jeopardy did not bar the prosecution from seeking capital punishment at a subsequent trial. *Sattazahan*, 537 U.S. at 109-114.

Although not cited to this Court, at trial Flowers relied on *North Carolina v. Pearce*, 395 U.S. 711 (1969), *overruled in part, Alabama v. Smith*, 490 U.S. 794 (1989) for the proposition that prosecutorial vindictiveness can serve to preclude the State from seeking the death penalty. *Pearce* dealt with limiting the imposition, by a sentencing authority, of harsher sentences after conviction upon retrial. Although refusing to pronounce harsher punishments at subsequent trials unconstitutional, *Pearce* held that, "It would be a flagrant violation of the Fourteenth Amendment for a state trial court to follow an announced practice of imposing a heavier sentence on every reconvicted defendant for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside." *Pearce*, 395 U.S. at 723-24. Thus, *Pearce* served to prevent a trial judge from imposing a heavier punishment against a defendant on retrial as a penalty for the successful exercise of his constitutional rights.

Pearce has been both expanded and restricted since its release in 1969. *Pearce* and its progeny[49] are inapplicable to the instant case, however, for several reasons. First, any

[49] Pearce dealt with actual vindictiveness on the part of the sentencing authority—in that case, the trial judge. In *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973) the Supreme Court refused to extend *Pearce* to jury sentencing (*Pearce* inapplicable where jury imposed increased sentence on retrial). In *Blackledge v. Perry*, 417 U.S. 21 (1974) the Court analogized *Pearce* to prosecutorial vindictiveness in dropping a misdemeanor charge and seeking a felony conviction after the defendant's successful appeal. *Blackledge* would, of course, be inapplicable to Flowers's situation, for two reasons. First, *Blackledge* dealt with harsher charging indictments—at all times Flowers has only

presumptive vindictiveness on the part of the State is negated by the fact that the State did not seek a harsher punishment after Flowers succeeded in having his conviction set aside. The State sought the death penalty in Flowers's first two trials. After Flowers successfully secured a reversal of his first two convictions, the State again sought the death penalty. Flowers secured a third reversal, and this time the State sought a lesser penalty of life imprisonment (as part of a deal with the defense, see *infra*). After a mistrial, the State then reinstated its initial decision to seek death in this case—a decision which remained through the instant case.

Thus, the presumption of vindictiveness pronounced in *Pearce*—a presumption that the State would seek the death penalty only to punish Flowers for appealing his case—was not present here. After Flowers won three appeals, the State intended to seek the death penalty yet again. It removed the capital sentencing option in *Flowers IV* only after Appellant's defense team leveraged that sentence against a surprise witness, effectively forcing the State to withdraw the death penalty in order to prevent the defense witness from testifying. As the trial court stated in the instant case:

> Mrs. Steiner: Allow me to renew from the—before the fifth trial, the third motion that was made at that time, Motion to Bar the Death Penalty Based on Prosecutor Vindictiveness and Misconduct. The fact is, Your Honor, that in 2007 the prosecutor opted to proceed with the trial in this manner not seeking the death penalty. The—
>
> The Court: Well, didn't that happen after y'all had come up with a last-minute witness that you sprung on the State that was going to testify about whether there was—about witness identification? And didn't after y'all agree not to seek that witness, didn't at that time the State then agree not to seek the death penalty? I, I read that in a transcript.
>
> Mrs. Steiner: Yes, Your Honor.

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been charged with capital murder. Second, unlike *Blackledge*, the jury in Flowers's case was, at all times, offered the lesser option of sentencing Flowers to life. It chose not to—in sixteen years, no jury has chosen to sentence Flowers to life.

> The Court: So, so that is the reason why it was not done. They didn't seek the death penalty in '07, it was my understanding, because of y'all's springing a witness at the last minute and them not having time to research or to dine a rebuttal witness. And so Mr. DeGruy agreed not to seek that in exchange for the State not seeking the death penalty. Is that not what happened?
>
> Mrs. Steiner: If the Court please, I wasn't the person there. There was an agreement to withdraw. I think a motion in limine had been made by—
>
> The Court: Well, I know I read a transcript where Mr. DeGruy said if the State was not seeking the death penalty, he would not seek that witness, identification witness.
>
> Mrs. Steiner: Yes, Your Honor.
>
> The Court: So is that not the reason, what happened, why it was dropped?
>
> Mrs. Steiner: That was one factor, and we have that witness—

R. 1098-99.

The State reinstated its original decision to seek death only after a mistrial in this case—which had nothing to do with Flowers's prior appeals. The State then continued to seek death during the remaining trials. As the State's decision to seek death instead of life came about after a mistrial, any presumption that the State attempted to penalize Flowers for exercising his constitutional rights is demonstrably absent.

Further, *Pearce* and its progeny are limited in scope. *Pearce* does not extend to the State's right to seek the death penalty; it is limited only to the trial judge's decision to impose a harsher sentence (something which did not occur here). *Blackledge* is limited to the prosecutor's decision to eliminate a charge against a defendant and present the jury only with a stronger charge (something which did not occur here, *see* fn. 49). And in *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973), the U.S. Supreme Court held that, in states which entrust sentencing to a jury (like Mississippi), due process does not require extension of *Pearce*-type restrictions to jury sentencing. According to *Chaffin*,

> *Pearce* was not written with a view to protecting against the mere possibility that, once the slate is wiped clean and the prosecution begins anew, a fresh sentence may be higher for some valid reason associated with the need for flexibility and discretion in the sentencing process. The possibility of a higher sentence was recognized and accepted as a legitimate concomitant of the retrial process. […] Thus, the jury, unlike the judge who has been reversed, will have no personal stake in the prior conviction and no motivation to engage in self-vindication.

Chaffin, 412 U.S. at 25-26.

Finally, *Pearce* is inapplicable because Flowers never received a more severe sentence. Flowers's jury never acquitted him of the death penalty[50]. *Pearce* and its companion cases deal with situations where a defendant receives a "higher sentence" on retrial. "The evil *Pearce* sought to prevent" was the vindictiveness of the sentencing authority in imposing an "enhanced sentence" after a successful appeal. Here, however, the only sentence Flowers ever received was death. Due Process is violated where vindictiveness results in the imposition of a harsher sentence; Flowers has presented no case law to suggest that due process is violated where the end result is the imposition of an equal sentence. Appellant's "failure to cite relevant authority obviates [this Court's] obligation to review such issues." *Byrom*, 863 So.2d at 866 (quoting *Simmons v. State*, 805 So.2d 452, 487 (Miss. 2001).

> [*Pearce* is limited to circumstances] where its "objectives are thought most efficaciously served," *Texas v. McCullough, supra,* 475 U.S., at 138, 106 S.Ct., at 979, quoting *Stone v. Powell,* 428 U.S. 465, 482, 487, 96 S.Ct. 3037, 3046, 3049, 49 L.Ed.2d 1067 (1976). Such circumstances are those in which there is a "reasonable likelihood," *United States v. Goodwin, supra,* 457 U.S., at 373, 102 S.Ct., at 2488, that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority. Where there is no such reasonable likelihood, the burden remains upon the defendant to prove actual vindictiveness, *see Wasman v. United States*, 468 U.S. 559, 569, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984).

Alabama v. Smith, 490 U.S. at 799-800.

[50] Indeed, if such had happened the State would have been precluded, pursuant to *Bullington*, from seeking the death penalty on retrial.

Flowers fails to show any reasonable likelihood that the State attempted to punish Flowers more harshly by seeking death from the start of this case, in 1996, and by continuing to seek death after a mistrial. That the State sought life after Flowers succeeded in appealing his convictions and sentences, but sought death after mistrial, does not evidence vindictiveness as defined in *Pearce*. Flowers's instant trial—the only trial "on trial" at this point—was not brought about as the result of the defendant's successful attempts at appeal. And his instant trial did not result in the imposition of a harsher sentence than previously imposed, as Flowers's two previous trials resulted in mistrials, and his first three trials resulted in death. *See U.S. v. Goodwin*, 457 U.S. 368, 376 (1982) ("Both *Pearce* and *Blackledge* involved the defendant's exercise of a procedural right that caused a complete retrial after he had been once tried and convicted").

"A corollary of the power to retry a defendant is the power, upon the defendant's reconviction, to impose whatever sentence may be legally authorized, whether or not it is greater than the sentence imposed after the first conviction." *Stroud v. U.S.*, 251 U.S. 15, 40 S.Ct. 50 (1919). Flowers's sentence was legally authorized, was not the result of vindictiveness, and was not greater than his previous sentences. This issue is both procedurally barred and without substantive merit.

Finally, Flowers's Brief includes a single sentence, to wit, that "this Court should do what the trial court failed to do by reversing and rendering the convictions on the Rigby and Golden cases as obtained in violation of Flowers [sic] Speedy Trial rights." Flowers references his Motion to Bar Trials on Untried Cases for Speedy Trial Violation, as well as a hearing on this Motion, but he makes no further argument.

Again, the State feels compelled to point out Appellant's subtle, yet continued, attempts to suggest that certain hearings or testimony occurred in Flowers's instant trial, when in fact they

occurred in Flowers's previous trials. The State, while asserting all applicable procedural bars, does not dispute that Flowers, in the case *sub judice,* moved for renewed rulings on all motions filed in all five previous trials and has perhaps—albeit in the narrowest of technical senses—preserved his right to object to sometimes decades old rulings here on appeal. However, Appellant must still be forthcoming with this Court.

With respect to this speedy trial claim, the actual motion and hearing were conducted in 2008 (what appears to be Flowers's fifth trial), by Flowers's former attorney, Andre de Gruy. During that pretrial motion hearing, Mr. de Gruy asserted that prior to Flowers's third trial the defense moved to prohibit the State from trying Flowers for the murders of Rigby and Golden, as the State waited nearly eight years to commence such proceedings. The record Flowers provides this Court, on this direct appeal review, is limited in scope—for instance, while the record suggests the issue has already been examined several times, Appellant does not include the original hearing on the speedy trial issue (apparently from Flowers's third trial—although the State is not certain).

According to Appellant's citations (see Brief of Appellant, p. 171), the only information contained in the record of the case *sub judice,* from which the State can herein piece together an argument regarding Flowers's right to a speedy trial, came from the trial court's 2008 denial of Flowers's motion:

> I do not see there to be speedy trial violations on those issues. It was my understanding based on what I know about the—about the proceedings, Flowers I was—I'm not sure who the victim was, but I know that originally the State had indicted four separate indictments. And it's my understanding that there was a—basically two were tried, and they were waiting on decisions from the Supreme Court before others were tried. So I certainly think any delay was a reasonable delay.
>
> Also, I don't see how there is going to be any possibility of prejudice to the defendant on a speedy trial issue, because all four murders occurred at the same time. So, you know, whether he is convicted of one or four murders, ultimately,

> you know, if he is convicted of one and gets the death penalty or convicted of all four and gets it or if he is convicted of all four and does not receive it, there is still no—consequences of one conviction or four convictions would be the same.
>
> But I do not see there to be any valid speedy trial issues. I am certain if there had been, the Supreme Court would have so found in the appeal in Flowers III […]

R. 337-38.

It is Appellant's job to make a record of the arguments presented on appeal. The burden rests upon the Appellant "to see to it that the record contain[s] all data essential to an understanding and presentation of matters relied upon for reversal on appeal." *Shelton v. Kindred*, 279 So. 2d 642, 644 (Miss. 1973) (citing *Willenbrock v. Brown*, 239 So. 2d 922, 925 (Miss. 1970)). Not only does Appellant fail to make a record for appeal, he also fails to even make an argument on appeal (limiting his entire argument to a single sentence—without a statutory or case reference—and the mention of a hearing which occurred in a previous trial). Further, Appellant is barred in Reply from making any argument, or presenting any evidence, which he failed to provide in his original Brief—to allow otherwise would be to preclude the State from asserting an effective Response. This issue is due to be dismissed.

B. The Indictments were Proper

Appellant claims that the failure to consolidate his four capital murder indictments into a single trial, combined with his failure to waive indictment, is unconstitutional pursuant to Mississippi Code Annotated Section 99-7-2. This argument is both legally and factually unsupported. Multi-count indictments, while permissive, are not mandatory. *Jones v. State*, 956 So. 2d 310 (Miss. App. 2006). Indeed, separate indictments are the "usual practice" in Mississippi, while multi-count indictments are "exceptional." In *Burton v. State*, 79 So. 2d 242 (Miss. 1955), three separate indictments were returned against the defendant based on the alleged killing of three people after a hit and run accident. This Court expressly held that, "When a

single unlawful act results in the killing of more than one person, each homicide constitutes a separate offense for which the defendant may be tried." *Id*. at 250.

Such rule did not change with the promulgation of multi-count indictments in Mississippi. In *Brooks v. State*, 832 So. 2d 607 (Miss. App. 2002), the Mississippi Court of Appeals, relying on the precedent of this Court, held as follows:

> Brooks argues the cocaine sales were part of a common scheme; therefore, he should have been charged in a multi-count indictment. Brooks is incorrect. Separate indictments are the usual practice in Mississippi, while multi-count indictments are exceptional. Mississippi Code Annotated § 99-7-2(1) (Rev.2000) provides the three exceptional situations in which a multi-count indictment *may* be brought: "(1) the offenses are based on the same act or transaction; or (2) the offenses are based on two (2) or more acts or transactions connected together; or (3) the offenses are based on two (2) or more acts or transactions constituting parts of a common scheme or plan." *Id.* **A basic tenet of statutory construction is that the word "shall" is a mandatory directive, and the word "may" is discretionary in nature.** *American Sand and Gravel Co. v. Tatum*, 620 So.2d 557, 563 (Miss.1993); *Planters Bank & Trust Co. v. Sklar*, 555 So.2d 1024, 1027 (Miss.1990). In this case, the State could have brought a multi-count indictment but was not required to do so.

Brooks v. State, 832 So. 2d at 610-611 (emphasis added).

Moreover, while the State agrees with Flowers that criminal defendants must waive indictment to in order to proceed, alternately, under a bill of information, Flowers was indicted for each of the murders for which he was tried and convicted. Therefore, the argument that Flowers did not waive his right to a multi-count indictment is nonsensical.

The sum total of Appellant's argument (devoid of record support) is that in 2004 the trial court verbally agreed to enter an order of consolidation for Flowers's third trial—pursuant to mutual agreement by both the State and Flowers—but did not put that agreement in writing; that in 2004 Flowers gave "unsworn"[51] consent to have the trial take place in Montgomery County; and that, in the instant case, the State did not attempt to renew the agreed consolidation prior to

[51] The State is uncertain as to what Flowers means by unsworn, in this context (e.g., not in an affidavit, not in a statement to the trial judge). The State also is uncertain as to how Flowers's consent to have venue in Montgomery County relates to indictments.

the instant trial "as the parties were ordered to do with respect to anything that had been decided by the earlier judge." R. 466. Appellant's citation to page 466 of the trial record shows no such order made by the trial court.

Flowers's skeletal allegation is that Mississippi Code Annotated Section 99-7-2 allows separate offenses to proceed under multi-count indictments, and that if such rule is not followed, the State must prove there was a consolidated prosecution occurring with Flowers waiving his right to be tried only by a single indictment. This is incorrect. Flowers has failed to cite to a single legal authority requiring the State to proceed under a multi-count indictment. Flowers has failed to cite to a single legal authority requiring Flowers formally waive his right to a multi-count indictment. Moreover, according to Flowers's own concession, this case has been proceeding in a consolidated manner since 2004, when the parties agreed to such. Indeed, it seems Flowers himself has wanted to proceed in a consolidated manner since prior to 2000. According to *Flowers v. State*, 773 So. 2d 309, 318 (Miss. 2000), it was Flowers who filed a "motion to consolidate the four murder indictments into one trial." And Flowers presents no evidence suggesting he objected to these cases proceeding in a consolidated manner, or that he requested the case be severed. This issue is without merit.

C. There was no Error in the Use of Victim Impact Testimony

During the sentencing phase of the trial the State sought to introduce victim impact testimony. Appellant submits the testimony improperly incited the jury. Appellant also submits the U.S. Supreme Court's decision in *Payne v. Tennessee* is "inconsistent with the requirements of the Eighth Amendment." Finally, Appellant encourages this Court to reverse his sentence on these grounds, arguing that he "suspects *Payne* will be abrogated by the United States Supreme Court."

Appellant's arguments are unsupportable. Victim impact evidence is admissible at sentencing. The United States Supreme Court endorsed the use of victim impact testimony in *Payne v. Tennessee*, 501 U.S. 808, 825 (1991):

> Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities. We think the *Booth* court was wrong in stating that this kind of evidence leads to the arbitrary imposition of the death penalty. In the majority of cases, and in this case, victim impact evidence serves entirely legitimate purposes. In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief. *See Darden v. Wainwright*, 477 U.S. 168, 179-183, 106 S.Ct. 2464, 2470-2472, 91 L.Ed.2d 144 (1986). Courts have always taken into consideration the harm done by the defendant in imposing sentences, and the evidence adduced in this case was illustrative of the harm caused by Payne's double murder.
>
> We are not of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant. "[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentence that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." *Booth*, 482 U.S. at 517, 107 S.Ct. at 2540 (WHITE, J., dissenting) (citation omitted). By turning the victim into a "faceless stranger at the penalty phase of the capital trial," *Gathers*, 490 U.S. at 821, 109 S.Ct. at 2216 (O'CONNOR, J., dissenting) *Booth* deprives the State of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder.

The Fifth Circuit has adopted the holding and rationale of *Payne*:

> In *Payne v. Tennessee*, the Supreme Court held that victim impact evidence is admissible to "show […] each victim's uniqueness as an individual human being." 501 U.S. 808, 823-27, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). "Victim impact evidence is [a] method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities." *Id*. at 825, 111 S.Ct. 2597. Evidence

> "about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated." *Id*. at 827, 111 S.Ct. at 2609. Victim impact evidence is admissible unless it "is so unduly prejudicial that it renders the trial fundamentally unfair" in violation of a defendant's Due Process rights. *Id*. at 825, 111 S.Ct. 2597; *see also Jones v. United States*, 527 U.S. 373, 401-02, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999).

U.S. v. Bernard, et al., 299 F.3d 467, 480-481 (5th Cir. 2002) (noting that improper characterizations of the defendant by the victims and requests for the jury to sentence the victim to death—neither of which occurred in Flowers's case—are the types of evidence considered inadmissible but, nonetheless, holding the error harmless).

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

Moreover, the victim impact testimony was proper in this case[52]. During the sentencing phase, Roxanne Ballard testified that, other than her mother, she only knew Carmen Rigby, who

[52] The State would also point this court to the mitigation evidence Flowers presented, which included a 16 minute video tape of Flowers singing gospel music with his father, and which included several witnesses testifying to Flowers's kind nature, his love of God and his good character. Flowers's father, in fact, was asked whether he expects Flowers has "raised his voice in song, in harmony with yours" for the last time; whether Flowers "will be deprived of trying to establish the joy of raising his voice in harmony." Flowers has no problem presenting the jury

had worked for Tardy Furniture for 20 years. Ballard described the murders as a "horrible" ordeal; stated that she and her mother were close; that she lost her mother's support; that she was "crushed" by the murders; and that her children will never know their grandmother. Ballard testified that she had been in Rigby's wedding, and that the Tardy and Rigby families "go way back." R. 3268. Brian Rigby, Carmen's son, testified that Derrick Stewart was one of his best friends. Rigby testified that he missed his mother and Stewart every day; that for a long time he did not want to be close to people because he was hurting; that he felt guilty about Stewart's death; and that all four victims "were great people." R. 3268-70.

Kathy Permenter, Derrick Stewart's mom, testified that losing Stewart was a nightmare; that Stewart loved baseball and was a loveable, tender-hearted kid; that she asks God to help her make it through the day; and that she keeps Stewart close to her by talking about him. R. 3270-73. Willie Golden testified that his brother's death impacted him because they were a small family, and he and Robert were close. Willie Golden testified that Robert's death has "been a struggle." R. 3274.

It is unclear how the State could have introduced more proper testimony at sentencing, and Appellant offers no such argument. Indeed, Flowers cannot pinpoint any specific testimony that supposedly rendered the trial "fundamentally unfair." *Payne*, 501 U.S. at 825. He simply asserts victim impact testimony as a whole is improper; but neither this Court nor the U.S. Supreme Court agrees with him. Nothing in the record indicates that the testimony was legally improper or led in any way to an unfair trial as would give Appellant a Due Process remedy under *Payne*. To the contrary, pursuant to *Payne* this testimony was proper.

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with a picture of his character; he has no problem presenting the jury with the impact his death would have on his family. He only has a problem with the victims being shown the same courtesy.

Indeed, this Court repeatedly has approved the admission of victim impact evidence like that presented in this case. In *Jordan v. State*, 786 So. 2d 987, 1016 (Miss. 2001), this Court held:

> Jordan alleges that the prosecution should have been prohibited from introducing evidence of the effect that Edwina Marter's death had on her family. However, in *Wells v. State*, 698 So. 2d 497, 512-513 (Miss. 1997), we held that victim impact evidence of this sort would be allowed in the sentencing phase of a capital murder trial. Specifically, we found that the United States Supreme Court had found that victim impact statements were not constitutionally barred by the Eighth Amendment. *Id*. at 513; *see Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). The Supreme Court stated, "'A State may legitimately conclude that evidence about the victim and 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.'" *Wells*, 698 So. 2d at 513 (quoting *Payne*, 111 S.Ct. at 2609). Therefore, this assignment of error is without merit.

See Wilcher v. State, 697 So. 2d 112, 113-114 (Miss. 1997) ("In this case, Bobby Glen Wilcher killed Katie Belle Moore by stabbing her fifteen times. The jury was entitled to know exactly who Katie Belle Moore was and what impact her death had. This information was relevant to the circumstances of the crime. Therefore, the admission of the victim's family's testimony was proper").

Flowers has presented nothing to demonstrate that the testimony in the case sub judice exceeded the scope of that which allowed by the Supreme Court of the United States, the Fifth Circuit Court of Appeals, this Court and the Mississippi Legislature. Thus, his claim is without legal or factual basis. Accordingly, the State submits that Flowers should not be allowed to limit the evidence at sentencing by turning the victims into "faceless stranger[s]." *See Payne*, 501 U.S. at 825.

D. The Imposition of the Death Penalty was Constitutional.

Appellant claims the indictment failed to charge all elements necessary to impose the death penalty under Mississippi law, including the aggravating factors and the *mens rea* element.

Appellant submits this Court's prior jurisprudence validating his indictment is incorrect. Appellant also alleges Mississippi Code Annotated Section 97-3-19(2)(e) is unconstitutional. Appellant's "failure to cite relevant authority obviates [this Court's] obligation to review such issues." *Byrom*, 863 So.2d at 866 (quoting *Simmons v. State*, 805 So.2d 452, 487 (Miss. 2001) (citing *Williams v. State*, 708 So.2d 1358, 1362-63 (Miss. 1998)). This Court has held that issues raised on appeal, where the "defendant . . . failed to cite any relevant authority to support . . ." them, were procedurally barred from review. *Fulgham v. State*, 46 So.3d 315, 341 (Miss. 2010); *see Thorson*, 46 So.2d 85, 110 (Miss. 2004).

Appellant contends the U. S. Supreme Court's decisions in *Apprendi* and *Ring* require aggravating circumstances be included in an indictment. *See Apprendi*, 530 U.S. 466 (2000); *Ring*, 536 U.S. 584(2002). "[T]his Court previously has rejected similar arguments regarding the applicability of *Ring* and *Apprendi* to Mississippi's capital murder sentencing scheme." *Pitchford v. State*, 45 So.3d 216, 258 (Miss. 2010); *see Goff v. State*, 14 So.3d 625, 665-66 (Miss. 2009); *Loden v. State*, 971 So.2d 548, 565 (Miss. 2007); *Jordan v. State*, 918 So.2d 636, 661 (Miss. 2005); *Knox v. State*, 901 So.2d 1257, 1269 (Miss. 2005); *Hodges v. State*, 912 So.2d 730, 775-77 (Miss. 2005); *Thorson v. State*, 895 So.2d 85, 105-106 (Miss. 2004). *Ring* and *Apprendi* "address issues wholly distinct from our law, and do not address indictments at all." *Pitchford*, 45 So.3d at 258. Relying on *Apprendi* and *Ring*, Appellant has "failed to cite any relevant authority to support . . ." this position. *Fulgham*, 46 So.3d at 341; *Thorson*, 46 So.2d at 110.

Appellant contends the Grand Jury's indictment charging him with capital murder violated his due process rights under the Fifth Amendment and his right to a jury trial under the Sixth Amendment. Citing *Ring*, Appellant argues that "any fact that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Appellant claims his indictment failed to list the aggravating circumstances

that the State intended to use in seeking the death penalty; he also argues the indictment failed to provide capital murder's requisite mens rea.

This Court has consistently rejected these arguments. *See e.g., Pitchford v. State*, 45 So.3d at 216; *see Goff v. State*, 14 So.3d 625, 665 (Miss. 2009) ("[w]hen [Appellant] was charged with capital murder, he was put on notice that the death penalty might result, what aggravating factors might be used, and the mens rea standard that was required"); *Loden*, 971 So. 2d at 564-65; *Brawner*, 947 So. 2d 254, 265 (Miss. 2006); *Jordan*, 918 So. 2d at 661; *Knox*, 901 So.2d at 1269; *Hodges*, 912 So. 2d at 775-77; *Thorson*, 895 So. 2d at 105-06; *Berry v. State*, 882 So. 2d 157, 172 (Miss. 2004); *Stevens v. State*, 867 So. 2d 219, 227 (Miss. 2003).

"The purpose of the indictment is to provide the accused reasonable notice of the charges against him so that he may prepare an adequate defense." *Brawner*, 947 So.2d at 265 (citing *Brown v. State*, 890 So.2d 901, 918 (Miss. 2004)). State law does not require an indictment charging capital murder to set forth the aggravating circumstances that "the State intends to use at sentencing, as elements of the offense." *Brawner*, 947 So.2d at 265 (citing *Jordan*, 918 So.2d at 661; *Berry*, 882 So.2d at 172). "[T]he general rule finds indictments that track the language of the criminal statute to be sufficient . . ." in charging capital felony murder. *Turner v. State*, 732 So.2d 937, 948 (Miss. 1999) (citing *Ward v. State*, 479 So.2d 713, 715 (Miss. 1985).

As a matter of law, "a defendant is not entitled to formal notice of the aggravating circumstances to be employed by the prosecution . . . ." *Brawner*, 947 So.2d at 265. "[A]ll that is required in the indictment is a clear and concise statement of the elements of the crime charged." Id. "[E]very time an individual is charged with capital murder they are put on notice that the death penalty may result. *Id.* (citing *Brown*, 890 So.2d at 918 (citing *Williams v. State*, 445 So.2d 798, 804 (Miss. 1984))). At the same time, "an indictment for capital murder puts a defendant on sufficient notice to what statutory aggravating factors will be used against him..."

The State's "death penalty statute clearly states the only aggravating circumstances which may be relied upon by the prosecution in seeking the ultimate punishment." *Pitchford*, 45 So.3d at 258, n. 127 (citations omitted) (quoting *Goff*, 14 So.3d at 665); *see also Brawner*, 947 So.2d at 265; *Stevens*, 867 So.2d at 227.

Appellant mistakenly contends the U. S. Supreme Court's finding in *Kansas v. Marsh* invalidates Mississippi's sentencing scheme. *Kansas v. Marsh*, 548 U.S. 163, 169-170 (2006). Appellant argues that the *Marsh* Court found Kansas's sentencing scheme "indistinguishable" from Arizona's capital sentencing scheme. As a result, Mississippi's capital sentencing statute, which mirrors Kansas, is unconstitutional.

Under his interpretation of *Marsh*, Appellant argues the State was constitutionally required to expressly state each aggravating circumstance that was used to sentence him to death. Appellant asserts facts elevating punishment above the maximum are considered elements of the aggravated offense. According to Appellant, because the indictment failed to provide the aggravating circumstances, Flowers was denied due process of law as well as fair notice and the right to a jury trial.

Appellant's claims are incorrect. *Marsh* found Kansas's capital sentencing scheme distinguishable from Arizona's unconstitutional scheme in one key respect:

> The Arizona statute, once the State has met its burden, tasks the defendant with the burden of proving sufficient mitigating circumstances to overcome the aggravating circumstances and that a sentence less than death is therefore warranted. In contrast, the Kansas statute requires the State to bear the burden of proving to the jury, beyond a reasonable doubt, that aggravators are not outweighed by mitigators and that a sentence of death is therefore appropriate; it places no additional evidentiary burden on the capital defendant. This distinction operates in favor of Kansas capital defendants.

Marsh, 548 U.S. at 173.

Similarly, Mississippi's scheme is distinguishable and constitutional. This Court has, on several different occasions, emphasized this distinguishing feature. In *Thorson v. State*, this Court stated:

> 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.

895 So.2d at 105 (quoting *Berry*, 882 So.2d at 173). Mississippi's capital sentencing statute passes constitutional muster, because it incorporates the principles of federal "death penalty jurisprudence . . .[specifically it] "rationally narrow[s] the class of death-eligible defendants..." *Marsh*, 548 U.S. at 173-74. Plus, it "permit[s] a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime." *Id*. at 174. The U. S. Supreme Court found:

> 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 determinations as to the presences of aggravating
> circumstances.

Id. (citing *Ring*, 536 U.S. at 608, n.6).

Further, Appellant argues that aggravating circumstances are facts that elevate the punishment of a crime beyond its statutory maximum, which in turn, require those facts be included in the indictment. The *Marsh* decision says nothing to that effect. The Court in *Marsh* clearly defined the role that aggravating circumstances play in capital sentencing schemes such as Mississippi's. In deciding whether or not to impose a sentence of death, Mississippi juries weigh aggravating and mitigating circumstances. See Miss. Code Ann. § 99-19-101(2). "Weighing [aggravating and mitigating circumstances] is not an end; it is merely a means to reaching a decision." *Marsh*, 548 U.S. at 179.

Aggravating and mitigating circumstances, then, are wholly unlike an offense's essential elements. A jury must decide a defendant's guilt or innocence based on whether the prosecution proved every essential element of a charged offense, beyond a reasonable doubt. Aggravating and mitigating circumstances, on the other hand, factor into "the jury's determination of whether life or death is the appropriate punishment." *Id.*

The indictment passes constitutional muster. Appellant had sufficient notice of death was a possible sentence; and also, the aggravating circumstances that might be used to impose a death sentence. The indictment expressly captioned the charges "capital murder." In addition, the indictment included the applicable section and subsection of the Code defining capital murder and listing the underlying felonies that elevate murder to capital murder. *Jones v. State,* 461 So.2d 686, 692-94 (Miss. 1984). The indictment provided Appellant sufficient notice that death was a possible sentence as well as the aggravating circumstances which may be used against him. *Pitchford*, 45 So.3d at 258.

Additionally, State law does not require that an indictment allege "deliberate design" "premeditated design" or "malice aforethought" when charging a defendant with capital felony murder. *Dycus v. State*, 440 So.2d 246, 256-57 (Miss. 1983). "[D]eliberate design is not required for all types of murder" in this State. *Miller v. State*, 748 So.2d 100, 103 (Miss. 1999) (citing *Faraga v. State*, 514 So.2d 295, 302 (Miss. 1987). "Our statutory provisions dealing with murder in the particular felony in this case . . .[arson] are intended to protect different societal interests." *Faraga*, 514 So.2d at 303. "'[T]he Legislature's prerogative is to define crimes and set the punishment for offenders, and this prerogative is given great latitude.'" *Faraga*, 514 So.2d at 302-03). A "killing shall constitute capital murder whether done 'with or without design' to effect the death of the person killed." *Id.* at 257 (quoting Miss. Code Ann. § 97-3-19(2)(e)).

This Court has time and again found Miss. Code Ann. Section 97-3-19(2) to be constitutional without a deliberate design element. *See e.g., Bennett v. State*, 933 So.2d 930, 951 (Miss. 2006); Jackson v. State, 860 So.2d 653, 666 (Miss. 2003); *Faraga v. State*, 514 So.2d 295, 302 (Miss. 1987). Burglary is the sole exception. "[C]apital murder cases predicated upon the felony of burglary . . . require a more detailed indictment . . ." because burglary "requires as an essential element the intent to commit another crime." *Turner*, 732 So.2d at 948 (quoting *State v. Berryhill*, 703 So.2d 250, 256-58 (Miss. 1997)).

Otherwise, the killing of a human being constitutes capital murder when committed "without the authority of law by any means or in any manner . . . done with or without any design to effect death, by any person engaged in the commission of . . ." specific underlying felonies or "in any attempt to commit . . ." those crimes. Miss. Code Ann. § 97-3-19(2)(e)-(f); *see e.g., Bennett*, 933 So.2d at 951; *Willie v. State*, 585 So.2d 660, 673-74 (Miss. 1991) (vacated on other grounds) (finding language such as "engaged in the commission of" in an indictment referred to an attempt or commission of an underlying felony, and "the immediate post-felony acts of the accused so connected to the cardinal charge as to become a part of it . . . "); *Caldwell v. State*, 481 So.2d 850, 853 (Miss. 1984); *Culberson v. State*, 379 So.2d 499, 503-04 (Miss. 1979).

In summary, the indictment expressly stated that capital murder was charged; and, included citation to the specific sources of the Mississippi Code of 1972, Annotated. There is no requirement that aggravating circumstances must be listed in an indictment. Mississippi's death penalty statute enumerates all possible aggravating circumstances. Aggravating circumstances are not elements of an offense, but factors in reaching a sentencing determination. Further, state law does not require that an indictment allege "deliberate design" "premeditated design" or "malice aforethought" when charging a defendant with capital felony murder. The requisite

mens rea is presumed. Appellant's assertion that the Grand Jury indictment failed to provide adequate notice under the Due Process clauses of the Fifth and Fourteenth Amendments fails based on these reasons.

Finally, to the extent Appellant alleges the State cannot use the underlying felony as an aggravating circumstance, this Court has consistently rejected such argument. This Court has repeatedly held that evidence of the underlying crime can properly be used to both elevate the crime to capital murder and, later, as an aggravating circumstance. As such, Appellant's claim is without merit. The use of the underlying felony as an aggravating factor has always been approved in Mississippi's capital scheme and is proper. For just a few examples, *see Goodin v. State*, 787 So. 2d 639, 645-55 (Miss. 2001); *Manning v. State*, 735 So. 3d 323, 350-51 (Miss. 1999); *Smith v. State*, 729 so. 2d 1191, 1223 (Miss. 1998); *Bell v. State*, 725 So. 2d 836, 858-59 (Miss. 1998); *Crawford v. State*, 716 So. 2d 1028, 1049-50 (Miss. 1998).

In *Lowenfield v. Phelps*, 484 U.S. 231 (1988), the petitioner sought to have his death sentence vacated on the ground that the sole aggravating circumstance found by the jury at the sentencing phase was identical to an element of the capital crime for which he was convicted. *Id*. at 241. The U.S. Supreme Court held that when a Constitutionally required narrowing of the class of persons eligible for the death penalty is accomplished by the legislative definition of capital offenses in the guilt phase (as is done in Mississippi), the jury's further narrowing in the sentencing phase (by prohibiting the use of the underlying felony as an aggravator) is not Constitutionally required. *Id*. at 241-46.

In *Minnick v. State*, 551 So. 2d 77, 97 (Miss. 1988) this Court held, based on *Lowenfield*, that the fact that the sole aggravating circumstance found by the jury in its penalty decision was identical to an element of the underlying offense did not violate the Eighth Amendment. In *Davis v. State*, 684 So. 2d 643, 663 (Miss. 1996) this Court recognized the propriety of such

doubling, where "a crime such as robbery is used both as the underlying felony to support a capital murder charge and as an aggravating circumstance to support the imposition of a death sentence."

XI. THIS COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO REMAND.

On May 1, 2012, Flowers filed with this Court a Motion for Remand and Leave to File Supplemental Motion for New Trial. Flowers's motion was "based on evidence that the prosecution failed to disclose highly material information affecting the credibility of one of its most important witnesses […]." According to appellate counsel, prior to the start of Flowers's sixth trial the defense requested updated criminal histories on the State's witnesses. In his Motion for Remand Appellant claimed the State failed, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963) to produce evidence that witness Patricia Odom[53] had been indicted in federal court for preparing false tax returns.

This Court denied Flowers's Motion on June 20, 2012. Flowers submits that, based on *Keller v. State*, 2012-DP-00425 (*en banc* Order, February 15, 2013), this Court allows retrospective evidentiary hearings in capital cases and should remand this case to the trial court for a determination as to whether the State violated *Brady*.

This issue is not proper for direct appeal. The trial court in the case sub judice was never presented with the issue of whether the State violated *Brady*. Moreover, the trial court also was never presented with Appellant's Motion to Remand; such pleading was submitted to, and denied by, this Court more than two years after the conclusion of Flowers's trial. Thus, there is no record evidence, of an error occurring at the trial court level, for this Court to consider.

[53] Appellant references this individual as Patricia Hallmon, Patricia Sullivan, and Patricia Hallmon Sullivan. At Flowers's trial, this witness identified herself as Patricia Odom—the State will use that name for the sake of consistency with the trial record.

On appeal, this Court's review is, as has been repeatedly held, limited to what appears in the record; this Court "will not consider matters that are not contained in the record." *Jones v. State*, 776 So. 2d 643, 649 (Miss. 2000) (citing Medina v. State, 688 So. 2d 727, 732 (Miss. 1996)). This Court "cannot decide an issue based on assertions in the briefs alone; rather issues must be proven by the record." *Id*. It is Flowers who "bears the burden of including in his appeal all necessary items in the record." *Id*. (citing *Bennett v. State*, 933 So. 2d 930, 944 (Miss. 2006)).

"One of the most fundamental and long established rules of law in Mississippi is that the Mississippi Supreme Court will not review matters on appeal that were not raised at the trial court level." *Estate of Myers v. Myers*, 498 So. 2d 376, 378 (Miss. 1986) (citing *Adams v. City of Clarksdale*, 95 Miss. 88, 48 So. 242 (1909)). The fact that Appellant is requesting a retrospective evidentiary hearing on the issue of whether the State committed a *Brady* violation shows that Appellant intends to make a record, and then use that record to assert error. This is improper on direct appeal.

Attempting to bypass legal requirements for the sake of convenience, Appellant relies on *Keller* for the premise that retrospective evidentiary hearings are now to become commonplace on direct appeal (thus calling into question even the need for post-conviction, and successive post-conviction). *Keller* is inapplicable to the facts made the basis of Appellant's Motion to Remand for the simple fact that, in *Keller*, the issue relevant to the hearing had already been presented, and a ruling issued, at Keller's trial.

During Keller's trial, the trial court conducted an evidentiary hearing to determine the admissibility of three statements Keller gave to the police. The trial judge suppressed two of the statements, he admitted the third "without discussion or analysis of the coercive circumstances of the first two confessions, or the possible effect on the third statement." (*En Banc* Order). This

Court, noting that the circumstances were "unusual" and the remedy "extraordinary", remanded the case to the circuit court for an evidentiary hearing to determine, essentially, why Keller's third statement to police was admissible.

Justice Kitchens, in his dissent to the *Keller* Order, aptly noted such remedy was a plunge into distorting the record, rather than clarifying it. (*En Banc* Order, Kitchen, J., dissenting). However, with respect to Flowers's Motion to Remand, the State respectfully submits Flowers wants neither to distort nor clarify. Instead, Flowers wants to add[54] to the record—a critical difference between the instant appeal and the majority ruling in *Keller*. *Keller* effectively allowed the trial court to "redo" a hearing already conducted. (*En Banc* Order, Kitchens, J., dissenting). In the event this Court affords capital defendants such rights, *Keller* still doesn't apply— Flowers, in his Motion to Remand, asked this Court to order the trial judge to initiate a hearing that had never been conducted, on an issue that had never been presented at trial.

Flowers fails to cite any relevant authority holding that this Court's ruling on a post-trial Motion for Remand is a proper assignment of error on direct appeal. Flowers fails to cite any relevant authority holding that a retrospective evidentiary hearing, on an issue not presented at trial, is merited in the direct appeal of a capital case. Appellant's "failure to cite relevant authority obviates [this Court's] obligation to review such issues." *Byrom*, 863 So.2d at 866 (quoting *Simmons v. State*, 805 So.2d 452, 487 (Miss. 2001) (citing *Williams v. State*, 708 So.2d 1358, 1362-63 (Miss. 1998)). This Court has held that issues raised on appeal, where the "defendant . . . failed to cite any relevant authority to support . . ." them, were procedurally barred from review. *Fulgham v. State*, 46 So.3d 315, 341 (Miss. 2010); *see Thorson*, 46 So.2d 85, 110 (Miss. 2004).

Accordingly, this issue is without merit.

[54] Adding to the record is not the same as supplementing the record. *See* M.R.A.P. 10(e).

XII. APPELLANT'S DEATH SENTENCE IS NEITHER CONSTITUTIONALLY NOR STATUTORILY DISPROPORTIONATE.

Mississippi Code Annotated Section 99-19-105 requires that, before a death sentence can be upheld, this Court must determine whether "the sentence imposed was excessive or disproportionate to the penalty imposed in similar cases" decided since *Jackson v. State,* 337 So. 2d 1242 (Miss. 1976). This Court's determination of whether a death sentence is excessive or disproportionate to the penalties in similar cases is made by comparing cases in which a death sentence was imposed and was reviewed on appeal by this Court. In making an individualized comparison, this Court considers both the crime and the defendant. *Cabello v. State,* 471 So. 2d 332, 350 (Miss. 1985); *see Lockett v. Ohio,* 438 U.S. 586 (1978).

Appellant has not cited to a single case to factually support his claim that his death sentence for murdering four people is excessive. Considering the crime and the Appellant, the death penalty in this case was neither excessive nor disproportionate. This case is similar to other cases in which this Court, in accordance with the legislative mandates of Section 99-19-105, studied both the defendant and the crime and affirmed the imposition of death.

As held in *Batiste v. State*, "On numerous occasions, this Court "has upheld the death penalty in cases involving capital murders committed during the commission of a robbery." *Batiste*, 2013 WL 2097551 (citing *Gillett v. State,* 56 So.3d 469, 524 (Miss.2010); *see Fulgham v. State,* 46 So.3d 315, 323 (Miss.2010); *Goff v. State,* 14 So.3d 625, 650 (Miss.2009); *Chamberlin v. State,* 989 So.2d 320, 345 (Miss.2008); *Doss v. State,* 709 So.2d 369, 401 (Miss.1997). The death penalty also has been upheld in cases involving capital crimes with multiple victims. *Manning v. State,* 765 So. 2d 516 (Miss. 2000); *Manning v. State,* 726 So. 2d 1152 (Miss. 1998) (post-conviction relief granted, in part, on other grounds); *Brawner v.*

State, 872 So. 2d 1 (Miss. 2004). Mississippi case law directly contradictions Appellant's claim of disproportionality. Accordingly, this assignment of error is without merit.

XIII. THERE IS NO ERROR, CUMULATIVE OR OTHERWISE.

Appellant claims that the aggregate effect of the variety of errors in this case requires reversal. Appellant urges this Court to review the aggregate of errors committed during the course of his trial and sentencing, and afford Appellant relief accordingly. According to Appellant, "This is one of those cases where, even if there are doubts about the harm of any one error in isolation, the cumulative error doctrine requires reversal." *Flowers v. State*, 947 So. 2d at 940 (Cobb, P.J., concurring).

Appellant failed to raise this issue at trial. As such, he is barred from doing so now. A trial court cannot be put in error on matters not presented to it for decision. *Moawad v. State*, 531 So. 2d 632, 634 (Miss. 1988); *see Walker v. State*, 823 So. 2d 557 (Miss. App. 2002) (failure to raise issue at trial level bars consideration at appellate level). Therefore, this assignment of error is procedurally barred from review by this Court. *Howard v. State*, 507 So. 2d 58, 63 (Miss. 1987).

Alternatively, and without waiving any applicable procedural bar, it is clear this claim is without substantive merit. Appellant has failed to demonstrate any errors committed during his trial or sentencing. Therefore, no prejudice can be shown either individually or cumulatively. In *Simmons v. State*, 805 So. 2d 452, 508 (Miss. 2001), this Court stated,

> Where there is no reversible error in any part […] there is no reversible error to the whole. *Doss v. State*, 709 So. 2d 369, 401 (Miss. 1996). Additionally, this Court has held that a murder conviction or a death sentence will not warrant reversal where the cumulative effect of alleged errors, if any, was procedurally barred. *Doss*, 709 So. 2d at 401.

A review of the record shows there were no individual errors which required reversal and no aggregate collection of minor errors that would, as a whole, mandate a reversal of either the conviction or sentence. Appellant has failed to demonstrate that an aggregation of errors created an "atmosphere of bias, passion and prejudice" so great as to "effectively deny" him a fundamentally fair trial. *Conner v. State*, 632 So. 2d 1239, 1278 (Miss. 1993) (citing *Woodward v. State*, 533 So. 2d 418, 432 (Miss. 1998)). All of Appellant's assignments of error "are either without merit or are procedurally barred. This issue itself if, therefore, without merit." *Brown v. State*, 798 So. 2d at 505.

CONCLUSION

For the above and foregoing reasons, the State submits that Appellant's conviction of capital murder and sentence of death should be affirmed. Furthermore, a date for the execution of the sentence of death should be set according to statute.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I, Melanie Thomas, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be electronically filed a true and correct copy of the foregoing BRIEF OF APPELLEE, which motion was electronically transmitted to the following:

Alison Steiner
Office of the State Public Defender
Capital Defense Counsel Division
239 N. Lamar St., Suite 604
Jackson, MS 39201

I also hereby certified that I have this day caused to be mailed a true, via U.S. postal service, postage prepaid, a true and correct copy of the foregoing Motion to the following:

Sheri Lynn Johnson
Keir Weyble
158-B Myron Taylor Hall
Ithaca, NY 14853

This the 15th day of November, 2013.

By: /s/Melanie Thomas