IN THE SUPREME COURT OF MISSISSIPPI
No. 2011 –DP-00410

TIMOTHY ROBERT RONK — APPELLANT

v.

STATE OF MISSISSIPPI — APPELLEE

Appeal from the Circuit Court of Harrison County,
First Judicial District
No. B2401-2009-0434

REPLY BRIEF OF APPELLANT

Alison Steiner MB # 7832
Office of the State Public Defender
Capital Defense Counsel Division
239 N. Lamar St. Suite 604
Jackson MS 39201
(601) 576-2314

Justin T. Cook, MB # 102622
Office of the State Public Defender
Indigent Appeals Division
P.O. Box 3510
Jackson MS 39207
(601) 576-4290

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

Table of Contents i

Index of Authorities ii

Statement of Issues vi

Reply Argument 1

I. The Trial Court Violated State And Federal Law And Committed Reversible Error By Improperly Instructing The Jury At the Culpability Phase. 1

II. There Was Insufficient Evidence To Support A Conviction Of Capital Murder in the course of Arson. 19

III. The Death Sentence Must Be Vacated and the Case Remanded For a New Sentencing Proceeding Because Trial Counsel Gave Constitutionally Ineffective Assistance Of Counsel To Ronk At The Sentencing Phase Of The Trial. 30

IV. The Trial Court Erroneously Permitted the Trial Jurors and Alternates to be Selected but not Sequestered until the Following Morning........ 52

V. Ronk's Conviction Must Be Set Aside Because The Jury Erroneously Received Inadmissible Information During the Culpability Phase of the Trial.... 53

VI. Payment Of Excess Compensation To States Witness Heather Hindall Was Prosecutorial Misconduct That Violated Ronk's Rights To Due Process And To Confrontation Of Witnesses. 55

VII. The Sentencing Process was rendered Fundamentally Unfair And/or reversibly erroneous by Flawed Instructions To The Jury........ 58

VIII. The Death Sentence In This Case Must Be Vacated Because It Was Imposed In Violation Of The Constitution Of The United States. 63

IX. The Death Sentence In This Matter Is Constitutionally And Statutorily Disproportionate. 64

X. The Above Errors, All Concerning Violations of Ronk's Constitutional Rights Cannot be Considered Harmless. 65

XI. The Cumulative Effect of the Errors in the Trial Court Mandates Reversal of the Verdict of Guilt and/or The Sentence of Death. 66

XII. Ronk Reserves The Right to Raise any Issues Relating To Ineffective Assistance Of Trial Counsel That Are Not Fully Apparent From The Record. 67

Conclusion 69

INDEX OF AUTHORITIES

Cases

Abdul-Kabir v. Quarterman, 550 U.S. 233 (2007) 48, 49
Adams v. State, 772 So.2d 1010 (Miss.2000) 13
Apprendi v. New Jersey, 530 U.S. 466 (2000) 62
Arizona v. Fulminante, 499 U.S. 279 (1991) 19
Arizona v. Rumsey, 467 U.S. 203 (1984) 60
Arthur v. State, 735 So. 2d 213 (Miss. 1999) 21
Balfour v. State, 598 So.2d 731 (Miss.1992) 65
Ballenger v. State, 667 So.2d 1242 (Miss.1995) 13
Banyard v. State, 47 So. 3d 676 (Miss. 2010) 2, 20, 22
Bell v. Cone, 535 U.S. 685 (2002) 51
Berry v. King, 765 F.2d 451 (5th Cir. 1985) 39
Berry v. State, 703 So.2d 269 (Miss. 1997) 48
Blockburger v. United States, 284 U.S. 299 (1932) 17
Blunt v. State, 55 So. 3d 207 (Miss. Ct. App. 2011) 49
Boches v. State, 506 So. 2d 254 (Miss. 1987) 58
Brady v. Maryland, 373 U.S. 83 (1963) 57
Branch v. State, 882 So. 2d 36 (Miss. 2004) 48
Brown v. State, 39 So.3d 890 (2010) 2, 6, 8
Buckley v. State, 875 So.2d 1110 (Miss. Ct. App. 2010) .... passim
Bullington v. Missouri, 451 U.S. 430 (1981) 60
Byrom v. State, 863 So. 2d 836 (Miss. 2003) 67
Cannaday v. State, 455 So.2d 713 (Miss.1984) 13
Carmichael v. Agur Realty Co., 574 So.2d 603 (Miss.1990). 59
Clayton v. State, 106 So. 3d 802 (Miss. 2012) 4, 6, 7, 13
Clemons v. Mississippi, 494 U.S. 744 (1990), ... 62
Culberson v. State, 379 So.2d 499 (Miss.1979) 23
Davis v. State, 230 Miss. 183, 92 So. 2d 359 (1957) 54
Davis v. Washington, 547 U.S. 813 (2006). 54
Delaware v. Van Arsdall, 475 U.S. 673 (1986) 19
Doss v. State, 19 So. 3d 690 (Miss. 2009) 30, 40 52
Doss v. State, 709 So. 2d 369 (Miss.1996) 13
Duplantis v. State, 708 So.2d 1327 (Miss.1998) 59
Dycus v. State, 440 So. 2d 246 (Miss. 1983) 21
Eddings v. Oklahoma, 455 U.S. 104 (1982) 44
Edge v. State, 393 So. 2d 1337 (Miss. 1981) 35
Edwards v. State, 737 So.2d 275 (Miss.1999) 59
Ferguson v. State, 507 So. 2d 94 (Miss. 1987) 51
Fisher v. State, 481 So.2d 203 (Miss.1985) 8, 23, 24
Flowers v. State, 947 So. 2d 910 (Miss. 2007) 67
Fulgham v. State, 46 So. 3d 315 (Miss. 2010) .... passim
Gause v. State, 65 So. 3d 295 (Miss. 2011) .... passim

Gibson v. State, 731 So.2d 1087 (Miss. 1998)........67
Gillett v. State, 56 So. 3d 469 (Miss. 2010)........25
Goff v. State, 14 So. 3d 625 (Miss. 2009)........passim
Gowdy v. State, 56 So.3d 832 (Miss. 2010)........68
Gowdy v. State, 592 So. 2d 29 (Miss. 1991)........58
Grayson v. State, 806 So. 2d 241 (Miss. 2001)........29
Green v. State, 884 So. 2d 733 (Miss. 2004)........59
Gregg v. Georgia, 428 U.S. 153 (1976)........29
Griffin v. State, 533 So.2d 444 (Miss. 1988)........14
Griffin v. United States, 502 U.S. 46 (1991)........19
Hansen v. State, 592 So. 2d 114 (Miss. 1991).........66
Henderson v. State, 660 So. 2d 220 (Miss. 1995)........passim
Hodges v. Epps, 1:07CV66-MPM, 2010 WL 3655851
(N.D. Miss. Sept. 13, 2010)........39, 68
Howard v. State, 853 So.2d 781 (Miss. 2003)........29
Hughes v. State, 90 So.3d 613 (Miss. 2012)........63
Hunter v. State, 684 So.2d 625 (Miss. 1996)........18
Hodges v. State, 949 So. 2d 706 (Miss. 2006)........39
In re J.E., 726 So. 2d 547 (Miss. 1998)........58
In re Jordan, 390 So.2d 584 (Miss.1980)........13
Irving v. State, 361 So. 2d 1360 (Miss. 1978)........65
Johnson v. State, 476 So.2d 1195 (Miss. 1985)........42
Kimmelman v. Morrison, 477 U.S. 365(1986)........31
Kolberg v. State, 829 So. 2d 29 (Miss. 2002)........50
Kyles v. Whitley, 514 U.S. 419 (1995)........57
Layne v. State, 542 So.2d 237 (Miss.1989)........23
Lester v. State, 692 So.2d 755 (Miss. 1997)........48
Little v. State, 736 So. 2d 486 (Miss. Ct. App. 1999)........58
Love v. State, 441 So. 2d 1353 (Miss. 1983)........4, 58
Manuel v. State, 667 So. 2d 590 (Miss. 1995)........6, 7, 8
Maye v. State, 49 So.3d 1124 (Miss. 2010)........2
McGowan v. State, 541 So.2d 1027 (Miss.1989)........13
McIntosh v. State, 917 So. 2d 78 (Miss. 2005);........20, 21
McMann v. Richardson, 397 U.S. 759 (1970)........38
Meeks v. State, 604 So. 2d 748 (Miss. 1992)........17, 28
Meshell v. State, 506 So. 2d 989 (Miss. 1987)........5
Mills v. Maryland, 486 U.S. 367(1988)........44
Moore v. Johnson, 194 F.3d 586 (5th Cir. 1999)........31, 32, 40, 46
Moore v. State, 799 So.2d 89 (Miss.2001)........13
Murray v. Carrier, 477 U.S. 478 (1986)........52, 55
Penry v. Johnson, 532 U.S. 782 (2001)........49
Phillipson v. State, 943 So.2d 670 (Miss.2006)........13
Pickle v. State, 345 So. 2d 623 (Miss. 1977)........23
Pittman v. State, 297 So.2d 888 (Miss. 1974)........22
Quick v. State, 569 So. 2d 1197 (Miss. 1990)........14
Reddix v. State, 731 So.2d 591 (Miss. 1999)........4

Richardson v. State, 767 So. 2d 195 (Miss. 2000) 15
Ring v. Arizona, 536 U.S. 584 (2002) 62
Rompilla v. Beard, 545 U.S. 374 (2005) 30, 44, 51
Roper v. Simmons, 543 U.S. 551 (2005) 30
Ross v. State, 954 So. 2d 968 (Miss. 2007) .... passim
Sea v. State, 49 So. 3d 614 (Miss. 2010) 31, 33, 43, 51
Selman v. Selman, 722 So. 2d 547 (Miss.1998) 62
Simpson v. Holmes County Bd. of Educ., 2 So. 3d 799 (Miss. Ct. App. 2009) 62
Smith (Grady) v. State, 499 So. 2d 750 (Miss. 1986) 65
Smith v. Texas, 550 U.S. 297 (2007) 48, 49
State v. Berryhill, 703 So. 2d 250 (Miss. 1997) 11, 14
Strickland v. Washington, 466 U.S. 668 (1984) 31, 50
Stringer v. Black, 503 U.S. 222 (1992) 62
Tennard v. Dretke, 542 U.S. 274 (2004) 49
Thomas v. State, 48 So.3d 460(Miss.2010) 13
Thornton v. State, 369 So. 2d 505 (Miss. 1979) 35
Tuilaepa v. California, 512 U.S. 967 (1994) 60
United States v. Bagley, 473 U.S. 667 (1985) 57
United States v. Capone, 93 F.2d 840 (7th Cir. 1937) 28
United States v. Woods, 487 F.2d 1218 (5th Cir. 1973) 38
Walker v. State, 913 So.2d 198 (Miss. 2005) 65
Watts v. State, 733 So. 2d 214 (Miss. 1999) 55
Weathersby v. State, 147 So. 481 (Miss. 1933) 2
West v. State, 553 So. 2d 8 (Miss. 1989) 25, 26, 27
Wiggins v. Smith, 539 U.S. 510 (2003) .... passim
Wilcher v. State, 697 So.2d 1123 (Miss.1997) 44
Williams v. State, 797 So.2d 372 (Miss. Ct. App. 2001) 6, 9
Williams v. Taylor, 529 U.S. 362 (2000) 30, 43, 52
Woodward v. State, 726 So. 2d 524 (Miss. 1997) 55
Yohey v. Collins, 985 F.2d 222 (5th Cir. 1992) 42

Statutes

Miss. Code Ann. § 25-7-47 57
Miss. Code Ann. § 97-3-19(3) 5, 20
Miss. Code Ann. § 97-3-35 5
Miss. Code Ann. § 99-7-2 .... 13, 17
Miss. Code Ann. § 99-19-5 5
Miss. Code Ann. § 99-19-101(6)(f) 46
Miss. Code Ann. § 99-19-101(6)(b) 46
Miss. Code Ann. § 99-19-105 .... 62, 65

Rules

Miss. R. App. P. 22 .... 52, 55, 67
Miss R. App. P. 28(e) 7
URCCCP 9.04.A.4 57

Other Authorities

ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, (Rev. 2003) 36
Robert Guest, "Trial Stress," posted January 31, 2010 to *Dallas Criminal Defense Lawyer Blog,* http://www.dallascriminal defenselawyerblog.com/2010/01/trial-stress.html) (last viewed 3/06/13)(discussing stress effects from spending "most of a week" in non-homicide, non-death penalty DWI jury trial) 35
Robert J. Gula, Nonsense: Red Herrings, Straw Men, and Sacred Cows: How We Abuse Logic in Our Every Day Language. Axios Press (March 14, 2007) 11
Ted Brooks, "The Stress of Trial," posted June 13, 2011 to *The Court Technology and Trial Presentation Blawg* [sic], http://trial-technology.blogspot.com/2011/06/stress-of-trial.html (last viewed 3/06/13) (discussing effect of stress in civil litigation) 35

STATEMENT OF ISSUES

I. THE TRIAL COURT VIOLATED STATE AND FEDERAL LAW AND COMMITTED REVERSIBLE ERROR BY IMPROPERLY INSTRUCTING THE JURY AT THE CULPABILITY PHASE.

II. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A CONVICTION OF CAPITAL MURDER IN THE COURSE OF ARSON.

III. THE DEATH SENTENCE MUST BE VACATED AND THE CASE REMANDED FOR A NEW SENTENCING PROCEEDING BECAUSE TRIAL COUNSEL GAVE CONSTITUTIONALLY INEFFECTIVE ASSISTANCE OF COUNSEL TO RONK AT THE SENTENCING PHASE OF THE TRIAL.

IV. THE TRIAL COURT ERRONEOUSLY PERMITTED THE TRIAL JURORS AND ALTERNATES TO BE SELECTED BUT NOT SEQUESTERED UNTIL THE FOLLOWING MORNING.

V. RONK'S CONVICTION MUST BE SET ASIDE BECAUSE THE JURY ERRONEOUSLY RECEIVED INADMISSIBLE INFORMATION DURING THE CULPABILITY PHASE OF THE TRIAL.

VI. PAYMENT OF EXCESS COMPENSATION TO STATES WITNESS HEATHER HINDALL WAS PROSECUTORIAL MISCONDUCT THAT RONK'S RIGHTS TO DUE PROCESS AND TO CONFRONTATION OF WITNESSES.

VII. THE SENTENCING PROCESS WAS RENDERED FUNDAMENTALLY UNFAIR AND/OR REVERSIBLY ERRONEOUS BY FLAWED INSTRUCTIONS TO THE JURY .

VIII. THE DEATH SENTENCE IN THIS CASE MUST BE VACATED BECAUSE IT WAS IMPOSED IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES.

IX. THE DEATH SENTENCE IN THIS MATTER IS CONSTITUTIONALLY AND STATUTORILY DISPROPORTIONATE.

X. THE ABOVE ERRORS, ALL CONCERNING VIOLATIONS OF RONK'S CONSTITUTIONAL RIGHTS CANNOT BE CONSIDERED HARMLESS.

XI. THE CUMULATIVE EFFECT OF THE ERRORS IN THE TRIAL COURT MANDATES REVERSAL OF EITHER THE VERDICT OF GUILT OR THE SENTENCE OF DEATH.

REPLY ARGUMENT

I. The Trial Court Violated State And Federal Law And Committed Reversible Error By Improperly Instructing The Jury At the Culpability Phase.

The State's responses to this claim of error are founded on mistaken factual and legal premises, and should, therefore, be rejected by this Court. [1]

At the threshold, Ronk seeks to dispose of the State's claim that there was only an "alleged denial" of Ronk's imperfect self-defense manslaughter jury instruction. Corrected Brief of the Appellee at p. 19, hereinafter "State's Brief." There is, in fact, nothing "alleged" about the trial court's denial of that instruction. It is clear. It is unequivocal. Tr. 623, 765, C.P. 257. It is also error.

The State also mistakenly and repeatedly, throughout its briefing of this issue, asserts that Ronk "confessed" to the crimes of "murder" of Craite and "arson," and that the jury was thereby precluded from considering any verdict with respect Craite's homicide except guilty or not guilty of capital murder. State's Brief at pp. 19-49.

In fact, Ronk made no such confession. The State's evidence contains a letter in which Ronk acknowledges certain relevant facts: First, that he killed Craite by stabbing her during a heated argument in which she pulled a knife on him and then, after he disarmed her of the knife, threatened to shoot him with a gun he knew she possessed. Second, that after the homicide was complete, he set Craite's

[1] In his initial brief, Ronk asserts multiple bases supporting this claim of error, including the ones discussed here. In all other respects, including the ample basis for overcoming any procedural bars claimed by the State, Ronk anticipated the State's reply to the errors raised in this argument in his initial brief, and he relies on the arguments made there. Ronk's Brief at pp. 12-36.

house on fire. Ex. S-51, fourth page.[2] There is no other direct evidence of what occurred, the order in which it occurred, or of Ronk's intent.[3]

As a matter of Mississippi law, as this Court frequently acknowledges, not all homicides are murder. The fact that the State elects to charge a homicide as murder or capital murder does not preclude defending, as Ronk did here, against that charge with theories of justifiable and/or lesser-included homicides on the same facts the State contends establish murder or capital murder. It is left to a properly instructed jury to determine what, if any, crime is established beyond a reasonable doubt by the facts that it credits. *See, e.g.,* ***Brown v. State***, 39 So. 3d 890, 899 (2010), ***Banyard v. State***, 47 So. 3d 676, 687 (Miss. 2010) (capital felony murder), ***Maye v. State***, 49 So. 3d 1124, 1129 (Miss. 2010) (capital murder).

The State claimed at trial that Ronk's admission in Ex. S-51 that he killed Craite was sufficient to establish the unlawful homicide element of arson-based capital murder. However, S-51 contained information that, if believed by a properly instructed jury, could alternatively conclude that homicide was 1) done in

---

[2] Ex. S-51 is a letter from Ronk to his then-girlfriend Heather Hindall offered into evidence by the State. In relevant part, Ronk stated there that:

> I had no plan for what happened to happen. I was leaving and I told her [Craite] I was leaving and why I was leaving. I was coming to see you and ask you to be my wife. She completely lost it. She slapped me and I walked away. Then she came at me with my knife and I took it away. It was not till she told me she was going to get her shotgun and kill me that I lost it and went after her with the knife. When I realized what I had done, I cleaned the knife off, changed my clothes, doused the house with gasoline, set it on fire and drove off. (emphasis added)

[3] Since this was not testimony under oath, and there is indirect evidence that contradicted Ronk's version to some extent, it was not contended at trial, and is not contended here, that the ***Weathersby v. State,*** 147 So. 481 (Miss. 1933) rule precluded this matter from going to the jury.

reasonable self-defense and therefore not unlawful at all *or* 2) done in imperfect self-defense and was therefore manslaughter *or* 3) done with malice aforethought and was therefore murder.

Similarly, while Ronk's admission to setting Craite's house afire after completing the homicide was an admission of the elements of the crime of arson that does not, as the State mistakenly contends, make that admission a "confession" of the murder charged when combined with the homicide admission. Ronk was not charged with arson as a separate crime. He was charged with arson only as an element of the charge of capital murder. C.P. 10-11, R.E. Tab 1. Hence, in order for the self-admitted facts to make him guilty of the crime charged, the State had to prove not only that his killing of Craite was unlawful and that there was an arson, but also that the unlawful homicide was the "the intentional or unintentional product of the other felony." ***Buckley v. State***, 875 So. 2d 1110, 1113 (Miss. Ct. App. 2010) (emphasis added). *See also* State's Brief at p. 54, quoting that passage from ***Buckley***), ***Goff v. State***, 14 So. 3d 625, 650 (Miss. 2009) (requiring that the homicide occur at or after the time that an "indictable attempt" at the underlying felony has already occurred or is simultaneously occurring).

Hence, even if, *per arguendo*, Ex. S-51 were sufficient to establish the crime of arson capital murder if interpreted in one fashion by the jury, [4] it also provided sufficient evidence supporting granting not only of the justifiable self-defense

[4] As is discussed in Argument II of his brief in chief, and in Argument II of this reply, *infra,* Ronk also claims that the record was insufficient to establish capital murder at all

instruction, but also of both lesser-included homicide instructions.[5]

The State's entire argument to the contrary thus rests on a faulty understanding of the legal principles controlling capital felony murder and on the legal import of the facts in evidence.

a. The trial court committed reversible error in refusing Ronk's requested imperfect self-defense manslaughter instruction.

i. Manslaughter is a proper lesser-included offense of capital felony murder even where there is also evidence that the underlying felony occurred.

Because of this faulty understanding, the State, in its analysis concerning the denial of Ronk's imperfect self-defense manslaughter instruction, misidentifies the issue before this Court. It claims that in a capital murder prosecution, the jury has only two options: 1.) conviction of the capital murder if it finds that both an unlawful homicide and the felony have occurred , or 2.) acquittal, but only if it finds one or the other did not happen at all. Hence, the State's argument goes, there was never any basis for any lesser-included homicide to be considered by the jury in this case, because there was evidence that an arson had been committed after the killing was accomplished. (State's Brief at p. 24).

This claim, however, emanates from the State's legally unsupported supposition that where arson capital murder is charged, and there is evidence of an arson, any unlawful killing was capital murder regardless of whether that killing

---

[5] As this Court has long held, and recently reiterated, "[a] criminal defendant has a right to assert alternative theories of defense, even inconsistent alternative theories." ***Reddix v. State,*** 731 So. 2d 591, 593 (Miss. 1999) (citing ***Love v. State***, 441 So. 2d 1353, 1356 (Miss. 1983)). *See also* ***Clayton v. State,*** 106 So. 3d 802, 804 (Miss. 2012), reh'g denied (Feb. 21, 2013) ("We find that the trial court erred by failing to instruct the jury on Clayton's alternative heat-of-passion theory.")

was the product of the arson or not. Under Mississippi law, this is quite simply not the case. ***Buckley***, 875 So. 2d at 1113, ***Goff***, 14 So. 3d at 650. Despite the State's wanting it to be so, capital murder in Mississippi is not an all-or-nothing game, either in the abstract legal sense, or based upon the specific facts of this case. Statutorily, manslaughter is a lesser-included offense of capital murder.

Either side is entitled to have the jury instructed on manslaughter when the facts so warrant. As a matter of statute, Manslaughter and murder are <u>both</u> proper lesser-included offenses of capital murder. **Miss. Code Ann. § 99–19–5 (Rev.2007)**; *see also* **Miss. Code Ann. § 97–3–19(3) (Rev.2006)**. See also ***Gause v. State***, 65 So. 3d 295, 300 (Miss. 2011) (holding that a jury may be instructed on manslaughter upon request of any party or upon the court's own motion.)

Indeed, this Court regularly upholds the convictions of individuals <u>charged</u> with capital murder but <u>convicted</u> of manslaughter. *See, e.g.*, ***Meshell v. State***, 506 So. 2d 989, 991 (Miss. 1987) (defendant charged with capital murder in the course of a robbery, but convicted of manslaughter). More recently, in ***Gause***, this Court upheld a manslaughter conviction <u>even when the nature of the underlying offense was undisputed by both parties</u>. ***Gause***, 65 So. 3d at 297.

> [I]t is undisputed that Gause was entitled to a heat-of-passion manslaughter instruction, based on the evidence. **Miss. Code Ann. § 97–3–35 (Rev.2006).** By statute, manslaughter is a lesser-included offense of capital murder, and the jury may be instructed on manslaughter upon request of any party or upon the court's own motion, where the instruction is supported by the evidence, "consistent with the wording of the applicable manslaughter statute." **Miss. Code Ann. § 99–19–5 (Rev.2007)**; *see also* **Miss. Code Ann. § 97–3–19(3) (Rev.2006)** ("[a]n indictment for murder or capital murder shall serve as notice to the defendant that the indictment may include any and all

> lesser[-]included offenses thereof, including, but not limited to, manslaughter").

Gause, 65 So. 3d at 300. Clearly, as a matter of law, defendants in felony capital murder prosecutions are entitled to present one or more theories of defense to a capital murder charge that the killing in question was a lesser-included homicide. ***Clayton v. State***, 106 So. 3d 802, 804 (Miss. 2012), reh'g denied (Feb. 21, 2013).

This right of the criminal accused is also based in his constitutional right to present a defense, and to have the jury apprised of it. Particularly in homicide cases, where this is not done, the conviction cannot stand.

> [I]n homicide cases, the trial court should instruct the jury about a defendant's theories of defense, justification, or excuses that are supported by the evidence, no matter how meager or unlikely, and the trial court's failure to do so is error requiring reversal of a judgment of conviction."

Manuel v. State, 667 So. 2d 590, 593 (Miss. 1995). *See also* ***Brown***, 39 So. 3d at 899; ***Banyard,*** 47 So. 3d at 687, ***Williams v. State,*** 797 So. 2d 372, 378 (Miss. Ct. App. 2001). In this case the evidence supporting the requested instruction was far more than "meager, and the failure to instruct on manslaughter was therefore error.

ii. There was sufficient evidence to support granting Ronk's requested manslaughter instruction.

Contrary to the State's claims, and the trial court's ruling, the evidence in this case clearly supported granting Ronk's requested imperfect self-defense manslaughter instruction. Ex. S-51, fourth page (set forth at note 2, *supra*). [6]

---

[6] The State does not, and on this record would have no basis to, contend that Ronk's imperfect self-defense manslaughter instruction, C.P. 256-57, did not properly set forth the

Indeed, the State does not rest its claim that the evidence did not support granting this instruction on the fact that if believed, Ronk's version of events would not support the manslaughter instruction at all. The State's contention appears to be that insofar as this evidence did anything other than admit to the stabbing and to setting the house afire, it was, in the State's view, not credible.

> [Ronk's][7] entire theory of manslaughter rested on the unsworn statements to his Internet girlfriend that, when an unarmed woman threatened to shoot him with a weapon she did not have – but he thought she might have nearby, he stabbed her; then, despite his belief that the killing was justified, he destroyed all the evidence and ran.

(State's Brief at p. 29) (footnote added).

Not only is this not the proper legal standard for determining this, ***Manuel***, 667 So. 2d at 593, shorn of the advocative cast given them by the State, and with the addition of the rest of the information in the letter about Craite's earlier knife attack on Ronk, which is what put him in possession of a knife in the first place, the facts recounted in the above excerpt from the State's brief are the precise basis for Ronk's allegation of error in refusing his imperfect self-defense manslaughter instruction. Ex. S-51 at fourth page.

That the State deems only the inculpatory parts of that statement credible is immaterial to Ronk's right to a jury instruction on his manslaughter theory of

---

law relating to that lesser included offense, or that the lesser included manslaughter offense was instructed upon elsewhere. *See* ***Clayton,*** 106 So. 3d at 804. The trial court's only basis for refusing that instruction, and the State's only basis for supporting that refusal, was the erroneous one that there was no evidence to support it. Tr. 623.

[7] The State's brief refers to Ronk as "The Appellant" throughout its entirety. This would appear to run afoul of **Mississippi Rule of Appellate Procedure 28(e)**. In the interest of readability and conformity to Rule 28(e), Ronk has substituted "Ronk" for any reference to "The Appellant" in all quotations from the State's brief.

defense on the basis of the other parts of the statement. Even "meager" evidence supporting Ronk's theory of defense requires the granting of an instruction. ***Manuel***, 667 So. 2d at 593. Credibility of evidence and testimony is purely a matter for the jury, and the jury must be instructed on all the legal possibilities suggested by the evidence, at least if requested by the defendant to do so. ***Id.*** *See also* ***Brown,*** 39 So. 3d at 899 (2010) (reversing conviction for denial of instruction necessary to defense). The State's attempt to cast doubt on the credibility of evidence supporting Ronk's theories of defense is thus a red herring without legal significance to this issue.

The State's argument that the evidence is insufficient also relies on the second and equally unsupported, premise on which it founds its arguments: That Ronk's admissions to both killing Craite and to setting the house afire afterwards were the same as "confessing" to a killing during the course of the arson. However, that completely ignores the key third element required, i.e. that there be the proper "nexus" between the killing and the arson. ***Fisher v. State,*** 481 So. 2d 203, 212 (Miss.1985). At least where the capitalizing crime alleged is arson, that nexus is not established by the mere proximity of an arson to a killing – even an unjustified one. The killing must also be the intentional or unintentional product of the [arson]." ***Buckley***, 875 So. 2d at 1113.

No matter how many times the State incorrectly claims that Ronk was not entitled to his lesser-included homicide instructions "because the crime happened during the course of an arson," as it would like to persuade a jury to believe, that

does not change the facts of record. As the State acknowledges, Ronk's version of events would, if believed, be sufficient to establish Ronk's claim that neither the intent to arson, nor any act in furtherance of that intent, was underway at the time of the homicide, as would be necessary to establish the requisite "indictable attempt" at the arson at the time of the homicide required under ***Goff v. State***, 14 So. 3d 625, 650 (Miss. 2009) to make the crime an arson capital murder. ***Henderson v. State***, 660 So. 2d 220, 222 (Miss. 1995). *See* State's Brief at 50-51, (citing Ex. S-51). Hence the record clearly does support instructing the jury on the that if it did not agree with the State's "spin" on the facts, the killing of Craite was a lesser included unlawful homicide of murder or manslaughter

Ronk, of course, was unable to persuade the trial court to give the jury proper instructions on either of the lesser homicides that the jury could, on the evidence, conclude establish one of his lesser included offense theories. It erroneously refused his manslaughter instruction altogether, and, as is set forth in the next section, it improperly tainted the murder instruction it did give by attaching it to a stand-alone instruction on arson, with which Ronk was not charged, and to which the State was not entitled.

Not having a properly instructed jury resulted in a violation of Ronk's constitutional right to a fair trial. ***Williams,*** 797 So. 2d at 378 (finding "a defendant has a constitutional right to a fair trial. That right necessarily embraces his right to have his theory of defense presented to the jury and to have the jury properly instructed on the law regarding that defense."). Because the jury was

improperly instructed here, reversal is required.

b. *The law does not support the State's positions on the murder and arson instructions, or its alternative claim that any error regarding them was harmless.*

i. *Ronk's request for a lesser-included instruction on murder was warranted by the evidence and its grant by the trial court did not "warrant" the grant to the State of a stand-alone arson instruction.*

In the instant matter, Ronk requested, and the trial court properly granted, an instruction on the lesser included offense of murder, but erroneously required that it be given only when coupled with the State's requested instruction also permitting the jury to convict Ronk of the stand-alone crime of arson, with which the state had elected not to charge him, and which Ronk did not seek to have it instructed upon. Tr. 616-19 (ruling of trial court), C.P. 252-53 (instruction requested), C.P. 243-44 (instruction as modified at State's request) For the same reasons as the State's arguments concerning Ronk's requested manslaughter instruction, the State's arguments on this point also miss there mark: neither the law nor the facts of record support the State's position.

Perhaps to avoid confronting that reality, the State attempts to divert this Court with arguments about "loop holes" and making the "arson disappear" as a result of a stand-alone murder charge. State's Brief at p. 35. The State then asserts that, the law not supporting its claim, there is some sort of formal "logical fallacy" in asking to have the jury instructed on simple murder without a separate arson instruction. State's Brief at p. 40. The State's is mistaken in what a formal "logical fallacy" actually is. *See generally* Robert J. Gula, Nonsense: Red Herrings,

Straw Men, and Sacred Cows: How We Abuse Logic in Our Every Day Language. Axios Press (2007).

What the State is really saying is much less elaborate than that. It simply disagrees with Ronk's position that the trial court properly instructed the jury on his lesser included murder theory of defense but erred in conditioning the grant of that instruction on accompanying, and *de facto* qualifying it with, a stand-alone arson instruction. The State argues that the trial court's granting of the lesser-included murder instruction was error, but that if that instruction were to be given, then the trial court did not err in requiring that it be qualified with the stand alone arson instruction. State's Brief at p. 42.

The law supports Ronk's positions on this point. The State's claim that no murder instruction was warranted relies on the same mistaken legal and factual premises that it relied on to say no manslaughter instruction was warranted. *See* Section a., *supra* . In claiming that the State was entitled to have the stand alone arson instruction appended to any murder instruction given, it is simply wrong under established law. Far from being "warranted" by the request for the lesser-included murder instruction, the arson instruction was affirmatively impermissible as a matter of law. ***Gause***, 65 So. 3d at 300.

At the threshold, the State's claim on this point is probably not even properly before this Court. It perfected no cross appeal asserting this to be legal error, as it should have done if it wished to have this point addressed. *See, e.g.,* ***State v. Berryhill***, 703 So. 2d 250 (Miss. 1997). In the case *sub judice*, the jury was

instructed as to murder. C.P. 252-53. It was given a so-called "acquit first instruction." C.P. 217-18. It was clearly not plain error for the trial court to have instructed upon murder as a lesser included offense of capital murder where there was evidence from which the jury could have concluded, as it could have here, that neither the intent to arson, nor any act in furtherance of the arson was undertaken until after the homicide was complete. Ex. S-51, fourth page. *See* Section a, *supra.*

Moreover, perhaps unwittingly, the State's own argument outlines the precise reason the trial court was correct in granting the murder instruction, and would not have been in error had it not also granted the State's requested arson instruction:

> However, the State understands [Ronk] placed the judge in a difficult position. She could either grant [Ronk] an instruction which had no basis in the evidence, was unsupported by the law, and afforded the jury an opportunity to convict Ronk of a crime for which the State was not attempting to seek a conviction. Or, she could deny [Ronk] the one instruction on which his theory of the case was based (i.e., that intent became relevant if the jury found that the murder and the underlying felony were separate crimes)

(State's Brief at p. 44) (emphasis added).

The dilemma the State imagines the trial court to have faced here was neither a dilemma, nor the product of Ronk's request for his simple murder theory of defense instruction. Very simply, the first horn of the false dilemma posed by the State does not exist at all. There was evidence that, if believed, supported the simple murder instruction. Exhibit S-51, fourth page. As the State concedes, State's Brief at 43. Ronk's requested murder instruction properly stated the elements of simple murder and the jury was not instructed on simple murder

anywhere else. Hence, the trial court properly gave that instruction. ***Clayton v. State***, 106 So. 3d at 804.

The second horn of the false dilemma is not the trial court's problem at all, and is purely the product of the State's election not to seek a stand-alone arson count in the indictment, C.P. 10-11, R.E. Tab 1, as it could easily have done. **Miss. Code Ann.** § 99-7-2 Since it did not do so, the trial court had absolutely no power to grant the arson instruction at the request of the State under any circumstances. ***Gause***, 65 So. 3d at 300.

The capitalizing felony is not a lesser-included offense of a capital felony murder. ***Id.*** *See also* ***Doss v. State,*** 709 So. 2d 369, 378 (Miss.1996), ***Ballenger v. State,*** 667 So. 2d 1242, 1252–55 (Miss.1995) (robbery), ***Gray v. State,*** 472 So. 2d 409, 417 (Miss.1985) (overruled on other grounds), ***Cannaday v. State,*** 455 So. 2d 713, 724–25 (Miss.1984), ***In re Jordan,*** 390 So. 2d 584, 585 (Miss.1980) (kidnapping). Unless it was included in the indictment, it is merely a lesser offense that was never charged by the State, but happens to arise out of the facts of record. ***Gause***, 65 So. 3d at 301. *See also* ***Phillipson v. State,*** 943 So. 2d 670, 672 (Miss.2006) (quoting ***Adams v. State,*** 772 So. 2d 1010, 1016 (Miss.2000)).

Unlike lesser included offenses, on which the jury may be instructed at the request of either party, only the defendant is entitled to an instruction for the lesser charge. ***Gause***, 65 So. 3d at 300. *See also* ***Moore v. State,*** 799 So. 2d 89, 91 (Miss. 2001),***Thomas v. State,*** 48 So. 3d 460, 472 (Miss. 2010) (citing ***McGowan v. State,*** 541 So. 2d 1027, 1028 (Miss. 1989)), ***Griffin v. State,*** 533 So. 2d 444, 448 n. 2

(Miss. 1988) (emphasis added).

The State, not concerned with the absence of a legal basis for its argument nonetheless continues:

> [Ronk] cannot parse the Instruction as "half good, half bad," when the portion of it he requested and now claims was warranted (the murder charge) necessitated the portion he claims was unlawful (the arson charge).

State's Brief at p. 45. Actually, as ***Gause*** makes clear, where the State has elected not to seek a separate arson count in the indictment, Ronk not only may do exactly that, it is also reversible error for the trial court to let the State to fix its indictment-stage failure in response. 65 So. 3d at 300.

The State has it entirely backwards. It is the State that got an unwarranted benefit by piggy-backing a non-charged offense over Ronk's objection. Tr. 587-88, 630-31. Given its obligations to criminal accused under the state and federal constitutions, and the requirements of indictment in this state, it is a benefit that violated Ronk's constitutional rights when it was accorded the prosecution in the instant matter. See ***Berryhill,*** 703 So. 2d 250. ***Quick v. State,*** 569 So. 2d 1197, 1199 (Miss. 1990). See also Ronk's Brief at 24. Far from being "necessitated" by the request for the lesser-included murder instruction, the arson instruction was affirmatively impermissible as a matter of law. ***Gause***, 65 So. 3d at 300.

As this Court recently reiterated in ***Gause***, there are no factual circumstances that would entitle the State to request or receive stand-alone instruction on the capitalizing felony over Ronk's objection unless the State had also included a separate, stand-alone count of arson in the indictment itself. 65 So. 3d at

300. Since that was not done in this matter, the State's attempts to distinguish ***Gause*** on its facts are as much of a red herring as its claim that purported credibility issues with the evidence of manslaughter supported denial of the manslaughter instruction. Moreover, as it would happen, the facts of this case all but identical to the facts of ***Gause*** in this regard so there is no basis for distinguishing them, in any event. 65 So. 3d at 300.[8]

First, the State argues ***Gause*** is distinguishable from the instant case because, in the instant case, the elements of the offense of arson are listed in the indictment. (State's Brief p. 46, citing the distinction between the facts of ***Gause*** and ***Richardson v. State***, 767 So. 2d 195 (Miss. 2000)). However, in ***Richardson*** the defendant was indicted for both a primary offense <u>and</u> a lesser offense. ***Richardson***, 767 So. 2d at 197. In the instant matter, as in ***Gause***, there was no separate count charging the lesser offense. *See* C.P. 10-11, R.E. Tab. 1; Gause v. State, No. 2010–KA–00127–SCT, Record on Appeal at Vol. 1 (Clerks Papers) pp. 15-16.[9]

Second, the State argues that the instant case is distinguishable from ***Gause*** because, in ***Gause,*** the State offered both the lesser-included offense homicide instruction and the lesser-offense instruction on burglary. State's Brief at p. 47.

---

[8] This Court may take judicial notice of the content of its own files, and has, in fact, recently done so. *See* ***In re Dunn***, 2011-CS-0255-SCT at ¶ 11, n.6, 2013 WL 628646 at * 3, n.6 (Miss. Feb 21, 2013) (not yet released for publication).

[9] Rather, in ***Gause***, the elements of burglary were set forth only as an element of the capital murder count, as this Court requires they be in order to meet the requirements for sufficiency of an indictment for felony capital murder based on burglary. ***Berryhill***, 703 So. 2d 250. So, too, in the instant case, arson is mentioned in the indictment merely as an element of the capital murder count, not as a separate crime.

Again, the State is only partially correct. In ***Gause***, the State did indeed offer the combination manslaughter and stand-alone burglary instruction. ***Gause***, 65 So. 3d at 299 (Miss. 2011). Gause himself, on the other hand, asked for the manslaughter instruction without the burglary instruction, which the trial court denied in favor of the improperly requested State's instruction. (Gause v. State, 2010-KA-127-SCT, Record on Appeal at Vol. 4 (Clerks Papers) p. 599, Instruction D-3). This Court found that found that to be error. ***Gause,*** 65 So. 3d at 301-02.

Third, the State contends that ***Gause*** supports the State's argument because Gause "disputed" the burglary charge against him whereas Ronk admitted to the acts which constituted the arson. (State's Brief at p. 47). Like Ronk, Gause admitted to all the elements of the burglary; his only claim was that the State, having failed to indict him for that burglary, was not entitled to have the jury instructed upon it as a stand-alone crime. This Court found that claim meritorious as a matter of law notwithstanding Gause's admission to the elements of burglary. ***Id.*** at 298.[10]

The prosecutor asserted at trial, and the State reurges here, that the trial court did not err in instructing on the arson because otherwise, there would have been no way of punishing the arson if the lesser offense, rather than the capital one, were the crime of which the defendant were convicted. Tr. 596, State's Brief at pp. 35, 50. That is completely unfounded as a matter of law, and in the instant matter, was a problem not of Ronk's creation, but of the State's.

---

[10] "[Gause testified he] 'saw red' and 'snapped.' He smashed the truck windows, looked inside the trailer, saw Tracy performing a sexual act on Swords, and broke into the trailer and the bedroom inside." ***Gause***, 65 So. 3d at 299 (emphasis added).

Had the State wanted to reserve the right to hold Ronk criminally responsible for arson as a fall-back in the event the jury failed to convict him of capital murder, it could have indicted Ronk for arson in the same indictment as the capital murder. **Miss. Code Ann.** § 99-7-2. The only limitation on the State was that if there had been convictions for both capital murder and arson, only one conviction could be sustained ***Meeks v. State***, 604 So. 2d 748, 750-51 (Miss. 1992) (citing ***Blockburger v. United States***, 284 U.S. 299, 303 (1932).)

For whatever reason, the State elected not to charge arson in the instant matter and forfeited its right to hold Ronk criminally liable for the arson as a free standing crime if Ronk were successful in one of his lesser included homicide defenses. ***Gause*** makes it clear that it was error as a matter of law for the trial court to force Ronk, as a precondition to receiving a theory of defense instruction to which he was entitled, to have the jury instructed on a crime with which, as the State admits, it had never charged him. State's Brief at p. 44.

It was thus completely proper for the trial court to instruct on simple murder at Ronk's request and completely erroneous for it to use the grant of that instruction as the basis for instructing the jury, at the State's sole request, on the stand-alone crime of arson. Because that instructional error was prejudicial to Ronk, reversal is required.

ii. The erroneous inclusion of the stand-alone arson instruction with murder instruction prejudicially tainted the jury's ability to consider the lesser-included offense of murder, and is therefore not, as the State contends, harmless error.

The State contends that even if there were error in giving the stand-alone arson instruction, that error was harmless. State's Brief at pp. 45-46, 183. This is not the case. Even though Ronk was not convicted of arson on the basis of the State-requested arson instruction, the fact that he was also instructed on arson as part of the murder instruction prejudicially tainted the murder instruction by making it virtually indistinguishable from the capital murder instruction.

Hence the jury, which Ronk was clearly entitled to have instructed on the lesser-included offense of murder, was affirmatively improperly instructed on that offense. The simple murder instruction was the only way the jury would have the tools to consider Ronk's murder only theory of defense.

> It is axiomatic that a jury's verdict may not stand upon uncontradicted fact alone. The fact must be found via jury instructions correctly identifying the elements of the offense under the proper standards. Where the jury had incorrect or incomplete instructions regarding the law, our review task is nigh unto impossible and reversal is generally required. ***Henderson v. State***, 660 So. 2d 220, 222 (Miss. 1995) (citations omitted).

Hunter v. State, 684 So. 2d 625, 636 (Miss. 1996) (internal quotation marks omitted). Because the murder instruction also included the arson instruction, it likely made the jury unable to distinguish stand-alone murder from capital murder and properly consider the murder as the lesser offense it was.

While juries are to be trusted to find the necessary facts as long as they are properly instructed as to the applicable law, such is not the case when they are

required to determine whether or not the facts before them warrant a verdict of conviction, and if so, of what crime, without proper instruction.

> Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law – whether, for example, the action in question . . . fails to come within the statutory definition of the crime.

Fulgham v. State, 46 So. 3d 315, 325 (Miss. 2010) (quoting ***Griffin v. United States***, 502 U.S. 46, 59-60 1 (1991)).

The jury was prejudicially misled as to the elements of murder as distinguished from capital murder by the trial court's erroneous attachment of an instruction on arson as a stand-alone crime to the murder instruction. Because proper instruction of the jury is required by the Sixth and Fourteenth Amendments of the United States Constitution, it cannot be said that the State has shown beyond a reasonable doubt that the instructional error did not affect the verdict in this matter. ***Smith v. State***, 986 So. 2d 290, 300 (Miss. 2008) (citing ***Arizona v. Fulminante***, 499 U.S. 279, 296 (1991), ***Delaware v. Van Arsdall***, 475 U.S. 673, 674, (1986). Reversal is therefore required.

II. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A CONVICTION OF CAPITAL MURDER IN THE COURSE OF ARSON.

The State's arguments on this point are founded on the same legally incorrect assumptions informing its arguments on the jury instructions: That evidence of the existence of a capitalizing felony in proximity to a homicide precludes that homicide from being anything other than capital murder. As is discussed more fully in the foregoing argument, that is simply not the law. *See, e.g.*, **Miss. Code Ann. § 97-3-**

19(3) ("[a]n indictment for murder or capital murder shall serve as notice to the defendant that the indictment may include any and all lesser[-]included offenses thereof, including but not limited to, manslaughter"), ***Gause v. State***, 65 So. 3d 295, 300 (Miss. 2011) (citing the statute in burglary capital murder prosecution and stating that "it is undisputed that Gause was entitled to a heat-of-passion manslaughter instruction, based on the evidence") ***Banyard v. State,*** 47 So. 3d 676, 683 (Miss. 2010) (approving giving of manslaughter instruction in robbery capital murder prosecution).

Where the capitalizing felony is arson, in particular, it is necessary not only that there be a homicide and an arson in proximity to each other, but that the homicide be "the intentional or unintentional product of the other felony." ***Buckley v. State***, 875 So. 2d 1110, 1113 (Miss. Ct. App. 2010 (emphasis added). *See also* State's Brief at p. 54, quoting that passage from ***Buckley***), ***Goff v. State***, 14 So. 3d 625, 650 (Miss. 2009) (requiring that the homicide occur at or after the time that an "indictable attempt" at the underlying felony has already occurred or is simultaneously occurring). An indictable attempt to commit a crime requires the existence both of the intent to commit the particular crime, and of a direct act done in furtherance of that intent. ***Henderson v. State***, 660 So. 2d 220, 222 (Miss. 1995).

There are thus three essential elements needed to establish guilt of felony capital murder in the commission of arson:

1) Intent to commit arson either for its own sake or in order to victimize the decedent, ***McIntosh v. State***, 917 So. 2d 78, 85 (Miss. 2005); and

2) A direct act in furtherance of the intent to commit arson, ***Henderson,*** 660

So. 2d at 222; and

3) A homicide that is the "product of," i.e., resulting from the first two things, ***Buckley,*** 875 So. 2d at 1113. *See, e.g.* ***McIntosh,*** 917 So. 2d at 85, ***Dycus v. State***, 440 So. 2d 246, 257 (Miss. 1983) (in both instances intentionally set fire to property resulted in the death of the victim).

If one of the first two elements is missing with respect to the underlying felony of arson at the time of the homicide, there is no "indictable attempt" at the arson sufficient to elevate the homicide to capital murder, and the homicide is legally and factually incapable of being "the product of" the intended or attempted arson. The evidence in this case establishes, at most, an arson that may be the "product of" escaping from the homicide, but does nothing to establish what is required to sustain a capital murder conviction – i.e. that the homicide was the "product of" an arson, or an attempt to commit or to escape from an arson.

The State's assertion that "it does not matter whether [Ronk] decided to burn Craite's home before or after he stabbed her" is, therefore, simply wrong as a matter of established law. The timing of the intent to commit the underlying felony, and of direct acts in furtherance of it essential in establishing guilt of capital murder. ***Arthur v. State,*** 735 So. 2d 213, 219 (Miss. 1999) (notwithstanding use of force to kill by accomplice, followed by taking of personal property from decedent by defendant, "if the robbery was a total afterthought then no indictable attempt ever began until after the victim was dead [and there was] therefore, no continuous transaction linking [the defendant] with the murder.").

The State's opening salvo on this point has the additional distinction of turning the burden of proof required in a criminal case on its head: "[T]here is also

no evidence to support [Ronk]'s claim that he did not intend to set the fire until after he stabbed Michelle Craite." State's Brief at p. 50. As this Court has recently reiterated, when it comes to establishing the elements of a crime, and the defendant's guilt of that crime, the burden of proof remains solely on the State. *See* ***Banyard,*** 47 So. 3d at 687 (finding instruction reversibly unconstitutional as a matter of plain error because "accused never has the burden. . . to disprove facts necessary to establish the offense charged"). Consequently, if the State's evidence, as it does here, permits an inference favorable to the accused, the jury may draw that inference without any further testimony or evidentiary support from the defense. ***Pittman v. State***, 297 So. 2d 888, 891 (Miss. 1974).

Moreover, as the State itself acknowledges in the next breath, there is a great deal of such evidence. State' Brief at pp. 50-51. It agrees that Ronk's statement, Ex. S-51 fourth page, provides an ample basis to infer a completed act of homicide prior to formation of any intent at all with respect to arson, or any direct act to commit an arson, and therefore preventing a capital murder conviction from being sustainable. (Ex. S-51, fourth page ("I had no plan for what happened to happen), State's Brief at pp. 50-51 (agreeing that this statement establishes a time frame "showing [Ronk's] intent to commit arson formed after he stabbed Craite.") (emphasis added). The trial court likewise acknowledged this in correctly granting Ronk's requested lesser-included offense murder instruction, and even in erroneously granting the State's requested arson instruction. Tr. 624, 630-31, C.P. 217-18.

More importantly, even the inference the State claims the jury could draw

from Ronk's letter is equally insufficient to support a conviction of capital murder. The State asserts that the jury could, alternatively, have concluded from Ronk's statement that Ronk had a contingent "existing plan" to cover any "crime" with an arson, which was set in motion after "he realized the stabbing was complete." State's Brief at p. 51.

Even under this scenario there is still no capital murder. The homicide is not the "product of" the arson or any attempt to commit the arson or to escape from or conceal the arson, as the law requires. ***Buckley,*** 875 So. 2d at 1113. The arson is an independent crime committed to cover up a homicide which was, at most, a non-capital murder.

The State's arguments to the contrary turn the *res gestae* and one continuous transaction doctrines upon which those arguments purport to rely on their heads: As this Court has repeatedly said, it is the attempt to commit the underlying felony, the completed underlying felony and the immediate post underlying felony acts that determine whether the homicide occurred while the accused was "engaged in the commission of" the underlying felony, and the *res gestae* does not commence until there is an indictable attempt at the underlying felony itself. ***Pickle v. State***, 345 So. 2d 623, 626 (Miss. 1977). *See also* ***Layne v. State,*** 542 So. 2d 237, 243 (Miss.1989); ***Fisher v. State,*** 481 So. 2d 203, 212 (Miss.1985); ***Culberson v. State***, 379 So. 2d 499, 503–04 (Miss.1979). The "causal nexus" required must proceed from the underlying felony to the homicide, not *vice*

versa. ***Fisher,*** 481 So. 2d at 212. [11]

This requires that the focus be on the intent and the acts constituting the underlying felony, and the relationship of the homicide to achieving or concealing that felony, not of the relationship of the felony to concealing a homicide. To be sufficient to sustain a conviction for capital murder, the evidence must support the jury finding, beyond a reasonable doubt, that the homicide was without authority of law and was either part of the means of attempting, accomplishing or escaping from the underlying felony of arson, or was the product of the arson fire, or of the accused's attempting, accomplishing or escaping from commission of the underlying felony of arson. As a matter of law, a homicide completed by means of stabbing before any indictable attempt at an arson is reached (i.e. intent to burn property plus a direct act in furtherance of the arson) is not, by its mere proximity to a subsequent arson, even an arson committed because the homicide had been committed, elevated to capital murder. ***Buckley,*** 875 So. 2d at 1113.

This is not to gainsay the fact that, under the proper factual circumstances, it is legally permissible to allow the intent required for the underlying felony to be inferred from events occurring after the homicide, especially when the act of homicide itself would also suffice to provide the evidence of a direct act in

---

[11] The State's apparent position is that a connection flowing from the homicide to a subsequently conceived of and committed arson creates a sufficient legal nexus to make the completed homicide the "product of" the after-occurring arson. That is the legal equivalent of asserting that because it is possible to navigate upriver from New Orleans to St. Louis, the Mississippi River changes its flow and runs away from the sea, and from a lower elevation to a higher one, when one is doing so. That simply is not so, whether in law or in physics.

furtherance of the underlying felony. *See, e.g.* ***Gillett v. State,*** 56 So. 3d 469 (Miss. 2010), ***Goff v. State,*** 14 So. 3d 625 (Miss. 2009) (both concluding, in robbery capital murder cases where the same act of violence that killed the victims was sufficient to meet the use of force element of the underlying felony of robbery, and in which there was no evidence of subjective intent at all, that requisite intent to rob could be inferred from subsequent possession of property taken from the presence of the decedent).

However, in the instant matter, that inference alone does not get the State over its sufficiency problem. Even if the existence of a subsequent arson permitted inference of intent to commit arson prior to the homicide, that deals with only one of the two things necessary to establish that the homicide of Michelle Craite occurred when an indictable attempt at arson was underway in the instant matter. There must also be the requisite direct act in furtherance of that intent prior to or at the time of the act of homicide. ***Henderson,*** 660 So. 2d at 222, ***West v. State,*** 553 So. 2d 8, 13 (Miss. 1989).

As the State admits, there is absolutely no evidence of any direct acts in furtherance of an arson until after the homicide in the instant matter. (State's Brief at 51). Rather, here it is undisputed that the decedent did not die in the fire, Tr. 526, and that there was no independent act related to the setting of a fire occurring until after the homicide was completed for reasons having nothing at all to do with setting the fire. Ex. S-51, fourth page. Nor is this a situation where any of the acts relating to the homicide were also essential elements of the crime of arson, which

can provide the requisite indictable attempt at the underlying felon at or before the time of the homicide, and consequently the requisite nexus, as is the case where the underlying felony is rape or robbery. *See* ***West***, 553 So. 2d at 13 ("[B]ecause the use of force is an essential element to the crime of rape, the use of deadly force, if done with the intent to coerce the victim into engaging in a sexual act, satisfies the factual nexus between the killing and the underlying felony to elevate the killing to a capital crime."). *See also* ***Goff***, 14 So. 3d at 647-48, 668 (finding that killing was sufficient act of force to sustain conviction of robbery capital murder on basis of unexplained post-homicide possession by defendant of decedent's property, but also expressly noting that crime of arson committed after completion of the homicide was not used as either the predicating felony or an aggravating circumstance). [12]

Even if the improbable inference of intent suggested by the State here was justified, there was no evidence at all of any direct act in furtherance of the purported underlying felony of arson until after Craite was dead by means that had nothing to do with the arson. At most, the intent with regard to arson in this scenario was that there would be an arson, but if and only if a successful homicide

---

[12] Unlike with robbery or rape, where use of force is an essential element of the underlying felony and permits a finding of capital murder where there is an inference of intent possible, use of force is not an essential element in arson which requires only that the accused "willfully and maliciously sets fire to or burns or causes to be burned" arsonable property or solicits others to do so, or to attempted to do either act. *See* **Miss. Code. Ann. § 97-17-1, 3, 5 through 11** (common elements of all degrees of arson and of attempt to arson). Hence the act of force that constitutes the homicide cannot create the requisite factual nexus that makes the homicide the product of the underlying felony as long as the intent may be inferred. There must be some other evidence of a direct act in furtherance of the arson + requisite intent to arson in order to establish the requisite nexus to make the homicide a capital murder. To the extent that this distinguishes arson from other kinds of capitalizing felonies for purposes of the one continuous transaction rule, that does not "exempt" arson capital murder from it, as the state asserts. State's Brief at p. 56. It simply requires some act other than the killing to be the predicate act of the arson.

were committed by independent means. There is nothing in the existence of this intent that creates the requisite causal nexus from commission of the underlying to the homicide the way that this nexus is created where the same set of acts that constitutes the *res gestae* of the killing is also sufficient to simultaneously be an essential element of the underlying felony. ***West,*** 553 So. 2d at 13.

The State's assertion that remedying the error here would "afford[] criminal defendants an opportunity to cover their tracks in a legally approved effort to avoid a capital murder charge (this is especially true in that arson is an easy way to destroy evidence of a crime)" is thus as bizarre a response to the arguments being advanced by Ronk here as it is unsupported by the record.

First of all, Ronk's claim on this point is based on the argument that evidence in the instant matter is devoid of any proof – inferential or otherwise – that there was both the requisite intent and a direct act in furtherance of arson at the time homicide occurred sufficient to elevate whatever crime was being committed to capital murder. Ronk's Brief at pp. 37-40. Hence, Ronk submits the only thing that could have been concealed was a homicide that could not have been capital murder in the first place. Even if the jury correctly rejected Ronk's claim that this was a justifiable homicide in self-defense, which is not a crime at all (and would not be rendered any less justifiable or more criminal as a homicide *qua* homicide for having been covered up with an arson) and the trial court did not err in refusing a manslaughter instruction, the only "crime" which Ronk would have been concealing was non-justifiable homicide. When someone destroys evidence of a

murder or manslaughter, by whatever means, he is not "avoiding" a capital murder charge – there is no basis for that charge in the first place. He is attempting to avoid, at most, a murder charge.

Second, there is nothing "legally approved" about someone "covering their tracks" with an arson. Arson is a crime, and had the State wanted to reserve the right to hold Ronk criminally responsible for that crime as a fall back in the event that the homicide was found to be justifiable, or if it feared that evidence of it had been destroyed in the fire, it could have indicted Ronk for arson in the same indictment as the capital murder, as long as, if there had been convictions for both, the trial court had sentenced him for only one. ***Meeks v. State***, 604 So. 2d 748, 750-51 (Miss. 1992). This kind of fall back indictment is the remedy for use of criminal means to cover up tracks of other crimes, not permitting unconstitutional convictions to stand. *See, e.g.,* ***United States v. Capone***, 93 F.2d 840 (7th Cir. 1937) *cert denied* 303 U.S. 651 (1938) (affirming convictions and sentences for failure to file federal income tax returns of notorious racketeer and serial murderer, despite apparent success by defendant in "covering his tracks" with respect to homicides and racketeering committed in the course of a long criminal career).

Even the State's best case scenario for the inferences that could be drawn from Ronk's description of the events, the only version in evidence, establishes only that Ronk completed a homicide by fatally stabbing Michelle Craite and then carried out a separate plan to burn down the house they had shared together in order to conceal the homicide, rather than attempting to conceal the homicide in

some other manner. Ex. S-51, State's Brief at 51.[13]

The purpose of the common law felony murder doctrine is not to make it possible to punish an otherwise unprovable homicide. It is to elevate the criminality of committing a non-homicide felony that results in a death to the punishment for murder – capital murder in some cases – even without the requisite *mens rea* required to convict of malice aforethought murder.

> All states have endorsed the common-law concept of felony murder in some form. In it the felon is considered "at risk" while committing the felony so that if a homicide results, it is considered murder, or, as in our state, capital murder if associated with the felonies, designated by the legislature. The legislature's intent was to protect the citizenry from the evil of the lesser felony by imposing a greater penalty upon a homicide occurring during its commission.

Grayson v. State, 806 So. 2d 241, 252 (Miss. 2001).

Subjecting perpetrators of otherwise non-capital homicides to the death penalty solely for the means by which a completed homicide is concealed, at least where no further homicide results from those means, also serves neither the retributive nor deterrent justifications that make the death penalty for felony murder constitutionally permissible. ***Gregg v. Georgia***, 428 U.S. 153, 183 (1976). It certainly does not narrow the circumstances in which homicides may be punished by death to "a narrow category of the most serious crimes" and whose extreme

---

[13] This alone is sufficient to distinguish the factual and legal circumstances from slim reed of dictum in ***Howard v. State***, 853 So. 2d 781 (Miss. 2003), about arson as an aggravating circumstance on which State attempts to hang its argument. In ***Howard***, the underlying felony was rape, not arson. ***Id.*** at 783. The dictum about the arson as a sentencing aggravator was contained in this Court's rejection of a claim that the sentence was disproportionate where there was sufficient evidence of multiple additional aggravating circumstances sufficient to support a death sentence in a factual situation where there was no evidence of any kind as to the order in which the fire setting and homicide had occurred. ***Id.*** at 798.

culpability makes them "the most deserving of execution." ***Roper v. Simmons***, 543 U.S. 551 (2005).

The evidence in this matter supports conviction of, at most, a non-capital homicide. This Court may therefore not permit the conviction of capital murder to stand here.

III. THE DEATH SENTENCE MUST BE VACATED AND THE CASE REMANDED FOR A NEW SENTENCING PROCEEDING BECAUSE TRIAL COUNSEL GAVE CONSTITUTIONALLY INEFFECTIVE ASSISTANCE OF COUNSEL TO RONK AT THE SENTENCING PHASE OF THE TRIAL.

On its face the record establishes without dispute that trial counsel affirmatively failed to do an investigation into Ronk's medical, mental health, family, social and educational history that minimal performance required, and that the expert witness he was relying upon told him must be done in order to permit adequate and competent expert psychological testimony. Ex. D-2 at 24-25. *See* ***Doss v. State***, 19 So. 3d 690, 696-707 (Miss. 2009) (reversing sentence for similar failure and expressly citing ***Rompilla v. Beard***, 545 U.S. 374 (2005); ***Wiggins v. Smith***, 539 U.S. 510 (2003) and ***Williams v. Taylor***, 529 U.S. 362 (2000) as controlling ineffective assistance claims in capital matters in Mississippi).

The record also establishes, without dispute, that Dr. Beverly Smallwood, the psychologist whom trial counsel elected to call as Ronk's sole penalty phase witness even before she had examined Ronk, Tr. 15, 45-46, was, by her own admission, unqualified to perform or present to the jury an adequate mitigation study, D-2 at

24-25. [14] Perhaps consequently, there is also abundant proof that her actual testimony did more harm than good to Ronk at the sentencing phase, Tr. 691-700.

This is sufficient to establish both deficient performance and prejudice from that performance under ***Strickland v. Washington***, 466 U.S. 668 (1984). ***Ross v. State***, 954 So. 2d 968, 1006 (Miss. 2007) (reversing conviction, but also finding that counsel were ineffective in the investigation and presentation of a sentencing theory that permitted harmful and otherwise inadmissible evidence of prior misbehavior to come into evidence), ***Sea v. State***, 49 So. 3d 614, 617 (Miss. 2010) (reversing for ineffective assistance of counsel for permitting evidence of otherwise inadmissible prior bad acts to come before the jury).

The State's arguments on this point are, for the most part, an effort persuade this Court to engage in impermissible "*post-hoc* rationalization of [trial] counsel's conduct" with respect to all of these matters. ***Wiggins***, 539 U.S. at 526-27. *See also* ***Kimmelman v. Morrison***, 477 U.S. 365, 386-387 (1986) (reviewing court may not use hindsight about what the strength or weakness of the State's case is to determine whether deficiency prong of ***Strickland*** is met where claimed failure is failure to properly investigate), ***Moore v. Johnson***, 194 F.3d 586, 604 (5th Cir. 1999) (stating that courts are "not required to condone unreasonable decisions parading under the umbrella of strategy, or to fabricate tactical decisions on behalf of counsel when it appears on the face of the record that counsel made no

[14] The fact that Dr. Smallwood's credentials as a clinical or forensic psychologist are not in question, State's Brief at pp. 64, is not the same thing as saying that she was qualified to perform a mitigation study. Dr. Smallwood's statement that, notwithstanding her many professional abilities that particular task, or testifying about it to the jury, was not one of them is uncontroverted in the record.

strategic decision at all."). This Court should not take that bait.

Here, despite the *post-hoc* "strategic" rationalizations fabricated by the State in its brief, the record does not suggest that these rationalizations were actually the reason for trial counsel's prejudicially deficient performance. What the face of the record does indicate, however, is that counsel's deficient performance was the product of another cause altogether and that trial counsel in fact made "no strategic decision[s] at all" with respect to the acts or omissions that form the basis of Ronk's claims of ineffective assistance and affirmatively prevented other counsel from doing so either. ***Moore***, 194 F.3d at 604. The record is replete with affirmative evidence that those acts and omissions were the product of trial counsel's own chronic medical problems and his unwillingness to withdraw or to delegate lead duties to another counsel. Ronk's Brief at p. 44, n. 21. The State's dismissal of this aspect of the record as irrelevant to the claim of ineffectiveness is unsupported by the record or the law.

Before turning to that substantive discussion, however, Ronk must dispose of the State's preposterous procedural bar-type claim that this Court cannot address this question at all because Ronk did not adequately specify what the ineffective, non-strategic actions and omissions were or the basis for them. State's Brief at pp. 59-60. Contrary to the State's assertions, Ronk's brief in chief identifies and cites to specific places in the record that affirmatively establish both trial counsel's ongoing struggles with his own health throughout his representation of Ronk and the specific acts and omissions in investigation, preparation and presentation that

deprived Ronk of constitutionally adequate assistance of counsel in defending Ronk against the imposition of a death sentence. ***Ross***, 954 So. 2d at 1006, ***Sea,*** 49 So. 3d at 617. [15] Hence there is no basis for this Court to decline to review this issue for failure to brief it in conformity with Rule 28(a).

The State's merits position on the ineffectiveness claim is simply unsupported as a matter of fact or law. It is founded on the assertion that none of the direct references to trial counsel's ill health were made <u>during</u> the sentencing phase of the trial. State's Brief at p. 59. This is both factually and legally insufficient to support the State's claims, however.

Factually, there is no dispute that lead trial counsel was chronically ill throughout the representation.[16] There is nothing to suggest he miraculously recovered from the serious effects of that illness on the fifth continuous day of a

---

[15] *See, e.g.* Ronk's Brief at p. 44, n. 1 (summarizing with specific record citations places where illness of counsel is acknowledged in the record and where it affected actual performance in pretrial preparation, at trial, and in post-trial motions), pp. 47-54 (citations to record of deficiencies in trial counsel's general deficient pretrial investigation and preparation of his sentencing case defense, including pretrial litigation to obtain, and provide the requisite information to, a qualified expert witness who could explain an adequately prepared mitigation case to the jury. Also identifying record citations establishing testifying expert's lack of qualifications or information to perform a mitigation study or present adequate mitigation testimony), pp. 56-71 (citations to record of prejudicial evidence elicited from unqualified expert, who was sole defense penalty phase witness and the lack of any strategic basis to call such witness), pp. 72-74 (identifying record citations where deficient handling of culpability phase instructions by unprepared second chair counsel pinch hitting for lead counsel too ill to participate himself led to failure to instruct jury on two statutory mitigators established by the evidence), pp. 75-77, 79 (record establishing deficiencies in closing argument).

[16] Supp. Tr. 13-14 (trial judge placing on the correction proceedings record that lead trial counsel had been "ill for many years" in connection with discussion on effects that illness had on his absence at times during trial and his subsequent retirement). Tr..751 (absence from hearing on Motion for New trial due to illness). Indeed, this chronic ill health is conceded by the State in its brief. State's Brief at p. 59.

stressful jury trial where the client's life hung in the balance, Tr. 121, 668. In fact, the record suggests otherwise. It is uncontradicted that unexpectedly, and without any explanation, lead counsel turned the sentencing instruction conference over to second chair counsel who had had no participation in presentation of defendant's penalty phase case, and who was, by his own admission, unprepared with respect to either the provisions of the capital sentencing statute or the wording of any mitigation-related jury instructions that those provisions might warrant. Tr. 668-705, 710. [17]

It is certainly far more reasonable to conclude that this was yet another episode of mental and physical weakness that had already begun to affect his abilities during the previous four days.[18] Egregious deficiencies in performance in those parts of the sentencing phase that lead counsel did handle also support a conclusion that he was suffering the mental and physical weakness from his chronic illness as acutely at the sentencing phase as during the culpability phase. See

---

[17] Second chair counsel admitted that he had neither the statute nor any defense prepared wording when he was asked for the mitigating factors on which Ronk wished to have the jury instructed, and failed to request instruction on either the "extreme emotional disturbance" or "substantially impaired ability to conform behavior to law" statutory mitigators that such mitigation evidence as was adduced was adduced in aid of. Tr. 710 ("I'm not looking at the statute, but I think there is a coverall that covers everything, any of his characteristics. I'm not sure what the wording is.").

[18] *See* Tr. 200 and Supp. Tr. 56-57 (absence of lead counsel from record reconstruction proceedings during voir dire due to such considerations), Tr. 243-44 (shortness of breath affecting lead counsel's voir dire examination),Tr. 567, 570 (admission by lead counsel that he had neglected to make a directed verdict motion at the close of the first phase evidence because "I'm really not having a good day"), Tr. 615 (admission to being "terribly confused" and unable to answer court inquiry during culpability phase instruction conference).

Ronk's Brief at pp. 60-69, 75-80. [19]

Such a conclusion is also a matter of simple common sense. Even for the healthiest trial lawyer, a lengthy trial is a physically and mentally exhausting experience, and the effects of that exhaustion are cumulative. [20] Where the trial lawyer is physically or mentally impaired, this Court has expressly recognized that the effects can so debilitating as to prevent a fair trial for the defendant. *See, e.g.,* ***Edge v. State,*** 393 So. 2d 1337, 1342 (Miss. 1981) (fatigue, need for medication); ***Thornton v. State,*** 369 So. 2d 505, 506 (Miss. 1979) (age, medical condition).

---

[19] Lead counsel's eighteen line opening statement did not bother to mention what the mitigating testimony would be or even tell the jury that he would use it to seek a life sentence for Ronk; instead, it told the jury that he was distancing himself from their decision and put all his eggs in the basket of them relying on the psychologist's expertise. Tr. 670-71. Since that testimony permitted the State to elicit from the psychologist the diagnosis of Ronk as a "sociopath," that was a particularly ineffective strategy – whether he actually knew that was going to happen or if, as is more likely, he had failed to properly prepare himself for the fact that the bad acts he was going to elicit from the psychologist would also support the anti-social personality disorder diagnosis. Lead counsel also conducted a hapless sentencing phase examination of the psychologist in which he unnecessarily underscored the weaknesses in her favorable opinions, Tr. 683, 688-89, without actually "inoculating" the jury against the devastating aggravating facts and opinions related to anti-social personality disorder and dishonesty with the testifying expert that he should have known would be elicited on cross-examination. Tr. 691-700 (cross-examination eliciting extremely damaging facts and opinions about diagnosis of "sociopathy" and psychologically "documented" dishonesty) As a consequence, exceedingly harmful and otherwise inadmissible evidence of prior bad acts, purported dishonesty, and a diagnosis that the State was able to use to characterize Ronk as a "sociopath," came into evidence without any effective countermeasures on either direct examination or on redirect, Tr. 702-03, and formed the core of the State's closing argument at penalty phase. Tr. 736, 741-42. As is discussed in Ronk's Brief at pp. 75-78, his closing essentially told the jury to agree with the State's characterization of Ronk as a sociopath by accepting the psychologist's testimony on that point.

[20] *See, e.g.,* Ted Brooks, "The Stress of Trial," posted June 13, 2011 to *The Court Technology and Trial Presentation Blawg* [sic], http://trial-technology.blogspot.com/2011/06/stress-of-trial.html (last viewed 3/06/13) (discussing effect of stress in civil litigation), Robert Guest, "Trial Stress," posted January 31, 2010 to *Dallas Criminal Defense Lawyer Blog,* http://www.dallascriminal defenselawyerblog.com/2010/01/trial-stress.html) (last viewed 3/06/13) (discussing stress effects from spending "most of a week" in non-homicide, non-death penalty DWI jury trial).

Moreover, as a matter of law, the core of furnishing effective assistance at the sentencing phase of a capital trial is the investigation and preparation prior to walking into the courtroom. ***Ross***, 954 So. 2d at 1006 (failure to do sufficient pretrial investigation on sentencing issues found to be ineffective assistance in capital case). *See also* ***ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases***, (Rev. 2003), Introductory commentary at 5-7, Guideline 10.7 and commentary at 80-84 (general obligations regarding investigations), Guideline 10.10.1 (investigation required for adequate formulation of defense theory), Guideline 10.11 F., G. and commentary at 106-10 (investigation required for adequate selection of witnesses to present penalty phase case), Guideline 10.4 B ("Lead counsel bears overall responsibility for the performance of the defense team, and should allocate, direct and supervise its work in accordance with these Guidelines and professional standards"). [21]

There is no dispute that the record shows significantly impaired pretrial preparation resulting from lead counsel's chronic health problems. He routinely missed, or was ill during, pretrial court appearances and did not prepare or file any of Ronk's pretrial motions himself, or even to coordinate the filing of same by his team, which filed duplicative sets of motions signed by persons other than lead

[21] This Court endorses use of the *ABA Guidelines* as "prevailing norms" and "guides to determining" what is deficient professional performance for ***Strickland*** purposes. ***Wilson v. State***, 81 So. 3d 1067, 1092 (Miss. 2012) (quoting ***Padilla v. Kentucky***, 559 U.S. 356, ---, 130 S. Ct. 1473, 1482 (2010) and ordering PCR hearing on ineffective assistance for lack of out of court research and lack of effective out of court communication with client despite no facial deficiency in way in which actual plea colloquy handled).

counsel. [22] On the crucial motion to obtain a defense mitigation psychologist, he neither prepared the motion, nor argued it, nor presented the order on that motion (and failed to secure any record of those proceedings). He also failed to involve the second chair counsel who had taken up those duties in any of the follow up on it. C.P. 93, Tr. 10-11, 15, 24-25.[23] As a consequence, lead counsel committed to using the less than fully qualified psychologist as his sole expert even before any examination was made of Ronk, and then failed to ensure that the investigation required to present mitigation was completed. He also affirmatively failed even to pass on to that psychologist the results the partial investigation that was done despite lead counsel's inaction by a volunteer co-counsel. [24]

The State asserts, in response to this overwhelming evidence of actual

[22] *See, e.g.,* Tr. 6 (arraignment handled by otherwise nonparticipating counsel due to lead counsel's need to recover from recent hospitalization), Tr. 20 (lead counsel's apparent physical difficulties during motion hearing argument due to side effects of medication), Tr. 24-25 (discussion of signing of motions by third parties and duplicative filings as a result of confusion during lead counsel's hospitalization), , C.P. 31-42 (omnibus multi part motion filed 2/25/10, signed by non-participating counsel for second chair counsel), C.P. 78-80 (motion for psychological evaluation signed with name of lead counsel with initials of non-participating counsel), C.P. 52-59, 66-77, 81-83, 86-87 (motions filed March 1 that were duplicative of motions filed on Feb. 25, also signed with name of lead counsel with initials of non-participating counsel).

[23] In lead counsel's absence, that order both appointed a "defense" expert psychologist who was not actually qualified to prepare a mitigation study and present mitigation testimony, Ex D-2 at 24-25, and directed the psychologist to perform additional, and ultimately damaging, evaluation not requested by the defense. C.P. 93 (ordering unrequested evaluation for ***Atkins*** mental retardation in individual as to whom defense made no claim of retardation due to Ronk's established above average IQ), Tr. 693-94, 707 (using malingering testing required by this Court to make *prima facie* case of ***Atkins*** mental retardation claims, but not for presentation of mitigation testimony, to add dishonesty to the litany of bad character traits the State was eliciting from the sole defense mitigation witness).

[24] *See* Ex. D-2 at 24, C.P. 115-19 (orders obtained by volunteer co-counsel granting payment for medical records apparently obtained, but never furnished to expert, Ex. D-2 at 6-8).

prejudicial deficiencies in pretrial mitigation investigation and preparation, that medically impaired lead counsel's mere presence in the courtroom during the sentencing proceedings, assisted by an unprepared second chair counsel unexpectedly improvising when lead counsel could not function, makes it impossible for this Court to conclude that that counsel was ***Strickland/Wiggins/ Williams*** ineffective. See State's Brief at p. 61.

This "mere presence" notion has long been resoundingly rejected as sufficient to fulfill the criminal accused's Sixth Amendment right to counsel. *See* ***McMann v. Richardson***, 397 U.S. 759, 771 (1970) (holding "if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel"). *See also* ***United States v. Woods,*** 487 F.2d 1218, 1219 (5th Cir. 1973) (stating "physical presence alone fails to satisfy the mandate of the Sixth Amendment. It is now firmly established that the right to counsel means no less than the right to effective counsel.")

Equally unfounded is the State's related contention that, as a matter of law, counsel's physical or mental infirmities can never be sufficient to support a ***Strickland*** claim. State's Brief at pp. 60-61. Ronk does not dispute that the existence of an impairment that does not actually result in prejudicially deficient performance does not establish ***Strickland*** ineffectiveness. However, as the cases relied upon by the State make clear, it was the want of evidence of any actual deficient performance or prejudice that defeated the claim in the one case where ineffectiveness was not found, not the fact that the claim rested on physical or

mental impairment of counsel rather than some other shortcoming. ***Berry v. King***, 765 F.2d 451, 454 (5th Cir. 1985) (stating that "[t]he critical inquiry is whether, for whatever reason, counsel's performance was deficient and whether that deficiency prejudiced the defendant.") (emphasis added).

Where there is evidence of actual deficient performance, as there was before the district court in ***Hodges,*** the other matter cited by the State, then the fact that addiction impaired counsel

> missed several hearings, . . . when considered with the fact that his trial performance appears, from a charitable view, to have been awkward and confused, should have concerned the . . . court as to whether the defendant had adequate counsel.

Hodges v. Epps, 1:07CV66-MPM, 2010 WL 3655851 at * 25 (N.D. Miss. Sept. 13, 2010 aff'd in part, 648 F.3d 283 (5th Cir. 2011) (ordering vacation of sentence and new trial on sentencing due to ineffective assistance of counsel). Indeed, the federal district court in ***Hodges*** expressly found reversible ineffectiveness at the sentencing phase not only because of haplessness in the courtroom, but expressly because of the pretrial failure of medically impaired counsel or his co-counsel to fully investigate and prepare that led to that haplessness. ***Id.*** at * 38. [25]

Since the legal and factual foundations upon which the State relies in opposing Ronk's ineffectiveness claims before this Court are not sound, its

---

[25] To the extent that the State relies upon unspecified and un-pinpoint cited findings allegedly made by this Court in ***Hodges v. State***, 949 So. 2d 706 (Miss. 2006) to support its claim that medical impairments are irrelevant to the ***Strickland*** inquiry, of course, any such findings were expressly rejected by the federal habeas court as "an unreasonable application of the law governing the right to effective counsel. " ***Hodges v. Epps*** at * 39. With its obligations under the Supremacy Clause, the State should not urge this Court to make the same mistake twice.

arguments on each of the specific prejudicial shortcomings identified by Ronk are unsupportable.

a. The State's arguments do not render "effective" the facially deficient and significantly prejudicial acts and omissions of trial counsel with respect to investigating, preparing and presenting a penalty phase defense, and the exceedingly prejudicial, but otherwise inadmissible, information that the State was able to extract from Ronk's own witness as a result of those acts and omissions.

The State's arguments on this point are simply elaborations on the improper *post-hoc* justifications the State has constructed for deficient performance that is fully explained by other evidence. ***Wiggins***, 539 U.S. at 526-27, ***Moore***, 194. F.3d at 604. They are also disingenuous, at least to the extent they are founded on the State's praise of how "smart" and "effective" defense counsel was. State's Brief at pp. 68, 64. There is nothing "smart" about calling as one's sole penalty phase witness -- a witness who had expressly told the lawyer she did not have sufficient information to fully present even the minimal information she was presenting -- much less ignoring her advice on the need for a witness with different expertise to present a comprehensive mitigation theory to the jury. ***Doss***, 19 So. 3d at 696-707, ***Fulgham v. State***, 46 So. 3d 315, 336 (Miss. 2010). There is certainly nothing "effective" in calling a mitigation witness who provides more effective aggravation evidence for the State than mitigation for the defendant. ***Ross***, 954 So. 2d at 1006.[26]

---

[26] On at least the latter point one needs look no further for the disingenuousness than the prosecutor's final closing at trial, which exhorted the jury to use Dr. Smallwood's diagnosis of Ronk as a "sociopath" as a justification for killing him and ignoring any of the more mitigating information that Smallwood's testimony might have alluded to. Tr. 741-42.

The legal flaws in the State's argument arise from its ignoring this Court's jurisprudence on this point. As this Court has recently held, one of the key functions of a mitigation expert witness – which is distinct from expert testimony of psychological diagnoses – is to provide the jury with a "cohesive overview of the mitigation evidence." ***Fulgham,*** 46 So. 3d at 336. Hence, when a jury is deprived of that cohesive review, it is impaired in its "ability to consider <u>all</u> mitigating evidence [and] there is a risk of erroneous imposition of the death sentence." ***Id.*** (reversing sentence as a result of that deprivation).

As this Court recognized in ***Fulgham,*** and Dr. Smallwood herself understood and attempted to tell defense counsel, Ex. D-2 at 24-25, testimony about psychological diagnoses from an evaluating psychologist or psychiatrist on the basis of a clinical interview with the client, cannot and do not fulfill the same function as testimony based upon comprehensive review of multiple information sources, and interviews of collateral witnesses, that is encompassed in a mitigation study. ***Id.*** at 334.

It is absolutely undisputed on the face of the record that the only thing Dr. Smallwood considered herself qualified to do or, due to the shortcomings in the investigation, she actually did do in the instant matter. This was to testify from an incomplete medical and psychological record, about her and other doctors' diagnoses, their origins and their nature, much as Dr. Webb did in ***Fulgham.*** Ex. D-2, Tr. 673-690.[27] This is not, alone, sufficient to ensure "a fair sentencing phase"

---

[27] The Court in ***Fulgham*** summarized Dr. Webb's testimony as follows:

in the absence of an accompanying "cohesive overview" of that testimony in the larger context of the Defendant's life and the facts upon which the psychological diagnoses were made. ***Fulgham,*** 46 So. 3d at 337. That by itself defeats the State's claims that Smallwood's testimony was sufficient to render Ronk's trial counsel *Strickland* effective. State's Brief at pp. 64-68. [28]

Retaining a mental health professional to examine an accused with a history of mental illness may be, for purposes of determining whether counsel's penalty phase representation passes ***Strickland*** muster, a necessary initial step. However, it is certainly not sufficient standing alone, as the State appears to assert. ***Wiggins***, 539 U.S. at 524-25 (noting that counsel was ineffective despite having retained

---

Webb testified that he had performed a psychiatric assessment of Fulgham at the Oktibbeha County Jail. He testified that Fulgham suffered from post-traumatic stress disorder and panic disorder with dependent personality traits. In arriving at these diagnoses, Webb testified that he had based his opinion on information from Fulgham, namely: (1) Fulgham was raped by her biological father when she was eleven years old; (2) one of her stepfathers was an alcoholic who had abused her mother; (3) and one of her mother's boyfriends had neglected her.

Fulgham, 46 So. 3d at 334.

[28] This also defeats the State's claim that Ronk's counsel would not have been entitled to receive funding for a full mitigation investigation, and/or for an expert actually qualified to do a mitigation study and provide testimony based on that study at the sentencing hearing in addition to or in lieu of Dr. Smallwood's testimony about her evaluation. State's Brief at pp. 68, 70-71. Dr. Smallwood's information about the existence of multiple additional sources of medical, family and social information available but not provided to her, as well as her professional understanding of what was entailed in providing a mitigation investigation and study and her own lack of qualifications to do so, Ex. D-2 24-25, would have demonstrated the requisite "something more than a mere possibility of assistance" the State acknowledges would support such a request if considered on a "case by case basis" in this case. ***Yohey v. Collins***, 985 F.2d 222, 227 (5th Cir. 1992), ***Johnson v. State***, 476 So. 2d 1195, 1202 (Miss. 1985). Indeed, the trial court expressly understood that and left the door open for defense counsel to come back if Dr. Smallwood was unable to provide the required services, Tr. 15. Trial counsel's failure to do so when that occurred was not strategy, it was ineffectiveness.

psychologist to perform examination of client where further evidence of background was not also obtained). Counsel must also secure the information the expert needs to perform that examination and follow any leads suggested by that expert's examination before attempting to make strategic decisions regarding mitigation theory or the kinds of witnesses needed to present it. ***Id.***, ***Williams***, 529 U.S. at 369 (finding ineffectiveness despite actually presenting mitigating information conveyed to psychiatrist) *See also* **Fulgham**, 46 So. 3d at 336 (recognizing need for more than just psychiatric testimony to sufficiently convey "cohesive" mitigation theory). At the very least, before actually presenting testimony from that expert, or any other witness, defense counsel must do an investigation sufficient to determine whether that expert's testimony will do more good than harm if it were presented to a jury and accordingly prepare to ameliorate any harmful things that might come of it. ***Ross,*** 954 So. 2d at 1006 (failure to investigate sufficiently to discover harmful information), ***Rompilla,*** 545 U.S. at 385-89 (failure to prepare amelioration despite knowing of harmful information likely to be used) *See also* **Sea,** 49 So. 3d at 617.

In this light, there is nothing inconsistent or paradoxical about claiming that trial counsel's election, without sufficient investigation or preparation, to present a mitigation case consisting exclusively of presenting the testimony of an expert who, by her own admission, had neither the qualifications nor the information necessary to perform or present a full mitigation study, Ex. D-2 at 24-25, was ineffective assistance both counts and who had dangerously harmful information that she could impart to the jury if she were called to testify. *See* State's Brief at p. 72. The

negative effects of that ineffective and uninformed performance are cumulative and interrelated, not mutually exclusive. ***Ross,*** 954 So. 2d at 1005-06 (noting both failure to adequately develop facts and testimony suggested by the record and the prejudicial effects of the testimony actually presented). *See also* ***Rompilla,*** 545 U.S. at 385-89.

Moreover the State's claim to the contrary simply fails to recognize the undergirding ineffectiveness that caused this to happen: the absence of sufficient investigation to either 1.) provide an expert with existing available information – or the means to obtain the information-- that would have permitted a full study and presentation of a cohesive overview of the mitigation story, ***Fulgham***, 46 So. 3d at 336 *or* 2.) to uncover and ameliorate the negative things that could come in as a result of electing despite these shortcomings to present testimony from that particular witness. ***Ross,*** 954 So. 2d at 1005-06.

Nor, as the State asserts, must Ronk establish that a proper mitigation study "would have altered the jury's decision." State's Brief at p. 84. The standard for prejudice in capital sentencing is "a risk of erroneous imposition of the death sentence." ***Fulgham,*** 46 So. 3d at 336 (citing ***Wilcher v. State***, 697 So. 2d 1123, 1133 (Miss.1997) (citing ***Mills v. Maryland***, 486 U.S. 367, 375 (1988) (quoting ***Eddings v. Oklahoma***, 455 U.S. 104, 117, (1982))). *See also* ***Wiggins,*** 539 U.S. at 538 (finding prejudice where a mitigation case and based upon a fuller investigation "might well have influenced the jury's appraisal of [the defendant's] moral culpability").

This Court has concluded that such risk arises whenever, as a product of deficient investigation and preparation, defense counsel permits penalty phase testimony that tends to cast the defendant as "unrepentant" or a "danger to society," as the bad acts and sociopath evidence does in the instant case. This is because evidence is, without any more specific showing of prejudice other than the omission of an optimal mitigation case and the detrimental information imparted to the jury through the witnesses presenting it, "undoubtedly highly prejudicial." ***Ross***, 954 So. 2d at 1006. [29]

The State's arguments and its improper *post hoc* construction of possible strategic justifications are not on point to the inquiry that this Court has said it will conduct in a capital case under the circumstances reflected by the record here. ***Id.*** The matters set forth there and on this point in Ronk's brief in chief, Ronk's Brief at pp. 48-71, fully justify a conclusion that the sentence, at least, must be set aside due to constitutionally ineffective representation accorded him by trial counsel.

b. The State fails to demonstrate that trial counsel were not prejudicially ineffective in failing to seek and obtain jury instructions on statutory mitigation factors which supported the mitigation theory offered.

---

[29] There is undisputed evidence of both an incomplete mitigation investigation to obtain all the relevant mitigation evidence prior to determining a sentencing theory, and of the highly prejudicial aggravating information produced as a consequence of the witnesses that are presented. The former condition is established without dispute by Dr. Smallwood's report. *See* Ex. D-2 at 24 ("In addition to the above findings, it must be noted that many variables which may provide mitigation are reportedly found in this man's psychological and medical history. However, I do not have the benefit of those medical records."). The latter is established by the testimony elicited by the State from Smallwood on cross examination, Tr. 691-700, and the powerful use to which it was put by the State in its closing exhortation to the jury to disregard the minimally mitigating effect of the incomplete mitigation case actually presented to it. Tr. 726, 741-42).

Again, the State's arguments on this point rest on post-hoc strategic justifications fabricated in the face of a record establishing affirmatively that trial counsel "made no strategic decisions at all" about the mitigation instruction strategy, ***Moore v. Johnson***, 194 F.3d at 604, and/or on the basis of readings of the law that have no support in this Court's jurisprudence. [30]

The State effectively concedes that the evidence supported the granting of an instruction based on the "extreme mental or emotional disturbance" statutory mitigator set forth at **Miss. Code Ann. § 99-19-101(6)(b).** State's Brief at p. 89. Nonetheless, it contends that it was a sound strategic decision to decline to seek an instruction on this point because the jury "did not buy" a claim that he acted in reasonable self-defense in stabbing Ms. Craite. ***Id.*** at 86.

While it does not concede that there is evidence to support the '"diminished capacity to appreciate the criminality of his conduct or conform it to the law" mitigator, ***Miss. Code Ann,*** **§ 99-19-101(6)(f)**, it too is established by the evidence. The notion that there could be any strategic justification for declining to request and obtain either of them is simply unsupported as a matter of law and fact.

The jury was never instructed on <u>any</u> defense theory of which extreme mental and emotional distress was a component, so the State's assertion that there

[30] The State's purported perplexity over whether it was lead counsel or second chair counsel who was ineffective here is a red herring. It is deficient performance on the part of lead counsel to fail to supervise the entire defense team. If lead counsel he was not going to conduct the instruction conference himself, he nonetheless was required to ensure that the attorney who did was adequately prepared to do so, or to seek a continuance to permit such preparation. ***ABA Guidelines*** at Guidelines 5.1 and 10.4 ("Lead counsel bears overall responsibility for the performance of the defense team, and should allocate, direct, and supervise its work in accordance with these Guidelines and professional standards.")

was a strategic reason not to remind the jury of something that it had rejected is simply without any foundation. At the culpability phase, Ronk's attorney withdrew the heat of passion manslaughter instruction and the trial court erroneously refused the imperfect self-defense manslaughter instruction, the only two instructions that required findings as to extreme mental or emotional agitation of any kind. Tr. 593-600. C.P. 256-57, 363-65. See also Argument I, *supra*. The self-defense instruction proposed by the State and given by the trial court did not require any conclusions on the part of the jury regarding extreme mental or emotional distress of the actor to either find its existence or reject it. Tr. 610-12, C.P. 230. Hence, the jury had no opportunity to have passed on that question at all during the culpability phase at all.

Moreover, as the State itself points out, State's Brief at pp. 64-69, to the extent that Dr. Smallwood's penalty phase testimony had any mitigating point, it was largely that, due to Ronk's history of bipolar disorder and ADHD, Ronk's mental state at the time of the killing was both one of extreme mental or emotional disturbance, and one of a reduced capacity to appreciate criminality or conform his behavior to the law due to the impulsivity associated with both bi-polar disorder and ADHD and failures of judgment and control associated with both phases of bipolar disorder Tr. 679-86, Ex. D-2. Of course, this point was incompletely documented and ineffectively investigated, arrived at, prepared for or presented.

If that is the selected mitigation theory, no matter how ineffective counsel was with respect to choosing or presenting it, and no matter how much other, more

negative evidence it also opened the door to, there is no conceivable strategic basis for not seeking an instruction on it. If anything it is even more important to get the judge to remind the jury that the law does direct them to consider the original mental health testimony as mitigating, and give them concrete ways in which to give it that consideration. Indeed, as a matter of constitutional law, the trial judge must give a capital sentencing jury the legal criteria which it may consider, and to do so with reasonable specificity. ***Abdul-Kabir v. Quarterman***, 550 U.S. 233, 264 (2007), ***Smith v. Texas***, 550 U.S. 297, 315-16 (2007).

Any claims that the evidence was insufficient to grant these instructions if requested are also without support, since here, unlike in the cases cited by the State to support that contention, there was ample expert evidence justifying both. Tr. 679-86, Ex. D-2. In neither ***Branch v. State,*** 882 So. 2d 36, 52 (Miss. 2004) nor ***Lester v. State***, 692 So. 2d 755, 799 (Miss. 1997) was there any mental health expert report or testimony. Additionally, in ***Lester,*** this was entirely dictum, since the conviction and sentence were set aside on other grounds. In ***Berry v. State,*** 703 So. 2d 269, 287 (Miss. 1997), the jury actually was instructed on one of these two mitigators in addition to receiving the catch all instruction.

Nor are the legal standards for finding mitigating levels of emotional distress or reduced capacity the same, or as stringent, as those required to establish legal sanity (ability to distinguish right from wrong), or ***Atkins*** retardation (mild mental retardation under prescribed diagnostic standards). The fact that Ronk did not meet the exceedingly stringent criteria for insanity or retardation does not preclude less

serious mental illness to be mitigating as extreme mental distress or diminished capacity to understand or conform his conduct to law at the time it occurred. Additionally, it certainly does not take away Ronk's right to have the jury instructed about the kinds of things related to those conditions that the law deems mitigating. ***Tennard v. Dretke***, 542 U.S. 274, 285 (2004), ***Penry v. Johnson***, 532 U.S. 782, 797 (2001). The Eighth Amendment clearly requires that a State must be sufficiently specific about what it defines as mitigation to permit the jury to differentiate mitigation of culpability from a complete absence of it. *See* ***Abdul-Kabir,*** 550 U.S. at 264. ***Smith v. Texas,*** 550 U.S. at 315-16.

Finally, the State's argument that any error in failing to obtain these instructions was cured – or rendered non-prejudicial – by the giving of the "catch-all" instruction is not supported by law or the record. As this Court understands, when something is told to the jury by the judge, it carries with it an "imprimatur of authority" which argument by counsel can never convey as powerfully. *See* ***Collins v. State***, 701 So. 2d 791, 795 (Miss.1997). *See also* ***Bollenbach v. U.S***. 326 U.S. 607, 612 (1946), (noting that "jurors are ever watchful of the words that fall from [the judge]. Particularly in a criminal trial, the judge's last word is apt to be the decisive word").

In the instant matter, this was particularly prejudicial since counsel did not even bother to connect anything it had heard from Dr. Smallwood to either the general catchall instruction, or these principles. Tr. 736-40. *See* Section C., *infra*. This left Ronk's jury with nothing at all to explain the core of his sentencing defense

to it. *See* ***Blunt v. State***, 55 So. 3d 207, 211 (Miss. Ct. App. 2011) (reversing for ineffective assistance of counsel where defense counsel "proffered [a] jury instruction [that] misstated the law on self-defense to the jury, and it essentially left Blunt with no instruction on his theory of the defense"). That the omission of the more specific jury instructions actually prejudiced Ronk is demonstrated by the fact that the jury expressly requested further definition of mitigation during its deliberations, though it was not given any. (Tr. 743). *See* ***Kolberg v. State***, 829 So. 2d 29, 48 (Miss. 2002).

For the reasons stated here, and in Ronk's brief in chief, and incorporated herein by reference, reversal of the sentence is required for this ineffectiveness as well.

c. Nothing in the State's Brief redeems trial counsel's damaging closing argument – which essentially seconded everything the State was saying about why nothing presented in mitigation was worth crediting –from being found prejudicially ineffective assistance of counsel

The State's arguments on this point continue to misrepresent what the core ineffectiveness was in this case and seek to have this court completely immunize any act or omission within the customary ambit of strategy from review as ineffective. That is not the law. All conduct of counsel, whether discretionary or traditionally "strategic" is subject to such review, albeit very deferential review. ***Strickland***, 466 U.S. 668. Where a normally strategic decision is prejudicial to the defendant and founded on insufficient investigation or preparation, any presumptions against deficient performance are overcome because the insufficient

investigation or preparation is itself so deficient as to constitute ineffectiveness. ***Ross,*** 954 So. 2d at 1006. *See also* ***Wiggins,*** 539 U.S. 510, ***Rompilla,*** 545 U.S. 374. Where an act or omission, despite being within the ambit of strategy, is affirmatively harmful or disloyal to a defendant without any reason to suppose it could bring him any benefit, this Court does not hesitate to reverse, even if there is no record evidence that investigation leading to the act or omission was itself deficient. ***Sea,*** 49 So. 3d at 617, ***Ferguson v. State,*** 507 So. 2d 94, 97 (Miss. 1987).

Trial counsel's closing argument in the instant matter offends all of these principles. The instant case was not a situation where counsel, having actually made a full investigation and having weighed the pros and cons of arguing or not, elected to close the door to a greater harm by not arguing at all. ***Bell v. Cone***, 535 U.S. 685 (2002). There was nothing gained in making the argument he did, which ratified the State's arguments made in its initial closing, and simply opened the door even wider to the State, in its final closing, turning Ronk's only mitigation witness from a shield against imposition of a death sentence to a sword with which the jury could run him through. *See* ***Sea,*** 49 So. 3d at 617, ***Ross,*** 954 So. 2d at 1006.

He had not done the investigation his own expert told him was necessary to make an effective mitigation case and deflect the aggravating implications of parts of it, ***Ross,*** 954 So. 2d at 1006, ***Rompilla***, 545 U.S. 374 and/or to make it wise to call her as a witness for the limited purpose of providing medical facts that could be used by an expert qualified to make and present a mitigation study, or even for him

to present by way of argument a cohesive narrative justifying the imposition of a lesser sentence than death. D-24 at 24-25. *See* ***Fulgham***, 46 So. 3d at 337.

In short, there was neither any indication that any strategic decisions were made at all on this point, nor any conceivable strategic justification for the way in which the case was argued. While the explanation for that failure was illness, and, therefore, deserving of sympathy, performance in the sentencing phase was both deficient and prejudicial within the meaning of ***Strickland,*** and its elaboration by the Supreme Court in death penalty matters. ***Rompilla***, 545 U.S. 374, ***Wiggins***, 539 U.S. 510, and ***Williams***, 529 U.S. 362.

For the reasons set forth here, and in Ronk's brief in chief, incorporated herein, vacating the sentence and remanding for a new sentencing proceeding is the only remedy for that Sixth Amendment deprivation. ***Doss v. State,*** 19 So. 3d 690 (Miss. 2009), ***Ross***, 954 So. 2d 968.

IV. THE TRIAL COURT ERRONEOUSLY PERMITTED THE TRIAL JURORS AND ALTERNATES TO BE SELECTED BUT NOT SEQUESTERED UNTIL THE FOLLOWING MORNING.

The State's claim of procedural bar on this point fails to make any response to the basis advanced by Ronk for raising this point despite the fact that trial counsel did not make any objection. This shortcoming was likewise the product of trial counsel's demonstrated physical illness that prevented him according effective assistance of counsel in this matter. That renders the error reviewable despite the lack of objection. ***Murray v. Carrier,*** 477 U.S. 478, 488 (1986), ***Miss. R. App. P.*** 22(b).

In all other respects, Ronk anticipated the State's reply to the errors raised in this argument in his brief in chief, and he relies on the arguments made there. Ronk's Brief at pp. 80-82.

V. RONK'S CONVICTION MUST BE SET ASIDE BECAUSE THE JURY ERRONEOUSLY RECEIVED INADMISSIBLE INFORMATION DURING THE CULPABILITY PHASE OF THE TRIAL.

a. *The State misapprehends and therefore does not refute Ronk's claim of violation of the Mississippi Rule of Evidence 106 "completion doctrine."*

That the State seems befuddled by this point of error stems, apparently, from failing to understand what it is. Ronk does not contend that Hindall was precluded from testifying about the one aggressive and angry confrontation of Ronk by Craite that Hindall actually overheard on the phone. As the State points out, the jury did hear that after the State's objection to it coming in was overruled at the bench. Tr. 511--12.

However, in that ruling, the trial court also ruled that nothing that was conveyed by Hindall to Ronk in the virtually continuous other communications about Craite over the six day period preceding Craite's death would be admissible. Tr. 508-11. Although the State contends that the prosecution had not elicited any testimony from Hindall about those communications, it had, in fact, done so at length during its direct examination. *See, e.g.* Tr. 485-92. Ronk's contention here is that because those text and cell communications were admittedly virtually continuously, the State had, by referring to parts of them, opened the door by way of the completion doctrine to anything else that was in that virtually continuous

communication, even things that would otherwise be inadmissible as self-serving. ***Davis v. State***, 230 Miss. 183, 92 So. 2d 359, 361 (1957).

In all other respects, Ronk anticipated the State's reply to the errors raised in this argument in his brief in chief, he relies on the arguments made there. Ronk's Brief at pp. 84-87.

b. *The State's brief fails to justify the admission into evidence of a knife that was clearly not the murder weapon.*

Ronk anticipated the State's reply to the errors raised in this argument in his brief in chief, and he relies on the arguments made there. Ronk's Brief at 87-89.

c. *Craite's bank records were testimonial under the circumstances under which they were obtained, and permitting them to be admitted without confrontation of their preparer violated Ronk's Sixth Amendment right to confront the witnesses against him.*

The State does not, in its argument, dispute that Hancock Bank was asked to produce the records that were not the actual records which Hancock Bank employed in handling of Craite's money or to make sure that transactions on her account were processed properly under the Uniform Commercial Code provisions governing banking. Rather, the records admitted into evidence were generated expressly at the request of police investigating a homicide in order to obtain evidence against the accused. The bank records were thus most explicitly testimonial. They were evidence not of "what is happening," at the time they were provided to the officer, but rather "what happened" at some earlier time. ***Davis v. Washington***, 547 U.S. 813, 830 (2006). [31]

---

[31] This is no different than if the officer had, instead of asking for a printout of something from the bank's computer, asked a bank employee whose job it was to watch a computer

In all other respects, Ronk anticipated the State's reply to the errors raised in this argument in his brief in chief, and he relies on the arguments made there. Ronk's Brief at pp. 89-93.

d. *The jury was allowed to receive inadmissible evidence about an unduly suggestive photo show-up identification of Ronk by Wal-Mart clerk Jennifer Mitchell, which show-up also tainted Mitchell's in-court identification of Ronk.*

The State's procedural bar claim on this point fails to acknowledge or respond to Ronk's assertion that review of this error is sought under the doctrines of plain error and/or ineffective assistance of counsel fully apparent from the record. ***Watts v. State***, 733 So. 2d 214, 233 (Miss. 1999), **Murray v. Carrier**, 477 U.S. 478, 488 (1986), **Miss. R. App. P.** 22(b).

In all other respects, Ronk anticipated the State's reply to the errors raised in this argument in his brief in chief, and he relies on the arguments made there. Ronk's Brief at pp. 94-97

VI. PAYMENT OF EXCESS COMPENSATION TO STATES WITNESS HEATHER HINDALL WAS PROSECUTORIAL MISCONDUCT THAT VIOLATED RONK'S RIGHTS TO DUE PROCESS AND TO CONFRONTATION OF WITNESSES.

That the State fails to rebut Ronk's claims on this point is demonstrated most clearly by the three page single spaced quotation from ***Woodward v. State***, 726 So. 2d 524 (Miss. 1997) with which it opens its arguments. That quotation, for the reasons Ronk took some pains to discuss in his brief in chief, sets forth the factual and legal circumstances that distinguish ***Woodward*** from the instant matter with

---

screen showing remote transactions all day long to say what transactions occurred on Craite's account. Her subsequent statement to an officer about what she saw with respect to transactions on Craite's account would clearly be inadmissible under ***Davis***

respect to both the nature of the failure by the defense to discover the excess compensation and the prejudice ensuing from it. Ronk's Brief at pp. 109-113.

Moreover, the State goes on to support this position by misleading this court on a factual point central to both the ***Brady*** and state law claims. It suggests that the State's first application for an out of state subpoena gave the defense actual notice that intended to make these payments to Hindall prior to Hindall's testimony. State's Brief at p. 127. This is not so. Though the rules clearly require that all such pleadings should be served on the opposite party, these were not. C.P. 88-92 (showing no certificate of service of this motion). Hence, it is, at best, incorrect, to even suggest such actual notice. It certainly does little to refute the claim that there was prejudicial misconduct on the part of the prosecution.

The State is also mistaken about where Hindall was compensated for traveling to and from. State's Brief at p. 130 ("The State paid Heather Hindall's expenses in traveling to Mississippi to Illinois (not Florida as [Ronk] mistakenly claims."). The State's March 2010 filed but unserved on Ronk subpoena requests listed an Illinois address for Hindall, Tr. 89-90. However the actual travel arrangements paid in October show that her airplane travel was to and from Gainesville, Florida, and the automobile travel reimbursed at 5 times the amount it should have been was from there to her home at 4638 Plaintain Ave., Middleburg, Florida, a Jacksonville suburb, not to an Illinois address. C.P. 325, 311. That is also consistent with Ms. Hindall's testimony at trial. Tr. 484 (Q. "Where do you currently live? A. Jacksonville, Florida . . . .Middleburg.").

It is not insignificant that the State missed something of such significance about these payments so completely that it relies upon it in its brief. The State did so, despite having a brief pointing out to it exactly where those references were located in a formally prepared record, and presumably with less to distract them from reading that record closely than chronically ill lead defense counsel did in the pretrial, trial and post-trial stage (including the new trial motion hearing, which he didn't even handle). This alone substantially undercuts the State's position that ***Woodward*** bars this claim because of the unserved materials filed by the State during and after the trial. State's Brief at pp. 127-28.

The State's policy suggestion that this Court should usurp the legislature and simply overlook this prosecutor's apparently customary practice of making undisclosed excess payments to lay witnesses because the permissible payments are insufficient is neither well taken nor wise. State's Brief at p. 129. The legislature did act after ***Woodward,*** and elected to improve that circumstance for former law enforcement officials, but not for lay witnesses. *See* Laws 2005, Ch. 385 § 1, eff. July 1, 2005, amending **Miss. Code Ann. § 25-7-47**. The State's redress for this lies across High Street in the Mississippi State Capitol building, not with this Court. Until the legislature acts, however, if the State intends to provide its witnesses with expenses not reimbursable by law, those need to be disclosed as a matter of Due Process and state law. ***Kyles v. Whitley***, 514 U.S. 419 (1995), ***United States v. Bagley***, 473 U.S. 667 (1985), ***Brady v. Maryland***, 373 U.S. 83 (1963) (federal constitutional due process). *See* also **URCCCP 9.04.A.4** (Mississippi

criminal discovery rule), ***Love v. State***, 441 So. 2d 1353, 1355-57 (Miss. 1983); ***Little v. State***, 736 So. 2d 486, 489 (Miss. Ct. App. 1999) (citing ***Boches v. State***, 506 So. 2d 254, 263 (Miss. 1987)), ***Gowdy v. State***, 592 So. 2d 29, 35 (Miss. 1991), ***In re J.E.***, 726 So. 2d 547, 550 (Miss. 1998) (all acknowledging the existence of state constitutional protections in this regard).

Finally, the State makes no response to Ronk's principal point of prejudice. Because the State failed to disclose that it was paying Hindall much more than she was legally entitled to, it forestalled cross-examination of Hindall that could have explained her nervousness and inconsistency in a manner favorable to the defense. It could also have suggested to the jury Hindall's favorable testimony, which was not the product of payment of excess witness compensation, was the more important and credible than her adverse testimony, which was. *See* Ronk's Brief at pp. 112-13.

In all other respects, including the ample basis for overcoming any procedural bar claimed by the State, Ronk anticipated the State's reply to the errors raised in this argument in his brief in chief, and he relies on the arguments made there. Ronk's Brief at pp. 102-113.

VII. THE SENTENCING PROCESS WAS RENDERED FUNDAMENTALLY UNFAIR AND/OR REVERSIBLY ERRONEOUS BY FLAWED INSTRUCTIONS TO THE JURY.

For the most part, Ronk anticipated the State's arguments on these errors in his brief in chief and will rely on that brief. Ronk's Brief at pp. 116-24. As to the failure to give the two mitigation instructions, the factual basis for giving them is

discussed at length in Argument III. b., *supra,* and in the corresponding Section III b. of his brief in chief. Ronk's Brief at pp. 72-75. However, the following matters require at least some response.

VII a.

Defense instructions refused by the trial court: Claims of procedural bar

The claims of procedural bar on the instructions actually tendered by the defense are completely without foundation. This Court has made it clear that the right to seek appellate review of the denial of a jury instruction is preserved simply by tendering the proposed instruction, even if the basis on which were tendered is not one which would have warranted the granting of it:

> [A]n issue involving the refusal of a requested jury instruction is procedurally preserved by the mere tendering of the instruction, suggesting that it is correct and asking the court to submit it to a jury. This in and of itself affords counsel opposite fair notice of the party's position and the court an opportunity to pass upon the matter.

Green v. State, 884 So. 2d 733, 736 (Miss. 2004) (holding that fact that defendant tendered instruction on improper basis did not preclude review) (citing ***Edwards v. State***, 737 So. 2d 275, 310 (Miss.1999), ***Duplantis v. State***, 708 So. 2d 1327, 1340 (Miss.1998), ***Carmichael v. Agur Realty Co.***, 574 So. 2d 603, 613 (Miss.1990)).

Defense instructions refused by the trial court: Specific instructions

Sentencing Instruction DS-2 (redacted and given as DS-2A)

Ronk anticipated the State's arguments on the substance of this point, and relies upon his brief in chief. Ronk's Brief at pp. 116-17. However, Ronk did fail to anticipate the State would not locate the place in the clerk's papers specifically cited

by Ronk as having been erroneously redacted from instruction DS-2 to create DS-2A. Therefore, it was a surprise to read the State's assertion that this Court could not review this question because "the unredacted instruction is not contained in the trial record." State's Brief at p. 132. As Ronk makes clear in his brief, the proposed instruction, containing the redacted language, is set forth at C.P. 248. Ronk's Brief at 116. Accordingly, there can be no cavil at the completeness of the record on this point.

Sentencing instructions DS-4, DS-9

The State's position on the denial of both of these instructions relies on the same mistaken foundation: That the jury may impose a sentence of death even if the State has failed to convince it unanimously, and beyond a reasonable doubt of all elements required to imposed such a sentence. Neither the Eighth Amendment nor the due process clause permit this, and, in fact, as is discussed in detail in Ronk's Brief at pp. 118-121, require just the opposite. ***Tuilaepa v. California***, 512 U.S. 967, 971-72 (1994), ***Bullington v. Missouri***, 451 U.S. 430, 444 (1981). *See also* ***Arizona v. Rumsey***, 467 U.S. 203, 209-11 (1984) (all placing the burden of proof upon the prosecution in sentencing matters).

Sentencing instruction DS-8

This instruction is admittedly not covered elsewhere in the omnibus sentencing instruction in this matter. The State's argument simply restates the precedent of this Court which Ronk acknowledges in his brief in chief, but within which he contends should be revisited in light of both the Constitution and the

Mississippi Sentencing statute, especially in this case in which the jury received such minimal instruction particularly with respect to mitigation. Ronk will not repeat those arguments here, but respectfully submits that this Court should consider them carefully, and that upon doing so, conclude that in at least this case, find it to be reversible error to have deprived the jury of this information. Ronk's Brief at pp. 122-24

With respect to any instructions not specifically addressed here, or bases for error not discussed with respect to instructions mentioned here, Ronk anticipated the State's arguments on these errors in his brief in chief and will rely on that brief. Ronk's Brief at pp. 116-24.

VII b.
Improper instruction on aggravation; the need for new sentencing hearing if any one of the aggravator instructions is found to have been erroneously given

The State's claims of procedural bar on these instructions are simply not well taken. Objections were interposed by the defense either at the time of the instruction conference, including with the offer of a peremptory instruction, and/or by way of pretrial constitutional challenge to Mississippi's death penalty statute to the constitutionality of the entire scheme, and the issue is therefore preserved by those means. *See* C.P. 31, 52-57, 102, 285, Tr. 711-12, 716-17.

As to the substance of the claims that the two aggravating circumstance instructions were given, Ronk anticipated the State's reply to the errors raised in this argument in his brief in chief, and he relies on the arguments made there. Ronk's Brief at pp. 125-27. He also respectfully reiterates that to the extent that

this Court has previously rejected his claims on those points, those decisions should be revisited and the positions taken by Ronk should be adopted as the law in light of the Constitution of the United States, and the language of the Mississippi statute governing sentencing in a capital case.

The State claims that even if one of these sentencing factors were set aside, this Court could nonetheless affirm the sentence pursuant to of **Miss. Code Ann. § 99-19-105(d)**. However, the State relies on that statute without offering any responsive argument at all to Ronk's position that that statute is an unconstitutional infringement of his Sixth Amendment right to a jury determination of his sentence and the facts on which it is based. Ronk's Brief at pp. 127-30.[32]

The absence of any response to his claims on this point, Ronk submits, is "tantamount to confession of those errors." ***Simpson v. Holmes County Bd. of Educ.***, 2 So. 3d 799, 803 (Miss. Ct. App. 2009) (citing ***Selman v. Selman***, 722 So. 2d 547, 551 (Miss.1998)). While this principle does not prevent affirmance, it can result in reversal where the record "create[s] enough doubt in the judiciousness of the trial court's judgment" that the reviewing court "cannot say with confidence that the case should be affirmed." ***Id.***

---

[32] Ronk's claim on this point is founded on the abrogation of ***Clemons v. Mississippi***, 494 U.S. 744 (1990), ***Stringer v. Black***, 503 U.S. 222 (1992), and the repudiation by the U.S. Supreme Court of the reasoning on which they rely in ***Apprendi v. New Jersey***, 530 U.S. 466 (2000), ***Ring v. Arizona***, 536 U.S. 584 (2002) and their progeny.

VIII. THE DEATH SENTENCE IN THIS CASE MUST BE VACATED BECAUSE IT WAS IMPOSED IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES.

The State's claim that these issues are procedurally barred from appellate review is extraordinary, without support in the law, and, indeed, verges on the bizarre. State's Brief at pp. 146-48 (VIII a. insufficiency of the indictment for failure to include aggravating circumstances), pp. 155-57 (VIII b. unconstitutional scienter provisions), pp. 162-63 (VIII c. dual use of underlying felony as both capitalizer and aggravator), pp. 169 (VIII e. Other attacks on constitutionality). The State concedes that Ronk filed, called up for argument, and obtained rulings on written pretrial motions making these claims, C.P. 31-43, 53-57, 72-77, 81-83, 102, 107, Tr. 22-27. As the State also concedes, that is sufficient to preserve the issue for review under this Court's longstanding and recently reiterated jurisprudence. *See, e.g.,* ***Hughes v. State***, 90 So. 3d 613, 623 (Miss. 2012).

Nonetheless, the State asserts that these claims were not supported by authority or argument and are therefore barred. State's Brief at pp. 146-48, 155-57, 162-63. That assertion is simply false. Ronk incorporated lengthy argument as to why these claims should be granted and extensive citation to the legal precedent upon which those arguments relied into the written motions. C.P. 31-43, 53-57, 72-77, 81-83. He also explicitly relied upon that argument and those citations when he argued these matters to the trial court, which expressly declined his offer to provide copies of the cases cited. Tr. 22-23. Though the trial court left it open for Ronk to reurge his motions "if the law changes" at any time, Tr. 25, it ruled on all these

issues *ore tenus* at the time they were argued and reduced those rulings to writing, as well. Tr. 25, 27, C.P. 102, 107. Hence, these matters are properly before this Court for purposes of making its heightened scrutiny direct appeal review in the instant matter. ***Fulgham v. State***, 46 So. 3d 315, 322 (Miss. 2010) [33]

In all other respects, the State's position on the issues raised in this Argument VII and its subsections was anticipated by Ronk in his brief in chief, and he relies on the arguments made there. Ronk's Brief at pp. 130-42. To the extent that the precedent of this Court supports finding no constitutional violation from the challenged matters, Ronk respectfully submits that the precedent is inconsistent with the correct interpretation of the United States Constitution for the reasons set forth in this brief in chief and that this Court should therefore alter or overrule that precedent and adopt the interpretation proposed in Ronk's arguments on these points.

IX. THE DEATH SENTENCE IN THIS MATTER IS CONSTITUTIONALLY AND STATUTORILY DISPROPORTIONATE.

Ronk anticipated the State's reply to the errors raised in this argument in his brief in chief, and he relies on the arguments made there. Ronk's Brief at pp. 142-46. To the extent that the precedent of this Court supports finding Ronk's sentence

---

[33] As the trial court notes, this Court has in the past ruled against Ronk's substantive positions, which of course bound the trial court to rule as it did. Tr. 25, 27. Hence, Ronk preserved this issue by efficiently making a record fully sufficient to support this Court's revisiting those issues on appeal, as he requests it to do in his brief in chief, and in this one, *infra*. Though the trial court ruled, on all the claims, it also left open the possibility that if this Court had changed the law in the interim, that Ronk could reopen his claim with the trial court. Tr. 22-23. Since this Court did not do so, Ronk, of course, had no occasion to reopen the claim. This is not waiver or bar. It is respect for the process and an attempt to accommodate judicial economy.

neither statutorily nor constitutionally disproportionate, Ronk respectfully submits that the precedent is inconsistent with the correct interpretation of the United States Constitution for the reasons set forth in the brief in chief and that this Court should therefore alter or overrule that precedent and adopt the interpretation proposed in Ronk's arguments on these points.

X. THE ABOVE ERRORS, ALL CONCERNING VIOLATIONS OF RONK'S CONSTITUTIONAL RIGHTS CANNOT BE CONSIDERED HARMLESS.

It is telling that the State seeks to have this issue "dismissed" rather than arguing that it should "fail" or be "rejected" on its merits, or even due to a procedural bar. It seems that State is inviting this Court to improperly apply the standards of post-conviction review to deciding a direct appeal, where the burden of proof falls upon the Petitioner seeking post-conviction review, and the kinds of issues that may be raised are strictly limited by statute. **Miss. Code Ann. §§ 99-39-1 through 27.**

This Court should not accept that invitation. In death penalty cases, particularly, this Court's statutory obligation to review such cases for error, and its scrupulous adherence to the heightened scrutiny requirements of the Mississippi and United States Constitutions, precludes such restrictions. ***Irving v. State,*** 361 So. 2d 1360, 1363 (Miss. 1978), **Miss. Code Ann. § 99-19-105(3)(c) and (5).** *See also* ***Fulgham v. State***, 46 So. 3d 315, 322 (Miss. 2010) (reversing sentence), ***Walker v. State***, 913 So. 2d 198, 216 (Miss. 2005); ***Balfour v. State***, 598 So. 2d 731, 739 (Miss. 1992) (citing ***Smith (Grady) v. State,*** 499 So. 2d 750, 756 (Miss. 1986)

"[P]rocedural niceties give way to the search for substantial justice, all because death undeniably is different." ***Hansen v. State,*** 592 So. 2d 114, 142 (Miss. 1991).

In all other respects, Ronk anticipated the State's reply to the errors raised in this argument in his brief in chief, and he relies on the arguments made there. Ronk's Brief at pp. 143-46.

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

The State's claim of procedural bar on this point because "[Ronk] failed to raise this issue at trial" is particularly peculiar because the State itself suggests that there are at least four points raised by the defense regarding which it may have to concede error. State's Brief at pp. 183. It is also entirely unfounded.

Ordinarily, cumulative error is not something the trial court addresses, other than implicitly when, as it did here, it denies a post-trial motion reiterating all the errors claimed at trial, and seeking general relief from the verdict. C.P. 365-67. [34]

Rather, cumulative error is the means by which an appellate court reviews its own findings of error, and considers whether, notwithstanding the fact that each error might not be reversible in and of itself, may combine with other otherwise harmless errors found by the appellate court to warrant reversal because the

[34] In the instant matter, Ronk also reserved the right to cite any other error in the event the trial court permitted him a transcript of the proceedings. C.P. 366-67. The trial court elected not to order a transcript prepared, and due to the illness of lead counsel second chair counsel was forced to argue the motion without the benefit of either lead counsel or that transcript. Tr. 751. Where such reservation has been made, but the trial court has prevented it from being carried out, that is sufficient to preserve the error, as well.

combined effect of those errors deprived the defendant of fundamental constitutional rights.

> What we wish to clarify here today is that upon appellate review of cases in which we find harmless error or any error which is not specifically found to be reversible in and of itself, we shall have the discretion to determine, on a case-by-case basis, as to whether such error or errors, although not reversible when standing alone, may when considered *cumulatively require reversal* because of the resulting cumulative prejudicial effect.

Byrom v. State, 863 So. 2d 836, 847 (Miss. 2003) (emphasis added). *See also* ***Flowers v. State***, 947 So. 2d 910, 940 (Miss. 2007) (Cobb, J., concurring), ***Ross v. State***, 954 So. 2d 968, 1018 (Miss. 2007) (relying on ***Byrom,*** 863 So. 2d at 847).[35]

In all other respects, Ronk anticipated the State's reply to the errors raised in this argument in his brief in chief, and he relies on the arguments made there. Ronk's Brief at pp. 146-47.

XII. RONK RESERVES THE RIGHT TO RAISE ANY ISSUES RELATING TO INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL THAT ARE NOT FULLY APPARENT FROM THE RECORD.

This section is not a claim of error, *per se*, but rather a statement of Ronk's recognition of, and reliance upon, this Court's clear statement in **Miss. R. App. P. 22 (b)** concerning the extremely narrow scope of the kinds of ineffectiveness claims that can be raised on direct appeal. Ronk's Brief at pp. 147-49. He is invoking what this Court has repeatedly to held the inevitable consequence of Rule 22(b)'s constraints to be: The inability on direct appeal to address most ineffectiveness

[35] To the extent that earlier cases had suggested otherwise, *see, e.g.,* ***Gibson v. State***, 731 So. 2d 1087 (Miss. 1998), ***Byrom*** expressly clarified that such review was something the appellate court, at least in death penalty matters, reserved the right to do with respect to the cumulative effect any errors that it had itself reviewed and found to exist. 863 So. 2d at 847.

claims due to the absence of a record sufficient to do so, and the consequent preservation of the defendant's right to defer this Court's consideration of most such claims to post-conviction proceedings, where the record may be supplemented. ***Gowdy v. State***, 56 So. 3d 832, 837 (Miss. 2010).

Ronk has raised only on direct appeal only those claims of ineffectiveness that he believes are fully apparent from the record and the State has made its substantive response to each such claim. Ronk's Brief at pp. 40-80. To the extent that this Court elects to decide them on their merits, they are, of course, not subject to "relitigation" in this Court except on very specific bases, though they are subject to subsequent review elsewhere. *See e.g.* ***Hodges v. Epps***, 1:07CV66-MPM, 2010 WL 3655851 at * 25 (N.D. Miss. Sept. 13, 2010 *aff'd in part*, 648 F.3d 283 (5th Cir. 2011).

However, as Ronk also makes clear in this argument in his brief in chief, there are likely are instances of ineffective representation that will require record supplementation to be properly litigated. Ronk's Brief at p. 149. He has also sought that this Court defer for post-conviction review any claims that he has raised at this time if that it feels the record would require supplementation to fully develop the claim. Ronk's Brief at p. 41, note 19.

The State points to no place where the record in the instant matter presents ineffectiveness claims that it contends should have been raised on direct appeal but were not. Ronk therefore respectfully submits that it cannot now, or in the future, complain of Ronk's failure to raise them on direct appeal.

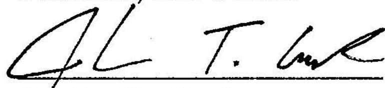
CONCLUSION

Ronk submits that for the foregoing reasons, and for the reasons set forth in his brief in chief, as well as such other reasons as may appear to the Court on a full review of the record and its statutorily mandated proportionality review, Timothy Ronk respectfully submits that the State's arguments are legally and factually insufficient to prevail in this matter, and this Court should reject them and reverse the conviction and death sentence.

Respectfully submitted,

Timothy Ronk, Appellant

Alison Steiner
Miss Bar No. 782
OFFICE OF STATE PUBLIC DEFENDER
CAPITAL DEFENSE COUNSEL
239 N. Lamar St. Suite 604
Jackson, MS 39201



Justin T. Cook
Miss. Bar No. 102622
OFFICE OF STATE PUBLIC DEFENDER
INDIGENT APPEALS DIVISION
Post Office Box 3510
Jackson, MS 39207

CERTIFICATE OF SERVICE

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

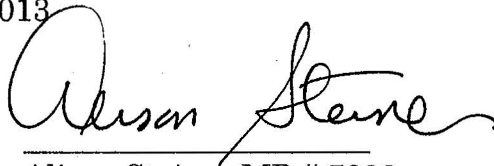
Mr. Timothy Robert Ronk
Unit 29-J
Mississippi State Penitentiary
Parchman, MS 38738

Hon. Lisa P. Dodson
Presiding Judge
P.O. Box 1461
Gulfport, MS 39502

Jason L. Davis, Esq.
Office of the Attorney General
P.O. Box 220
Jackson, MS 39205

Joel Smith, Esq.
District Attorney
P.O. Box 1180
Gulfport, MS 39502

THIS the 25th day of March, 2013.



Alison Steiner MB # 7832