Serial: **182302**

IN THE SUPREME COURT OF MISSISSIPPI

No. 2010-DP-00425-SCT

JASON LEE KELLER ***Appellant***

v.

STATE OF MISSISSIPPI ***Appellee***

EN BANC ORDER

In this death-penalty case, law enforcement officers took three statements from Jason Lee Keller while he was in the hospital recovering from gunshot wounds. Although the trial judge excluded the first two statements – finding they were "not the product of a free, voluntary or intelligent waiver of Keller's Miranda rights" – he admitted the third statement into evidence without discussion or analysis of the coercive circumstances of the first two confessions, or their possible effect upon the third statement. Based on the unusual facts before us, we find it appropriate to take extraordinary steps to ensure that the trial court's admission of Keller's third statement into evidence did not violate federal or Mississippi constitutional principles.[1]

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[1] *See* ***Oregon v. Elstad***, 470 U.S. 298, 304, 105 S.Ct. 1285, 1290-91, 84 L.Ed. 2d 222 (1985); ***Davis v. North Carolina***, 384 U.S. 737, 740, 86 S.Ct. 1761, 1764,16 L.Ed 2d 895 (1966) (holding that ***Miranda*** does not change the duty of courts to analyze whether a confession offends pre-***Miranda*** standards of voluntariness); ***Westover v. United States***, decided together with ***Miranda v. Arizona***, 384 U.S. at 494, 86 S.Ct. at 1638 (discussing factors to be considered for admission of subsequent statement, where a prior statement was coerced); ***Clewis v. Texas***, 386 U.S. 707, 87 S.Ct. 1338, 18 L.Ed.2d 423 (1967) (same); ***White v. State***, 129 Miss. 182, 91 So. 903 (1922) (coercive circumstances can render a confession involuntary and all influences surrounding it must be removed from a subsequent confession to be deemed admissible); *see also* ***Fisher v. State,*** 145 Miss. 116, 110 So. 361 (1926) (confession illegally obtained renders subsequent confession made under similar influence not admissible).

After due consideration, this Court finds that it should retain jurisdiction, but remand the matter for the trial court to conduct an evidentiary hearing to determine whether – because of the circumstances[2] under which they were taken – any of the three statements made by Jason Lee Keller to law enforcement was coerced and, if so, whether any information learned in a coerced confession was used to gain additional information from Keller. It is therefore

ORDERED, that this matter is remanded to the trial court for an evidentiary hearing to be conducted within sixty days from the date of entry of this order. The State and Keller may present evidence they deem necessary to assist the trial judge in making a determination of whether any one or more of the statements Keller made to law enforcement was coerced and, if so, whether any information gained in any coerced statement assisted law enforcement in gaining additional information from Keller in any statement that was not coerced. It is further

ORDERED that, within ten days following the conclusion of the hearing, the State and Keller shall provide the trial judge with proposed findings of fact and conclusions of law. It is further

ORDERED that, within thirty days following the conclusion of the hearing, the trial court shall provide this Court with its findings of fact and conclusions of law. It is further

[2]By our order today, this Court does not suggest that the members of law enforcement who questioned Keller intentionally used coercive tactics. Our concern is with the circumstances that existed when the statements were taken.

ORDERED that, within thirty days following the conclusion of the hearing, the State and Keller shall submit briefs to this Court, not to exceed twenty-five pages each, addressing the trial court's findings of fact and conclusions of law.

SO ORDERED this 14th day of February, 2013.

/s/ Josiah D. Coleman

JOSIAH D. COLEMAN, JUSTICE
FOR THE COURT

AGREE: WALLER, C.J., DICKINSON AND RANDOLPH, P.JJ., LAMAR, CHANDLER, PIERCE AND COLEMAN, JJ.
KITCHENS, J., OBJECTS TO THE ORDER WITH SEPARATE WRITTEN STATEMENT JOINED BY KING, J.

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v.

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KITCHENS, JUSTICE, OBJECTING TO THE ORDER WITH SEPARATE WRITTEN STATEMENT:

¶1. With respect to my colleagues who have decided to plunge – or have acquiesced in plunging – this Court into an unnecessary and unorthodox enterprise that is fraught with potential for distorting rather than clarifying the record, I register my strong objection.

¶2. Occasionally, in a direct appeal of a criminal conviction, we require supplementation of the appellate record. This usually involves the trial court's providing this Court something already in existence that was contained in the lower court's record, but for some reason was not included in the record on appeal. M.R.A.P. 10(e). Here, however, in a bifurcated capital murder case in which a guilty verdict and a sentencing verdict were rendered more than three years ago, we are ordering the trial court to conduct a redo of a suppression hearing that was conducted and concluded, as it should have been, in advance of the trial. Thus, we are requiring an augmentation, or enhancement, of the record by the trial court, not a supplementation. Waxing Biblical about it, it might be said that we are attempting to pour new wine into an old bottle. Matthew 9:17.

¶3. That scriptual metaphor, sage though it is, does not adequately describe the perilous path on which we embark when, years after the relevant events that generated Keller's trial, we seek to reenact or recreate, under this Court's direction, a *pre*-trial hearing in a *post*-trial environment. We have firmly pronounced to Bench and Bar in innumerable decisions that this Court is bound by the record created (past tense) in the trial court. *See, e.g.*, ***Havard v. State***, 928 So. 2d 771, 786 (Miss. 2006) ("We are not about to embark upon a journey of a carte blanche consideration of outside-the-record documents."); ***In re City of Jackson***, 912 So. 2d 961, 971 (Miss. 2005) ("This Court will not go outside the record to assist [a party] where its proof is lacking."); ***Walker v. State***, 729 So. 2d 197, 200 (Miss. 1998) ("While we empathize with the plight of [the defense attorney], we are bound by the record before us."); ***Estate of Myers v. Myers***, 498 So. 2d 376, 378 (Miss. 1986) ("One of the most fundamental and long established rules of law in Mississippi is that the Mississippi Supreme Court will not review matters on appeal that were not raised at the trial court level.") (citing ***Adams v. City of Clarksdale***, 95 Miss. 88, 48 So. 242 (1909)).

¶4. Notably, when faced with an assignment of error regarding a trial court's finding a confession voluntary – the exact issue being remanded in the instant case – this Court has ruled on the matter based on the record before us, without the solicitation of any new findings of fact from the trial court. ***McCarty v. State***, 554 So. 2d 909, 912 (Miss. 1989); ***Gavin v. State***, 473 So. 3d 952 (Miss. 1985). We explained that:

> "There will be no doubt times when such a cursory handling of the question of voluntariness will place us in an awkward position." . . . But, when the trial judge fails to make specific findings and only makes general findings thereby allowing admissibility of evidence, this Court's scope of review is

> considerably broader particularly when the trial judge's findings on the precise points at issue on appeal are not clearly inferable from the findings made.

McCarty, 554 So. 2d at 912 (citations omitted). In Keller's case, however, the trial judge heard from several witnesses, listened to the recordings of Keller's statements, and issued a detailed order suppressing the first two confessions but allowing the third. Given the extensive record already before us, surely we are capable of ruling on the matter, without bestowing upon the parties another bite at the apple to fill any evidentiary gaps which might affect their positions on appeal.

¶5. The record in the present case is complete. During proceedings in the trial court, from the filing of the indictment to the filing of the sentencing order, the State and the defendant had unfettered opportunity to include in the record, under the supervision of a capable circuit court judge, anything and everything they deemed necessary. In due course, both sides rested. In the absence of a reversal and remand of the case, neither party should be given a second chance to improve upon a record certified as complete by the circuit court clerk. Moreover, one of our own judicially created rules clearly prohibits our adding to or subtracting from a record in the manner now being undertaken by my learned colleagues in the majority:

> Nothing in this rule shall be construed as empowering the parties or *any court* to add to or subtract from the record except insofar as may be necessary to convey a fair, accurate, and complete account of what *transpired* in the trial court with respect to those issues that are the bases of appeal.

M.R.A.P. 10(f) (emphasis added).

¶6. With abiding respect for the justices in the majority, I am compelled to conclude that today *this* Court overtly violates not only one of the soundest of the rules we have

promulgated and which we require others to obey; we also abandon decades of well-established practice which historically has never allowed, let alone required, litigants and trial judges to journey back into the very entrails of a criminal trial and "add to or subtract from" the record.[3] Rule 10(f) reaffirms and firmly formalizes what our Bench and Bar have known, until now: that, once a case has been tried and appealed, the record from the trial court is sacrosanct and unchangeable. To utilize one of the trite expressions of our day, with respect to the record in an appealed case, "it is what it is." No matter how fervently a Mississippi lawyer or judge may have yearned to go back and change something that was said or done during the course of pre-trial, trial, or post-trial proceedings, once completed in a circuit court criminal case, it could not be done – until now.

¶7. The justices of the Mississippi Supreme Court are accustomed to deciding appealed cases on the basis of applicable law and records of what "transpired" (past tense) in the trial court. M.R.A.P. 10(f). There is nothing to prevent our doing so in the instant case. The record "is what it is," and so is the law. Today's departure from the tried and true practice of never basing our decisions, in whole or in part, on records that have been altered according to our specifications – no matter how well intentioned our desire for additional information – is, in my humble judgment, a colossal mistake that we, as a Court, are likely to regret.

KING, J., JOINS THIS STATEMENT.

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[3] Rare exceptions are those cases requiring remand for hearings in accordance with ***Batson v. Kentucky***, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). *See, e.g.,* ***Manning v. State***, 735 So. 2d 323 (Miss. 1999) (remanding case for State to articulate race-neutral reasons for its peremptory strikes). Of course, post-conviction proceedings are an entirely different matter, for they are collateral attacks on criminal convictions. *See* ***Wilcher v. State***, 863 So. 2d 776, 825 (Miss. 2003).