IN THE SUPREME COURT OF MISSISSIPPI

NO. 2010-CT-01780-SCT

TERRY HYE, JR.

v.

STATE OF MISSISSIPPI

ON WRIT OF CERTIORARI

DATE OF JUDGMENT:	03/05/2010
TRIAL JUDGE:	HON. DALE HARKEY
TRIAL COURT ATTORNEYS:	ANTHONY LAWRENCE, III ROBERT KNOCHEL ARTHUR CARLISLE WENDY MARTIN
COURT FROM WHICH APPEALED:	JACKSON COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	GRAHAM PATRICK CARNER
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: LISA L. BLOUNT
DISTRICT ATTORNEY:	ANTHONY N. LAWRENCE, III
NATURE OF THE CASE:	CRIMINAL - FELONY
DISPOSITION:	AFFIRMED IN PART; VACATED AND REMANDED IN PART - 02/05/2015
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

PIERCE, JUSTICE, FOR THE COURT:

¶1. Following his capital- murder conviction in Jackson County, Terry Hye Jr. received a life sentence without the possibility of parole. The Court of Appeals affirmed Hye's conviction but vacated and remanded his sentence as unconstitutional, pursuant to the intervening decision of the United States Supreme Court in ***Miller v. Alabama***, __ U.S. __,

132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) (holding that mandatory life sentences without possibility of parole for individuals under the age of eighteen years at the time of their crimes violate the Eighth Amendment prohibition against cruel and unusual punishment). Hye was sixteen years old at the time of the crime. ***Hye v. State***, 2013 WL 2303518, at *9 (Miss. Ct. App. May 28, 2013). Aggrieved by the Court of Appeals' affirmance of his conviction, Hye filed a petition for writ of certioriari in this Court, arguing that the trial court violated his right to a fair trial by denying him an accessory-after-the-fact instruction and an accomplice instruction. Hye also claimed that the trial court failed to properly instruct the jury on the underlying felony of armed robbery, which resulted in a constructive amendment of the indictment. We granted Hye's petition, and, pursuant to Mississippi Rule of Appellate Procedure 17(h), address only the question of whether the trial court erred by denying Hye an accessory-after-the-fact instruction.

¶2. We agree with the Court of Appeals that the trial court properly denied Hye's request for an accessory-after-fact instruction because there was no evidentiary basis for it. We also find, after much consideration on the matter, that a criminal defendant no longer has the unilateral right under Mississippi law to insist upon an instruction for lesser-related offenses which are not necessarily included in the charged offense(s), i.e., so-called lesser-nonincluded-offense instructions. And we overrule ***Griffin v. State***, 533 So. 2d 444 (Miss. 1988), and its progeny, to the extent they hold otherwise.

FACTS[1]

[1] Facts are taken *verbatim* from the opinion of the Court of Appeals.

On October 23, 2008, Michael and Linda Porter stopped at a Conoco gas station in Moss Point, Mississippi, to ask for directions. Linda testified that Michael got out of the car and began to walk toward the service station. Linda noticed three young black males standing near the car. One of these men had a white towel draped over his head. As Michael returned to the car, two of the men attacked him. Michael was able to get into the car, shut the door, and put the car in gear. Linda testified she saw the man with the white towel on his head walk toward the car, pull out a gun, and shoot Michael through the car window. Linda stated the car sped forward down the road. Linda tried to manage the car, eventually running the car into a ditch. Linda then sought help for Michael, who died from his injuries. Linda was unable to identify these three men.

The shooter was later identified as Darwin Wells, who was fifteen years old at the time of the murder. Wells was convicted of deliberate-design murder and sentenced to life imprisonment. Wells's conviction was affirmed by this Court in ***Wells v. State***, 73 So. 3d 1203, 1204 (¶1) (Miss. Ct. App. 2011). Three other men were questioned about Michael's murder: Hye, Tevin Benjamin, and Alonzo Kelly. At the time of the murder, Hye was sixteen years old, Benjamin was fourteen years old, and Kelly was seventeen years old.

Kelly testified for the State at Hye's trial. Kelly was initially charged with capital murder but ultimately pleaded guilty to accessory after the fact and served eleven months in jail. According to Kelly, earlier that day he, Hye, and Benjamin met Wells at a store, the Little Super. Benjamin and Wells stated they needed money, and Wells said he would "hit a lick." Kelly stated this meant getting money by any means, legally or illegally. The group left the Little Super and walked to Kelly's house. On the way, Wells got into a fight with another person on the street. The police responded, and all four men were searched. No weapons or drugs were found on the men. After this, Wells left the group for the afternoon.

The group met again a few hours later at the Little Super. Wells stated again that he needed to "hit a lick." Hye indicated he needed to find someone to buy him cigarettes, so the group walked to the Conoco. On the way Wells showed his gun to Kelly. Kelly's testimony indicates the whole group, including Hye, knew Wells was carrying a gun. Once the group neared the Conoco, Kelly decided to leave and turned around at a stop sign one block away from the Conoco. Kelly was concerned that "every time we go down there or something, we always get locked

> up for something." As he was turning away, Kelly said he heard a gunshot and saw Wells, Benjamin, and Hye run past him. However, at one point, Kelly testified Hye and Benjamin were still standing in the road when Wells approached the Porters' car.
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> Hye testified in his own defense and denied any involvement with Michael's death. Hye stated he thought Wells wanted to sell drugs when he said "hit a lick." Hye said he found someone to buy him cigarettes at the Conoco, but he never set foot on the property. According to Hye, after the Porters drove up, Wells ran from the side of the store but slipped and fell. Only then did Hye notice Wells had a gun. Hye said he and Kelly were walking away when he heard a gunshot.
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> Benjamin and Wells were called to the stand but refused to testify, each invoking his right against self-incrimination. Zachary Kelly, Alonso [sic] Kelly's cousin, was called to testify as to a conversation he had with Kelly. Zachary also invoked his right against self-incrimination.

Hye, 2013 WL 2303518, at **2-4.

¶3. This Court granted Hye's Petition for Writ of Certiorari by order entered on January 9, 2014. On June 12, 2014, this Court ordered supplemental briefing regarding "[w]hether ***Griffin v. State***, 533 So. 2d 444 (Miss. 1988), and its progeny, authorizing 'lesser non-included' offense instructions[,] should be overruled."

¶4. Having reviewed the supplemental briefing regarding the question outlined in the June 12, 2014, order from this Court, we find that Mississippi's practice of instructing the jury on lesser nonincluded crimes is "fundamentally unsound." We, therefore, overrule ***Griffin*** and its progeny. Additional facts, as necessary, will be related in our discussion.

DISCUSSION

¶5. As mentioned, we agree with the Court of Appeals that the trial court properly denied Hye's request for an accessory-after-the-fact instruction. The trial court may refuse a

proffered jury instruction if the instruction is without a foundation in the evidence. ***Murphy v. State***, 566 So. 2d 1201, 1206 (Miss. 1990) (citing ***U.S. v. Robinson***, 700 F.2d 205, 211 (5th Cir. 1983)). As illustrated by the record, Hye's theory of the case was that he did nothing wrong the evening of October 23, 2008, other than illegally purchase cigarettes at the Conoco gas station, and not report the shooting to the police. No evidence was presented to Hye's jury that would have allowed it to consider whether Hye was guilty as an accessory after the fact, as prescribed by Mississippi Code Section 97-1-5(1) (Rev. 2014).[2]

¶6. Hye's requested instruction in this instance is known as a lesser-nonincluded-offense instruction–typically referred to as such because it instructs the jury on an offense whose essential elements are not included (or a subset) of the offense(s) charged in the indictment. This type instruction lies in contrast with what is known as a lesser-included-offense instruction–referred to as such because all of its essential elements are also essential elements of the greater offense charged.

¶7. Like most jurisdictions, Mississippi has long recognized that an offense alleged in the indictment (or accusatory pleading) may necessarily include one or more lesser offenses. Under Mississippi Code Section 99-19-5, the jury may convict the defendant of an "inferior offense, or other offense, the commission of which is necessarily included in the offense with

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[2] Mississippi Code Section 97-1-5(1) states in part:

> Every person who shall be convicted of having concealed, received, or relieved any felon, or having aided or assisted any felon, knowing that the person had committed a felony, with intent to enable the felon to escape or to avoid arrest, trial, conviction or punishment after the commission of the felony, on conviction thereof shall be imprisoned in the custody of the Mississippi Department of Corrections . . . .

which he is charged in the indictment . . . ."[3] This Court repeatedly has interpreted Section 99-19-5 (and its predecessors) to "apply only to an inferior offense 'necessarily included within the more serious offense.'" *See* ***Hailey v. State***, 537 So. 2d 411, 414 (Miss. 1988) citing ***Sanders v. State***, 479 So. 2d 1097, 1105 (Miss. 1985); ***Gillum v. State***, 468 So. 2d 856, 861 (Miss.1985); ***Cannaday v. State***, 455 So. 2d 713, 725 (Miss.1984); ***Biles v. State***, 338 So. 2d 1004 (Miss. 1976); ***Gray v. State***, 220 Miss. 220, 70 So. 2d 524 (1954); ***Boggan v. State***, 176 Miss. 655, 170 So. 282 (1936); ***Brown v. State***, 103 Miss. 664, 60 So. 727 (1913); ***Bedell v. State***, 50 Miss. 492 (1874).

¶8. A lesser offense is necessarily included in the greater offense if the elements of the greater offense include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser. *See* ***Porter v. State***, 616 So. 2d 899, 909-10 (Miss. 1993) (Hawkins, J., specially concurring) ("A lesser included offense by definition is one in which all its essential ingredients are contained in the offense for which the accused is indicted, but not all of the essential ingredients of the indicted offense. An accused could not be guilty of the offense for which he is indicted without at the same time being guilty of the lesser-included offense."). As we explained in ***Hailey***, 537 So. 2d at 416, "if under the

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[3] Section 99-19-5 is a derivative of the common law practice that permitted a jury to find a defendant guilty of any lesser offense necessarily included in the offense charged. *See, e.g.*, ***Mease v. State***, 539 So. 2d 1324, 1328 (Miss. 1989) ("At common law the jury was permitted to find the defendant guilty of any lesser offense necessarily included in the offense charged."). In 1848, the Mississippi Legislature codified this common law practice in Hutchinson's Code 1848, ch. 64, art. 12, title 8, § 22, which reads: "Upon an indictment for any offence consisting of different degrees, the jury may find the accused not guilty of the offence in the degree charged in the indictment, and may find such accused person guilty of any degree of such offence, inferior to that charged in the indictment . . . ."

facts alleged in the indictment a lesser offense is necessarily included, then a conviction of the lesser offense may be proper[; but] [t]he indictment must sufficiently allege the lesser crime so that the defendant is notified of the lesser charge . . . ." When the indictment alleges a particular offense, it thereby demonstrates the State's intent to prove all the elements of any lesser-included offense. And the stated charge notifies the defendant, for due process purposes, that he or she must also be prepared to defend against any lesser-included offense, even if the lesser offense is not expressly set forth in the indictment. *See* ***Wallace v. State***, 10 So. 3d 913, 917 (Miss. 2009) ("[B]y its very definition, a defendant is always on notice of a lesser-included offense.").

¶9. In 1988, this Court greatly expanded the law in this area in the case ***Griffin v. State***, with its holding that a criminal defendant may request an instruction regarding any offense carrying a lesser punishment if the lesser offense arises out of a continuing factual scenario giving rise to the charge laid in the indictment. ***Griffin***, 533 So. 2d at 447-48. ***Griffin*** explained:

> This case presents a problem we encounter all too often. The prosecution charges the accused with a serious felony, only to have the defense offer a version of the facts rendering the accused far less culpable and, most important, subject to a far lesser punishment. If the evidence be such that a reasonable jury might have found the facts as the defense suggests them to have been, the accused of right is entitled to have the jury consider that *option* and be instructed to that effect.

Id. at 445 (emphasis added). In applying this rationale to the case before it, ***Griffin*** reasoned:

> Whether simple assault is formally a lesser included offense to rape is not the point. We have before us a continuing factual scenario bracketed by a relatively brief period of time . . . . The facts suggest that Griffin may have been guilty of at least two possible courses of criminal conduct: rape and simple assault, the latter carrying a maximum penalty far less than the former.

> As the jury may on these facts reasonably have found Griffin guilty of simple assault but not guilty of rape–without any inconsistency in evidentiary or ultimate findings, it follows that Griffin was of right entitled to have the jury instructed on the lesser offense of simple assault.

Id. at 447-48.

¶10. From ***Griffin***, Mississippi began its "journey into non-included offense instructions." ***McDonald v. State***, 784 So. 2d 261, 269 (Miss. Ct. App. 2001) (J. Southwick, specially concurring).

¶11. At this point, we must reiterate that fundamental jurisprudential policy requires that prior applicable precedent usually must be followed even though the case, if considered anew, might be decided differently by the current court. This doctrine is known as stare decisis. The principle is based on the assumption that consistency and definiteness in the law are the major objectives of the legal system. ***Laurel Daily Leader, Inc. v. James***, 224 Miss. 654, 681, 80 So. 2d 770, 780-81 (1955) (Gillespie, J., special opinion). Stare decisis, however, is not immutable "but is flexible enough to allow the Court to admit . . . change under certain limited circumstances . . . where the previous rule of law would perpetuate error and wrong would result if the decisions were followed." ***Id***. at 781. This Court has recognized that the doctrine is subordinate to legal reason and justice, and courts "will depart therefrom when such departure is necessary to avoid the perpetuation of pernicious error." ***Stone v. Reichman-Crosby Co.***, 43 So. 2d 184, 190 (Miss. 1949).

¶12. We find this to be the case with the ***Griffin*** rule. Indeed, our Court of Appeals, which hears many criminal appeals each year, has recognized and communicated on numerous occasions the problematic nature this practice creates for our criminal jurisprudence. Also,

the Uniform Criminal Rules Study Committee, which comprises some of the finest legal minds in this state in the area of criminal law, has proposed the ***Griffin*** rule be abandoned. The vast majority of states do not allow the practice. And the United States Supreme Court prohibits the practice in the federal courts by virtue of Rule 31(c) of the Federal Rules of Criminal Procedure, which limits a defendant to instructions on lesser offenses "necessarily included" in the offense charged.

¶13. As Judge Maxwell rightly pointed out in ***Gebben v. State***, 108 So. 3d 956, 970 (Miss. Ct. App. 2012), the concept of allowing lesser-nonincluded-offense instructions is grounded in neither the United States Constitution, the Mississippi Constitution, our statutes, or Mississippi precedent; rather, it derives exclusively from this Court's opinion in ***Griffin***. *See also* ***Williams v. State***, 53 So. 3d 761, 792 (Miss. Ct. App. 2009) (Roberts, J., dissenting) (noting same and contending that this Court's endorsed practice for allowing such instructions runs afoul of Article 3, Section 27 of the Mississippi Constitution of 1890); ***Brooks v. State***, 18 So. 3d 859, 876 (Miss. Ct. App. 2008) (Carlton, J., dissenting) (contending that our state constitution and statutory law allow only for lesser-included-offense instructions).

¶14. In ***McDonald***, Judge Southwick called attention to the flawed reasoning in ***Griffin***.

> In the original case that unleashed us on her journey into non-included offense instructions, the Court said "[w]hether simple assault is formally a lesser included offense to rape is not the point." ***Griffin***[], 533 So. 2d at [] 447. With respect for the Court and the author of that opinion, that should be and had before then been exactly the point. If the elements on the lesser offense are all in the greater offense, then what is in the lesser offense instruction will necessarily have been examined fully in the trial.

> The problems of this case, when the lesser non-included charge was based on factual issues that were not meaningfully developed, are one more set of reasons that this whole area of law has proved perhaps unexpectedly troublesome. The evidence here of an effort to arrest was incidental at best, though it did exist. A jury should not be asked to determine the guilt of a person on an offense for which he was not even tried.

McDonald, 784 So. 2d at 269-70.

¶15. We agree.

¶16. At the outset, we point out that ***Griffin*** instituted the rule without much discussion and cited no authority for its support. Though ***Griffin*** did not expressly say, we think it fair to surmise that the Court was proceeding on what it believed was a practical and logical extension of Mississippi's existing law for lesser-nonincluded-offense instructions. As will be explained, though, the rule is neither a practical nor a logical extension of existing Mississippi law, but rather is subversion of it.[4] Also, we think ***Griffin*** was likely persuaded, if not influenced, by a federal Court of Appeals decision, ***United States v. Whitaker***, 447 F.2d 314 (D.C. Cir. 1971), and a California Supreme Court decision, ***People v. Geiger***, 35 Cal. 3d 510, 674 P.2d 1303 (1984). ***Geiger*** relied heavily on ***Whitaker***'s rationale when instituting California's lesser-nonincluded-offense rule–which, before being overturned by the California Supreme Court, was a carbon copy of the ***Griffin*** rule. *See, e.g.*, ***Williams***, 53 So. 3d at 792 (Roberts, J., dissenting) (pointing out that "[a]fter fourteen years' experience [with the lesser non-included-offense practice], California reversed course [in ***People v.***

[4] Both Hye and the Amicus Curiae submit that Section 99-19-5(1) authorizes lesser-nonincluded-offense instructions via the "inferior offense" clause contained therein. We disagree. As mentioned above, we repeatedly have interpreted this section to apply only to an inferior offense necessarily included within the more serious offense. *See* ***Hailey***, 537 So. 2d 411, *et al.*

Birks, 19 Cal. 4th 108, 960 P.2d 1073, 1090 (1998)] and joined the majority of jurisdictions that do not permit such jury instructions").

¶17. In ***Whitaker***, the D.C. Circuit held that a defendant's right, under Federal Rule 31(c), to request instructions on lesser necessarily included offenses shown by the evidence could not be confined by a strict comparison of the elements of the greater and lesser offenses. The ***Whitaker*** court reasoned, "[a] more natural, realistic, and sound interpretation . . . is that the defendant is entitled to invoke Rule 31(c) when a lesser offense is established by the evidence adduced at trial in proof of the greater offense, with the caveat that there must also be an 'inherent' relationship between the greater and lesser offenses, i.e., they must relate to the protection of the same interests, and must be so related that in the general nature of these crimes, though not necessarily invariably, proof of the lesser offense is necessarily presented as part of the showing of the commission of the greater offense." ***Whitaker***, 447 F.2d at 319. As the Fifth Circuit Court of Appeals noted in ***U.S. v. Browner***, 937 F.2d 165, 168 (5th Cir. 1991), the "inherent relationship" test adopted by ***Whitaker*** is "one of three [recognized] tests to determine when, assuming a proper evidentiary showing, an offense not otherwise specifically charged may be deemed a lesser included offense of another, greater offense charged." The "inherent relationship" test is the most expansive of the three tests. ***Browner***, 937 F.2d at 168. Significantly, though, the test is a two-way street; meaning, the standard applies both to the defendant and the prosecution, mutually. In short, ***Whitaker***'s "inherent relationship" test is a far-reaching, lesser-included-offense test. And it has since been discredited by the United States Supreme Court for purposes of Federal Rule 31(c). *See* ***Schmuck v. United States***, 489 U.S. 705, 715-21, 109 S. Ct. 1443, 103 L. Ed. 2d 734 (1989).

¶18. In ***Geiger***, California accepted the essence of ***Whitaker***'s rationale for the concept of related offenses. ***Birks***, 960 P.2d at 1081. But ***Geiger*** declined to broaden California's definition of necessarily included offenses in the manner prescribed by ***Whitaker*** for the prosecution. ***Id***. at 1081. What resulted in California, according to ***Birks***, was the establishment of a unilateral right for criminal defendants "to demand instructions on charges neither stated nor necessarily included in the accusatory pleading . . . ." ***Id***. Such a right both "usurp[s] the prosecutor's charging discretion and . . . undermine[s] the mutuality of rights and obligations between the parties." ***Id***.

¶19. The same has resulted in Mississippi under the ***Griffin*** rule. By allowing a criminal defendant "to seek and obtain conviction for a lesser [nonincluded] offense whose elements the state has neither pled nor sought to prove" gives the defendant a "superior trial right." *See, e.g*, ***Sheffield***, 64 So. 3d at 533, and ***Williams***, 53 So. 3d at 793 (Roberts, J., dissenting) (both quoting ***Birks***, 960 P.2d at 1074).

¶20. As recognized by the Uniform Criminal Rules Study Committee, prior to ***Griffin***, there existed symmetry in Mississippi's criminal jurisprudence. Again, under the lesser-included-offense doctrine, all the elements of the charged offense are treated as pleaded in the indictment and undertaken to be proven by the prosecution at trial. Criminal defendants are deemed on notice of all the elements contained in the greater offense, and thus are likewise on notice of any other offense, the commission of which is necessarily included in the offense with which the defendant is charged in the indictment. *See* Miss. Code Ann. § 99-19-5(1) (Rev. 2007). Both the prosecution and the defendant may seek an instruction on a lesser-included offense. Under the ***Griffin*** rule, however, only the criminal defendant may

request a lesser-nonincluded-offense instruction, as constitutional notice considerations forbid the prosecution from receiving an instruction on a lesser offense whose elements are not included in the indictment. We find the inherent imbalance embodied by the ***Griffin*** rule is significant and unsustainable.

¶21. We first point out that, soon after ***Griffin*** was decided, "all arguable federal support for its conclusions has been withdrawn." *See* ***Birks***, 960 P.2d at 1082 (finding same with ***Geiger***). As ***Birks*** observed, the rationale of the ***Geiger*** decision has since been unequivocally repudiated by the United States Supreme Court in ***Schmuck v. United States***, 489 U.S. 705, 109 S. Ct. 1443, 103 L. Ed. 2d 734 (1999), and ***Hopkins v. Reeves***, 524 U.S. 88, 118 S. Ct. 1895, 141 L. Ed. 2d 76 (1998).

¶22. In ***Schmuck***, the Court held that the right of a federal noncapital defendant to obtain instructions on a lesser-included offense under Federal Rule 31(c) is limited by a strict-elements test which compares only the statutory definitions of the two crimes. ***Schmuck***, 489 U.S. at 715-21. "Where the lesser offense requires an element not required for the greater offense, no instruction is to be given under [Federal] Rule 31(c)." ***Id***. at 716. Also, as ***Birks*** noted, ***Schmuck*** expressly disapproved the contrary inherent relationship test of ***Whitaker***, for multiple legal and policy reasons. ***Birks***, 960 P.2d at 1082 (citing ***Schmuck***, 489 U.S. at 715-16).

¶23. In ***Hopkins***, the Supreme Court expressed that the practice of allowing lesser-nonincluded-offense instructions is "not only unprecedented, but also unworkable[,]" and is likely to "detract from, rather than enhance[], the rationality of the process." ***Hopkins***, 524 U.S. 97-99 (citations omitted).

¶24. Both ***Schmuck*** and ***Hopkins*** "identified serious legal and practical difficulties with any requirement that instructions on nonincluded offenses be given in criminal cases." ***Birks***, 960 P.2d at 1082. ***Birks*** observed that ***Schmuck*** expressed a fundamental concern for mutual fairness between the defense and prosecution with the law governing instructions on lesser offenses. ***Birks*** explained:

> ***Schmuck's*** reasoning also impresses us for broader and more fundamental reasons. In particular, we are persuaded that the concern for mutual fairness between defense and prosecution, as set forth in ***Schmuck***, is an important one which has independent foundation in California's law governing instructions on lesser offenses. The ***Geiger*** rule contravenes the principle of mutual fairness by giving the defendant substantially greater rights either to require, or to prevent, the consideration of lesser nonincluded offenses than are accorded to the People, the party specifically responsible for determining the charges. ***Geiger's*** soundness is therefore suspect.

Birks, 960 P.2d at 1084.

¶25. We likewise are persuaded by ***Schmuck***'s reasoning and ***Birk***'s concerns. In his dissent in ***Barber v. State***, 743 So. 2d 1054 (Miss. Ct. App. 1999), Judge Southwick touched on similar concerns when recognizing that the ***Griffin*** rule is prone to conflict with another fundamental principle–the State's charging decision. Judge Southwick expressed the following:

> A related criminal law doctrine is that even if the same facts would support the conviction of two different crimes with much different punishments, the grand jury can indict for the greater and there is no obligation that a lesser offense also be charged to the jury.
>
> > Even where there are two statutes covering the same crime, and there is a difference in the penalty between the two statutes, the [S]tate is under no obligation to prosecute under the statute with the lesser penalty. It may choose to prosecute under either, and so long as the choice is clear and unequivocal the defendant has no right to complain.

> ***Cumbest v. State***, 456 So. 2d 209, 222-23 (Miss. 1984), cited in ***Gibson v. State***, 731 So. 2d 1087 (¶21) (Miss. 1998). The only manner in which these two doctrines can work together without capriciousness, so long as the doctrine of "lesser [nonincluded] offense" is to be perpetuated, is if there are restrictions maintained as to when the lesser offense is to be charged.

¶26. Today, we find that the ***Griffin*** rule cannot be squared with the principle recognized and maintained by ***Cumbest***. We also find there are no workable restrictions (or clear standards) that would prevent the ***Griffin*** rule from interfering with the role accorded to the State alone, the responsibility to determine the charges. *See, e.g.*, ***Birks***, 960 P.2d at 1086 (same). The ***Griffin*** rule, we are now convinced, has a very real propensity to lead to "unsound compromise verdicts." *See, e.g.*, ***Geiger***, 674 P.2d at 1317 (Richardson, J., dissenting). Such outcomes place the truth-seeking process that is a criminal trial in serious doubt.[5] And we cannot allow that. To paraphrase Justice Jackson, we refuse to remain consciously wrong today simply because we were unconsciously wrong yesterday. ***Massachusetts v. United States***, 333 U.S. 611, 639-40, 68 S. Ct. 747, 92 L. Ed. 968 (1948) (Jackson, J., dissenting).

¶27. In our criminal jurisprudence, the party responsible for determining the charges to present to the grand jury is the State. When the grand jury returns an indictment on the presented charge, the State assumes the obligation to prove the charge and any necessarily included offense beyond a reasonable doubt. At the very least, any conviction of a charged or necessarily included offense is based on evidence adduced by the State in sustaining its hefty burden. The defense of course has no duty whatever to prove or disprove any crime

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[5] This goes beyond the pernicious concern this Court referred to in ***Stone***, 43 So. 2d 184, in speaking to the doctrine of *stare decisis*.

by any standard. And the State undertakes no duty to prove uncharged, nonincluded offenses. ***Cumbest***, 456 So. 2d at 222-23. Thus, and particularly when the State does not consent, the giving of lesser-nonincluded-offense instructions invites the jury to convict the defendant of a crime that no party may have attempted to establish beyond a reasonable doubt.

¶28. Case in point is illustrated by the trial record before us. As mentioned, Hye's theory of the case at trial was that he did nothing wrong the evening of October 23, 2008, except: (1) illegally purchase cigarettes at the Conoco gas station, by soliciting an older gentleman who lived near the Conoco to make the purchase for him; and (2) not report the shooting to the police, because he was scared of Darwin Wells (not a criminal offense in this jurisdiction, because Mississippi does not recognize misprision of felonies). According to Hye's testimony, the only reason he went to the Conoco gas station with Benjamin, Wells, and Alonzo Kelly was to get cigarettes. Hye testified that, after receiving his cigarettes and while standing across the street from the Conoco with Kelly and Benjamin, he heard Wells, who was on the Conoco property running towards the Porters' vehicle, yell "I'm fixing to hit a lick." Hye told the jury, "When [Porter] came out, [Wells] ran up to the car and slipped and got up and said: Give it up." When Hye saw Wells's gun for the first time, Hye and Kelly began walking away and had their backs turned away from the Conoco. When Hye heard the shot, Hye and Kelly ran. Hye said Benjamin ran behind Kelly, and Wells ran behind Benjamin. Kelly told Wells, "don't run behind us." Hye, Kelly, and Benjamin ran to Kelly's house. From there, Hye and Benjamin went to the "Little Super" store and "caught a ride" to Hye's house. The following night, a Friday, Hye, Kelly, and Benjamin went to the fair.

There, they ran into Wells. None discussed what had transpired the night before. Hye told the jury that he did not know Michael had died until Sunday night, when the police contacted him. Hye also told the jury that he did not know what Wells meant by "hit a lick." Hye further told the jury that the note he wrote to Benjamin while in jail awaiting trial (which jail officials had confiscated, turned over to the State, and which was submitted by the State to Hye's jury at trial) was intended only to remind Benjamin not to lie to officials, because Hye and Benjamin did nothing wrong.

¶29. The dissent posits that "Hye contended at trial that he had lied to police and covered for other members of the group, which according to his petition for writ of certiorari, 'could have led the jury to believe that [Hye] was an accessory after the fact.'" This is incorrect. Nowhere in the record did Hye ever contend that he lied to the police to cover for other members of the group. Rather, Hye initially denied that he knew anything about the shooting at the Conoco. After admitting to authorities that he was present near the Conoco at the time of the shooting, Hye consistently maintained throughout that the only person who was involved in the shooting was Wells, and Hye consistently stated that the group separated from Wells after the shooting. The only discrepancy in Hye's story was with his statement during cross-examination at trial that Benjamin was on the Conoco's premises at one point, standing next to Wells. Hye maintained, though, that he did not see Benjamin do anything wrong.

¶30. The dissent also posits that Hye "cited Kelly's testimony to show that Hye had colluded with Kelly, Benjamin, and Wells to concoct an exculpatory version of events." Hye's appellate counsel cites the following testimony from Kelly at trial for this contention:

Q. All right. Do you remember when you talked to the police?

A. Yes, sir.

Q. It was that Monday?

A. Yes, sir.

Q. Okay. Over the weekend, I imagine you had been talking to all three people at the scene?

A. Yes, sir.

Q. Y'all had been discussing what happened down at the scene?

A. Yes, sir.

Q. Did you tell the police what you know - - or knew back then?

A. Yes, sir.

¶31. From this, the dissent would have us find that, because Hye testified that he and Benjamin had caught a ride from Moss Point to Pascagoula, where they stayed at Hye's aunt's house, "there was evidence to support that [Hye] provided assistance to [Benjamin] by providing shelter to him at a relative's following the shooting." This is conjecture, not evidence.

¶32. As did Hye, Kelly maintained throughout his testimony that he had his back turned from the Conoco at the time of the shooting. Kelly said he did not see either Hye or Benjamin ever walk onto Conoco's premises. The trial record is utterly barren as to what occurred between these individuals during the weekend following the shooting and before their arrests on Monday. And there is no sufficient evidence whatsoever to support the theory that Hye concealed, received, aided, or assisted a felon, knowing that such person had

committed a felon with intent to enable the felon to escape, avoid arrest, trial conviction or punishment after the commission of the felony.

¶33. Kelly, who the dissent points out testified "it wasn't no plan[;] [n]obody was planning to go rob nobody[,]" also testified as follows in response to the State's question: "And is that when you said: Who's got the gun?":

> I like, I said: How can we do, hit a lick, you know what I'm saying? Like, what you going to do? You going to sell some crack or something, because, you know what I'm saying? So, so, [Wells] was like no, I got - - He showed me the gun. So, everybody was like, you mean he got gun for real? So, you know, everybody went to walking. So, I was like, no, no, I ain't going to it. You get locked up every time you go to the store. So, then I stopped.

Later on, in cross-examination, the following exchange occurred between Kelly and Hye's defense counsel:

> Q. Earlier, when Mr. Lawrence was questioning you, did you not testify that you heard someone say they were going to commit a robbery?
>
> A. Yes, sir, going to hit a lick.
>
> Q. All right. And what does "hit a lick" mean?
>
> A. Referring to getting money. Any part of getting money. Whatever you feel like it will take for you to get money, that what it mean.
>
> Q. Okay. So, for example, if I go to work, am I hitting a lick?
>
> A. If you getting money.
>
> Q. If I get paid at the end of the week, did I hit a lick?
>
> A. Yes, sir.
>
> Q. All right. And if I go down there and somebody pulls up in the Conoco and I have some crack cocaine in my pocket and I go up and do what y'all call service him and I sell some crack to that person, did I just hit a lick if they pay me back?

A. Yes, sir. If you're getting paid for it, you hit a lick.

Q. Okay. If I'm getting money for it, it's hitting a lick?

A. You can go out there and cut 10 yards, you hitting a lick.

Q. And that means hit a lick? Right?

A. Yes, sir.

Q. Okay. So, that's what you heard that day. Am I right?

A. Yes, sir.

Q. Did you hear anything about a robbery?

A. No, I didn't hear about no robbery, but I knew what was going on. I ain't, I ain't, I ain't dumb or nothing.

Q. But you didn't hear anything about a robbery.

A. I didn't hear nothing about no robbery.

Q. Do you remember in the tape we just listened to you said something about a robbery?

A. Yeah, he asked me, he asked me what hitting a lick mean. I say it can mean, it can mean robbery or anything. If you go back to the tape, you will see that.

Q. So, that day, nobody mentioned committing a robbery. Are we sure of that?

A. Yeah, nobody - - nobody said it was a robbery. He said hit a lick.

¶34. As mentioned, Kelly maintained throughout his testimony that he had his back turned from the Conoco at the time of the shooting, and that he did not see either Hye or Benjamin, who were standing together in the road next to the Conoco, ever walk onto the Conoco premises. Kelly's testimony alone, of course, is insufficient to support the State's theory that

a killing occurred while Wells, Hye, and Benjamin were engaged in the act of robbery. But, when coupled with Linda's testimony that she saw three individuals standing together in the rain at the Conoco, and that two of those individuals physically attacked Mike while he was outside the vehicle, and that the third individual then shot Mike after Mike reentered the vehicle, the evidence becomes more than sufficient for a jury determination as to whether Hye was a principal by statute to the crime of capital murder with the underlying felony of robbery. Linda testified as follows:

> After [Michael] gets out of the car, he tosses his little daytimer in, and I just kind of threw it in the back. And I look up and I see these three black males standing there. And I'm thinking , well, that's strange. You know, it's raining and they're just standing there. And then just within seconds, they start walking toward the car. And I'm thinking: Oh, this doesn't feel very safe. But then all of a sudden they kind of split off. And two of them are together, the two without a white towel. Then the one with the white towel starts going toward the driver's side of the car and the other two gentlemen split off toward the passenger side.
>
> The eerie, unnerving thing was, the one with the white towel just kept staring at me, right in the face. It was just like our eyes had locked and I just was watching him. And he was approaching the driver's side. And that's when I'm thinking maybe I'll lock the car. But, he, instead of headed [sic] straight to the car, then he starts veering out a little, kind of fanning out, maybe moving toward the gas pumps. And I'm just watching him. And then all of a sudden, I just hear this noise, I mean, bumping the car. And at that pont, I look around and Mike is at the door, getting the door open and trying to get in the car, and there's two - - the other two boys are all on top of him, and one's got him around the neck and the other's got him on his arm, and he's doing this (demonstrating), trying to get rid of them. And he's trying to get in the car, and it's a real struggle. And he manages to get into the car, and these other two guys are trying to get in the car with him, and he's trying get rid of them. And he is a pretty big guy and these guys weren't nearly his size. And he's able to get most of the body parts out of the door, but he's slamming the door on them, just like this, trying to get rid of them.

Q. Can you tell the members of the jury who - - the two that were - - or the individual that was stopping the door from shutting, the one with the towel on his head or the other two?

A. The guy with the towel on his head was not involved in this struggle at all.

Q. Okay.

A. It was the other two gentlemen. And as they were attempting to hold Mike back, to keep him from getting in the car or to do whatever, he is fighting them off. He gets in the car and manages to get the door closed, and he's holding it with this hand.

Q. Which hand?

A. His right hand. He's holding the door closed. And basically, because they were pulling him like this. He closed the door with his right hand, and reaches with his left hand to start the ignition and get it in gear. And in the meantime, he is saying, "We've got to get out of here." He said, "Baby, we got to get out of here right now. We got to get out of here now." And I looked up, and all of a sudden, I see the one with the white towel approaching the car very slowly and very definite. And I look up as he's approaching the car and then all of a sudden, I see a gun - - like this. And I'm thinking, he's going to shoot me. I mean right between the eyes. I mean it was right in my face. And I'm not screamer and I'm not a yeller, I'm not any of those things. So, I'm just watching him. And he's watching me. And then all of a sudden, he brings his left hand over, grabs the gun, and he aims it down toward Mike and, very carefully, he picked his spot to shoot. And he got a shot off before Mike could get the car into gear. And when he shot, he shot through the driver's window. It hit Mike in here as he's doing this. (Demonstrating). Glass goes every where, all in my face, my shoulders, my arms and everything. And about that time, Mike obviously has gotten it in gear, so we immediately shoot out of there. I mean, we're just gone. That car is just going as fast as his foot on the accelerator will allow it.

¶35. With the aforementioned record testimony in mind, the problem with both Hye's and the dissent's contention that the jury should have also been allowed to take into consideration Hye's guilt as an accessory after the fact to felony murder, is that there is nothing but inferences upon inferences to support that proposed theory of the case. The State's

description of the weekend following the shooting as a "weekend alibi fest," constitutes merely such an inference. The inference counts as nothing in the calculation of whether the State met its burden in introducing substantial evidence in support of its case against Hye. ***Henton v. State***, 752 So. 2d 406, 409 (Miss. 1999) (closing arguments are not evidence). Nor would (or should) the inference count in the calculation of whether substantial evidence exists in support of an alternative theory of the case. Accordingly, and for the reasons explained above, Hye's proposed accessory-after-the-fact instruction lacked an evidentiary basis. Thus, the trial court properly denied it.

¶36. The trial court did, however, grant the following instructions, which we find fully covered Hye's defense at trial that he was not a participant to the alleged crime: Jury instruction S-8, provided:

> The guilt of a defendant in a criminal case may be established without proof that the defendant personally did every act constituting the offense alleged. The law recognizes that, ordinarily, anything a person can do for himself may also be accomplished by that person through the direction of another person as his or her agent, or by acting in concert with, or under the direction of, another person or persons in a joint effort or enterprise.
>
> If another person is acting under the direction of the defendant or if the defendant joins another person and performs acts with the intent to commit a crime, then the law holds the defendant responsible for the acts and conduct of such other persons just as though the defendant had committed the acts or engaged in such conduct.
>
> Before any defendant may be held criminally responsible for the acts of others, it is necessary that the accused deliberately associated himself in some way with the crime and participated in it with the intent to bring about the crime.
>
> Of course, mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish that a defendant either

> directed or aided and abetted the crime unless you find beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator.
>
> In other words, you may not find any defendant guilty unless you find beyond a reasonable doubt that every element of the offense as defined in these instructions was committed by some person or persons, and that the defendant voluntarily participated in its commission with the intent to violate the law.

¶37. Jury instruction D-21, provided:

> One who aids and abets another in the commission of a crime is guilty as a principal. However, in order to aid and abet the commission of a felony, Terry Hye must have done something to incite, encourage, or assist the actual perpetrator in the commission of the crime or participate in the design of the felony.

¶38. Finally, by according the defendant the power to insist, over the State's objection, that an uncharged, nonincluded offense be placed before the jury, the ***Griffin*** rule (which is court-created) usurps the State's exclusive charging discretion, and may therefore violate Mississippi's separation-of-powers clause, as recognized by our Court of Appeals. We need not reach that question, however, because we find ***Griffin*** was wrongly decided for reasons otherwise stated above.

CONCLUSION

¶39. The judgment of the Court of Appeals upholding Hye's conviction and vacating Hye's sentence, remanding to the trial court for resentencing, is affirmed. ***Griffin*** and progeny authorizing lesser-nonincluded-offense instructions are hereby overruled. Section 99-19-5(1) and this Court's precedential interpretation of it consistent with ***Hailey***, *et al.*, governs what lesser offenses may be charged to the jury.

¶40. **CONVICTION OF CAPITAL MURDER, AFFIRMED. SENTENCE OF LIFE WITHOUT PAROLE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF**

CORRECTIONS IS VACATED, AND THIS CASE IS REMANDED TO THE JACKSON COUNTY CIRCUIT COURT FOR RESENTENCING.

WALLER, C.J., RANDOLPH, P.J., LAMAR AND COLEMAN, JJ., CONCUR. CHANDLER, J., CONCURS IN PART AND IN RESULT WITH SEPARATE WRITTEN OPINION JOINED IN PART BY KITCHENS, J. KITCHENS, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY DICKINSON, P.J., AND KING, J. CHANDLER, J., JOINS THIS OPINION IN PART.

CHANDLER, JUSTICE, CONCURRING IN PART AND IN THE RESULT:

¶41. I agree with Justice Pierce that there was no evidentiary basis for Hye's requested accessory-after-the-fact instructions and would affirm Hye's conviction. But, unlike Justice Pierce, I would not abandon this State's longstanding adherence to the rule that a defendant is entitled to an instruction on a lesser-related offense if justified by the evidence. I join Justice Kitchens's well-reasoned analysis of that issue.

KITCHENS, J., JOINS THIS OPINION IN PART.

KITCHENS, JUSTICE, DISSENTING:

¶42. For nearly thirty years, the common law of the State of Mississippi has entitled criminal defendants to have the juries they faced instructed on lesser-related offenses for which an evidentiary basis exists. But today, the majority discards that longstanding precedent by overruling ***Griffin v. State***, 533 So. 2d 444 (Miss. 1988), and its progeny. Because I would hold that the rule articulated in ***Griffin*** is logical, fair, and often valuable in the quest for justice, and additionally, because Hye presented sufficient evidence to support an accessory-after-the-fact instruction, I respectfully dissent.

I. Lesser-related-offense jury instructions ought to remain viable under Mississippi law.

¶43. This Court is loathe to dispense with longstanding rules of law: "[A] former decision of this court should not be departed from, unless the rule therein announced is not only manifestly wrong, but mischievous." ***McDaniel v. Cochran***, ___ So. 3d ___, 2014 WL 5419723, * 8 (Miss. Oct. 24, 2014); ***Caves v. Yarbrough***, 991 So. 2d 142, 151 (Miss. 2008) (quoting ***Forest Prod. & Mfg. Co. v. Buckley***, 107 Miss. 897, 899, 66 So. 279 (1914)). To overturn a rule or decision of this Court requires satisfaction of a high burden:

> In *stare decisis* generally, we look for error, but, finding that, we look largely in the area of public or widespread disadvantage. Ordinarily, we do not overrule erroneous precedent unless it is "pernicious,"[6] ***Stone v. Reichman-Crosby Co.***, 43 So. 2d 184, 190 (Miss. 1949); "impractical," ***Robinson v. State***, 434 So. 2d 206, 210 (Miss. 1983) (Hawkins, J., concurring); or is "mischievous[7] in effect, and resulting in detriment to the public." ***Childress v. State***, 188 Miss. 573, 577, 195 So. 583, 584 (1940). We look for "evils attendant upon a continuation of the old rule." ***Tideway Oil Programs, Inc. v. Serio***, 431 So. 2d 454, 467 (Miss. 1983).

Caves, 991 So. 2d at 151-52 (quoting ***State ex rel. Moore v. Molpus***, 578 So. 2d 624, 635 (Miss. 1991)). This Court will depart from precedent "when such departure is necessary to avoid the perpetuation of pernicious error." ***Stone***, 43 So. 2d 184, 190.

¶44. Almost three decades have passed since this Court decided, in ***Griffin v. State***, 533 So. 2d 444 (Miss. 1988), that a criminal defendant has the right to have the jury instructed on lesser offenses, related to the offense for which he or she was indicted, for which there

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[6]"Pernicious" is defined as "having a harmful effect, especially in a gradual or subtle way." *Compact Oxford English Dictionary* 842 (2d rev. ed. 2003). It is derived from the Latin, *perniciosus*, meaning "destructive." *Id.*

[7]"Mischievous" is defined as "(1) causing or disposed to mischief," or "(2) intended to cause trouble." *Compact Oxford English Dictionary* 720 (2d rev. ed. 2003).

is support in the evidence. While the victim in that case claimed that Griffin had raped her, Griffin offered a differing version of events:

> Griffin testified that he paid [victim] $10.00 to perform oral sex on him. While she was so engaged, however, Griffin insulted [victim] by referring to her as "bitch." [Victim] responded by squeezing his penis and testicles and, in an effort to free himself, Griffin began to strike her about the face. . . . The two reconciled, however, and immediately returned to their amorous activity.

Griffin, 533 So. 2d at 446. Griffin requested, and the trial court denied, a lesser-offense instruction for simple assault. ***Id.*** at 447.

¶45. We reversed, stating:

> This case presents a problem we encounter all too often. The prosecution charges the accused with a serious felony, only to have the defense offer a version of the facts rendering the accused far less culpable and, most important, subject to a far lesser punishment. If the evidence be such that a reasonable jury might have found the facts as the defense suggests them to have been, the accused of right is entitled to have the jury consider that option and be instructed to that effect.

Id. at 445. This Court continued that:

> Whether simple assault is formally a lesser included offense to rape is not the point. We have before us a continuing factual scenario bracketed by a relatively brief period of time . . . . The facts suggest that Griffin may have been guilty of two possible courses of criminal conduct: rape and simple assault, the latter carrying a maximum penalty far less than the former. As the jury may on these facts reasonably have found Griffin guilty of simple assault but not guilty of rape—without any inconsistency in evidentiary or ultimate findings, it follows that Griffin was of right entitled to have the jury instructed on the lesser offense of simple assault.

Id. at 447-48.

¶46. The majority finds the holding in ***Griffin*** and its progeny to be "pernicious." But, in support of its argument, the majority relies on opinions from the Court of Appeals which have been critical of the ***Griffin*** rule, on the Uniform Criminal Rules Study Committee which

advocates for its abandonment, on the laws of states other than Mississippi, and on the United States Supreme Court's interpretation of Rule 31(c) of the Federal Rules of Criminal Procedure.

¶47. The majority opens its attack on the well-established ***Griffin*** rule with a salvo of opinions from our Court of Appeals, where the rule roundly has been castigated: "[s]everal members of this court have expressed concerns with Mississippi's approach to lesser non-included offenses." ***Gebben v. State***, 108 So. 3d 956, 971 (Miss. Ct. App. 2012). According to the majority, "the concept of allowing lesser non-included offense instructions is grounded in neither the United States Constitution, the Mississippi Constitution, our statutes, nor Mississippi precedent; rather, it derives exclusively from this Court's opinion in ***Griffin***." Maj. Op. ¶13 (citing ***Gebben***, 108 So. 3d at 970) ("The right to lesser non-included instructions in Mississippi is neither grounded in our state's constitution nor its statutes or longstanding precedent."); *see also* ***Brooks v. State***, 18 So. 3d 859, 875 (Miss. Ct. App. 2008) (Carlton, J., dissenting), *rev'd in part*, 18 So. 3d 833 (Miss. 2009). I disagree.

¶48. Mississippi Code Section 99-19-5(1) provides:

> On an indictment for any offense the jury may find the defendant guilty of the offense as charged, or of any attempt to commit the same offense, or may find him guilty of an inferior offense, or other offense, the commission of which is necessarily included in the offense with which he is charged in the indictment . . . .

Miss. Code Ann. § 99-19-5(1) (Rev. 2007) (emphasis added). While Code Section 99-19-5(1) specifically contemplates lesser-*included* offenses, we recently have recognized that, "[a]s an exception, the Court has provided that '[a]n *accused* is entitled to a lesser-offense instruction only where there is an evidentiary basis in the record.'" ***Hall v. State***, 127 So. 3d

202, 205 (Miss. 2013) (emphasis in original) (quoting ***Thomas v. State***, 48 So. 3d 460, 472 (Miss. 2010) (citing ***McGowan v. State***, 541 So. 2d 1027, 1028 (Miss. 1989))).

¶49. Although no statute or federal or state constitutional provision explicitly authorizes the giving of lesser-related-offense instructions, it cannot be said that such is not grounded in "Mississippi precedent." To the contrary, Mississippi precedent is the source of lesser-related-offense instructions under our state's law. This Court consistently has held in the nearly thirty years since ***Griffin*** handed down that, "[i]f a lesser offense, as opposed to a lesser-included offense, arises from the same operative facts and has an evidentiary basis, we have held the defendant is *entitled* to an instruction for the lesser charge the same as if it were a lesser-included charge." ***Thomas v. State***, 48 So. 3d 460, 472 (Miss. 2010) (quoting ***Moore v. State***, 799 So. 2d 89, 91 (Miss. 2001) (citing ***Griffin***, 533 So. 2d at 447-48)) (emphasis added). *See also* ***Hall***, 127 So. 3d at 205 (only an accused, not the State, may request a lesser-offense instruction); ***Expose v. State***, 99 So. 3d 1141, 1147 (Miss. 2012) (recognizing ***Griffin*** but finding evidentiary support for lesser-offense instruction lacking); ***Williams v. State***, 53 So. 3d 734, 740-41 (Miss. 2010) (murder conviction reversed and remanded because evidence supported instructing the jury on a lesser nonincluded offense of assisted suicide); ***Brooks v. State***, 18 So. 3d 833, 839-41 (Miss. 2009) (defendant, indicted for aggravated assault, entitled to lesser-offense instruction on reckless driving); ***Delashmit v. State***, 991 So. 2d 1215, 1221-22 (Miss. 2008) (lesser-offense instruction on misdemeanor indecent exposure not proper where evidence supported only felony enticement of a child for sexual purpose, for which defendant was convicted); ***Brazzle v. State***, 13 So. 3d 810, 815-16 (Miss. 2009) (lesser-offense instruction not supported by the evidence); ***Green v. State***, 884 So. 2d 733,

737 (Miss. 2004) (conviction reversed and remanded where evidence supported giving of lesser-offense instruction); ***Moore***, 799 So. 2d at 91; ***Richardson v. State***, 767 So. 2d 195, 200-01 (Miss. 2000) (conviction of statutory rape reversed and remanded where lesser related offense on lustful touching supported by evidence); ***Mangum v. State***, 762 So. 2d 337, 343 (Miss. 2000) (lesser-offense instruction not supported by the evidence); ***Chase v. State***, 645 So. 2d 829, 851 (Miss. 1994) (no evidentiary basis for accessory-after-the-fact instruction); ***Jefferson v. State***, 556 So. 2d 1016, 1020 (Miss. 1989) (by requesting a lesser-offense instruction, accused waives right to indictment as to lesser offense); ***McGowan***, 541 So. 2d at 1029; ***Gangl v. State***, 539 So. 2d 132, 136-37 (Miss. 1989) (by requesting a lesser-offense instruction, accused waives right to indictment as to lesser offense; conviction of armed robbery reversed and remanded where lesser offense of accessory after the fact supported by the evidence); ***Mease v. State***, 539 So. 2d 1324, 1329 (Miss. 1989) (accused "is of right entitled to have the jury instructed regarding any offense carrying a lesser punishment arising out of a common nucleus of operative fact with the scenario giving rise to the charge laid in the indictment.").

¶50. The unanimous Court[8] in ***Griffin*** was acting pursuant to its inherent rulemaking authority under ***Newell v. State***, 308 So. 2d 71 (Miss. 1975). ***Newell*** provided that

> [L]egislative suggestions concerning procedural rules . . . will be followed unless determined to be an impediment to justice or an impingement upon the constitution. The inherent power of this Court to promulgate procedural rules emanates from the fundamental constitutional concept of separation of powers and the vesting of judicial powers in the courts.

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[8]Robertson, J., authored the ***Griffin*** decision and was joined by Roy Noble Lee, C.J., Hawkins, and Dan M. Lee, P.JJ., and Prather, Sullivan, Anderson, Griffin, and Zuccaro, JJ.

Id. at 76 (citing ***Matthews v. State***, 288 So. 2d 714 (Miss. 1974); ***Gulf Coast Drilling & Exploration Co. v. Permenter***, 214 So. 2d 601 (Miss. 1968); ***Southern Pac. Lumber Co. v. Reynolds***, 206 So. 2d 334 (Miss. 1968)).The judicial instruction of jurors respecting the law to be applied by them is a procedural process. This Court was well within its judicial prerogatives in ***Griffin*** to require the giving of jury instructions on lesser-related offenses, when warranted by the evidence. That principle can be applied today in the context of the lesser-related offense of accessory after the fact. The accessory-after-the-fact statute legislatively established a lesser crime that, by definition, was, in every case in which it applied, both "lesser" than and "related" to some greater offense that either had been committed or attempted by someone else. There can be no doubt that this Court possessed full authority under ***Newell*** to craft, as it did in ***Griffin***, a precedential rule that, when warranted by the evidence, a defendant is entitled to have the jury instructed on the lesser-related offense.

¶51. Here, Hye contends that the jury had before it evidence which could have led to his being found guilty of the lesser-related offense of accessory after the fact. Without doubt, this was a *lesser* offense than that pled in the indictment. Since the evidence to which Hye pointed, if believed beyond a reasonable doubt by the jurors, would have resulted in his being convicted of helping, or trying to help, another indictee in the capital-murder case after the commission of that crime, clearly it would have been *related* to the principal charge—thus, a *lesser-related offense*. This was Hye's theory of his case; indeed, it was his defense. But, in the absence of an appropriate jury instruction, the jurors were powerless to address it.

Hye's theory was a legitimate one, well grounded in Mississippi law. But, contrary to our clear and powerful precedent, it was not brought to the jury's attention by the trial court via appropriate instruction. Instead, the jury was given but two options in the guilt phase of the trial: finding Hye guilty of capital murder, or finding him not guilty.

¶52. Despite this Court's protracted adherence to ***Griffin***, the majority expresses agreement with those members of the Court of Appeals who advocate for the rule's demise. But neither the majority nor those learned judges persuasively explain why the decision in that case ought to be abandoned in order "to avoid the perpetuation of pernicious error." ***Stone***, 43 So. 2d 184, 190 (Miss. 1949). With respect to the majority and to those members of our Court of Appeals whose view they share, the simple circumstance that some other jurisdictions have discarded the rule, and Mississippi happens to be in the minority of jurisdictions which have retained it, is not a sufficient reason to overcome the doctrine of *stare decisis*, especially with respect to a longstanding procedure which serves good purposes and is not in any state of disrepair. *See* ***Gebben***, 108 So. 3d at 969-70; ***Sheffield v. State***, 64 So. 3d 529, 532-33 (Miss. Ct. App. 2011). A footnote from ***Gebben*** tracks criticism from the Court of Appeals:

> *See* ***Barber v. State***, 743 So. 2d 1054, 1059 (¶ 19) (Miss. Ct. App. 1999) (Southwick, P.J., dissenting) ("An accused should not have the unrestricted right to search the statute books for some other related but not lesser-included offense with a lesser punishment, and insist upon an instruction on that crime."); *see also* ***Williams v. State***, 53 So. 3d 761, 792 (Miss. Ct. App. 2009) (Roberts, J., dissenting) ("[I]n the context of a prosecution of a felony, the entitlement to a lesser non-included offense instruction is contrary to Article 3, Section 27 of the Mississippi Constitution of 1890," which requires indictment by a grand jury absent a sworn waiver.[9]), *rev'd*, 53 So. 3d 734

[9]This concern is discussed in a footnote in ***Griffin***: "Any possible concern that simple assault, because technically not a lesser included offense, is not within the indictment for

> (Miss. 2010); ***Brooks v. State***, 18 So. 3d 859, 876 (Miss. Ct. App. 2008) (Carlton, J., dissenting) ("The current case exemplifies what the United States Supreme Court projected as unworkable jurisprudence lacking constitutional and statutory legs."), *rev'd in part*, 18 So. 3d 833 (Miss. 2009); ***McDonald v. State***, 784 So. 2d 261, 266 (Miss. Ct. App. 2001) (Southwick, J., concurring) ("In effect an accused can indict himself for an offense that is not within the actual indictment but is potentially within the facts and carries a lesser sentence.").

Id. at 971 n.6.

¶53. Judge Southwick, then a member of the Mississippi Court of Appeals, expressed the concern that "[a] jury should not be asked to determine the guilt of a person on an offense for which he was not even tried." ***McDonald***, 784 So. 2d at 270 (Southwick, J., dissenting). The defendant had been indicted for simple assault on a police officer but had requested and been denied an instruction on the lesser-related offense of resisting arrest. ***McDonald***, 784 So. 2d at 264. The majority reversed McDonald's conviction and remanded, finding that he had a right to have the jury instructed on simple assault, which the majority found to have an evidentiary foundation. ***Id.*** Judge Southwick disagreed: "The underlying factual issue of arrest was simply not explored or even mentioned at trial. . . . Yet there was *some* evidence here." ***McDonald***, 784 So. 2d at 270 (Southwick, J., dissenting) (emphasis in original). According to Judge Southwick, "if the elements on the lesser offense are all in the greater offense, then what is in the lesser offense instruction will necessarily have been examined fully in the trial." ***Id.*** However, "the lesser non-included charge was based on factual issues

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rape dissipates in the face of Griffin's request for the simple assault instruction. Griffin thus waived any inadequacy in the indictment." ***Griffin***, 533 So. 2d at 448, n.2. *See* ***Jefferson***, 556 So. 2d at 1020; ***Gangl***, 539 So. 2d at 136-37.

that were not meaningfully developed . . . ." ***Id.*** Ultimately, Judge Southwick found that "[t]he evidence here of an effort to arrest was incidental at best, though it did exist." ***Id.***

¶54. Any concern regarding factual development of a requested lesser-related instruction is ameliorated by the predicate which must be laid in order to support granting of the instruction: such an instruction will be given only where "a lesser offense, as opposed to a lesser-included offense, arises from the *same operative facts* and has an *evidentiary basis*." ***Williams***, 53 So. 3d at 740-41 (quoting ***Moore***, 799 So. 2d at 91) (citing ***Griffin***, 533 So. 2d at 447-48)) (emphasis added). Additionally, the evidentiary standard for a lesser-included offense and a lesser-related offense is the same, and a lesser-related instruction should be granted unless "the trial judge—and ultimately this Court—can say, taking the evidence in the light most favorable to the accused, and considering all reasonable favorable inferences which may be drawn in favor of the accused from the evidence, that no reasonable jury could find the defendant guilty of the lesser included offense." ***Richardson***, 767 So. 2d at 200 (quoting ***Harper v. State***, 478 So. 2d 1017, 1021 (Miss. 1985)).

¶55. Moreover, the ***Griffin*** rule came into being to address the following problem, as articulated by this Court: "[t]he prosecution charges the accused with a serious felony, only to have the *defense offer a version of the facts* rendering the accused far less culpable and, most important, subject to a far lesser punishment." ***Griffin***, 533 So. 2d at 445 (emphasis added). The Court continued: "[*I*]*f the evidence be such that a reasonable jury might have found the facts as the defense suggests them to have been*, the accused of right is entitled to have the jury consider that option and be instructed to that effect." ***Id.*** (emphasis added). To entitle the accused to a lesser-offense instruction, ***Griffin*** requires, as it always has required,

that an evidentiary predicate be laid. The burden is on the defense meaningfully to develop the facts in a way that is supportive of a requested instruction. As such, this Court's long adherence to the rule articulated in ***Griffin*** cannot be said to be "mischievous," nor does it constitute "pernicious error." Our trial courts, the Court of Appeals, and this Court are well-equipped to decide whether a lesser-offense instruction is warranted.

¶56. The majority further opines that ***Griffin*** "instituted the rule without much discussion and cited no authority for its support." Maj. Op. ¶16. Thus, the majority conjectures that "Griffin was likely persuaded, if not influenced, by a federal Court of Appeals decision, ***United States v. Whitaker***, 447 F.2d 314 (D.C. Cir. 1971), and a California Supreme Court decision, ***People v. Geiger***, 35 Cal. 3d 510, 674 P.2d 1303 (1984)." Maj. Op. ¶16. In interpreting Federal Rule of Criminal Procedure 31(c),[10] the United States Court of Appeals for the District of Columbia Circuit adopted what is known as the "inherent relationship test" in ***United States v. Whitaker***:

> A more natural, realistic and sound interpretation of the scope of "lesser included offense," in line with our own views on the subject, is that defendant is entitled to invoke Rule 31(c) when a lesser offense is established by the evidence adduced at trial in proof of the greater offense, with the caveat that there must also be an "inherent" relationship between the greater and lesser offenses, i.e., they must relate to the protection of the same interests, and must be so related that in the general nature of these crimes, though not necessarily invariably, proof of the lesser offense is necessarily presented as part of the showing of the commission of the greater offense.

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[10]Rule 31(c) states that "[a] defendant may be found guilty of any of the following: (1) an offense necessarily included in the offense charged; (2) an attempt to commit the offense charged; or (3) an attempt to commit an offense necessarily included in the offense charged, if the attempt is an offense in its own right." Fed. R. Crim. P. 31(c).

Whitaker, 447 F.2d at 319. ***Geiger***, premised on the rationale of the ***Whitaker*** court, stands for the proposition that, where the defendant had been indicted for burglary, the denial of a request by the defendant to have the jury instructed on the "related, but not necessarily included offense" of vandalism constituted reversible error:

> The offense of vandalism is related to burglary since it is made an offense to protect the same societal interest—security of property—as burglary. It is often proven by the evidence that is offered to prove burglary. The defense evidence and theory here were consistent with the commission of vandalism and with an acquittal of burglary. The testimony of the owner of the Dragon Moon Disco, and the evidence that nothing in Jack's was taken or disturbed, both of which were admitted for the purpose of establishing defendant's guilt or innocence of the charged offense were sufficient to create a genuine conflict as to defendant's intent when he, concededly, broke the window.

Geiger, 35 Cal. 3d at 521, 532 . The majority may be correct that these opinions influenced this Court's decision in ***Griffin***. But, while the foundation and ancestry of ***Griffin*** are of interest academically, a professorial analysis of each and every precedential influence upon the ***Griffin*** Court back in 1988 is unnecessary to an appreciation of the important utility and inherent fairness of the rule thus promulgated, whose judicious use by Mississippi trial and appellate courts has withstood a very lengthy test of time.

¶57. As the majority notes, California has retreated from its decision in ***Geiger***. ***People v. Birks***, 19 Cal. 4th 108, 112-13, 960 P.2d 1073 (1998). Because "***Geiger's*** rationale has since been expressly repudiated for federal purposes by the United States Supreme Court, and it continues to find little support in other jurisdictions," the California Supreme Court held that "***Geiger*** represents an unwarranted extension of the right to instructions on lesser offenses." ***Id.*** But, while California may have retreated from its previous position with regard to the entitlement of defendants to instructions on lesser-related offenses, the majority again fails

to answer the ultimate question before it: whether the rule articulated by the Mississippi Supreme Court in ***Griffin*** is "pernicious" or "mischievous" to such a degree that this Court now should disregard *stare decisis* in order to overrule it. I am unwilling to agree with the rationale that, because California did away with its rule, so should Mississippi.

¶58. The majority further notes that, "soon after ***Griffin*** [and since ***Geiger***] was decided, 'all arguable federal support for its conclusions has been withdrawn.'" Maj. Op. ¶21 (citing ***Birks***, 19 Cal. 4th at 123). The majority continues: "As ***Birks*** observed, the rationale of the ***Geiger*** decision has since been unequivocally repudiated by the United States Supreme Court in ***Schmuck v. United States***, 489 U.S. 705, 109 S. Ct. 1443, 103 L. Ed. 2d 734 (1989) and ***Hopkins v. Reeves***, 524 U.S. 88, 118 S. Ct. 1895, 141 L. Ed. 2d 76 (1998)." Our Court of Appeals has noted that "the Federal Rules of Criminal Procedure limit the defendant's entitlement to instructions on only those lesser offenses 'necessarily included' in the offense charged." ***Gebben***, 108 So. 3d at 969 (citing Fed. R. Crim. P. 31(c); ***Schmuck***, 489 U.S. at 716). "And the United States Supreme Court has rejected the notion that defendants are entitled to lesser non-included instructions under the U.S. Constitution." ***Gebben***, 108 So. 3d at 969 (citing ***Hopkins***, 524 U.S. at 96-97); see ***Sheffield v. State***, 64 So. 3d at 532 (citing ***Hopkins***, 524 U.S. at 97). But the United States Supreme Court's analysis remains unpersuasive, and in these circumstances is not binding upon us, regarding why Mississippi's law should change. As with the majority's discussion of ***Birks***, it certainly fails to analyze the alleged "pernicious" nature of lesser-related-offense instructions under Mississippi law.

¶59. In ***Schmuck***, the defendant was indicted for and convicted of mail fraud. ***Schmuck***, 489 U.S. at 707. He moved under Federal Rule of Civil Procedure 31(c) to have the jury

instructed on the lesser-related misdemeanor of odometer tampering, and the district court denied the motion. ***Id.*** at 708. A divided panel of the United States Court of Appeals for the Seventh Circuit reversed and remanded the case for a new trial, holding that the jury should have been instructed on odometer tampering based on the "inherent relationship test." ***Id.*** (citing ***Whitaker***, 447 F.2d at 319). The *en banc* Seventh Circuit vacated the panel opinion and reversed, holding that the district court was not required by Rule 31(c) to instruct the jury on odometer tampering. ***Schmuck***, 489 U.S. at 709-10. The Supreme Court agreed: "[w]here the lesser offense requires an element not required for the greater offense, no instruction is to be given under Rule 31(c)." ***Id.*** at 716.

¶60. But a federal interpretation of a federal rule of criminal procedure, while interesting, is of no moment to this Court's analysis of controlling Mississippi precedent or court rules, and certainly does not provide support for the argument that the ***Griffin*** rule is "pernicious" and should be struck down. In fact, Mississippi's Uniform Rules of Circuit and County Court Practice provide, in pertinent part, that "[i]n criminal cases if different counts are charged in the indictment *or if the court instructs the jury as to related or lesser offenses*, the jurors shall, if they convict the defendant, make it appear by their verdict on which counts or of which offenses they find the defendant guilty." URCCC 3.10 (emphasis added).The rules of procedure adopted by this Court for use in the trial courts of this State contemplate the giving of lesser-related-offense jury instructions, unlike Federal Rule of Criminal Procedure 31(c), which allows only for lesser *included* offenses. It is elementary that Mississippi is free to promulgate and adhere to its own common law and rules of court, to the extent that they are not repugnant to the United States Constitution. *See* ***Downey v. State***, 144 So. 3d 146, 151

(Miss. 2014) ("We are empowered by our state constitution to exceed federal minimum standards of constitutionality and more strictly enforce [constitutional rights].") (citing Miss. Const. art. 3, § 26; ***Smith v. State***, 500 So. 2d 973, 979 (Miss. 1986)); *see also* ***Whitaker v. State***, 146 So. 3d 333, 342 (Miss. 2014) (Kitchens, J., dissenting).

¶61. Likewise, in ***Hopkins v. Reeves***, Nebraska indicted Reeves for two counts of felony murder. ***Hopkins***, 524 U.S. at 91. At trial, Reeves requested that the jury be instructed on second-degree murder and manslaughter. ***Id.*** at 92. According to the United States Supreme Court, "[t]he trial court refused on the ground that the Nebraska Supreme Court consistently has held that second-degree murder and manslaughter are not lesser included offenses of [felony murder]." ***Id.*** Following conviction, sentence, and unsuccessful pursuit of relief in Nebraska state courts, Reeves sought a writ of *habeas corpus* in federal district court, arguing that the trial court's failure to give his requested instructions was unconstitutional pursuant to ***Beck v. Alabama***, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980), in which the Supreme Court held "unconstitutional a state statute that prohibited lesser included offense instructions in capital cases, when lesser included offenses to the charged crime existed under state law and such instructions were generally given in noncapital cases." ***Hopkins***, 524 U.S. at 90.

¶62. The district court rejected Reeves's claim, but the United States Court of Appeals for the Eighth Circuit reversed, reasoning that "the constitutional error was the same as that in ***Beck***," because Reeves "could have been convicted and sentenced for either second degree murder or manslaughter . . . ." ***Hopkins***, 524 U.S. at 93 (quoting ***Reeves v. Hopkins***, 102 F.3d 977, 983-84 (8th Cir. 1996) ("The unacceptable constitutional dilemma [in ***Beck***, as in

Hopkins] was that state law *prohibited* instructions on noncapital murder charges in cases where conviction made the defendant death-eligible.")).

¶63. The Supreme Court considered "whether ***Beck*** requires state trial courts to instruct juries on offenses that are not lesser included offenses of the charged crime under state law." ***Id.*** at 90.The Court held that because, "*as a matter of law*, Nebraska prosecutors cannot obtain convictions for second-degree murder or manslaughter in a felony-murder trial," the Nebraska trial court "merely declined to give instructions on crimes that are not lesser included offenses." ***Id.*** at 96. (emphasis in original). In contrast to ***Beck***, where the constitutionally offensive statute "prohibited instructions on offenses that *state law clearly recognized as lesser included offenses* of the charged crime" in capital cases, the Nebraska court "did not deny respondent instructions on any existing lesser included offense of felony murder." ***Id.***(emphasis added). Ultimately, the Court found the rule articulated by the Eighth Circuit too restrictive:

> The Court of Appeals apparently would recognize a constitutional right to an instruction on any offense that bears a resemblance to the charged crime and is supported by the evidence. Such an affirmative obligation is *unquestionably a greater limitation on a State's prerogative to structure its criminal law* than is ***Beck's*** rule that a State may not erect a capital-specific, artificial barrier to the provision of instructions on offenses *that actually are lesser included offenses under state law*.

Id. at 97-98 (emphasis added).

¶64. The Court declined to extend ***Beck*** to require state courts to provide lesser-related-offense instructions where state law prohibited or did not recognize them. The Court, then, was not referring to the "*practice of allowing* lesser non-included-offense instructions" when it opined that lesser-related-offense instructions would be "not only unprecedented, but also

unworkable." Maj. Op. ¶23 (citing ***Hopkins***, 524 U.S. at 97) (emphasis added) . The Court simply held that the federal Constitution does not *require* "that States create lesser included offenses to all capital crimes," nor does it *require* "that an instruction be given on some other offense—what could be called a 'lesser related offense'—when no lesser included offense exists." ***Hopkins***, 524 U.S. at 97. Again, the ***Griffin*** rule is unaffected. The ***Hopkins*** case does not address the question before this Court now: whether entitling an accused to an instruction on a lesser-related offense where an evidentiary basis for it exists is "mischievous" in effect or "pernicious" such that *stare decisis* may be disregarded. ***Hopkins*** simply did not address that question. Its holding did no damage to ***Griffin***.

¶65. The majority next turns to policy arguments in an attempt to support its repudiation of the longstanding ***Griffin*** rule. According to the majority, "[b]y allowing a criminal defendant 'to seek and obtain conviction for a lesser [nonincluded] offense whose elements the state has neither pled nor sought to prove' gives the defendant a 'superior trial right.'" Maj. Op. ¶19 (quoting ***Birks***, 960 P.2d at 1081). Additionally, the Uniform Criminal Rules Study Committee has proposed Rule 23.2(d)[11] to this Court, the suggested comment to which reads as follows, in pertinent part:

> Specifically, a jury may no longer be instructed on a so-called "lesser related" or "less[er] non-included" offense (a lesser offense which does not meet the criteria for a lesser *included* offense instruction). . . . The approach of section (d) avoids the difficulties inherent when a defendant seeks to place an

[11]Proposed Rule 23.2(d) reads as follows: "The jury may be instructed on any of the following: (1) an offense necessarily included in the offense charged; or (2) an attempt to commit the offense necessarily included therein, if such attempt is an attempt." Matthew Steffey, *Mississippi Criminal Procedure: Proposed Rules and Comments*, 31 Miss. C. L. Rev. (Special Issue) 1, 155 (2013).

> uncharged, non-included offense before the jury, thereby diminishing the prosecuting attorney's traditional and exclusive discretion over charging decisions. Section (d) also restores symmetry, as both the prosecution and the defense may seek an instruction on a lesser included offense, while the Constitution forbids a prosecuting attorney from receiving an instruction on a lesser offense whose elements are not included in the indictment.

Matthew Steffey, *Mississippi Criminal Procedure: Proposed Rules and Comments*, 31 Miss. C. L. Rev. (Special Issue) 1, 156 (2013) (citing ***Schmuck***, 489 U.S. at 718).[12]

¶66. But the ***Griffin*** Court addressed the concern over uncharged offenses being placed before the jury and the purported diminution of prosecutorial discretion, for it places upon the *defense* the burden to adduce evidence at trial, "such that a reasonable jury might have found the facts as the defense suggests them to have been." ***Griffin***, 533 So. 2d at 445. The jury, of course, is to consider the evidence as a whole, which may mean that the jurors find, on the basis of some of the prosecution's proof, when considered in conjunction with some, or perhaps all, of the defendant's proof, that the lesser-related offense has been proven beyond a reasonable doubt, but not the crime charged in the indictment. *See* ***Warner v. State***, 222 Miss. 322, 328, 75 So. 2d 741, 744 (1954) ("It is the duty of the jury to consider the evidence as a whole and determine from that the guilt or innocence of an accused.").

¶67. The majority echoes the concerns of the Criminal Rules Study Committee: "[P]articularly when the State does not consent, the giving of lesser-nonincluded-offense instructions invites the jury to convict the defendant of a crime that no party may have attempted to establish beyond a reasonable doubt." Maj. Op. ¶27. But as mentioned above,

[12]Neither this proposed rule nor the accompanying suggestion for a comment has been adopted by this Court.

the defendant, by requesting the lesser-related-offense instruction, waives the right to indictment on the offense for which he or she seeks the instruction. ***Hall***, 127 So. 3d at 205 ("defendant's request of a lesser-offense instruction operates as a waiver of indictment . . . ."); ***Griffin***, 533 So. 2d at 448 n.2; ***Jefferson***, 556 So. 2d at 1020; ***Gangl***, 539 So. 2d at 136-37.

¶68. Additionally, the Criminal Rules Study Committee and the majority imply that the ***Griffin*** rule promotes asymmetry, because "only the criminal defendant may request a lesser non-included offense instruction, as constitutional notice considerations forbid the prosecution from receiving an instruction on a lesser offense whose elements are not included in the indictment." Maj. Op. ¶20. It is true that "only the defendant, and not the State, may request a lesser[-related]-offense instruction." ***Hall***, 127 So. 3d at 205 (citing ***Griffin***, 533 So. 2d at 448 n.2). ***Griffin*** appeared in the common law of this State to bring symmetry to one aspect of our criminal jurisprudence: "the prosecution charges the accused with a serious felony, only to have the defense offer a version of the facts rendering the accused far less culpable and, most important, subject to a far lesser punishment," leaving the jury faced with the choice of conviction or acquittal despite evidence supporting a lesser offense. ***Griffin***, 533 So. 2d at 445. The concerns of the majority and others regarding the ***Griffin*** rule simply do not rise to the level of "perniciousness" or "mischievousness" necessary to overcome *stare decisis*.

¶69. Furthermore, symmetry in a criminal case never before has concerned this Court, as can be observed in the context of a lesser-*included* offense instruction: "in a murder case our law allows the prosecution to obtain a manslaughter instruction, almost willynilly, but [. . .]

the defendant is not always so entitled." ***Jackson v. State***, 551 So. 2d 132, 146 (Miss. 1989) (citing ***Reed v. State***, 526 So. 2d 538, 540 (Miss. 1988); ***Fairchild v. State***, 459 So. 2d 793, 800-02 (Miss. 1984)). This having been an argument of the defendant, the Court pointed out that "[c]andor requires concession that Jackson has accurately described the current state of our law." ***Jackson***, 551 So. 2d at 146 (citing ***Mease***, 539 So. 2d at 1338 (Hawkins, P.J., specially concurring)). But, despite the lack of "symmetry" between the prosecution and the defense, this Court reaffirmed the principle that, "where there is in the record evidence legally sufficient to support a jury finding of guilty of murder, . . . the defendant will not be heard to complain that a manslaughter instruction was given," *despite* the fact that "the manslaughter *instruction was not warranted under the evidence*." ***Jackson***, 551 So. 2d at 146 (citations omitted) (emphasis added). Thus it seems the *defendant* is estopped from complaining that a lesser-*included*-offense instruction was given*, though the instruction was not supported by the evidence*. I decline to countenance the State's fairness argument, considering that a lesser-*related*-offense instruction *requires evidentiary support* for its presentation to the jury.

¶70. Interestingly, today's reversal of ***Griffin*** will have a restrictive effect on the State's ability to engage in plea bargaining. Long before ***Griffin***, this Court held that the trial court was without jurisdiction to accept the defendant's guilty plea to accessory after the fact, since accessory after the fact is not a lesser-included offense of attempted armed robbery. ***Box v. State***, 241 So. 2d 158, 159 (Miss. 1970). In the wake of ***Griffin***, this Court overruled ***Box***, holding that "[a] subsequent event such as a guilty plea to a lesser related offense in no way ousts the court of personal jurisdiction" to accept a guilty plea on a lesser-related offense.

Jefferson, 556 So. 2d at 1021. By entering a plea of guilty to a lesser-*related* offense, the Court opined, a defendant waives his right to be indicted. ***Id.*** Thus, under ***Jefferson***, the State could reach a plea agreement with a criminal defendant on a lesser-related offense, such as accessory after the fact. After today's decision, the State is bound, as it was under ***Box***, to offer *only* pleas of guilty to lesser-*included* offenses.

¶71. Because I would not overrule ***Griffin*** and its progeny and because I find that lesser-related-offense instructions which are supported by the evidence ought to remain a viable component of Mississippi criminal law and practice, I dissent.

II. Terry Hye presented sufficient evidence to support an accessory-after-the-fact instruction.

¶72. I turn now to analyze whether Hye was entitled to an accessory-after-the-fact instruction. We review a grant or denial of a jury instruction under an abuse-of-discretion standard, considering the jury instructions "as a whole 'to determine if the jury was properly instructed.'" ***Clayton v. State***, 106 So. 3d 802, 804 (Miss. 2012) (quoting ***Flowers v. State***, 51 So. 3d 911, 912 (Miss. 2010)). "On appellate review of the trial court's grant or denial of a proposed jury instruction, our primary concern is that 'the jury was fairly instructed and that each party's proof-grounded theory of the case was placed before it.'" ***Banyard v. State***, 47 So. 3d 676, 681 (Miss. 2012) (quoting ***Young v. Guild***, 7 So. 3d 251, 259 (Miss. 2009)).

¶73. A criminal defendant "is entitled to have jury instructions given which present his theory of the case." ***Clayton***, 106 So. 3d at 804 (quoting ***Bailey v. State***, 78 So. 3d 308, 315 (Miss. 2012)). Such entitlement, however, is not unlimited. ***Id.*** The trial court may refuse a proffered jury instruction if: (1) the instruction "incorrectly states the law," (2) the instruction

"is covered fairly elsewhere in the instructions," or (3) the instruction "is without foundation in the evidence." ***Id.***

¶74. The trial court refused the following jury instructions requested by Hye:

> **Instruction D-26**: The Court instructs the Jury that if you are unable to find the Defendant, Terry Hye, Jr., guilty of the felony crime of capital murder then you should continue your deliberations to consider the elements of the felony crime of Accessory After the Fact to Murder.
>
> **Instruction D-28**: To find Terry Hye, Jr. guilty of Accessory After the Fact, you must find to [sic] following:
>
> (1) a completed felony has been committed;
>
> (2) Terry Hye concealed, received, relieved, aided, or assisted a felon, knowing that such person had committed a felony; and
>
> (3) such assistance or aid was rendered with the intent to enable such felon to escape or avoid arrest, trial, conviction, or punishment after the commission of the felony.

Mississippi Code Section 97-1-5(1) sets forth the elements of the crime of accessory after the fact:

> Every person who shall be convicted of having concealed, received, or relieved any felon, or having aided or assisted any felon, knowing that the person had committed a felony, with intent to enable the felon to escape or to avoid arrest, trial, conviction or punishment after the commission of the felony, on conviction thereof shall be imprisoned in the custody of the Department of Corrections . . . .

Miss. Code Ann. § 97-1-5(1) (Rev. 2014). Because the requested jury instruction on the elements of the crime of accessory after the fact tracks the language of the statute, it cannot be said that the proposed jury instruction "incorrectly states the law." The State does not dispute this and does not contend that the proposed jury instructions are "fairly covered elsewhere in the instructions." The State vehemently objected to the proposed jury

instructions, and the trial court agreed by refusing to give them. Thus, the dispute hinges on the existence of a sufficient evidentiary foundation to support the giving of Hye's proposed accessory-after-the-fact jury instructions.

¶75. This Court consistently has articulated a low threshold with regard to what a defendant must show in the record to support a tendered "theory-of-the-case" instruction. "A defendant is entitled to have instructions on his theory of the case presented, even though the evidence that supports it is weak, inconsistent, or of doubtful credibility." ***Banyard v. State***, 47 So. 3d 676, 681 (Miss. 2010) (quoting ***Ellis v. State***, 778 So. 2d 114, 118 (Miss. 2000)). "There needs [sic] not be even a plausible explanation" for the defendant's theory. ***Banyard v. State***, 47 So. 3d at 681 (quoting ***Walker v. State***, 913 So. 2d 198, 235 (Miss. 2005)). Further, "[a] criminal defendant is entitled to have his jury instructed on all offenses of which an evidentiary basis exists in the record, *even where the evidence . . . arises only in the defendant's own testimony*."[13] ***Banyard v. State***, 47 So. 3d at 681 (quoting ***West v. State***, 725 So. 2d 872, 888 (Miss. 1998), *overruled on other grounds by* ***Jackson v. State***, 860 So. 2d 653 (Miss. 2003)) (emphasis added). The standard is similar in 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." ***Clayton***, 106 So. 3d at 806 (quoting ***Brown v. State***, 39 So. 3d 890, 899 (Miss. 2010)) (emphasis added).

[13]It is this low threshold which persuades me that the evidence in the present case supports Hye's requested accessory-after-the-fact instruction.

¶76. Where one defendant, tried for the murder of his wife, testified that he and his wife were involved at the time in an escalating argument in which his wife threatened him and cut him with a knife at the time of the killing, this Court unanimously reversed and remanded for a new trial because the trial court failed to instruct the jury on the defendant's alternative heat-of-passion manslaughter theory. ***Clayton***, 106 So. 3d at 806. Likewise, in ***Banyard***, 47 So. 3d at 679, codefendant Ragsdale encouraged Banyard to assist Ragsdale in robbing a pizza delivery person. ***Id.*** at 680. Banyard testified that Ragsdale told him the gun was unloaded; but Banyard feared that Ragsdale would load the weapon and shoot him if he refused to comply. ***Id.*** As Banyard handed the gun to Ragsdale, it discharged. ***Id.*** This Court reversed Banyard's conviction of capital murder and remanded because the trial court had refused to instruct the jury on duress, a defense theory that Banyard had maintained throughout trial. ***Id.*** at 683. In ***Brown***, 39 So. 3d at 900, this Court reversed the trial court for failing to give Brown's requested accidental-shooting instruction where an alternative theory of his defense was that he accidentally shot the victim "in the heat of passion." We urged "our trial judges to remember that if 'serious doubt exists as to whether an instruction should be included, the doubt should be resolved in favor of the accused.'" ***Id.*** (quoting ***Davis v. State***, 18 So. 3d 842, 849 (Miss. 2009)).

¶77. In another instance, this Court reversed a defendant's conviction of armed robbery and remanded because the trial judge failed to give the jury a requested accessory-after-the-fact instruction. ***Gangl v. State***, 539 So. 2d 132, 137 (Miss. 1989).[14] There, the State presented

[14] Where the trial judge refused an accessory-after-the-fact instruction "since accessory after the fact is not a lesser included offense of robbery," this Court held that

evidence "that the primary participants had a pre-arranged plan[15] with Gangl for him to be the driver of a getaway vehicle." But had an accessory-after-the-fact instruction been granted, "a serious doubt may have arisen in the minds of the jurors as to whether Gangl's apparent assistance to at least one of the perpetrators was the product of pre-design, or was simply the product of after the fact circumstance." ***Id.*** at 136.

¶78. In the present case, Hye asserted that evidence adduced at trial supported his proposed accessory-after-the-fact jury instructions. Hye cited Alonzo Kelly's testimony to show that Hye had colluded with Kelly, Benjamin, and Wells to concoct an exculpatory version of events. According to Hye, this is supported by the State's description in closing argument of the Thursday (when the shooting occurred) to Monday (when the police interviews took place) as "a weekend alibi fest." Further, Hye contended at trial that he had lied to police and had covered for other members of the group, which, as he contended in his petition for writ of *certiorari*, "could have led the jury to believe that Terry was an accessory after the fact." Hye testified that he and Benjamin had caught a ride from Moss Point to Pascagoula, where they had stayed in Hye's aunt's house—"[t]hus, there was evidence to support that Terry provided assistance to Tevin by providing shelter to him at a relative's house following the

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"[p]aying obedience to form over substance misses the point." ***Gangl***, 539 So. 2d at 135. The evidentiary standard is the same for lesser-offense instructions as it is for lesser-included-offense instructions. ***Id.*** at 136-37. We continued, "[t]he facts adduced at trial, and acknowledged by the trial judge, suggest that Gangl may have been guilty of two possible courses of criminal conduct; accessory before the fact to armed robbery, or accessory after the fact to armed robbery." ***Id.*** at 135.

[15] "Every person who shall be an accessory to any felony, before the fact, shall be deemed and considered a principal, and shall be indicted and punished as such . . . ." Miss. Code Ann. § 97-1-3 (Rev. 2014).

shooting." In response, the State posited that "all evidence placed Kelly away from the Conoco and not a principal in the crime. The evidence showed that Hye acted as a principal." The Court of Appeals agreed with the State, finding both that Hye's "involvement in the robbery began earlier in the day when the group decided to go 'hit a lick' and headed to the gas station" and that Hye "never presented this theory of defense to the jury." ***Hye***, 2013 WL 2303518, at *7. With respect, we disagree.

¶79. Not only was evidence adduced at trial that the group, following the shooting, frantically attempted to concoct alibis, that Hye initially lied to police, and that Hye provided shelter to Benjamin at Hye's aunt's house in Pascagoula, but also that both Hye and Kelly testified that the robbery was not the product of planning. Kelly[16] testified "it wasn't no plan. Nobody was planning to go rob nobody." Kelly testified further that the reason Hye walked to the Conoco was to purchase cigarettes and that Hye said he "don't want nothing to do with it."[17] Hye denied involvement in the robbery and testified that Kelly walked down to the Conoco gas station with Hye, Wells, and Benjamin, instead of remaining at the stop sign down the road as he claimed. Further, Hye testified that, following a failed attempt to get

[16]Kelly pled guilty to accessory after the fact. According to Kelly, who was standing at a stop sign down the street, "Terry and Tevin was standing in the road, Darwin went to the parking lot. I heard a gunshot. It happened that quick," at which point the entire group ran away. The State argues that Kelly's testimony, plus the testimony of Linda Porter that two black men tussled with her husband just before Wells shot him, proves that Hye was a principal and that Kelly was an accessory after the fact.

[17] "[I]t" refers to "hitting a lick," which Kelly testified "mean like going to get, going to money. You fixing to get some money or something." Hye testified that his understanding of the meaning of "hitting a lick" was "selling dope or weed or something."

someone to purchase cigarettes for him[18] at the Little Super gas station, Darwin Wells suggested that the group go to the nearby Conoco so that Wells could "hit me a lick" and Hye could "find someone easy to go in the store there for you to purchase some cigarettes." Hye testified, "So, I'm like, I ain't got nothing to do with you hitting no lick, but I need me some cigarettes, so I start walking toward the Conoco." Hye further testified that, "I never seen a gun until when Darwin Wells slipped and fell and pulled out the gun." He testified that he did not see a gun during the group's walk.

¶80. It is true that a defendant cannot be both a principal to the crime and an accessory after the fact. ***Mangum v. State***, 762 So. 2d at 343 (quoting ***Hoops v. State***, 681 So. 2d 521, 534 (Miss. 1996)). *See also* ***Crosby v. State***, 175 So. 180, 181, 179 Miss. 149,162 (Miss. 1937) (This Court reversed and remanded Crosby's accessory-after-the-fact conviction where the lower court "refused to grant the appellant an instruction to the effect that the principal in the commission of a felony cannot thereafter become an accessory after the fact, and, if [the jury] believed from the evidence that the appellant himself murdered Lizzie Marsh, or assisted Williams so to do, he could not be convicted of being an accessory thereto after the fact.") In its *certiorari* brief to this Court, the State argues that, "there simply was not evidence that Hye acted as an accessory after the fact and not as a principal." Nevertheless, where the evidence supports the giving of a jury instruction, however weak that evidence may be, it remains the province of the jury, and not the province of this Court, to sort out whether the defendant was a principal to the crime or an accessory after the fact. ***Banyard***, 47 So. 3d at

[18] Hye was sixteen at the time and could not purchase cigarettes for himself, so he would ask adults to go into gas stations to purchase them for him.

683 ("The jurors are the judges of the credibility of the witnesses, not the appellate courts. We need only decide whether Banyard presented sufficient evidence to meet the minimum threshold necessary to require an instruction on his theory. We find that he did.").

¶81. All the accused must do is "point to evidence in the record from which a jury reasonably could find the defendant not guilty of the crime with which the defendant is charged and at the same time find the defendant guilty of the 'lesser offense.'" ***Brazzle***, 13 So. 3d at 816 (quoting ***Dampier v. State***, 973 So. 2d 221, 231 (Miss. 2008)). *See also* ***Harper v. State***, 478 So. 2d 1017, 1021 (Miss. 1985) ("The only fact issues which should be taken from the jury are those with respect to which the evidence is so clear that rational jurors could not disagree. On all other material issues of fact, the jury must be instructed in the law so that they may then perform their constitutional responsibility.").

¶82. Hye argued in his petition for writ of *certiorari* that "there was sufficient evidence, certainly more than necessary under the 'meager, unlikely evidence' standard in ***Clayton*** to support the instruction." We agree. The standard is not concerned with the quantity or quality of the evidence presented, but rather whether *any* evidentiary support, however tenuous it may be, exists to support giving the defendant's requested jury instruction. From the witness stand, Hye denied going to the Conoco station with the intent to participate in a robbery, he denied involvement in the robbery, and he denied knowing that Wells possessed a gun. Hye testified that he simply wanted to have someone buy cigarettes for him. Kelly testified that there was no plan to rob. With regard to presenting an alternative theory of defense at trial, which the Court of Appeals determined that Hye had failed to do, Hye testified that, after the robbery and shooting, he hosted Tevin Benjamin at his aunt's Pascagoula home. Hye

admitted that he initially lied to police, and in so doing he seemed to be trying to assist some of the other suspects. Officer Gray, who interviewed Hye, testified that Hye initially told police that three people remained at the stop sign as the murder transpired. And Kelly testified that the group got together over the weekend to concoct alibis, which the State labeled in its closing argument as a "weekend alibi fest."

¶83. We cannot, therefore, concur with our colleagues in the majority that "there is nothing but inferences upon inferences to support [Hye's] proposed theory of the case" and that "Hye's proposed accessory after the fact instruction lacked an evidentiary basis." Maj. Op. ¶35. To the contrary, ample evidence adduced at trial supported Hye's proposed accessory-after-the-fact instruction. This Court repeatedly has held that: "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 or conviction*." ***Clayton***, 106 So. 3d at 806 (quoting ***Brown***, 39 So. 3d at 899 (Miss. 2010)) (emphasis added). It is not for us to evaluate Hye's claims for truthfulness, or the lack thereof. Rather, it is our province to determine whether the jury was given proper judicial guidance, in the form of written instructions, to enable it to evaluate Hye's theory of the case in light of all applicable law.

¶84. In the Court of Appeals, the State argued that "with respect to the granting of lesser offense instructions, an evidentiary basis cannot lie in tenuous connections to the evidence which would require the jury to 'resort[] to speculation or conjecture.'" ***Brazzle***, 13 So. 3d at 818 (quoting ***Harper***, 478 So. 2d at 1021). Even though the Court of Appeals did not address this argument by the State, we find ***Brazzle*** to be distinguishable from the present

case. In ***Brazzle***, the victim of the carjacking alleged to have been committed by Brazzle identified Brazzle as the culprit both from a photo lineup and again at trial. ***Id.*** Brazzle also was identified by an officer who had observed him fleeing into the woods prior to being apprehended. ***Id.***

¶85. Here, Linda Porter was shown neither an in-person nor a photo lineup of suspects, and she testified that she recognized them at trial "from the pictures in the newspaper." Therefore, Brazzle's assertion on appeal that "the jury . . . was free to believe that she was mistaken about her identification and find that Brazzle had acquired the vehicle from Turner after the fact, as he claimed," warranted the refusal by the trial court of an accessory-after-the-fact instruction. ***Id.*** The jury there reasonably could not find that Brazzle was a mere accessory after the fact. Here, a reasonable jury, properly instructed, could have come to the conclusion, based on the evidence adduced at trial, that Hye was not guilty of capital murder, but was guilty as an accessory after the fact to capital murder. As in ***Gangl***, "a serious doubt may have arisen in the minds of the jurors as to whether" Hye was a principal in the robbery underlying the murder of Michael Porter, or whether his participation in the crime was limited to his having given after-the-fact assistance to the perpetrators of this dastardly and senseless crime. *See* ***Gangl***, 539 So. 2d at 136.

¶86. I would hold that Hye presented a sufficient evidentiary foundation to support the giving of an accessory-after-the-fact instruction, since a reasonable jury could have come to the conclusion that he was guilty of the crime of accessory after the fact. Because the jury was not instructed on Hye's accessory-after-the-fact theory, I would reverse the judgment and remand the case to the Circuit Court of Jackson County for a new trial.

DICKINSON, P.J., AND KING, J., JOIN THIS OPINION. CHANDLER, J., JOINS THIS OPINION IN PART.