IN THE SUPREME COURT OF MISSISSIPPI

NO. 2012-DP-00208-SCT

CALEB CORROTHERS a/k/a CALEB CARROTHERS a/k/a CALBE CAROTHER a/k/a CALEB L. CARROTHERS a/k/a CALEB COROTHERS a/k/a CALAB CAROTHERS

v.

STATE OF MISSISSIPPI

DATE OF JUDGMENT:	05/20/2011
TRIAL JUDGE:	HON. ANDREW K. HOWORTH
COURT FROM WHICH APPEALED:	LAFAYETTE COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	OFFICE OF STATE PUBLIC DEFENDER BY: ALISON R. STEINER KELSEY LEVOIL RUSHING
ATTORNEYS FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: MELANIE THOMAS JASON L. DAVIS
DISTRICT ATTORNEY:	BENJAMIN F. CREEKMORE
NATURE OF THE CASE:	CRIMINAL - DEATH PENALTY - DIRECT APPEAL
DISPOSITION:	AFFIRMED - 06/26/2014
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

CHANDLER, JUSTICE, FOR THE COURT:

¶1. Caleb Corrothers was convicted of two counts of capital murder, with the underlying felony of robbery, for the murders of Frank Clark and Taylor Clark. He was convicted on a third count of aggravated assault for the shooting of Tonya Clark. The jury sentenced

Corrothers to death for the two counts of capital murder and to life imprisonment without the possibility of parole for the aggravated assault. The trial court denied Corrothers's post-trial motions. He now appeals. We find no error and affirm Corrothers's convictions and sentences.

FACTS AND PROCEDURAL HISTORY

¶2. Taylor Clark, a twenty-year-old white male, was the youngest son of Frank and Tonya Clark. Known as an outgoing individual, Taylor was generally liked by everyone; however, trial evidence indicated that he was known throughout his community to sell marijuana "from time to time." According to the evidence, he usually carried four to five hundred dollars on him.

¶3. On the night of July 11, 2009, Taylor dropped off his girlfriend at her house around 9:00 p.m. and told her he was going home. Rather than going directly home, he went to Karen Hickinbottom's house at 2516 University Avenue. Hickinbottom was a friend of Taylor's and the girlfriend of his marijuana dealer. Karen testified at trial that Taylor stopped by her house around 9:00 p.m. on July 11, to return a cell phone belonging to her boyfriend, which he had left in Taylor's car earlier that day.

¶4. Karen had known Taylor for about a year, and she bought marijuana from him. Taylor was talking with Karen and her daughter when Karen's son came home and said that someone outside wanted to talk to Taylor. Taylor went outside, then came back in and said it was someone who wanted to buy drugs. The man outside came to the door a few minutes later, demanding to talk to Taylor again. Karen testified that Taylor went outside again to talk to the man, then came back in and said "Man, I got to get out of here." Karen saw the man

get in the passenger seat of Taylor's car, and they drove off. She said they left her house between 9:30 p.m. and 10:30 p.m. Karen would later describe the man who left with Taylor as a "6 foot to 6'2" black male, medium build, very low cut hair."

¶5. Sometime after 11:00 p.m. on the night of July 11, 2009, Taylor pulled up to his family's home, jumped out of his car, and ran into the house. An armed man got out of the passenger side of Taylor's car and chased Taylor toward the house. Taylor's older brother, Josh, was standing outside smoking a cigarette. Josh had suffered significant physical injuries in two recent car accidents, and he was barely able to walk without assistance. Taylor's parents, Frank and Tonya, were in the house asleep. Taylor ran into the house screaming to wake his parents, saying that a man was "fixing to kill Josh."

¶6. Frank ran from his bedroom to aid Taylor and attempted to hold the door shut to prevent the man from entering the house. The man shot through the door, then reached his arm around the door, shooting and killing Frank. The man was then able to enter the house. He shot Tonya twice in the neck, and Taylor came running to attack the man. He shot Taylor twice, killing him. Tonya testified that the man then went to her bedroom, got a rifle from her husband's collection, returned to the living room, and pointed the gun at her. When he realized that the rifle was not loaded, he wiped it off with a rug and threw the gun and the rug down.

¶7. The man then turned on Josh, who had entered the house and retreated to his bedroom. The man threatened Josh and demanded to know "where the money was." Tonya was able to get to Josh's room and force herself between Josh and the attacker. The man demanded money and car keys. Tonya gave him all the money she had in her purse – about $50 – and

the spare keys to Taylor's car, a white Crown Victoria. The man left the house and approached a car in the driveway. Tonya followed him out of the house, asking why he had done this. The man claimed that Taylor owed him $5,000. He attempted to use the keys to get into the wrong car, and Tonya yelled at him that the keys went to the Crown Victoria. The man got into the car and drove off, going left out of the Clarks' driveway, down a dead-end road. Tonya dialed 911 before he was out of the driveway. Tonya's call was received at 11:38 p.m.

¶8. When police arrived, they found Taylor's car abandoned down the road from the Clarks' driveway. The car was left running and the driver-side door was open. Police searched the car, revealing a F.I.E. brand .38 caliber revolver with six spent shell casings in it. No fingerprints were found on the weapon, in the house, or in the car that would aid in identifying the attacker, nor was forensic or DNA evidence found that would link a suspect to the crime. Soon after the car was found, a police K-9 unit searched the wooded area surrounding the car to no avail.

¶9. Around 4:15 a.m. on July 12, 2009, approximately four and half hours after the attacker had left the Clarks' house, Taylor Windham was walking in Grand Oaks neighborhood near Majestic Oaks Drive as he did nearly every morning at that time. A thickly wooded area covering approximately two miles separated Grand Oaks from the Clarks' house. While on his morning walk, Windham noticed a shirtless man approaching him. According to Windham, the man said that he had been jumped and that he was lost. He asked where the neighborhood was and asked for directions to Highway 7. Windham pointed him in the direction of the highway. He described the man as approximately five feet, ten

inches tall, slim but muscular, and wearing baggy pants but no shirt. Windham then hid in a neighbor's driveway and watched the man walk toward the intersection of Highway 7 and Belk Boulevard.

¶10. At 4:53 a.m., a shirtless man, covered in scratches, entered a Kangaroo Express gas station on Belk Boulevard. Kevin Maxey was working at that time, and the man told Maxey that he had been jumped by six people. The man used the phone to make two phone calls, but he did not get an answer. The man asked to borrow a shirt, but Maxey did not give him one. He then bought cigarettes, a lighter, juice, and cinnamon rolls, and paid with cash. Maxey testified at trial that the man did not seem nervous or scared and did not act like someone who had just been jumped. At the time, Maxey thought the man was attempting to call the police. The gas-station security camera captured most of the exchange. The video clearly shows an African-American man wearing baggy pants and no shirt. Maxey also testified that the man had scratches all over him; however, the scratches do not clearly appear in the video.

¶11. Police identified the man in the gas-station surveillance video as Caleb Corrothers and compiled a six-person photo lineup that included Corrothers's photo. They showed the lineup to Tonya and Josh at the funeral home during the visitation for Frank and Taylor, five days after the murders. Tonya and Josh were shown the lineup separately. Tonya could not identify the attacker from the photo lineup, but Josh identified Corrothers as the attacker. A search warrant was issued for Corrothers's arrest. Corrothers turned himself in to police after learning of the warrant. Investigator Scott Mills testified that, when Corrothers came to the police station, he had scratches on his face, head, and body, band-aids on his head, and an

injury to his left thigh. Investigator Mills's testimony was corroborated with photographs taken of Corrothers when he arrived at the police station.

¶12. Corrothers gave a statement to police, which was recorded, but he denied any involvement in the murders. At the beginning of the recorded interrogation, Investigator Mills read Corrothers his ***Miranda***[1] rights. When asked if he knew Taylor, Corrothers said that he had bought marijuana from Taylor in May at a house near Tammy's Salon. Tammy's Salon is located down the road from Karen Hickinbottom's house on University Avenue. Corrothers told Investigator Mills a colorful story about his whereabouts on the night of murders.

¶13. Corrothers said that on the night of July 11, he left his mother's home in the Brittany Woods subdivision and went to the Field, which is a building off Highway 6 East that is rented out for parties. He went to the Field with a man from Memphis named Suave. While there, Suave approached Corrothers about smoking marijuana. The two drove out into the county to smoke, when, for reasons unknown, Suave attacked Corrothers. Suave pulled out a gun, but Corrothers grabbed the gun and disarmed him; at some point, the gun discharged and grazed Corrothers's left thigh. Corrothers's friend, Cortez, arrived just in time to rescue him, and the two drove away in his blue Nissan Maxima. Cortez drove Corrothers to Caroline Redmond's house in Brittany Woods. After stopping at Redmond's house, Corrothers returned to his mother's home and went to bed around 10:30 p.m. that night. According to Corrothers, he slept until roughly 10:00 a.m. Sunday morning. Corrothers said that the pants

[1] ***Miranda v. Arizona***, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

he was wearing that night would still be at his mother's house, but police never found the pants after issuing a search warrant. Police spoke with Cortez and Redmond, but neither verified Corrothers's story.

¶14. A grand jury indicted Corrothers on two counts of capital murder, with the underlying felony of robbery, for the murders of Frank and Taylor. He was indicted on a third count of aggravated assault for the shooting of Tonya. Authorities charged Corrothers as a habitual offender. At trial, the jury heard testimony from Josh Clark, Tonya Clark, Karen Hickinbottom, Taylor Windham, and Investigator Scott Mills. Josh and Tonya identified Corrothers in court as the shooter. Hickinbottom identified Corrothers in court as the man who came to her door and left her house with Taylor the night of the murders.

¶15. The jury also heard from Tiffany Hutchins, who testified that Corrothers came to her house on July 13, 2009, to see her boyfriend, Frederick Holmes. Although Hutchins did not hear the entire conversation, she understood that Corrothers told Holmes that he had killed someone. Holmes also testified at trial. He testified that when Corrothers arrived at Hutchins's house he was covered in scratches, had band-aids on him, and appeared to be in shock. Holmes testified that Corrothers said he had "killed these white folks." Holmes testified that Corrothers said he met up with Taylor and "was trying to get him a lick," meaning a large amount of money. Holmes asked Corrothers what happened, and Corrothers recounted the following story: Corrothers met up with Taylor to buy drugs, then he got in the car with Taylor, pointed the gun at him, and made him drive to his house. When they got to the house, Taylor jumped out of the car and ran toward the house. Corrothers chased him, and when he got to the door, he shot through the door, hitting Taylor's father. He went inside

and shot the mother. Corrothers and Taylor started "tousling," and Corrothers's gun went off and grazed his own leg. Then he shot Taylor twice. Corrothers grabbed a set of car keys and left, but he wrecked the car and took off running through the woods.

¶16. Holmes did not initially report Corrothers's story to the police. Holmes was arrested for burglary sometime later and, at that time, he thought it beneficial to tell the police what Corrothers had told him. Holmes agreed to talk to the police about Corrothers, and police agreed to take his "truthful testimony" into consideration regarding the burglary charges. Holmes was out on bond when he testified at trial. Rawson Jannice, who had been incarcerated with Holmes at the Lafayette County Sheriff's Department, testified for the defense to rebut Holmes's testimony. Jannice testified that Holmes had told him that he was "going to lie on Mr. Corrothers" to get a deal. Corrothers did not testify at trial.

¶17. The defense attempted to call Dr. Jeffery Neuschatz, a cognitive psychologist, as an expert in memory and cognition related to eyewitness identification. The State objected, and the trial court did not permit Dr. Neuschatz to testify but allowed a proffer of his testimony outside the presence of the jury. Dr. Neuschatz would have testified about the psychological factors that affect the accuracy of eyewitness identifications and safeguards employed when administering photo lineups.

¶18. After both parties gave closing arguments, the jury deliberated for two hours and returned with a guilty verdict on all counts. The following day, the court conducted the sentencing portion of the trial. Tonya testified for the State as to the impact of the crime on her family. Corrothers's former parole officer testified to his past sentencing for armed robbery. The jury heard from several witnesses in mitigation – Corrothers's mother, brother,

aunt, middle-school teacher, and a family friend – who all testified to his poor upbringing, his being raised by his mother, and his lack of a father figure. The jury also heard from an expert witness, Dr. Joseph Angelillo, a clinical psychologist who had examined Corrothers. Dr. Angelillo had given Corrothers an intelligence test, an achievement test, and various personality tests. Corrothers's test results were within the average range for intelligence and in the ninety-fourth percentile on the achievement test. Dr. Angelillo described Corrothers as rebellious, cocky, a poor problem-solver, and testified that he might act out in anger "when cornered."

¶19. The jury sentenced Corrothers to death on both counts of capital murder. The jury found four aggravating factors: (1) Corrothers committed the capital offense while under sentence of imprisonment;[2] (2) Corrothers previously was convicted of a felony involving the use or threat of violence; (3) Corrothers created a great risk of death to many persons; and (4) the capital offense was committed while in the commission of a robbery. He received a sentence of life without parole for the aggravated assault. Corrothers appeals the convictions and sentences.

ISSUES

¶20. Twelve issues were enumerated in the original appellant's brief filed by Corrothers's attorneys:

> 1. Whether the trial court abused its discretion and erred as a matter of law in excluding the scientifically based testimony of a psychologist with expertise in memory and cognition concerning the reliability of eyewitness identification procedures and testimony in this case.

[2] At the time of the shooting, Corrothers had been on parole for just over a month for a 1999 armed-robbery conviction.

2. Whether the trial court erred in neither excluding in-court identification of Corrothers nor admitting expert testimony when the evidence established that the in-court identifications were tainted by improper pretrial identification procedures.

3. Whether the trial court exacerbated the foregoing errors and committed independently reversible error in its instructions to the jury at the culpability phase.

4. Whether Corrothers's conviction must be reversed due to unconstitutional racial discrimination by the prosecution in the jury selection process and other jury selection errors by the trial court.

5. Whether reversal is required for the erroneous and unconstitutional evidentiary rulings at the culpability phases of the trial.

6. Whether Corrothers's sentence must be vacated because of the trial court's failure to adequately instruct the jury before the overnight break between the verdict of guilt and the sentencing phase proceedings.

7. Whether Corrothers's sentence must be vacated because the State presented victim impact testimony in violation of the Eighth and Fourteenth Amendments of the United States Constitution.

8. Whether the trial court erred in refusing Corrothers's proposed penalty phase instructions.

9. Whether all of the aggravating circumstances on which the jury was instructed were either legally or factually unsupported, and Corrothers's death sentence is therefore invalid.

10. Whether the death sentence in this case must be vacated because it was imposed in violation of the Constitution of the United States.

11. Whether the death sentence in this matter is constitutionally and statutorily disproportionate.

12. Whether the cumulative effect of the errors in the trial court mandates reversal of the verdict of guilt or sentence of death entered pursuant to it.

We have restated or combined several of Corrothers's issues for the purposes of this opinion. Also, Corrothers filed a supplemental brief, *pro se*, in which he identified the following additional issues:

1. Whether the trial court erred by allowing Tonya Clark to make in-court identification, which was not consistent with pretrial identification.

2. Whether the trial court made reversible error by allowing the jury to hear only half of Corrothers's audio statement.

3. Whether the trial court made plain error in allowing Detective Scott Mills to give fabricated testimony that violates the chain of custody of his investigation and discredits the State's theory of the case.

Corrothers's *pro se* issues are akin to subissues of the issues articulated by his attorneys, and they will be discussed under the framework of the original twelve issues.

STANDARD OF REVIEW

¶21. We apply a standard of "heightened scrutiny" when reviewing capital-murder convictions where the accused has been sentenced to death. ***Batiste v. State***, 121 So. 3d 808, 828 (Miss. 2013) (quoting ***Fulgham v. State***, 46 So. 3d 315, 322 (Miss. 2010)). "[A]ll doubts are to be resolved in favor of the accused because 'what may be harmless error in a case with less at stake becomes reversible error when the penalty is death.'" ***Batiste***, 121 So. 3d at 829 (quoting ***Moffett v. State***, 49 So. 3d 1073, 1079 (Miss. 2010)).

LAW AND ANALYSIS

I. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED AS A MATTER OF LAW IN EXCLUDING THE TESTIMONY OF DR. NEUSCHATZ CONCERNING THE RELIABILITY OF EYEWITNESS IDENTIFICATION PROCEDURES AND TESTIMONY AND PHOTOGRAPHIC LINEUPS IN THIS CASE.

¶22. The defense filed a pretrial motion to determine the admissibility of testimony by Dr. Jeffrey Neuschatz, a cognitive psychologist, as an expert in memory and cognition related to eyewitness identification. Dr. Neuschatz has a Ph.D. degree in cognitive psychology and is a tenured professor at the University of Alabama at Huntsville. He has performed research and authored studies in the field of eyewitness identification. The State objected to Dr. Neuschatz's expert testimony, arguing that his proffered testimony did not rely on proven scientific principles, that it was not generally accepted, and that it would not assist the jury. The trial court heard the motion during the trial and excluded Dr. Neuschatz's testimony. Corrothers argues that the ruling was an abuse of discretion because Dr. Neuschatz's conclusions were admissible under Mississippi Rule of Evidence 702. Corrothers further argues that the exclusion was prejudicial because the State's case relied almost exclusively on the eyewitness identifications made by Tonya and Josh.

¶23. We begin by clarifying that Corrothers's proffer of Dr. Neuschatz's testimony was limited to Josh's eyewitness identification. Because Tonya never made a pretrial identification, Corrothers's pretrial motion to determine the admissibility of Dr. Neuschatz's testimony pertained solely to Josh's identification. At the trial, both Tonya and Josh made in-court identifications of Corrothers. The ***Daubert*** hearing on Dr. Neuschatz occurred after their testimony. *See* ***Daubert v. Merrill Dow Pharms.***, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). At the hearing, Corrothers argued that Dr. Nueschatz would assist the jury in determining the reliability of Josh's identification, and Dr. Neuschatz's proffer pertained solely to Josh's identification. The trial court recognized in its exclusionary ruling that Dr. Neuschatz's testimony pertained solely to Josh's credibility. On appeal, Corrothers

argues that Dr. Neuschatz's testimony challenged Tonya's credibility, in addition to Josh's. But because Dr. Neuschatz's proffer was limited to challenging Josh's identification, this argument is procedurally barred. ***Havard v. State***, 94 So. 3d 229, 239 (Miss. 2012) (an issue not raised before the trial court is procedurally barred).

¶24. We turn to the admissibility of Dr. Neuschatz's testimony. Expert testimony admitted at trial must meet the requirements of Rule 702, which provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

M.R.E. 702. Rule 702 requires expert testimony to be both relevant and reliable. ***Denham v. Holmes ex rel. Holmes***, 60 So. 3d 773, 784 (Miss. 2011) (citing ***Daubert***, 509 U.S. 579). The relevance prong requires that the evidence "assist the trier of fact to understand the evidence or to determine a fact in issue." ***Daubert***, 509 U.S. at 591. Evidence not relating to an issue in the case is not relevant and not helpful to the jury. ***Id.*** To be relevant, the evidence must "fit" the case by being "sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute." ***Id.*** (quoting ***U.S. v. Downing***, 753 F. 2d 1224, 1242 (3d Cir. 1985)).

¶25. Testimony is reliable when it is "based upon sufficient facts or data," is "the product of reliable principles and methods," and when "the witness has applied the principles and methods reliably to the facts of the case." M.R.E. 702. Under the reliability prong, the focus is on the "principles and methodology" underlying an expert opinion, not on the conclusions

generated. ***Miss. Transp. Comm'n v. McLemore***, 863 So. 2d at 37 (quoting ***Daubert***, 509 U.S. at 595). Expert testimony will always be deemed unreliable if it is the product of subjective belief or unsupported speculation. ***McLemore***, 863 So. 2d at 36. The United States Supreme Court in ***Daubert*** adopted a nonexhaustive list of factors for use in determining reliability, including (1) "whether the theory or technique can be and has been tested;" (2) "whether it has been subjected to peer review and publication;" (3) "whether, in respect to a particular technique, there is a high known or potential rate of error;" (4) "whether there are standards controlling the technique's operation;" and (5) "whether the theory or technique enjoys general acceptance within a relevant scientific community." ***McLemore***, 863 So. 2d at 37 (citing ***Daubert***, 509 U.S. at 592-94).

¶26. Rule 702 vests the trial court with a gatekeeping responsibility. ***McLemore***, 863 So. 2d at 36 (citing ***Daubert***, 509 U.S. at 589). In exercising this responsibility, the trial court must preliminarily determine whether the testimony is relevant and "whether the reasoning or methodology underlying the testimony is scientifically valid and . . . whether that reasoning and methodology properly can be applied to the facts in issue." ***McLemore***, 863 So. 2d at 36 (citing ***Daubert***, 509 U.S. at 592-93). The trial court also should determine what factors are most helpful in determining the reliability of the particular testimony. ***McLemore***, 863 So. 2d at 40. The trial court also should determine whether the expert has applied the principles and methodology reliably to the facts of the case. M.R.E. 702(3).

¶27. Finally, the trial court should admit expert testimony only if it is more probative than prejudicial under Rule 403. ***Denham***, 60 So. 3d at 784. "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk,

the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses." ***Daubert***, 509 U.S. at 595.

¶28. This Court reviews the trial court's admissibility determination for abuse of discretion. ***Anderson v. State***, 62 So. 3d 927, 936 (Miss. 2011). "A trial judge's determination as to whether a witness is qualified to testify as an expert is given the widest possible discretion and that decision will only be disturbed when there has been a clear abuse of discretion." ***Denham***, 60 So. 3d at 783 (quoting ***Worthy v. McNair***, 37 So. 3d 609, 614 (Miss. 2010)).

¶29. The trial court excluded the testimony of Dr. Neuschatz upon a finding that the testimony would not assist the trier of fact and would be confusing. The trial court did not rule on whether expert eyewitness identification testimony is admissible in the courts of Mississippi; instead, the court found that it would not be helpful to the jury in this particular case. The trial court deemed the testimony lacking because Dr. Neuschatz had not observed Josh's in-court testimony, but only had reviewed a transcript of his testimony. The trial court also found that the probative value of the testimony was exceeded by the testimony's potential to confuse the jury.

¶30. At the ***Daubert*** hearing, Dr. Neuschatz testified that he was an expert in the area of memory and eyewitness identification. He had performed numerous studies in the field of eyewitness identification. Dr. Neuschatz testified about several phenomena that affect a crime victim's ability to identify the perpetrator from a line-up. He testified that high stress impairs memory. He testified about the phenomenon of weapons focus – the idea that, when a weapon is present, it draws the victim's attention to the weapon and away from the person

holding the weapon. He testified that a victim may select from the lineup a bystander to the crime or someone he or she has seen before just because that person seems familiar, even if that individual is not the perpetrator. Further, he testified about the problem of cross-racial identification – that people have difficulty identifying individuals of another race. However, he testified that, if a person has been exposed to individuals of another race on a regular basis, the person's identification of a member of that race would be more reliable. Dr. Neuschatz also testified that, according to standards promulgated by the Department of Justice and the American Psychinosis Law Society, there are four requirements for a non-suggestive lineup: (1) the lineup administrator must not know the suspect's identity, (2), the victim should be informed the suspect may not be in the lineup, (3) the administrator should take the victim's confidence statement after the identification, and (4) the suspect should not stand out in the lineup.

¶31. Dr. Neuschatz related these tenets to the facts of the case as he understood them and concluded that Josh's identification of Corrothers from the photographic lineup "could" be unreliable. Dr. Neuschatz testified that he was able to glean from Josh's testimony those factors that would have affected his identification of the perpetrator. He testified that, because the crime was stressful for Josh, the perpetrator was of a different race, a weapon was present, Josh had seen Corrothers before, Josh had a short exposure time, it was dark, and Josh had memory issues from a traumatic brain injury, Josh's ability to accurately identify the perpetrator from the photo lineup would have been adversely affected. He also testified that the lineup was suggestive because it violated three of the four requirements of a nonsuggestive lineup, making it more likely Josh would have selected Corrothers. He

further testified that in-court identifications such as the one made by Josh are probably suggestive, but did not offer any scientific basis for that opinion.

¶32. Dr. Neuschatz's proffer demonstrates that he had an incorrect and incomplete understanding of the facts on which he based his opinions and a total lack of expertise about Josh's memory problems. Because Dr. Neuschatz did not apply his principles and methodology reliably to the facts of the case as required by Rule 702, we find that his testimony was unreliable and inadmissible. Dr. Neuschatz testified that Josh could have confused Corrothers with the perpetrator based on Josh's testimony that he had seen him before. But Josh actually testified that he had never seen Corrothers before the crime. Dr. Neuschatz testified that an individual who has been exposed to members of another race would have less risk of cross-racial identification problems. But Josh never testified about the extent of his interactions with African Americans; Dr. Neuschatz simply assumed that Josh would have problems identifying persons of a different race. Dr. Neuschatz testified that Josh was exposed to the perpetrator for a short time; however, Josh testified that he observed the perpetrator both inside and outside the house, and no evidence established the duration of the crime. While Dr. Neuschatz testified that it was dark in the house, Josh testified that all the lights were on. Dr. Neuschatz testified that memory is impaired in high-stress situations, but Josh never testified to the amount of fear or anxiety he experienced during the crime. While Dr. Neuschatz testified that Josh's memory would have been impaired by the presence of a weapon, Josh testified that the weapon was trained on him only once, and that he had several opportunities to observe the perpetrator when he was not holding a gun on him.

¶33. Further, Dr. Neuschatz testified outside his area of expertise when he concluded that Josh's memory problems, along with the other factors, would have impaired his identification. It was undisputed that Josh had suffered a traumatic brain injury in a car accident. Although Josh disagreed that he had memory problems as a result of the injury, other witnesses testified that Josh had memory problems from the injury.[3] When asked if he had any expertise with brain injuries and how they could affect eyewitness identifications, Dr. Neuschatz admitted that he had no expertise whatsoever in that area. He said he had done no research on how brain injuries relate to eyewitness identification. Yet Dr. Neuschatz testified that he took Josh's memory problems into account in reaching his ultimate conclusion that his identification of Corrothers from the photo lineup "could" be unreliable.

¶34. This testimony demonstrated that Dr. Neuschatz could not reliably apply the science to the facts of the case and that his testimony properly was excluded. M.R.E. 702. An expert opinion that is "fundamentally based on insufficient information" is unreliable and must be excluded from evidence. ***Paz v. Brush Engineered Materials, Inc.***, 555 F.3d 383, 388-89 (5th Cir. 2009) (where doctor rendered a diagnosis based on her evaluation of a second doctor's report and assumed the second doctor had performed certain tests, the diagnosis was unreliable because the record showed the second doctor had not, in fact, performed the tests). "[I]f the expert's opinion is so fundamentally unsupported that it can offer no assistance to the jury, it must be excluded. An expert opinion that fails to consider the relevant facts of the case is fundamentally unsupported." ***Neb. Plastics, Inc. v. Holland Colors Americas, Inc.***,

[3] The exact nature of Josh's brain injury was never established.

408 F.3d 410, 416 (8th Cir. 2005) (an expert's estimate of future damages was unreliable for failure to take "a plethora" of relevant facts into consideration); *see also* ***Myers v. Ill. Cent. R. Co.***, 629 F.3d 639, 645 (7th Cir. 2010) (because causation experts lacked an adequate understanding of the plaintiff's medical history and work, their opinions that the work had caused the plaintiff's injuries were unreliable). We recognize that "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." ***Daubert***, 509 U.S. at 596, 113 S. Ct. at 2798. But when an expert's opinions fundamentally rest upon insufficient information, they are unreliable and properly excluded from the jury's consideration. ***Paz***, 555 F.3d at 388-89.

¶35. Dr. Neuschatz attempted to apply the principles and methodologies underlying his expertise in eyewitness identification to opine that Josh's identification "could" be unreliable. But Dr. Neuschatz's opinions were undermined by his inaccurate and incomplete understanding of the facts on which he based his opinions and his complete lack of expertise on Josh's brain injury. These deficiencies rendered his opinions so fundamentally unsupported that they could offer no assistance to the jury and amounted to nothing more than unsupported speculation. His testimony was unreliable, and there was no abuse of discretion in excluding it. We further note that Dr. Neuschatz's testimony was inconclusive and speculative because he did not offer his opinions to a reasonable degree of scientific certainty, but testified only that Josh's lineup identification "could" be unreliable and that in-court identifications "probably" are suggestive. Nor did Dr. Neuschatz submit any peer-reviewed publications supporting his principles and methodologies; the trial court had only

the benefit of Dr. Neuschatz's curriculum vitae and his testimony that his studies had been subjected to peer review and publication and were generally accepted in the relevant scientific community. These facts further support the exclusion of Dr. Neuschatz's testimony.

¶36. We find that Dr. Neuschatz did not apply his principles and methodologies reliably to the facts of the case as required by Rule 702, and his testimony was unreliable and properly excluded. We briefly address the dissent's argument that the trial court improperly weighed the witness testimony in determining that Dr. Neuschatz's testimony would not be helpful to the jury. The trial court discussed the eyewitness testimony and expert testimony on eyewitness identification generally and then stated:

> The risk of confusion I believe is very high in this case as opposed to the opportunity for anything that might aid the trier of fact. In this case the proof is clear that these two eyewitnesses had a fairly lengthy period of time to observe the defendant. Maybe even longer and the record already reflects that and the expert was not in the courtroom. Did not have an opportunity to observe the testimony of either of the eye witnesses . . . I think the jury in this case is well equipped to handle the case, . . . and specifically under the facts of this case the court finds that this particular expert testimony will not assist the trier of fact to understand the evidence or determine any facts in issue.

From our review of the totality of the trial court's ruling, it is apparent that the court excluded the testimony under the relevance prong of Rule 702 and under Rule 403 as more prejudicial than probative due to the risk of confusion of the issues. Because we find that Dr. Neuschatz's proffered testimony was unreliable and inadmissible under Rule 702, we find no abuse of discretion in its exclusion.

II. WHETHER THE TRIAL COURT ERRED WHEN IT ADMITTED IN-COURT IDENTIFICATIONS OF CORROTHERS.

¶37. Corrothers argues that the trial court erred by not suppressing the in-court identifications of Corrothers by Josh and Tonya. Corrothers claims that the pretrial photo lineups were suggestive and tainted the in-court identifications.

A. Josh's identification

¶38. The trial court denied defense counsel's motions to exclude all photo lineups, identifications, and related testimony by Josh. Corrothers argues that the trial court should have suppressed Josh's in-court identification because it was tainted by an improper pretrial lineup identification. This Court applies a two-part test to determine the admissibility of a pretrial identification: "A court must first determine whether the identification process was unduly suggestive. And even if it was, the court has the right to admit the identification if it determines that the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed." ***Latiker v. State***, 918 So. 2d 68, 74 (Miss. 2005) (citing ***Neil v. Biggers***, 409 U.S. 188, 198, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972)). Moreover, "[i]n practice, Mississippi tends to place a heavy burden on defendants who are contesting the propriety of a pretrial identification procedure." ***Jones v. State***, 993 So. 2d 386, 393 (Miss. 2008).

1. Whether the lineup was suggestive.

¶39. A photographic lineup is impermissibly suggestive when the accused is "conspicuously singled out in some manner from the others." ***York v. State***, 413 So. 2d 1372, 1383 (Miss. 1982). "In general, courts will find a lineup to be impermissibly suggestive if the defendant is the only one depicted with distinctive features. . . . But 'minor differences with the suspects or differences in the photograph backgrounds will not render a lineup

impermissibly suggestive.'" ***Batiste v. State***, 121 So. 3d 808, 856 (Miss. 2013) (quoting ***Butler v. State***, 102 So. 3d 260, 265 (Miss. 2012)). In ***Jones v. State***, the Court found that a lineup in which the accused was the only individual wearing a coat, which happened to be included in the store clerk's description of the armed robber, was not tantamount to being impermissibly suggestive. ***Jones***, 993 So. 2d at 393. In a different case by the same name, the suspect was the only individual in the lineup wearing a baseball cap, and the Court again found that the lineup was not impermissibly suggestive. ***Jones v. State***, 504 So. 2d 1196, 1199-2000 (Miss. 1987).

¶40. In the photographic lineup at issue, four of the six individuals were wearing orange Mississippi Department of Corrections (MDOC) jumpsuits, the fifth individual's photo was cropped to show only his head, and Corrothers was wearing a white t-shirt. Both Josh and Tonya previously had described the shooter as wearing a white t-shirt. Corrothers's picture was somewhat brighter than the other five pictures. While it could be argued that Corrothers's picture stands out slightly from the rest, according to our precedent, and although Corrothers was the only person wearing a white t-shirt matching the previous description, and his picture was brighter than the others, and four of the six photos depicted individuals in MDOC custody, the lineup does not conspicuously single out Corrothers. *See* ***Jones***, 993 So. 2d at 393 (photographic lineup was permissible where "the backgrounds of the photographs clearly indicate that all individuals were in the custody of law enforcement, and the only difference is the photographic technique used to capture the defendant's likeness"). *See also* ***Jones***, 504 So. 2d at 1199-2000; ***Anderson v. State***, 724 So. 2d 475, 478

(Miss. Ct. App. 1998). We find that the photographic lineup shown to Josh was not impermissibly suggestive.

2. Whether Josh's identification was reliable.

¶41. In ***Biggers***, the Supreme Court set out five factors to consider in determining the reliability of an identification: "(1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation." ***Latiker***, 918 So. 2d at 74 (citing ***Biggers***, 409 U.S. at 199-200).

¶42. Josh testified that he had never seen the shooter before the night of the murders. It was dark when the shooter arrived at his house, and the incident took place relatively quickly. However, Josh had ample opportunity to see the shooter. He saw the shooter when he arrived at the house and jumped out of Taylor's car. Josh remained outside when the shooter first entered the trailer, but he went inside at some point during the attack. The shooter turned on Josh, followed him into his bedroom, yelled at him, and put a gun to his head. Due to the close proximity of Josh and the shooter, Josh had a decent opportunity to view the shooter, and we find that the first ***Biggers*** factor does not weigh in Corrothers's favor.

¶43. The second factor, Josh's degree of attention, also weighs against Corrothers. No facts suggest that Josh was not fully focused on the car when Taylor arrived with the shooter or that he was not attentive during the subsequent interactions. This situation does not involve a bystander to a crime or someone who saw a crime occur from a distance – Josh was a victim of this crime, which took place in his own home, with the shooter very close to him

at times. Further, Josh's high degree of attention is supported by the detailed description he gave of Corrothers.

¶44. Josh described the shooter to police as a black male, approximately six feet tall, dark skinned, skinny, with short hair and a goatee, and wearing a white t-shirt and blue-jean shorts. This description matched Corrothers as well as the man seen in the Kangaroo Express video. Thus, the third ***Biggers*** factor – the accuracy of Josh's prior description of the criminal – weighs against Corrothers.

¶45. Likewise, the fourth ***Biggers*** factor weighs against Corrothers, as Josh demonstrated a high level of certainty when he identified Corrothers. Josh quickly identified Corrothers when he was shown the photo lineup, suggesting high confidence in his selection. Finally, the fifth factor – the length of time between the crime and the confrontation – goes against Corrothers because only five days had passed from the time of the crime to the presentation of the lineup. The application of the ***Biggers*** factors indicates that Josh's identification of Corrothers in the photo lineup was reliable.

¶46. Because the photo lineup was not impermissibly suggestive and Josh's identification was reliable, we find that it did not taint Josh's in-court identification of Corrothers. The trial judge did not err in admitting Josh's pretrial and in-court identifications of Corrothers and related testimony.

B. Tonya's identification

¶47. We now address a subissue raised by Corrothers in his *pro se* supplemental brief: whether the trial court erred by allowing Tonya to make an in-court identification that was not consistent with her pretrial identification. Tonya was unable to identify Corrothers from

the photographic lineup presented by police pretrial. Tonya was not included in Corrothers's motion to exclude the photo lineup, which focused exclusively on Josh's identification. At trial, Tonya identified Corrothers. The defense failed to object to Tonya's in-court identification. Because Corrothers did not object, he waived this issue on appeal. ***McQuarter v. State***, 574 So. 2d 685, 688 (Miss. 1990); *see also* ***Galloway v. State***, 122 So. 3d 614, 662-64 (Miss. 2013).

¶48. Notwithstanding the procedural bar, this issue is without merit. Applying the ***Biggers*** factors, although Tonya was unable to identify Corrothers from the pretrial photographic lineup, she had a good opportunity to view Corrothers attentively at the time of the crime, and her in-court identification, though attenuated from the date of the crime, was not so unreliable as to be inadmissible. We observe that, because both Josh and Karen Hickinbottom also identified Corrothers, Tonya's identification was cumulative. Nothing indicates that Tonya's identification of Corrothers in court amounted to a manifest miscarriage of justice or denied Corrothers a fair trial.

III. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ITS INSTRUCTIONS TO THE JURY AT THE CULPABILITY PHASE.

¶49. Corrothers's third argument alleges that the trial court erred in refusing his proposed jury instructions D-3, D-6, D-7, D-10, and D-11, which he asserts were correct statements of the law and warranted by the evidence. Additionally, Corrothers argues the trial court erred by failing to grant a cautionary instruction on the unreliability of eyewitness identification. Our standard of review for challenges to jury instructions is well-settled:

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

Austin v. State, 784 So. 2d 186, 192 (Miss. 2001) (quoting ***Humphrey v. State***, 759 So. 2d 368, 380 (Miss. 2000) (*overruled on other grounds*)). Further, "[i]n homicide cases, the trial court should instruct the jury about a defendant's theories of defense, justification, or excuse that are supported by the evidence, no matter how meager or unlikely." ***Evans v. State***, 797 So. 2d 811, 815 (Miss. 2000) (quoting ***Manuel v. State***, 667 So. 2d 590, 593 (Miss. 1995)).

A. Proposed instruction D-3

¶50. The relevant portion of proposed instruction D-3 read,

> [U]nder the law you do not have the right to convict Caleb Corrothers upon mere suspicion, regardless of how strong that suspicion might be. You may not convict Caleb Corrothers just because there may be a preponderance of the evidence against him or just because there may be a reason to suspect that he is guilty. Suspicion, no matter how strong or convincing, never rises to the dignity of proof beyond a reasonable doubt. Before you find Caleb Corrothers guilty, you must be convinced solely upon the evidence presented during this trial that Caleb Corrothers is guilty beyond a reasonable doubt.

The State argued the instruction was an "attempt to define reasonable doubt." The trial judge stated, "I believe I could give this instruction but I never have and I don't intend to today unless y'all give me some authority that it's error for me not to give it." Corrothers concedes that the sentence reading, "[s]uspicion, no matter how strong or convincing, never rises to the dignity of proof beyond a reasonable doubt," would be objectionable; however, he argues that the trial court should have found that the instruction was partially acceptable, ordered the improper language to be deleted, and given the remaining part of the instruction.

¶51. The Court previously has disapproved of instructions on reasonable doubt. *See* ***Holland v. State***, 705 So. 2d 307, 355 (Miss. 1997); ***Giles v. State***, 501 So. 2d 406, 409 (Miss. 1987); ***Hunter v. State***, 489 So. 2d 1086, 1089 (Miss. 1986). "[A] trial judge is not required to grant an instruction which is cumulative of another." ***Edwards v. State***, 594 So. 2d 587, 593 (Miss. 1992). Here, instruction C-2 instructed the jury that Corrothers was presumed to be innocent and that the State bore the burden of proving him guilty, beyond a reasonable doubt, "of every material element of the crime with which he is charged." Additional instructions S-2, S-5, S-8, and D-13-A also included the requirement of finding Corrothers guilty beyond a reasonable doubt. Because the jury adequately was instructed on reasonable doubt, proposed instruction D-3 was redundant and properly denied.

B. Proposed instruction D-6

¶52. Corrothers's proposed instruction D-6, addressing the credibility of witness testimony, read:

> In determining the weight to be given to the testimony of any of the witnesses who testify, you should consider the witnesses' credibility as judged by you, the members of the jury. Members of the jury should also weigh the bias, interest and motive of all the witnesses who testify, not just the bias, interest and motive of the person charged with the crime. If you do not believe a particular witness or find that a witness is not credible you do not have to accept that testimony.

The trial court rejected the instruction, saying, "it's very similar to what the court has already given. I'm going to refuse it. It's just saying it another way." The trial court instead provided C-1, which stated, "[y]our exclusive province is to determine what weight and what credibility will be assigned the testimony and supporting evidence of each witness. You are required and expected to use your good common sense and sound honest judgment in

considering and weighing the testimony of each witness who has testified." As stated previously, "[t]he refusal to grant a jury instruction that is similar to one already given does not constitute reversible error." ***Walker v. State***, 913 So. 2d 198, 234 (Miss. 2005). Proposed instruction D-6 would have been redundant in light of C-1; thus, the trial court did not err in refusing D-6.

C. Proposed instruction D-7

¶53. Corrothers asserts that the court erred in rejecting his proposed instruction D-7 in favor of C-5. Proposed instruction D-7 pertained to informant testimony, and it provided:

> The Court instructs the jury that the law looks with suspicion and distrust on the testimony of an alleged informant, and requires the jury to weigh same with great care and suspicion. You should weigh the testimony from an alleged informant, and passing on what weight, if any, you should give this testimony, you should weigh it with great care and caution, and look upon it with distrust and suspicion.

The trial judge rejected D-7 and gave C-5 instead, reasoning that the "language [of D-7] was obsolete and actually I don't believe that it's been overruled but there are several different ways to give a cautionary instruction and I have found one in another case and am offering it in court's instruction 5." C-5 read:

> The Court instructs the jury that the testimony of an informant who provides evidence against a defendant for benefit, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. You the jury must determine whether the informant's testimony has been affected by interest or prejudice against the defendant.

¶54. Corrothers cites ***Moore v. State***, 787 So. 2d 1282, 1286-88 (Miss. 2001), in which the Court found the trial court had abused its discretion in rejecting the exact instruction proffered by Corrothers and instead provided an instruction that did not advise the jury to

weigh the testimony with "caution and suspicion." The Court found the instruction was warranted due to evidence that the jailhouse informant in that case may have received favorable treatment in exchange for his testimony. Corrothers also cites ***Wheeler v. State***, 560 So. 2d 171, 173-74 (Miss. 1990), for the proposition that a cautionary instruction on this type of testimony must contain the words "with suspicion;" however, ***Wheeler*** involved uncorroborated testimony by an accomplice/coconspirator to the crime, not testimony by an informant.

¶55. Here, it is undisputed that the jailhouse informant, Frederick Holmes, testified in exchange for "consideration on [his] auto burglary charges." But at trial, Holmes did not know exactly what type of consideration he would be afforded. More recently than the holding in ***Moore***, the Court has found that "the failure to give a cautionary instruction regarding [the informant's] testimony was not an abuse of discretion" because the details of the informant's paid arrangement were disclosed to the jury and the informant was subject to cross-examination. ***Webber v. State***, 108 So. 3d 930, 931-32 (Miss. 2013) (citing ***White v. State***, 722 So. 2d 1242, 1247-48 (Miss. 1998)). While jury instruction D-7 was a properly worded jury instruction regarding informants, under ***Webber***, it was not necessary to give an cautionary informant instruction, because Holmes's arrangement was disclosed to the jury and he was subject to cross-examination. Regardless, C-5 was a proper instruction.

D. Proposed instruction D-10

¶56. Corrothers asserts that the trial court erred in rejecting proposed instruction D-10, which read: "The Court instructs you that if you have a reasonable doubt as to the identity of the alleged shooter in this case you must find the Defendant, Caleb Corrothers, not guilty

on all counts." Instructions given to the jury included the elements instruction on the capital murder of Taylor, which instructed the jury to find Corrothers not guilty if the State failed to prove any one of the elements that Corrothers "did wilfully, unlawfully, feloniously, shoot with a firearm and kill Taylor Clark." The elements instruction on the capital murder of Frank contained identical language pertaining to Frank. Similarly, S-8 instructed the jury to find Corrothers not guilty "if the State has failed to prove any one or more of the above listed elements beyond a reasonable doubt," including a finding that Corrothers shot Tonya with a gun.

¶57. "The refusal to grant a jury instruction that is similar to one already given does not constitute reversible error." ***Walker***, 913 So. 2d at 234 (Miss. 2005). Further, a "trial judge is under no obligation to grant redundant instructions." ***Montana v. State***, 822 So. 2d 954, 961 (Miss. 2002) (citing ***Ellis v. State***, 790 So. 2d 813, 815 (Miss. 2001) (*overruled on other grounds*)). Because proposed instruction D-10 was covered in other instructions that were given, the trial judge did not err in refusing to grant Corrothers's instruction D-10.

E. Proposed instruction D-11

¶58. Corrothers argues that the trial court erred in refusing proposed instruction D-11, which read:

> The Court instructs the Jury that if there be a fact or circumstance in this case susceptible of two interpretations, one favorable and the other unfavorable to the accused, when the Jury has considered such fact or circumstance with all other evidence, there is a reasonable doubt as to the correct interpretation, then you, the Jury, must resolve such doubt in favor of the accused, and place upon such fact or circumstance the interpretation most favorable to the accused.

At the jury-instruction conference, the instruction was refused with no comment other than from the State, which said, "this is a circumstantial instruction two theory case. It's only applicable in circumstantial cases and there are two eye witnesses in this case." Corrothers argues that, if the trial court properly had excluded the eyewitness identification testimony, then D-11 would have been allowed. Two-theory instructions are reserved for circumstantial-evidence cases, which are cases in which there is no direct evidence such as an eyewitness or a confession to the crime. ***State v. Rogers***, 847 So. 2d 858, 863 (Miss. 2003) (citing ***Mangum v. State***, 762 So. 2d 337, 344 (Miss. 2000)). Corrothers is correct that *if* there had been no eyewitness testimony, D-11 may have been appropriate; however, as discussed above, the trial court did not err in allowing the eyewitness testimony. Therefore, the court did not err in refusing the instruction.

F. Unreliability of eyewitness identifications

¶59. Finally, Corrothers argues that, although not requested by defense counsel, the trial court erred by failing to instruct the jury *sua sponte* as to the unreliability of eyewitness identifications. As previously stated, if an issue or objection was not raised at trial, it is procedurally barred. ***McQuarter***, 574 So. 2d at 688. Because Corrothers did not request a cautionary instruction on the unreliability of eyewitness testimony, the issue is procedurally barred.

¶60. Notwithstanding the procedural bar, this issue is without merit. This Court refused a cautionary instruction on the unreliability of eyewitness identification in ***Hansen v. State***, stating:

> The proposed instruction, GP-13, was a cautionary instruction concerning eyewitness identification testimony. In ***Holmes v. State***, 483 So. 2d 684, 687 (Miss. 1986), this Court held such instructions were properly refused. The Court said:
>
> > [W]e know of no rule of law or standard of evidence which requires that identification testimony be viewed with caution and that juries be instructed to that effect. Our cases on the point expressly hold that such an instruction should *not* be given. ***Hines v. State***, 339 So. 2d 56, 58 (Miss. 1976); ***Clubb v. State***, 350 So. 2d 693, 697 (Miss. 1977); ***Ragan v. State***, 318 So. 2d 879, 882 (Miss. 1975) (emphasis in original).
>
> Again, the jury was instructed generally on its duty to scrutinize carefully all testimony of all witnesses, and, as well, on the prosecution's burden to prove Hansen guilty beyond a reasonable doubt. We find no error here.

Hansen v. State, 592 So. 2d 114, 141 (Miss. 1991). Notwithstanding the procedural bar, the trial court was not required to instruct the jury *sua sponte* on the unreliability of eyewitness identification.

IV. WHETHER CORROTHERS'S CONVICTION MUST BE REVERSED DUE TO UNCONSTITUTIONAL RACIAL DISCRIMINATION BY THE PROSECUTION IN THE JURY SELECTION PROCESS AND OTHER JURY-SELECTION ERRORS BY THE TRIAL COURT.

¶61. Corrothers's jury consisted of nine whites and three African Americans, with one African-American alternate. Corrothers argues that his conviction must be reversed because the State racially discriminated in its use of peremptory strikes during jury selection. Peremptory strikes alleged to be racially discriminatory are analyzed under ***Batson v. Kentucky***, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). ***Batson*** requires a three-step process to determine whether racial discrimination against jurors has occurred and, if so,

whether it compromised the defendant's constitutional rights. ***Batson***, 476 U.S. at 96-100. This Court has summarized ***Batson***'s requirements as follows:

> First, the party objecting to the peremptory strike of a potential juror must make a prima facie showing that race was the criterion for the strike. Second, upon such a showing, the burden shifts to the State to articulate a race-neutral reason for excluding that particular juror. Finally, after a race-neutral explanation has been offered by the prosecution, the trial court must determine whether the objecting party has met its burden to prove that there has been purposeful discrimination in the exercise of the peremptory strike, i.e., that the reason given was a pretext for discrimination.

Pitchford v. State, 45 So. 3d 216, 224 (Miss. 2010) (citing ***Flowers v. State***, 947 So. 2d 910, 917 (Miss. 2007)).

¶62. The defendant makes a prima facie case of discrimination by showing:

> (1) that he is a member of cognizable racial group; (2) that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race; (3) and the facts and circumstances raised an inference that the prosecutor used his peremptory challenges for the purpose of striking minorities.

Flowers, 947 So. 2d at 917. Once a prima facie case has been made, the prosecution meets its burden by offering a race-neutral reason for the strike. ***Id.*** Reasons given for a strike "need not be persuasive, or even plausible; so long as the reasons are not inherently discriminatory, they will be deemed race-neutral." ***Batiste v. State***, 121 So. 3d 808, 848 (Miss. 2013). Once the race-neutral explanation has been given, the trial court must determine whether the reason was a pretext for discrimination. ***Flowers***, 947 So. 2d at 917. We have acknowledged five indicia of pretext that are relevant when determining whether a proffered race-neutral reason was, in fact, pretextual:

> (1) disparate treatment, that is, the presence of unchallenged jurors of the opposite race who share the characteristic given as the basis for the challenge;

> (2) the failure to voir dire as to the characteristic cited; . . . (3) the characteristic cited is unrelated to the facts of the case; (4) lack of record support for the stated reason; and (5) group-based traits.

Id. (quoting ***Manning v. State***, 765 So. 2d 516, 519 (Miss. 2000)).

¶63. "In deciding whether the defendant has made a sufficient showing of discrimination, the trial court must consider all relevant circumstances." ***Batiste***, 121 So. 3d at 848. On review of the trial court's ruling on a claimed ***Batson*** violation, "[w]e give great deference to the trial court's findings of whether or not a peremptory challenge was race neutral. . . . Indeed, we will not overrule a trial court on a ***Batson*** ruling unless the record indicates that the ruling was clearly erroneous or against the overwhelming weight of the evidence." ***Thorson v. State***, 721 So. 2d 590, 593 (Miss. 1998).

A. Procedural bar

¶64. At voir dire, Corrothers raised ***Batson*** challenges to five jurors: Carole Ray, Betty Collins, Phyllis Berry, W.C. Brim, and Deidre Hereford. In his motion for a new trial, Corrothers argued that the trial court improperly overruled his ***Batson*** objections to six of the State's peremptory strikes; however, he did not identify those six strikes in the motion. On appeal, Corrothers makes arguments on the five jurors listed above and also raises ***Batson*** arguments as to three additional jurors unchallenged at trial: Pamela Billups, Shereca Watkins, and Antonio Edwards.

¶65. Corrothers is procedurally barred from making a ***Batson*** challenge to a juror for the first time on appeal. "[A] party who fails to object to the jury's composition before it is empaneled waives any right to complain thereafter." ***Thorson v. State***, 895 So. 2d 85, 118 (Miss. 2004). And when a defendant fails to "raise the ***Batson*** claim during the course of the

trial," the defendant "is procedurally barred from raising this claim on direct appeal." ***Branch v. State***, 882 So. 2d 39, 59 (Miss. 2004).

¶66. Further, although Corrothers challenged five jurors at trial, he offered rebuttal of the State's reasons for the strikes as to only one of those jurors, W.C. Brim. This Court has held that, when a defendant fails to rebut the State's offered reasons for a strike, "[w]e will not now fault the trial judge with failing to discern whether the State's race-neutral reasons were overcome by rebuttal evidence and argument never presented." ***Pitchford v. State***, 45 So. 3d 216, 227 (Miss. 2010). Corrothers failed to rebut the State's proffered race-neutral reasons for its exercise of strikes on Ray, Collins, Berry, and Hereford. Therefore, Corrothers did not preserve his pretext arguments for appeal as to Ray, Collins, Berry, and Hereford.

B. Batson challenges

¶67. At trial, the State struck seven white jurors and five African-American jurors, and the final jury was comprised of nine whites and three African Americans. Corrothers made his ***Batson*** challenge after the jury was selected. The entirety of Corrothers's argument supporting his *prima facie* case is as follows:

> **By Mr. Rushing:** Judge Howorth, before we go for the record on I guess my ***Batson*** challenges to S1, S2, S6, S7[,] S8 by the race neutral reasons for it.
>
> **By the Court:** . . . All right. If you are going to make your ***Batson*** challenge I want you to make a record on it. I have no idea who these people are. I invite you to go ahead and make your *prima facie* case.
>
> **By Mr. Rushing:** Your Honor, the strikes that I just called were strikes used by the State to eliminate the black jurors or those black jurors off of the jury and there is nothing in their testimony while we were out there during the voir dire that would have given rise for them to be stricken other than eliminating a substantial portion of the black jurors out of the first set of this panel that we have. And there, unless there is some showing that they are eliminated because

> they are black jurors and we have a black defendant accused of a crime against a white family.

The trial court stated "in the abstract" that Corrothers's ***Batson*** challenge was late, and that he should have made it as soon as he detected the discriminatory pattern, to have afforded the trial court an opportunity to correct it. Then, the trial court found that Corrothers had not made a *prima facie* case, but directed the State to provide its reasons for the allegedly discriminatory strikes on the record. The State gave race-neutral reasons for its strikes of Ray, Collins, Berry, Brim, and Hereford. The trial court stated for the record that the demographics or races of the jurors were not before the court. Without further analysis, the trial court denied Corrothers's ***Batson*** challenges.

¶68. We observe that the trial court's failure to articulate specific findings in its ruling on the State's race-neutral reasons is not reversible error. In ***Pruitt v. State***, 986 So. 2d 940, 946 (Miss. 2008), the Court stated:

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

We stated that, while the trial court should make on-the-record findings on each race-neutral reason provided by the State, as long as the record provides a basis in fact for the trial court's ruling, reversal is not required. ***Id.*** Further,

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

Id. at 946-47 (quoting ***Burnett v. State***, 854 So. 2d 1010, 1016 (Miss. 2003)). As in ***Pruitt***, here we find the trial court's ruling was sufficient for appellate review.

1. Prima facie case/pretext

¶69. Corrothers argues that he made a prima facie case of racial discrimination and showed pretext by showing that the State had exercised peremptory challenges on an unacceptably high number of African Americans compared with whites. While, at trial, Corrothers did not provide detail as to the racial discrimination alleged, he provides more information on appeal. He argues that the venire pool of forty-four individuals contained twelve African-American members (27%) and thirty-two white members (73%). However, the State eliminated eight of the twelve (66%) African-American venire members tendered to it, and eliminated only seven of the thirty-two (22%) white venire members tendered. In other words, the State struck African-American members at a rate more than twice as often as the rate at which African Americans appeared in the venire pool.

¶70. This Court faced a similar situation in ***Pitchford v. State*** and determined that the trial court was justified in finding the defendant had made a *prima facie* case of discrimination. We stated that:

> [T]he State used fifty-seven percent of its peremptory strikes (four out of seven) to remove African-Americans from a venire comprised of twenty-six percent African-American and seventy-four percent white. While the difference in these percentages is not so great as to constitute, as a matter of law, a *prima facie* finding of discrimination, it is sufficient for a trial judge – who was "on the ground" and able to observe the voir dire process, and in the exercise of sound discretion – to so find.

Pitchford, 45 So. 3d at 225-26. The Court has stated, "though the sheer number of strikes exercised against a cognizable group of jurors is not itself dispositive of our analysis, 'the relative strength of the *prima facie* case of purposeful discrimination will often influence this inquiry' into ***Batson*** challenges." ***Flowers***, 947 So. 2d at 935 (quoting ***Sewell v. State***, 721 So. 2d 129, 136 (Miss. 1998)).

¶71. Distinguishing this case from ***Pitchford*** is the fact that Corrothers did not articulate before the trial court the percentages of the venire pool or the percentage of strikes used against African Americans. Instead, he simply stated that African-American jurors had been struck and that, in this case, the victims were white and the defendant was African-American. In ***Strickland v. State***, we stated that:

> [The] Court finds that exercising seven peremptory strikes against African-Americans, standing alone, absent any other facts or circumstances related to (1) racial composition of the venire, empaneled jury, or community, or other non-exclusive factors such as (2) the prosecutor's conduct, (3) the habitual policies of these prosecutors, (4) the stated policies of the district attorney's office, or (5) the nature of the case itself, . . . fails to establish "a prima facie showing that race was the criteria for the exercise of the peremptory challenge." ***Carter***, 799 So. 2d at 46. As no evidence was offered in the trial court to support Strickland's claim of a ***Batson*** violation, this Court cannot conclude that the circuit court clearly erred in denying Strickland's request for a ***Batson*** hearing.

Strickland v. State, 980 So. 2d 908, 917 (Miss. 2008). As in ***Strickland***, Corrothers failed to provide the trial court with information on the racial composition of the venire, the

empaneled jury, or the community. Although he complains of the habitual policies of the district's prosecutors on appeal, he did not provide the trial court with that information to assist its ruling. The finding of no *prima facie* case and no pretext for discrimination was within the trial court's discretion. Nonetheless, assuming, *arguendo*, that a *prima facie* case was established, we proceed to review the State's race-neutral reasons for its peremptory strikes of individual jurors.

2. Carole Ray

¶72. As discussed above, Corrothers's argument as to Ray is procedurally barred. Notwithstanding the procedural bar, it is without merit. The prosecutor's reason for striking Ray was that she had not understood some of the questions on the jury questionnaire. Corrothers contends that this reason was pretextual because of disparate treatment – that the prosecution failed to challenge jurors of the opposite race with the same characteristic. He refers the Court to four white jurors whom he contends demonstrated a lack of understanding commensurate with Ray's. Our review of the questionnaires of the three of those jurors who returned them reveals no persuasive grounds for comparison with the answers provided by Ray, and the fact that the fourth juror failed to return his questionnaire does not mean that juror did not understand the questionnaire. A juror's indefinite answers on a juror questionnaire are a sufficient race-neutral reason for a strike. ***Lockett v. State***, 517 So. 2d 1346, 1356 (Miss. 1987) (citing ***Rodgers v. State***, 725 S.W. 2d 477, 480 (Tex. Ct. App.1987)). We find that the trial court's finding of no ***Batson*** violation was not clearly erroneous or against the overwhelming weight of the evidence.

3. Betty Collins

¶73. As previously discussed, Corrothers's argument as to Collins is procedurally barred. Notwithstanding the procedural bar, it is without merit. The prosecution's race-neutral reason for its strike of Collins was that "[s]he said she disliked people who sell drugs and steal and because the victim in this case did it is going to come in that he did sell [m]arijuana." The trial court did not abuse its discretion in finding that the State's reason was not motivated by discrimination. The proof at trial was that one of the victims, Taylor, had sold marijuana, and Collins's answer indicated her potential prejudice toward that victim because he sold drugs. This was a sufficient race-neutral reason for the strike. While Corrothers points to jurors accepted by the prosecution who had been associated with drugs, none of those jurors stated that he or she did not like people who sold drugs. Therefore, Corrothers's attempt to show disparate treatment of Collins fails.

4. Phyllis Berry and Deidre Hereford

¶74. As discussed above, Corrothers's argument as to Berry and Hereford is procedurally barred. Notwithstanding the procedural bar, it is without merit. The prosecutor stated that she struck Berry because she was talking to herself during voir dire and indicated on the juror questionnaire that she was generally against the death penalty. The prosecutor also struck Hereford because she stated in the questionnaire that she was generally against the death penalty. Corrothers argues these reasons were pretextual because the prosecutor did not voir dire either venire person as to her views on the death penalty and accepted white jurors who had failed to answer the death-penalty-opinion question on the jury questionnaire or marked "no opinion." A juror's stance against the death penalty is a valid race-neutral reason for a strike. ***Pitchford***, 45 So. 3d at 228-29. And, because expressing no opinion on the death

penalty is different from being against it, Corrothers has not shown disparate treatment from the State's acceptance of jurors who expressed no opinion on the death penalty. We find that the trial court's finding of no ***Batson*** violation was not clearly erroneous or against the overwhelming weight of the evidence.

5. W.C. Brim

¶75. The prosecutor struck Brim because he indicated in the juror questionnaire that he was generally against the death penalty and "his nephew was charged with attempted robbery and I believe someone in his family or he has a case pending in Lee County currently." Because Brim actually stated in his voir dire response that it was his nephew who had a case pending in Lee County, Corrothers argues that the prosecutor's reason was "entirely false." But the prosecutor's statement was not false; she indicated her reason for the strike was in the alternative: that either Brim or his nephew had a case pending in Lee County. Because Brim's nephew had a case pending in Lee County, the prosecutor's reason for the strike was supported by the record. Having a family member involved in a criminal proceeding has been deemed a race-neutral reason for a strike. ***Lockett***, 517 So. 2d at 1356 (citing ***Rodgers***, 725 S.W. 2d at 480). Again, Corrothers tries to show disparate treatment by pointing to venire persons who had relatives with convictions or pending charges who were accepted by the State. Only one of these venire persons, Cody Street, had a relative with a pending charge. However, no disparate treatment is shown, because Street's father's charge was pending in Pontotoc County, not in Lee County, from which the jury was drawn. And, as previously established, Brim's views on the death penalty were a race-neutral reason for the strike.

Pitchford, 45 So. 3d at 228-29. The trial court's finding of no ***Batson*** violation was not clearly erroneous or against the overwhelming weight of the evidence.

V. WHETHER REVERSAL IS REQUIRED FOR THE ERRONEOUS AND UNCONSTITUTIONAL EVIDENTIARY RULINGS AT THE CULPABILITY PHASES OF THE TRIAL.

¶76. Next, Corrothers argues reversal is required because of erroneous evidentiary rulings at the culpability phase. Corrothers claims that it was reversible error (a) to allow the jury to listen to the entirety of the 911 call made by Tonya; (b) to not allow Corrothers to impeach Josh by playing the recording of an inconsistent prior statement given to police by Josh; (c) to improperly allow the presentation of the bullets recovered from Taylor and Frank to the jury; (d) to permit Tiffany Hutchins to testify to what she "understood" from overhearing Corrothers's conversation with Frederick Holmes; (e) to allow the jury to hear only half of Corrothers's audio statement; and (f) to allow Investigator Mills to give fabricated testimony that violated the chain of custody of his investigation and discredited the State's theory of the case. "A trial judge enjoys a great deal of discretion as to the relevancy and admissibility of evidence. Unless the judge abuses this discretion so as to be prejudicial to the accused, the Court will not reverse this ruling." ***Jefferson v. State***, 818 So. 2d 1099, 1104 (Miss. 2002) (quoting ***Fisher v. State***, 690 So. 2d 268, 274 (Miss. 1996)).

A. Tonya's 911 call

¶77. At trial, the State was permitted to play the ten-minute recording of the 911 call made by Tonya immediately after the shootings. Corrothers objected on grounds of authentication, chain of custody, and unfair prejudice under Mississippi Rule of Evidence 403. On appeal, he asserts that it was reversible error for the trial court to permit the jury to hear the 911 call,

which Corrothers argues was inflammatory, cumulative of other testimony, and unfairly prejudicial under Rule 403.

¶78. Corrothers's argument as to improper authentication and chain of custody is without merit. "Rule 901(b)(1) of the Mississippi Rules of Evidence provides that authentication can be accomplished by testimony from someone familiar with and with knowledge of the contents of the document or recording." ***Bunch v. State***, 123 So. 3d 484, 492 (Miss. Ct. App. 2013) (citation omitted). Tonya, who made the call, testified that the call fairly and accurately represented her conversation with the 911 operator. The trial court denied Corrothers's authentication objection for this reason, and the ruling was not error.

¶79. Corrothers also argues that the probative value of the 911 call was substantially outweighed by the danger of unfair prejudice as well as needlessly cumulative under Mississippi Rule of Evidence 403. Rule 403 provides that [a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." M.R.E. 403. Corrothers argues that Tonya was "hysterical" in the call, and that her hysteria inflamed the jury. Although at trial, Corrothers objected to the admissibility of the entire call, on appeal, he argues that all but the first two minutes should have been excluded. The trial court did not make on-the-record findings under Rule 403. After the objection was overruled, Corrothers moved for a mistrial, which was denied.

¶80. The fact that the trial court did not make on-the-record findings under Rule 403 is not reversible error. ***Tate v. State***, 20 So. 3d 623, 639 (Miss. 2009). A trial judge's failure to

articulate Rule 403's "magic words" does not create a presumption that the trial court did not consider the requirements of Rule 403 before admitting evidence. ***Tate***, 20 So. 3d at 639 (Miss. 2009) (quoting ***Havard v. State***, 928 So. 2d 771, 797 (Miss. 2006)). We find that the trial court did not abuse its discretion in allowing the entire 911 call to be admitted. While the first two minutes contain much of the substance of the call, the remainder had probative value as well. For example, during the latter portion of the call, Tonya stated that she had been shot, then realized she had been shot in the neck. She also told the dispatcher that the shooter had said her son owed him $5,000. Also, Tonya gave the location of the crime, and she said the shooter had departed in Taylor's Crown Victoria vehicle headed toward County Road 403.

¶81. The recorded 911 call was not unduly prejudicial. While Tonya was emotional during the call, she had just witnessed, and been a victim of, a violent attack that resulted in the death of her husband and youngest son. Tonya cried, but for only a few moments at a time. She raised her voice, but did not appear to scream, yell, or lose control. Tonya was relatively composed under the circumstances and related crucial information to the dispatcher. We find that the trial court did not abuse its discretion in finding that the probative value of the recorded 911 call was not outweighed by the danger of unfair prejudice. Therefore, this issue is without merit.

B. Impeachment of Josh

¶82. Corrothers argues that the trial court erred by preventing his impeachment of Josh with the audio recording of Josh's interview with Officer Tim Douglas of the Mississippi Bureau of Investigation. Josh testified on direct examination that he had sustained a head

injury in an accident, but that his memory was unaffected by the injury. On cross-examination, Corrothers asked Josh about the accident and injury, and he testified that he did not remember "about what all happened." On further cross-examination, Josh admitted that he had given an interview to Douglas, but denied that he told Douglas he had memory problems. Douglas testified that Josh's wife, but not Josh, had told him during the interview that Josh had memory problems.

¶83. On appeal, Corrothers argues that the trial court denied him the opportunity to impeach Josh. This Court has discerned from the record that Corrothers made no attempt to impeach either Josh or Douglas with the audio recording. Because Corrothers made no effort at impeachment with the audio recording during the testimony of either Josh or Douglas, the trial court did not err. Corrothers has failed to establish an inconsistent statement; therefore, this argument is without merit.

C. Bullets recovered from the decedents

¶84. Corrothers next argues that, although the parties stipulated to the cause of death for Frank and Taylor, the State introduced "prejudicially gruesome" evidence – bullets taken from the decedents' bodies during the autopsies. Corrothers stipulated to the cause of death to avoid testimony from the medical examiner. The State attempted to introduce the bullets during the testimony of Investigator Mills. Corrothers objected because, in the absence of the medical examiner's testimony, the chain of custody of the bullets had not been established.

¶85. The trial court found that defense counsel's objection as to chain of custody was a valid objection, but that nothing indicated any reason to believe there had been a break in the chain of custody indicating a lack of reliability of the evidence. The trial court permitted the

State and defense counsel to question Investigator Mills out of the presence of the jury as to how he had come into possession of the bullets. Investigator Mills stated that he had received the bullets from the crime lab. He stated that, although he had not personally witnessed the bullets being removed from the decedents by the medical examiner or the transfer of the bullets from the medical examiner to the crime lab, the standard procedure, which appeared to have been followed, was for that to happen. Investigator Mills further stated that Deputy Bundren had picked up the bullets from the crime lab and delivered them to Mills. Stating that he did not "see any evidence, any lack of reliability," the trial court allowed the State to enter the bullets into evidence and allowed Investigator Mills to testify that he had received them from the crime lab.

¶86. This Court has stated that:

> An argument that the State failed to establish the chain of custody is a challenge to the authenticity of the evidence. ***Deeds v. State***, 27 So. 3d 1135, 1142 (Miss. 2009). Rule 901 of the Mississippi Rules of Evidence states that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." M.R.E. 901(a). "In order for the defendant to show a break in the chain of custody, there must be an 'indication or reasonable inference of probable tampering with the evidence or substitution of the evidence.' " ***Deeds***, 27 So. 3d at 1142 (quoting ***Spann v. State***, 771 So. 2d 883, 894 (Miss. 2000)). A mere suggestion that tampering possibly could have occurred does not satisfy the defendant's burden. ***Id.*** This Court reviews a trial court's admission or exclusion of evidence for abuse of discretion. ***Ellis v. State***, 934 So. 2d 1000, 1004 (Miss. 2006).

Hughes v. State, 90 So. 3d 613, 630-31 (Miss. 2012). Further, the State need not produce every person who has handled the evidence. ***Deeds***, 27 So. 3d at 1142.

¶87. We find no abuse of discretion in the trial court's decision to admit the bullets. Investigator Mills provided the court with an explanation of the transfer of the bullets from

the medical examiner's office to the crime lab. No indication or reasonable inference of substitution or tampering with the bullets arose from the statements of Investigator Mills, and Corrothers's argument took issue only with the fact the medical examiner did not testify; he did not point to anything that indicated tampering or substitution. The trial court limited Investigator Mills's testimony about the bullets to facts within his personal knowledge. This issue is without merit.

D. Hutchins's testimony

¶88. The State called Hutchins as a witness to testify to the conversation she overheard between Corrothers and Holmes. Corrothers lodged a hearsay objection. He argued that "it's one thing if Mrs. Hutchins is here to testify to something that she alleges my client said but it's . . . another thing if she claims to testify about what some other person said." The trial court agreed and allowed Hutchins to testify to statements by herself or Corrothers, but not statements by Holmes.

¶89. Hutchins testified that, on the Monday following the crimes, Corrothers visited her boyfriend, Holmes, at her mother's house. She stated that she did not remember exactly what Corrothers had said, but she understood that he had killed some people. She testified that she called Holmes to the back of the house and "asked him did I hear what I just think I heard and he said, yes," to which the trial court sustained Corrothers's objection. The trial judge cautioned Hutchins that she "can only say what [she] said and what Caleb Carrothers said but don't say what others said." But during Corrothers's cross-examination of Hutchins, she again referred to what Holmes said to her, testifying that she heard Holmes say, "man please tell me you didn't do that."

¶90. Corrothers argues that the trial court erred in permitting Hutchins to testify as to what she understood from overhearing the conversation. He also asserts that Hutchins's testimony constituted hearsay in violation of his right to confrontation under the Sixth Amendment. ***Crawford v. Washington***, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), held that the Confrontation Clause prohibits testimonial statements by a witness who did not appear at trial unless the witness is unavailable to testify, and the defendant had a prior opportunity for cross-examination. ***Id***. at 53-54, 124 S. Ct. at 1365.

¶91. Under Mississippi Rule of Evidence 801(d)(2), an admission by a party-opponent is not hearsay. Therefore, the trial court properly allowed Hutchins's testimony as to what Corrothers communicated. Because the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted," no Confrontation-Clause violation arose from that testimony. ***Crawford***, 541 U.S. at 59 n.9 (citing ***Tennessee v. Street***, 471 U.S. 409, 414, 105 S. Ct. 2078, 2081-82, 85 L. Ed. 2d 425 (1985)). Corrothers correctly argued at trial that anything Holmes told Hutchins would be inadmissible hearsay unless an exception applied. But the trial judge properly sustained Corrothers's objection and limited Hutchins's testimony to statements made by herself or Corrothers. Hutchins did relay another statement by Holmes, but she gave that statement in response to cross-examination elicited by the defense, and Corrothers did not object on hearsay or Confrontation-Clause grounds or request that the jury be instructed to disregard her testimony. The trial court did not abuse its discretion concerning the testimony of Hutchins.

E. Audio recording of Corrothers's interrogation

¶92. In his *pro se* supplemental brief, Corrothers argues that the trial court committed plain error by allowing the jury to hear only half of his recorded statement, which he claims was prejudicial and a violation of his Fifth and Sixth Amendment rights. At trial, the State played a portion of the audio recording of the interrogation of Corrothers by Investigator Mills. After listening for approximately an hour, the trial court gave the jury a short recess. Upon returning, the State told the trial judge that they were not going to play the remainder of the recording, "because basically that's all the State wanted to get in at this point." Corrothers did not object to the failure to play the remainder of the recording.

¶93. Notwithstanding the procedural bar, these issues are without merit. Corrothers argues that his right of confrontation was violated by the failure to play the entirety of the recording and that Investigator Mills "changed his words" when summarizing the contents of the recording. This argument is without merit, because Corrothers was afforded substantial opportunity to confront and cross-examine Investigator Mills during his trial testimony. Corrothers also argues that the trial court committed a ***Brady*** violation. *See* ***Brady v. Maryland***, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) (establishing the principle that suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment). But the prosecution did not suppress evidence, because the recording was made available to the defense. We note that nothing suggests the trial court would have prevented Corrothers from playing the remainder of the recording if he so requested.

F. Investigator Mills's testimony and chain of custody

¶94. The final issue raised by Corrothers in his *pro se* supplemental brief is whether the State committed "manifest constitutional error" by allowing Investigator Mills to testify. Corrothers alleges that Investigator Mills's "credibility violates the chain of custody in the series of the investigation" and affects the State's theory of the case. "The Court has previously held that where a prisoner is proceeding pro se, we will take that into account and, in our discretion, credit not so well pleaded allegations so that a prisoner's meritorious complaint may not be lost because inartfully drafted." ***Ivy v. Merchant***, 666 So. 2d 445, 449 (Miss. 1995) (citing ***Moore v. Ruth***, 556 So. 2d 1059, 1061 (Miss. 1990)). With that said, many of Corrothers's arguments on this issue appear incomplete or tenuously connected.

¶95. First, Corrothers argues that Investigator Mills made false statements about not knowing that Josh had memory problems. This argument is not further developed. Investigator Mills's statements were consistent with the previous analysis concerning Josh's memory problems, and Corrothers was afforded substantial opportunity to cross-examine Mills. This argument is without merit.

¶96. Next, Corrothers gives a lengthy account of how Officer Jason Butts, part of the first-response team, wrote a report roughly an hour after the crime took place, in which he reported statements made by Josh. Several of these statements were inconsistent with Tonya's testimony at trial. For example, Josh said that Frank came out of the bedroom with his rifle, but Tonya testified that she saw the killer go into the bedroom and retrieve it. Josh stated the killer kicked in the door and then shot Frank, while Tonya testified these events occurred in the opposite order. While Corrothers's individual statements are true, it is unclear how there was a "clear violation" of the United States Constitution. Corrothers could have

used the inconsistencies to impeach the witnesses at trial, but he failed to do so despite extensive cross-examination of these witnesses. This issue is without merit.

¶97. Third, Corrothers argues that Investigator Mills fabricated statements in his request for a search warrant in order to establish probable cause for the warrant. The "underlying facts and circumstances" sheet written to obtain the search warrant and dated July 17, 2009, stated that Corrothers was identified by the witnesses, referring to Tonya and Josh. However, only Josh was able to identify Corrothers in the photo lineup given the day before. While Corrothers is correct that Investigator Mills incorrectly stated Tonya also had identified Corrothers, probable cause for a search warrant still existed without Tonya's identification. "[P]robable cause exists when the facts and circumstances within an officer's knowledge are 'sufficient to justify a man of average caution in the belief that a crime has been committed and that a particular individual committed it.'" ***Roach v. State***, 7 So. 3d 911, 917 (Miss. 2009).

¶98. Next, Corrothers contends that possible exculpatory evidence was misplaced or purposefully destroyed, including a t-shirt with possible blood spots on it. Corrothers references a motion he filed under Mississippi Rule of Appellate Procedure 10(e) to correct the record to include several items, including the "cell phone and T-shirt confiscated in search [warrant]." However, that motion was denied, and nothing in the record suggests Taylor's cell phone ever was found. When law-enforcement officers searched Corrothers's mother's house, they were unable to find the clothes he said he was wearing that night. Nothing in the record indicates that law-enforcement officers ever found Corrothers's t-shirt or Taylor's cell phone. Mississippi Rule of Appellate Procedure 10(e) is not a vehicle for

admitting new evidence into the record, a role generally reserved for the trial court; rather, Rule 10(e) is a method for correcting the appellate record to reflect what occurred in the trial court. M.R.A.P. 10(e). This issue is without merit.

¶99. Corrothers also reiterates several arguments he has made elsewhere in this appeal, including that he was prejudiced by the admission of Tonya's 911 call, that the trial court erroneously refused his jury instructions on his theory of the case, and that the trial court erroneously excluded the audio statement of Josh taken by Douglas. We have addressed these arguments in this opinion and have found them to be without merit. Finally, Corrothers makes a lengthy factual argument that it is not possible to hide from a K-9 unit in the woods for roughly five hours in the middle of the night. This factual argument was for the jury, and Corrothers fails to show how the trial court erred. This issue is without merit.

VI. WHETHER CORROTHERS'S SENTENCE MUST BE VACATED BECAUSE OF THE TRIAL COURT'S FAILURE TO ADEQUATELY INSTRUCT THE JURY BEFORE THE OVERNIGHT BREAK BETWEEN THE VERDICT OF GUILT AND THE SENTENCING PHASE PROCEEDINGS.

¶100. Corrothers argues that the trial court erred in failing to instruct the jury before its overnight break between the guilt and sentencing phases of the trial. "Jurors must not 'discuss a case among themselves until all the evidence has been presented, counsel have made final grounds, and the case has been submitted to them after final instructions by the trial court.'" ***Holland v. State***, 587 So. 2d 848, 873 (Miss. 1991) (quoting ***State v. Washington***, 182 Conn. 419, 438 A.2d 1144, 1147 (1980)). "It is, of course, the duty of the trial judge to direct the activity of the juries, the lawyers, and the litigants. No person can perform this duty other than the judge." ***Roberson v. State***, 257 So. 2d 505, 508 (Miss. 1972).

¶101. Corrothers concedes that, throughout the trial, the jury was properly instructed at each break not to discuss the case among themselves or with anyone else, as well as being given other various admonishments. But Corrothers argues that such instructions were not given at the crucial time between the end of the guilt phase and the beginning of the sentencing phase. The next morning, the trial judge gave the jury such instructions in great detail. Corrothers argues, however, that the damage had been done at that point because the jury had the entire overnight break during which they had not been cautioned by the court. Corrothers failed to raise an objection at trial or ask the court to reinstruct the jury before they retired in the evening.

¶102. This issue is procedurally barred because Corrothers failed to make a contemporaneous objection. ***Moawad v. State***, 531 So. 2d 632, 634 (Miss. 1988). Procedural bar notwithstanding, Corrothers provides no authority for his claim that cautionary instructions must be given to the jury before each break. While Corrothers is correct that, ideally, the jury should be instructed before each break not to discuss the case among themselves or with others, he cites no authority that such instructions *must* be given before each break. Mississippi statutes are silent on the topic of jury instructions in death-penalty cases, stating only that "[t]he proceeding shall be conducted by the trial judge before the trial jury as soon as practicable." Miss. Code Ann. § 99-19-101(1) (Rev. 2007). As Corrothers has conceded, the jury was instructed appropriately at various other breaks before the overnight break between the guilt and sentencing phases of the trial. Concerning formal jury instructions on the law, "[t]his Court has held on numerous occasions that when a trial court instructs the jury, it is presumed the jurors follow the instructions of the court." ***Moffett v.***

State, 49 So. 3d 1073, 1108 (quoting ***Williams v. State***, 684 So. 2d 1179, 1209 (Miss. 1996)). Here, the jury was cautioned repeatedly by the trial judge and warned at the beginning of the sentencing phase, and the jury is presumed to have followed the instructions of the trial court. Corrothers does not point to any evidence that the jury deliberated prematurely. Therefore, notwithstanding the procedural bar, the issue is without merit.

VII. WHETHER CORROTHERS'S SENTENCE MUST BE VACATED BECAUSE THE STATE PRESENTED VICTIM IMPACT TESTIMONY IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

¶103. Next, Corrothers argues that the trial court erred in allowing Tonya to present victim-impact testimony in violation of the Eighth and Fourteenth Amendments to the Constitution. He argues that this Court should revisit its adherence to ***Payne v. Tennessee***, 501 U.S. 808, 827, 111 S. Ct. 2597, 2609, 115 L. Ed. 2d 720 (Miss. 1991), or, alternatively, that Tonya's testimony about the impact of the loss of her husband and son exceeded the permissible scope of victim-impact testimony.

¶104. Corrothers argues that he preserved this issue by filing a pretrial motion to preclude the victim-impact testimony. The motion concerned the use of victim-impact testimony at both the guilt and sentencing phases of the trial. Corrothers brought the motion to the court's attention at a pretrial-motions hearing, stating "[t]he next is a motion to preclude the State from introducing victim's impact evidence in the guilt phase of the trial . . . ." The State responded that it did not intend to use victim-impact evidence during the guilt phase, but only at sentencing. The trial court stated "[a]ll right," and Corrothers proceeded to his next motion. These proceedings reveal that, while Corrothers did file a pretrial motion to preclude

the use of victim-impact testimony at sentencing, he did not secure a ruling from the trial court on the use of victim-impact testimony at sentencing. And he did not lodge a contemporaneous objection when the State sought to admit the testimony at sentencing. Corrothers's failure to secure a ruling from the trial court and subsequent failure to object contemporaneously waived this issue for appeal. ***King v. State***, 960 So. 2d 413, 438 (Miss. 2007); ***Grayson v. State***, 806 So. 2d 241, 254-55 (Miss. 2001) (quoting ***Johnson v. State***, 461 So. 2d 1288, 1290 (Miss. 1984) (stating that [t]he movant bears the responsibility of obtaining a ruling from the court on a motion filed by him and his failure to secure such a ruling constitutes waiver")).

¶105. Notwithstanding the procedural bar, we briefly address this issue. The Court adopted the rule of ***Payne v. Tennessee*** in ***Hansen v. State***, writing:

> [T]here is no bar in federal law to our allowing prosecutors to produce for the jury "at the sentencing phase evidence of the specific harm caused by the defendant. . . . A state may legitimately conclude that evidence about the victim and about the impact of the murder or the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed."

Hansen v. State, 592 So. 2d 114, 146 (Miss. 1991) (quoting ***Payne***, 501 U.S. at 825, 827). Tonya's testimony falls squarely within the definition provided in ***Payne*** as to what constitutes admissible victim-impact evidence. While Corrothers argues the testimony was inadmissible because it was not related to any of the statutory aggravators, this Court allows victim-impact testimony in as narrow circumstances as constitutionally permissible "[w]hen the evidence is proper, necessary to a development of the case and the true characteristics of the victim, and could not incite the jury." ***Batiste v. State***, 121 So. 3d 808, 864 (Miss. 2013) (citing ***Havard v. State***, 928 So. 2d 771, 792 (Miss. 2006)). We note that Corrothers makes

no argument that any of Tonya's specific statements were unfairly prejudicial or otherwise inadmissible; he simply argues that the entirety of her victim-impact testimony was inadmissible. The trial court, following the rule in ***Payne***, properly allowed her victim-impact testimony, which was similar to what has been allowed in other cases. *See*, *e.g.*, ***Batiste***, 121 So. 3d at 864-65. This issue is procedurally barred; notwithstanding the procedural bar, it is without merit.

VIII. WHETHER THE TRIAL COURT ERRED IN REFUSING CORROTHERS'S PROPOSED PENALTY-PHASE INSTRUCTIONS.

¶106. Corrothers argues the trial court erred in refusing several of his proposed penalty-phase instructions, including D-23, D-25, and D-17. Corrothers also argues that it was plain error to instruct the jury that the Mississippi sentencing statute permitted it to impose a death sentence if mitigation did not outweigh aggravation. As stated previously concerning guilt-phase instructions, a "trial judge is under no obligation to grant redundant instructions. The refusal to grant an instruction which is similar to one already given does not constitute reversible error." ***Montana v. State***, 822 So. 2d 954, 961 (Miss. 2002) (citations omitted).

A. Proposed instruction D-23

¶107. Corrothers's proposed instruction D-23 read: "If you fail to reach a verdict as to penalty this will not affect the verdict you have already returned at the guilt trial. This means that even if you do not reach an agreement as to sentence, Mr. Corrothers will be sentenced to life imprisonment without the possibility of parole." Corrothers argues that, without this instruction, the jury was not informed that a hung jury would not result in a new trial but would result in a life-without-parole sentence.

¶108. This Court dealt with this argument in ***Gillett v. State***, 56 So. 3d 469, 516 (Miss. 2010). The defendant in ***Gillett*** requested an instruction that, in substance, was identical to that requested by Corrothers. ***Id.*** Applying the rule that jury instructions are to be read as a whole, we found that the failure to grant the instruction was not reversible error. As in this case, Gillett's jury had been instructed that the three sentencing options were death, life imprisonment, and life without the possibility of parole, and that one possible verdict it could return was that the jury was unable to agree unanimously on punishment. ***Id.*** We find that, under ***Gillett***, no reversible error resulted from the failure to grant the instruction.

B. Proposed instruction D-25

¶109. Proposed instruction D-25 read: "We emphasize that the procedure you must follow is not a mere counting process of a certain number of aggravating circumstances versus the number of mitigating circumstances, rather, each individual juror must apply a reasoned moral judgement [sic] as to whether this case calls for life imprisonment or whether death is the only appropriate punishment." The trial court refused D-25, stating that it was "covered adequately in S 3." Instruction S-3 read:

> The Court instructs the jury that it must be emphasized that the procedure that you must follow is not a mere counting process of a certain number of aggravating circumstances versus the number of mitigating circumstances. Rather, you must apply your reasoned judgment as to whether this situation calls for life imprisonment or whether it requires the imposition of death, in light of the totality of the circumstances present.

Instruction S-3 was largely the same as proposed instruction D-25; in fact, the first half is almost identical. Jury instructions that are redundant need not be given. ***Montana***, 822 So. 2d at 961. The Court has applied the redundancy rule to a request for an instruction that

specifically refers to "individual" jurors. ***Fulgham v. State***, 46 So. 3d 315, 328 (Miss. 2010). Accordingly, the trial court did not err in excluding D-25.

C. Proposed instruction D-17

¶110. Corrothers's proposed instruction D-17 read: "You may impose a sentence of life imprisonment for any reason or for no reason at all." Corrothers states that he relied on the principle that defendants are under no obligation to put on any mitigating evidence when he proposed D-17. The trial court agreed with that principle but found that D-17 was duplicative of given instruction D-19, which read:

> As each of you is free to consider any other matter which you may deem to be mitigating on behalf of Mr. Corrothers in reaching your sentencing decision, and as each of you maintains the option to sentence Mr. Corrothers to life imprisonment whatever findings you make, I instruct you as follows: you need not unanimously determine that a death sentence is inappropriate in this matter before you move on to consider a sentence less than death. Each one of you is allowed to give due consideration to whatever factors you find which call for a sentence less than death.

¶111. First, the proposed instruction, D-17, is akin to a "mercy" instruction. *See* ***Foster v. State***, 639 So. 2d 1263, 1300 (Miss. 1994). Defendants do not have a right to a mercy instruction. ***Saffle v. Parks***, 494 U.S. 484, 495, 110 S. Ct. 1257, 108 L. Ed. 2d 415 (1990). "In ***Saffle***, the United States Supreme Court stated that the giving of a mercy instruction results in a decision based on whim and caprice." ***Ladner v. State***, 584 So. 2d 743, 761 (Miss. 1991). Second, the proposed instruction is redundant in light of instruction D-19, which actually provides much more detail than proposed instruction D-17. For these reasons, the trial court did not err in refusing D-17.

D. Plain error

¶112. In addition to the proposed jury instructions specifically appealed, Corrothers asserts that it was error for the trial court to instruct the jury that the Mississippi sentencing statute permitted it to impose a death sentence if mitigation did not outweigh aggravation. Because Corrothers did not object to this instruction, he attempts to raise the issue as plain error. "The plain error doctrine requires not only the existence of an error, but also that either the error resulted in a manifest miscarriage of justice or 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" ***Brown v. State***, 995 So. 2d 698, 703 (Miss. 2008) (citation omitted). The Court applies the plain-error rule only when the error affects a defendant's fundamental rights. ***Id.***

¶113. With this argument, Corrothers contends that Mississippi law unconstitutionally permits a "tie" to go to death. This Court addressed this argument in ***Batiste***. ***Batiste***, 121 So. 3d at 866. We observed that, in ***Kansas v. Marsh***, 548 U.S. 163, 173, 126 S. Ct. 2516, 2524, 165 L. Ed. 2d 429 (2006), the United States Supreme Court held that "Kansas' death penalty statute, consistent with the Constitution, may direct imposition of the death penalty when the State has proved beyond a reasonable doubt that mitigators do not outweigh aggravators, including where the aggravating circumstances and mitigating circumstances are in equipoise." ***Batiste***, 121 So. 3d at 866 (quoting ***Marsh***, 548 U.S. at 173). Therefore, we found no error in a jury instruction stating that death could be imposed if mitigation did not outweigh aggravation. ***Id.*** Because no error occurred, we do not recognize plain error.

IX. WHETHER ALL OF THE AGGRAVATING CIRCUMSTANCES ON WHICH THE JURY WAS INSTRUCTED WERE EITHER LEGALLY OR FACTUALLY UNSUPPORTED, AND CORROTHERS'S DEATH SENTENCE IS THEREFORE INVALID.

¶114. On both counts of murder, the jury instructions directed the jury to consider four statutory aggravating circumstances, any one of which was required to support a sentence of death. *See* Miss. Code Ann. § 99-19-101(5) (Rev. 2007). Specifically, the jury was asked to consider: (1) whether the defendant committed the capital offense while under sentence of imprisonment; (2) whether the defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person; (3) whether the defendant knowingly created a great risk of death of many persons; and (4) whether the capital offense was committed while the defendant was engaged in the commission of a robbery. The jury found that all four aggravating circumstances existed as to both capital-murder convictions and imposed sentences of death. Corrothers raises several subissues, which are addressed in the order raised.

¶115. First, Corrothers argues it was error to instruct the jury to consider as two separate aggravating circumstances that the defendant previously had been convicted of a violent felony and that he had committed the capital crime under a sentence of imprisonment. These two aggravating circumstances are listed separately in Mississippi Code Section 99-19-101(5). Historically, juries have been allowed to consider these facts as two separate aggravating circumstances. *See* ***Galloway v. State***, 122 So. 3d 614, 654 (Miss. 2013). While Corrothers argues that the crime used to establish the "previous violent felony" aggravator cannot also be used to establish the "under a sentence of imprisonment" aggravator, this Court repeatedly has held the opposite. ***Hughes v. State***, 735 So. 2d 238, 277-78 (Miss.

1999); ***Blue v. State***, 674 So. 2d 1184, 1219-20 (Miss. 1996) (overruled on other grounds); ***Taylor v. State***, 672 So. 2d 1246, 1276 (Miss. 1996). This issue is without merit.

¶116. Second, Corrothers alleges the trial court erred in instructing the jury that it could consider the fact that the capital murders were committed in the course of a robbery as an aggravating circumstance in sentencing him to death. Such a situation, known as "doubling," refers "to situations where a crime such as robbery is used both as the underlying felony to support a capital murder charge and as an aggravating circumstance to support the imposition of a death sentence." ***Davis v. State***, 684 So. 2d 643, 663 n.6 (Miss. 1996). This Court has held "that the alleged felony underlying the capital-murder conviction may properly be used as an aggravator . . . ." ***Gillett***, 56 So. 3d at 510 (quoting ***Ross v. State***, 954 So. 2d 968, 1014 (Miss. 2007)). "The United States Supreme Court has held that use of an underlying felony as an aggravator is not a constitutional error." ***Moffett v. State***, 49 So. 3d 1073, 1116 (Miss. 2010) (citing ***Tuilaepa v. California***, 512 U.S. 967, 971-72, 114 S. Ct. 2630, 2634-35, 129 L. Ed. 2d 750 (1994); ***Lowenfield v. Phelps***, 484 U.S. 231, 233, 108 S. Ct. 546, 548, 98 L. Ed. 2d 568 (1988)). Accordingly, Corrothers's argument fails.

¶117. Corrothers also argues that, under the circumstances of his case, it was unconstitutional to instruct the jury on the "great risk of death of many persons" aggravating circumstance. First, he reiterates his "doubling" argument, which is without merit for the reasons recited above. Second, he argues that the use of the "great risk of death" aggravator in conjunction with his conviction of aggravated assault "runs afoul of the double jeopardy clause of the state and federal constitutions." *See* ***Blockburger v. United States***, 284 U.S.

299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932); ***Rowland v. State***, 98 So. 3d 1032, 1037 (Miss. 2012).

¶118. The Court has held that the use of the "great risk of death" aggravator in these circumstances does not violate the double-jeopardy clause. *See* ***Flowers v. State***, 842 So. 2d 531, 561-62 (Miss. 2003).

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

Flowers, 842 So. 2d at 561-62 (¶ 94) (quoting ***Wilcher v. State***, 697 So. 2d 1087, 1005 (Miss. 1997) (quoting ***Sekou v. Blackburn***, 796 F.2d 108, 112 (5th Cir. 1986))). To use the "great risk of death" aggravator, the risk must be to one other than the intended victim. ***Id.*** In this case, instruction on the "great risk of death" aggravator was proper because evidence showed Corrothers entered the home intending to attack Taylor, and in doing so, he shot Frank and Tonya and held a gun on Josh. The jury properly was instructed on this aggravating circumstance.

¶119. Finally, Corrothers argues that, even if only one of the aggravating circumstances instructed upon is found to be invalid, the Sixth Amendment requires that he be afforded a new sentencing hearing before a jury. Because all four of aggravators instructed upon were valid, this argument is moot.

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

¶120. Next, Corrothers asserts four subissues, arguing Mississippi's death penalty is unconstitutional because (a) the failure to include the aggravating circumstances in the indictment renders the sentence unconstitutional; (b) the scienter provisions of the Mississippi capital-sentencing statute are unconstitutional; (c) the Mississippi death penalty is unconstitutional for other reasons, including its discriminatory impact; and (d) execution by lethal injection will violate ***Baze v. Rees***, 553 U.S. 35, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (2008).

A. Failure to include aggravating circumstances in the indictment

¶121. Corrothers's first argument is that, because the aggravating circumstances used as grounds for his death sentence were not included in the indictment, his conviction must be reversed. He asserts that the United States Supreme Court decisions of ***Ring v. Arizona***, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), and ***Apprendi v. New Jersey***, 530 U.S. 466, 120 S. Ct. 466, 147 L. Ed. 2d 435 (2000), require the inclusion of aggravating circumstances in the indictment. He argues that, because the indictment omitted the aggravating circumstances, it did not set forth all of the elements necessary to impose the death penalty in violation of his right to due process under the Fifth and Fourteenth Amendments and his right to notice and a jury trial under the Sixth and Fourteenth Amendments.

¶122. ***Apprendi*** held that, "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." ***Apprendi***, 530 U.S

at 476, 120 S. Ct. at 2355. ***Ring*** held that, because, under Arizona's sentencing scheme, aggravating factors operated as "'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury." ***Ring***, 536 U.S. at 609, 122 S. Ct. at 2443 (quoting ***Apprendi***, 530 U.S. at 494 n.19, 120 S. Ct. 2348).

¶123. This Court has held that ***Apprendi*** and ***Ring*** do not invalidate our capital-murder sentencing scheme. ***Berry v. State***, 882 So. 2d 157, 172 (Miss. 2004). We have further held that

> ***Apprendi***'s statement that any fact that increases the maximum penalty must be charged in an indictment relates to the Sixth Amendment right to a jury trial, not to requirements for an indictment. ***Havard v. State***, 928 So. 2d 771, 801 (Miss. 2006). Neither ***Apprendi*** nor ***Ring*** addressed state indictments. *See* ***Berry v. State***, 882 So. 2d at 170. We have held that "these cases . . . address issues wholly distinct from our law, and do not address indictments at all." ***Brown v. State***, 921 So. 2d 901, 918 (Miss. 2004) (citing ***Stevens v. State***, 867 So. 2d 219 (Miss. 2003)).

Batiste, 121 So. 3d at 871. Accordingly, ***Apprendi*** and ***Ring*** did not require the inclusion of aggravating circumstances in Corrothers's indictment.

¶124. Moreover, "[w]hen [Corrothers] was charged with capital murder, he was put on notice that the death penalty might result, what aggravating factors might be used, and the *mens rea* standard that was required." *See* ***Goff v. State***, 14 So. 3d 625, 665 (Miss. 2009). "The State is correct in its assertion that a defendant is not entitled to formal notice of the aggravating circumstances to be employed by the prosecution and that an indictment for capital murder puts a defendant on sufficient notice to what statutory aggravating factors will be used against him." ***Brawner v. State***, 947 So. 2d 254, 265 (Miss. 2006). The Court in ***Brawner*** further stated:

> Accordingly, all that is required in the indictment is a clear and concise statement of the elements of the crime charged. Our death penalty clearly states the only aggravating circumstances which may be relied upon by the prosecution in seeking the ultimate punishment. Thus, every time an individual is charged with capital murder they are put on notice that the death penalty may result.

Id. at 265 (citing ***Brown v. State***, 890 So. 2d 901, 918 (Miss. 2004)).

¶125. Finally, Corrothers argues that Mississippi's capital-sentencing scheme is indistinguishable from that in ***Kansas v. Marsh***, 548 U.S. 163, 126 S. Ct. 2516, 165 L. Ed. 2d 429 (2006), and, therefore, the position that ***Ring v. Arizona*** has no application to Mississippi's scheme is incorrect. We rejected this argument in ***Batiste***, holding that, because ***Marsh*** did not address the requirements for indictments, it did not alter our interpretation of ***Apprendi*** and ***Ring***. ***Batiste***, 121 So. 3d at 871. This issue is without merit.

B. Scienter and Mississippi's capital-sentencing statute

¶126. Corrothers's next argument is that, pursuant to ***Enmund v. Florida***, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982), and ***Tison v. Arizona***, 481 U.S. 137, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987), the United States Supreme Court requires that to be sentenced to death, a person convicted of capital murder must have actually killed, attempted to kill, or intended to kill. Corrothers argues that Mississippi unconstitutionally adds a fourth basis – that the defendant "contemplated lethal force would be employed." Miss. Code Ann. § 99-19-101(7)(d) (Rev. 2007). "This Court has repeatedly held that 'Mississippi's capital sentencing scheme, as a whole, is constitutional.'" ***Stevens v. State***, 806 So. 2d 1031, 1052 (¶ 92) (Miss. 2001) (quoting ***Woodward v. State***, 726 So. 2d 524, 528 (Miss. 1997)). "The State must only prove one of the four facts. It is not necessary that the State prove intent

where the victim was actually killed." ***Id.*** at 1053 (¶ 99). Here, the trial court properly instructed the jury as to the findings necessary to impose a sentence of death based on state law. According to precedent, Mississippi's capital-sentencing scheme is constitutional. Therefore, this issue is without merit.

C. Other reasons for unconstitutionality

¶127. Corrothers asserts that other reasons mandate that our death-penalty statutes be held unconstitutional, including that the death-penalty scheme discriminates in violation of the Fourteenth Amendment. The Court previously has addressed Mississippi's death-penalty scheme in relation to discrimination:

> Lastly, Galloway claims Mississippi's death-penalty scheme is applied in a discriminatory and irrational manner in violation of the of the Eighth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment and corresponding clauses of the Mississippi Constitution. The United States Supreme Court rejected an almost identical argument in ***McCleskey v. Kemp***, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987). There, Warren McCleskey argued that Georgia's capital-punishment statute violated equal protection, based upon a study showing that black defendants were more likely to be sentenced to death than white defendants, and defendants murdering whites were more likely to be sentenced to death than defendants who murdered blacks. ***Id.*** at 291-92, 107 S. Ct. 1756. The Court held that, in order to raise a successful claim of an equal-protection violation, the criminal defendant must prove that "the decisionmakers in his case acted with discriminatory purpose." ***Id.*** at 292, 107 S. Ct. 1756. McCleskey's only proof supporting his claim was the results of the study. The Court determined that, due to the number of variables inherent in capital sentencing and the discretion allowed trial courts in implementing criminal justice, the use of statistical evidence was insufficient to prove purposeful discrimination. ***Id.*** at 292-97, 107 S. Ct. 1756.

Galloway v. State, 122 So. 3d 615, 680-81 (Miss. 2013). Like Galloway, Corrothers simply points to statistical evidence as evidence of discrimination and fails to demonstrate that the

decision-makers in his case acted with a discriminatory purpose. Therefore, this argument is without merit.

¶128. Corrothers also argues that Mississippi's capital-sentencing scheme is overly broad and vague, both facially and as applied to Corrothers "in permitting the jury to consider imposing the penalty based on aggravating circumstances that the murder was 'especially atrocious, heinous or cruel.'" *See* Miss. Code Ann. § 99-19-101(5)(h) (Rev. 2007). Granting relief on this argument would require the Court to overrule substantial precedent, as we have "repeatedly held that the 'especially heinous, atrocious or cruel' provision of Miss. Code Ann. § 99-19-101(5)(h) is not so vague and overbroad as to violate the United States Constitution." ***Stevens v. State***, 806 So. 2d 1031, 1060 (Miss. 2001) (citing ***Mhoon v. State***, 464 So. 2d 77, 84 (Miss. 1985) (*overruled on other grounds*)); *see also* ***Proffitt v. Florida***, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976).

¶129. Additionally, Corrothers argues that Mississippi's capital-sentencing scheme is unconstitutional because it allows the jury to apply the death penalty for felony murder but not for simple murder. Once again, this argument has failed repeatedly before this Court:

> [Appellant] further argues that the death-penalty scheme is unconstitutional because it does not allow the death penalty in cases of simple murder, no matter how premeditated or atrocious. We find that [Appellant] is entitled to no relief. This Court has held that "the death penalty in Mississippi does not violate the U.S. Constitution."

Batiste, 121 So. 3d at 872 (quoting ***Gillett v. State***, 56 So. 3d 469, 525 (Miss. 2010)).

¶130. Finally, Corrothers asserts that, under ***Coleman v. State***, 378 So. 2d 640, 649 (Miss. 1979), Mississippi's capital-sentencing scheme does not require the jury to make a written record of the circumstances it considered as mitigating against imposing a sentence of death.

Mississippi's capital-sentencing statute expressly requires the jury to make "specific written findings of fact" concerning aggravating and mitigating circumstances. *See* Miss. Code Ann. § 99-19-101(3) (Rev. 2007). ***Coleman*** held that the statute does not require detailed findings. Although Corrothers argues that this violates his Sixth, Eighth, and Fourteenth Amendment right to appellate review of the jury's decision for possible arbitrariness, he cites no authority supporting his proposition that Section 99-19-101(3) is unconstitutional. The failure to cite authority waives the issue for appellate review. ***Gillett***, 56 So. 3d at 517.

D. Constitutionality of lethal injection

¶131. Finally, Corrothers asserts that Mississippi's use of the lethal-injection protocol violates ***Baze v. Rees***, 553 U.S. 35, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (2008). First, Corrothers is procedurally barred from raising this issue on appeal, as he failed to challenge the method of execution at trial. ***Batiste***, 121 So. 3d at 872 (citing ***Chamberlin v. State***, 55 So. 3d 1046, 1056 (Miss. 2010)). Second, the Court has "held unequivocally that Mississippi's method of lethal injection does not violate the Eighth Amendment." ***Chamberlin***, 55 So. 3d at 1056. In ***Bennett v. State***, the Court stated:

> If differences exist between Mississippi's execution protocols and those used in Kentucky, then, the inquiry is whether Mississippi's lethal-injection protocol meets Constitutional muster in light of this recent Supreme Court decision. The Fifth Circuit, when considering inmate Dale Leo Bishop's Eighth-Amendment challenge to Mississippi's lethal-injection procedures, recently announced that "Mississippi's lethal injection protocol appears to be substantially similar to Kentucky's protocol that was examined in ***Baze***." ***Walker v. Epps***, 2008 WL 2796878, *3, 2008 U.S.App. LEXIS 15547, *3 (5 th Cir. Miss. July 21, 2008). We agree with the Fifth Circuit's analysis, and hold that Bennett's Eighth Amendment challenge to the lethal injection protocol in Mississippi is without merit.

Bennett v. State, 990 So. 2d 155, 161 (Miss. 2008). By the same analysis, Corrothers's argument fails.

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

¶132. Mississippi Code Section 99-19-105 requires that this Court review the record in any case in which the death sentence is imposed and compare it with death sentences imposed in other capital-punishment cases to determine whether the sentence imposed was excessive or disproportionate to the penalty imposed in similar cases decided since ***Jackson v. State***, 337 So. 2d 1242 (Miss. 1976). ***Nix v. State***, 533 So. 2d 1078, 1102 (Miss. 1987).

¶133. In this case, we find that "after a review of the cases coming before this Court, and comparing them to the present case, the punishment of death is not too great when the aggravating and mitigating circumstances are weighed against each other and the death penalty will not wantonly or freakishly be imposed here." ***Nix***, 533 So. 2d at 1102. The Court has repeatedly "upheld the death penalty in cases involving capital murders committed during the commission of a robbery." ***Batiste***, 121 So. 3d at 873 (citing ***Gillett***, 56 So. 3d at 524; ***Fulgham***, 46 So. 3d at 323; ***Goff***, 14 So. 3d at 650; ***Chamberlin***, 989 So. 2d at 345; ***Doss v. State***, 709 So. 2d 369, 401 (Miss. 1997)). Likewise, we repeatedly have upheld the death penalty in cases involving multiple capital murders. *See* ***Brawner v. State***, 872 So. 2d 1, 17 (Miss. 2004); ***Stevens v. State***, 806 So. 2d 1031, 1064 (Miss. 2001); ***Manning v. State***, 765 So. 2d 516, 522 (Miss. 2000); ***McGilberry v. State***, 741 So. 2d 894, 925 (Miss. 1999); ***Brown v. State***, 690 So. 2d 276, 298 (Miss. 1996); ***Jackson v. State***, 684 So. 2d 1213, 1240

(Miss. 1996). Because the punishment in the instant case is commensurate with punishments imposed in a litany of similar cases, this issue is without merit.

XII. WHETHER THE CUMULATIVE EFFECT OF THE ERRORS IN THE TRIAL COURT MANDATES REVERSAL OF THE VERDICT OF GUILT OR THE SENTENCE OF DEATH ENTERED PURSUANT TO IT.

¶134. Corrothers argues that the cumulative effect of the errors in this case deprived him of a fair trial and mandates reversal. Under the cumulative-error doctrine, even if any specific error is insufficient for reversal, we may reverse if the cumulative effect of all the errors deprived the defendant of a fundamentally fair trial. ***Ross v. State***, 954 So. 2d 968, 1018 (Miss. 2007). But where no error has occurred, there can be no cumulative error. Because we have found that no error occurred at Corrothers's trial, there can be no cumulative error, and this issue is without merit.

CONCLUSION

¶135. We affirm Corrothers's convictions and sentences.

¶136. **COUNT I - CONVICTION OF CAPITAL MURDER AND SENTENCE OF DEATH BY LETHAL INJECTION, AFFIRMED. COUNT II - CONVICTION OF CAPITAL MURDER AND SENTENCE OF DEATH BY LETHAL INJECTION, AFFIRMED. COUNT III - CONVICTION OF AGGRAVATED ASSAULT AND SENTENCE OF LIFE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, AS A HABITUAL OFFENDER, WITHOUT THE POSSIBILITY OF PAROLE AND SENTENCE SHALL NOT BE REDUCED OR SUSPENDED NOR SHALL APPELLANT BE ELIGIBLE FOR PAROLE OR PROBATION OR EARLY RELEASE, AFFIRMED.**

WALLER, C.J., LAMAR AND PIERCE, JJ., CONCUR. RANDOLPH, P.J., SPECIALLY CONCURS WITH SEPARATE WRITTEN OPINION JOINED BY PIERCE, J.; LAMAR AND CHANDLER, JJ., JOIN IN PART. KING, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY KITCHENS, J. COLEMAN, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY DICKINSON, P.J.; KITCHENS AND KING, JJ., JOIN IN PART.

RANDOLPH, PRESIDING JUSTICE, SPECIALLY CONCURRING:

¶137. I fully concur with the majority opinion but choose to write separately to address the Neuschatz proffer and its lack of relevance and reliability, and the alleged ***Batson*** violation.

I. Whether the trial court abused its discretion and erred as a matter of law in excluding the scientifically based testimony of a psychologist with expertise in memory and cognition concerning the reliability of eyewitness identification procedures and testimony in this case.[4]

¶138. "Expert opinion testimony not tied to the individual whose behavior is at issue and not stated with reasonable certainty *flunks the test*." ***West v. State***, 553 So. 2d 8, 21 (Miss. 1989) (emphasis added). In today's case, we must decide who "flunked the test." Is it Neuschatz, who failed to proffer an opinion with a reasonable degree of certainty, and who further failed to support his opinions with fact-specific testimony that "fit"[5] the facts of this case? Or was it the trial judge who excluded Neuschatz's proffer in a case with substantial direct and circumstantial evidence, supported by substantial corroborative evidence, consistent with the holdings of a majority of all federal and state courts that have considered the issue?[6] Did the trial judge act within his discretion in excluding Neuschatz's problematic, general testimony,

---

[4]The issue as presented by Corrothers (Appellant's Brief at xii) and the State (Appellee's Brief at 4), *verbatim et literatim*.

[5]"Fit" is "whether expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute." ***Daubert v. Merrell Dow Pharms., Inc.***, 509 U.S. 579, 591, 113 S. Ct. 2786, 2796, 125 L. Ed. 2d 469 (1993) (citing ***U.S. v. Downing***, 753 F. 2d 1224, 1242 (3rd Cir. 1985)).

[6]George Vallas, *A Survey of Federal and State Standards for the Admission of Expert Testimony on the Reliability of Eyewitnesses*, 39 Am. J. Crim. L. 97, 136 (2011).

that did not "fit" the facts of the case *sub judice*? *See* ***Daubert v. Merrell Dow Pharms., Inc.***, 509 U.S. 579, 591, 113 S. Ct. 2786, 2796, 125 L. Ed. 2d 469 (1993). Generalized testimony on the assumed deficiencies of everyman eyewitness testimony, such as that proffered by Neuschatz, can lead to confusion, and, when not based on facts of a specific case, can mislead the jury. Furthermore, Neuschatz's generalized proffer was contrary to actual evidence adduced at trial.

¶139. Other trial and appellate courts from other jurisdictions have rejected and excluded nearly identical testimony from Neuschatz himself. This trial court rejected Neuschatz's proffered testimony for some of the same reasons.

A. Recent courts have excluded Neuschatz.

¶140. Neuschatz recently has "flunked the test" to offer similar testimony in Georgia, Maryland, and Minnesota, in both federal and state courts, trial and appellate. Neuschatz recently was excluded in Georgia trial and appellate courts. ***Frazier v. State***, 699 S.E. 2d 747, 750 (Ga. Ct. App. 2010). A special concurrence perhaps stated it best: "the admission of [Neuschatz's testimony] is within the *sound discretion of the trial court*, whose discretion will not be disturbed on appeal absent clear abuse. I also wish to point out that *such expert testimony is problematic and generally unnecessary*." ***Frazier***, 699 S.E. 2d at 752 (Mikell, J., concurring) (emphasis added). "*An appellate court should not feign allegiance to the rule that a matter is within the trial court's sound discretion and then find an abuse of discretion whenever it disagrees with the trial judge's decision*." ***Id.*** (emphasis added). The ***Frazier*** court wrote that the victim stated that "she looked him 'right in the face' during the incident" and that the victim's description of the gender, race, height, hairstyle, and pants of the

suspect all matched the defendant, obviating the need for Neuschatz's testimony.[7] ***Id.*** at 749-750.

¶141. Likewise, the Fourth Circuit upheld the exclusion of Neuschatz's proposed testimony by a U.S. district court in Maryland. In ***U.S. v. Davis***, 690 F. 3d 226, 257 (4th Cir. 2012), the court stated:

> Davis sought to introduce the testimony of Dr. Jeffrey Neuschatz as an expert in eyewitness identifications. According to his expert witness report, Dr. Neuschatz intended to testify that the lineup procedure used with Ms. Jessamy did not meet the good practices guidelines of the American Psychology-Law Society and to testify concerning a number of factors which might result in a misidentification.
> . . .
> After a hearing, the district court granted the government's motion to exclude Dr. Neuschatz's testimony on the grounds that it would not assist the jury. The court also explained that the testimony was not admissible under Fed. R. Evid. 403. . . . Thus, the danger of unfair prejudice, confusing of the issues or misleading the jury heavily outweighed the probative value of the testimony.

Id. The trial court in today's case specifically found the dangers of confusion and misleading the jury to be problematic while exercising the discretion that only a trial judge can employ. The Fourth Circuit agreed that the district court did not abuse its discretion in determining that the "proffered evidence was not 'scientific knowledge' that would be of benefit to the jury." ***Id.***

¶142. More recently, a U.S. district court in Minnesota was the latest court to exclude Neuschatz's testimony, finding:

---

[7]The eyewitness testimony of Tonya in the case *sub judice* provided a description to the responding police which matched similar corroborative descriptions by Taylor Windham and Karen Hickinbottom of Corrothers's gender, race, height, hairstyle and pants, and the store video.

> because expert evidence can be both powerful and quite misleading, a trial court must take special care to weigh the risk of unfair prejudice against the probative value of the evidence under Fed. R. Evid. 403. It is plain error to admit testimony that is a *thinly veiled comment on a witness's credibility*.

United States v. Benedict, 2013 WL 6500120, *3 (D. Minn. Dec. 11, 2013) (quoting ***Nichols v. American Nat'l Ins. Co.***, 154 F. 3d 875, 884 (8th Cir. 1998)) (emphasis added). The ***Benedict*** court held that "[b]ecause Dr. Neuschatz's proposed testimony would address issues of witness credibility, his testimony will not be admitted." The same court reaffirmed its decision and stated "the subject of Dr. Neuschatz's proposed testimony would improperly invade the province of the jury." ***United States v. Benedict***, 2014 WL 272317 (D. Minn. Jan. 24, 2014).

B. Our standard of review is no different.

¶143. In the case *sub judice*, the trial judge heard a proffer of Neuschatz's testimony outside the presence of the jury in order to determine its admissibility. The trial judge, as have most courts that have addressed this issue, excluded the proffered testimony under Rule 403 as not likely to assist the jury and likely to confuse the jury due to the abundance of other direct and circumstantial corroborative evidence, including Tonya's uncontested eyewitness testimony, Corrothers's confession heard by two witnesses, and a videotape displaying Corrothers's likeness.

¶144. "Our well-settled standard of review for the admission or suppression of evidence is abuse of discretion." ***Mississippi Transp. Comm'n v. McLemore***, 863 So. 2d 31, 34 (Miss. 2003) (citing ***Haggerty v. Foster***, 838 So. 2d 948, 958 (Miss. 2002)). "[T]he admission of expert testimony is within the sound discretion of the trial judge." ***McLemore***, 863 So. 2d at

34. "Sound discretion imports a decision by reference to legally valid standards." ***Bell v. City of Bay St. Louis***, 467 So. 2d 657, 661 (Miss. 1985). "Where a trial judge in determining a matter committed to his sound discretion makes his decision by reference to an erroneous view of the law, this Court has authority to take appropriate corrective action on appeal." ***Id.*** That did not occur in this case. The decision of a trial judge to exclude expert testimony "will stand 'unless we conclude that the discretion was arbitrary and clearly erroneous, amounting to an abuse of discretion.'" ***McLemore***, 863 So. 2d at 34 (citing ***Puckett v. State***, 737 So. 2d 322, 342 (Miss. 1999)). Certainly, the trial judge did not "flunk the test." Nothing in the record hints of an arbitrary decision. The trial judge thoughtfully considered and reconsidered his decision. This discretion has been described as follows:

> Our inquiry, then is not whether the circuit judge ruled contrary to what one of us might have ruled, *not whether he was 'right' or 'wrong' in our view, but whether he abused his discretion*. And, unless the trial court based his decision on an erroneous view of the law, we are not authorized to reverse for an abuse of discretion unless we find it was arbitrary and clearly erroneous.

Westbrook v. State, 658 So. 2d 847, 851 (Miss. 1995) (quoting ***Hooten v. State***, 492 So. 2d 948, 950 (Miss. 1986)) (emphasis added). Stated differently, if reasonable minds could differ on whether an expert's proffered testimony should be considered by the jury *vel non*, the trial court's decision cannot amount to an abuse of discretion as a matter of law. *See* ***Westbrook***, 658 So. 2d at 851.

¶145. In the case *sub judice*, the trial court did not exclude the proffer for lack of general acceptance; he excluded it because it did not "fit" the facts of the case and, thus, would confuse the jury. *See* ***Daubert***, 509 U.S. at 591. The dissent authored by Justice Coleman states that "the trial court erred by not applying the ***Daubert*** factors in its determination of

the admissibility of Neuschatz's testimony." (Coleman Dis. Op. ¶ 219). However, the trial court may reject expert eyewitness testimony solely on the grounds that it is irrelevant or unfairly prejudicial under Rule 403. ***U.S. v. Curry***, 977 F. 2d 1042 (7th Cir. 1992) ("[w]e conclude, however, that the district court's decision to exclude [expert eyewitness testimony] was a proper exercise of its discretion, whether under Rule 702 or Rule 403"). In fact, most courts that have excluded expert eyewitness testimony have excluded such testimony based on Rule 403 grounds, not based on a full ***Daubert*** analysis. Regardless, had the trial court applied a Rule 702 ***Daubert*** analysis, exclusion would still be the result, for the proffer did not "fit" the facts. The dissent opines that every defendant has "a 'fundament right' to present his theory of the case." (Coleman Dis. Op. ¶ 220). The "fundamental right" to assert a defense is not boundless. Admission of testimony is controlled by and subject to the Mississippi Rules of Evidence. The Rules of Evidence preclude the admission of evidence that is irrelevant, confusing, substantially more prejudicial than probative, *inter alia*. The Rules of Evidence permit the exclusion of expert testimony that does not meet the two prongs, relevance and reliability, of ***McLemore*** and ***Daubert***. Neuschatz's testimony was not relevant because it did not "fit" the facts and was confusing, as found by the trial judge. Furthermore, its reliability is debatable, as acknowledged by self-identified experts in the very same field.

¶146. Additionally, a trial judge cannot be held in error for evidence not presented to him. *See* ***Moffett v. State***, 49 So. 3d 1073, 1114 (Miss. 2010) ("[w]e will not hold a trial court in error for issues not presented to it for ruling"). The proponent of expert testimony has the burden of establishing the admissibility of such testimony. Neuschatz failed to offer any

studies, articles, surveys, or other documentation to establish the admissibility and "scientific validity" (a precondition to admission) to support the *ipse dixit* of his testimony. *See* ***McLemore***, 863 So. 2d at 36. Rather, Neuschatz offered only a mischaracterization of a 2001 survey (*see infra*). That should be the end of this discussion. However, Corrothers, on appeal, offers numerous articles and surveys not provided to the trial court to convince this Court of the propriety of generalized expert-identification testimony.

C. Neuschatz's proffered propositions are neither generally accepted nor reliable.

¶147. The Kassin article referred to by Neuschatz at trial and the Mississippi Psychological Association in its amicus brief reveal the opposite. Support for expert eyewitness-identification testimony has actually *declined* among psychologists. Neuschatz proffered that, based on a general-acceptance survey conducted by "Sal Kasten [sic] [referring to Saul Kassin]," the theories he proffered were "generally accepted and for the most part almost all of them between 70 to 100 percent agree that they have been accepted." The survey cited paints a different picture. In 2001, Dr. Saul Kassin conducted a survey of self-described experts on the "general acceptance" of eyewitness-testimony research.[8] The survey updated a previous survey of 1989 conducted by Kassin.[9] Significantly, the 2001 article concluded that the consensus among the participants was that the reliability of numerous propositions *had declined* since the 1989 survey. The 1989 survey included twenty-one propositions. The 2001 survey included thirty. Propositions that declined in reliability, for which Neuschatz

---

[8]Saul Kassin, *On the "General Acceptance" of Eyewitness Testimony Research*, American Psychologist 408 (2001).

[9]*Id.*

proffered an opinion, included the effects of (1) stress, (2) exposure time, (3) lineup fairness, and (4) unconscious transference upon eyewitnesses. Twelve years of additional research in the theoretical field of witness identification reflect many of the same shortcomings that enlightened courts across the country recognized.

¶148. The 2001 article reveals that only *six percent* of the sixty-two self-reporting experts worldwide[10] believed the experimental studies on the effects of "stress" were "very reliable," and only *thirty-one percent* considered "stress" to be "generally reliable."[11] Only *twenty-four percent* believed the theory of "weapon focus" was "very reliable." Only *thirty-five percent* considered the "unconscious transference" theory to be "very reliable." Only *forty percent* found "cross-race bias" to be "very reliable."[12]

¶149. The lack of general acceptance and reliability fails ***McLemore***. In the case *sub judice*, not a single factor proffered by Neuschatz as "affecting" Josh Clark's eyewitness identification received higher than a forty-percent approval rating as better than simply "generally reliable." Neuschatz failed to provide the trial judge a copy of the 2001 article that he cited as authority for his testimony, despite the burden of establishing the admissibility of such testimony. As part of a trial court's "gatekeeping responsibility," the "trial court must make a 'preliminary assessment of whether the reasoning or methodology underlying the testimony is *scientifically valid*.'" ***McLemore***, 863 So. 2d at 36 (emphasis

---

[10]Only fifty-three percent of the self-reporting experts were employed in the United States. The others were from the United Kingdom, Canada, Germany, Australia, the Netherlands, Spain, New Zealand, Israel, Italy, Sweden, Denmark, and France. *Id.*

[11]*Id.*

[12]*Id.*

added). Neuschatz's proffer failed to satisfy a modified ***Daubert*** standard, ***Kumho Tires***,[13] and more importantly, ***McLemore***. Whether *six percent* or *forty percent* of the experts in this limited field can agree that such testimony is "very reliable," neither percentage qualifies as a consensus of opinion, or the seventy-to-one-hundred-percent general acceptance testified to by Neuschatz. Neuschatz's testimony that the field was generally accepted was belied by the very article he referenced and Corrothers's brief relies upon to support admissibility. I acknowledge that the article discussed *supra* was not presented to the trial court, but it was referenced by Neuschatz as the underlying basis for his opinion. No other articles were offered to support Neuschatz's *ipse dixit*. We have instructed our trial courts not to accept unsupported statements, i.e., *ipse dixit*, of proposed experts. ***McLemore***, 863 So. 2d at 37 (courts "should not 'admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert,' as self-proclaimed accuracy by an expert [is] an insufficient measure of reliability").

¶150. Our rules do not allow for expert evidence that is not reliable and not scientifically valid. ***McLemore***, 863 So. 2d at 36. The courts cited by Corrothers that have accepted such testimony failed to address decline in acceptance, and more importantly, did not discuss any distinctions of the scientific validity of opinion testimony on "soft science"[14] versus "hard

---

[13] ***Kumho Tire Co., Ltd. v. Carmichael***, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999).

[14] "Soft science" is defined as "any of the specialized fields or disciplines, as *psychology*, sociology, anthropology, or political science, that interpret human behavior, institutions, society, etc., on the basis of scientific investigations for *which it may be difficult to establish strictly measurable criteria*." *Random House Webster's Unabridged Dictionary* 1814 (2d ed. 2001) (emphasis added).

science," where near, if not absolute, certainty exists (e.g., a consensus exists that one molecule of water is made up of two atoms of hydrogen and one atom of oxygen).

D. Neuschatz's proffer did not fit the facts of the case, obviating the need for his testimony.

¶151. ***Daubert*** requires the facts to fit the case. The State presented compelling evidence, direct and circumstantial, corroborated by another uncontested eyewitness, Tonya, a video, and a confession, beyond the testimony of Josh Clark (the target of Neuschatz's proffer), obviating the need for Neuschatz's testimony.

¶152. This is not a one-eyewitness, drive-by shooting case.[15] Of great import within the context of this case, the State presented evidence of Corrothers's confession through two separate witnesses, Tiffany Hutchins and Frederick Holmes. A defendant's "confession is probably the most probative and damaging evidence that can be admitted against him." ***Palm v. State***, 748 So. 2d 135, 143 (Miss. 1999) (quoting ***Arizona v. Fulminante***, 499 U.S. 279, 295-96, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) (White, J., dissenting)). Hutchins was a lifelong friend of Corrothers, hanging out with him every weekend. Hutchins testified that, two days after the murders of Frank and Taylor Clark, Corrothers came to Hutchins's mother's residence to see her boyfriend, Holmes. She overheard Corrothers telling Holmes that he had "killed some people." She asked Holmes "did Corrothers say what I think he said?" Holmes confirmed he had. She demanded that Corrothers leave immediately. Holmes testified that Corrothers told him that he had "killed these white folks." Holmes then

[15]Nor is it a one-eyewitness, two-second or five-second viewing as in ***State v. Copeland***, 226 S.W. 3d 287, 303 (Tenn. 2007) (two seconds), and ***United States v. Moore***, 786 F. 2d 1308, 1312 (5th Cir. 1986) (five-to-six seconds). *See infra*.

testified that Corrothers had recounted the story of how he killed Frank and Taylor. Holmes's testimony corroborated the facts already in evidence.

¶153. In addition to Tonya's eyewitness testimony and Corrothers's confession, the State presented numerous witnesses who provided direct and circumstantial evidence that corroborated Corrothers's confession and guilt. *See* ***Fulminante***, 499 U.S. at 299 ("details in the confession . . . were corroborated by circumstantial evidence"). Less than an hour before the murders, Karen Hickinbottom observed Corrothers in the company of Taylor Clark. First, Karen saw Corrothers after her daughter Jasmine opened the front door, revealing Corrothers standing in her doorway, wanting to speak to Taylor. Then, Karen saw Corrothers and Taylor walk to Taylor's car and get in and drive off. Karen later identified Corrothers from a photo lineup. At trial, Karen again identified Corrothers as the man at her house shortly before the murders of Taylor and Frank Clark.

¶154. Shortly after Corrothers and Taylor left in Taylor's car, Josh and Tonya saw Corrothers outside and inside their home preceding, during, and after the murders of Taylor and his dad, Frank. The event began shortly after Tonya and Frank retired to bed at approximately 10:30 p.m., the approximate time Taylor and Corrothers pulled away from Karen's house. Tonya heard Taylor yelling a man was "fixing to kill Josh." Then Tonya witnessed her husband desperately attempt to keep an intruder from entering their home. Frank and Taylor sought to block the intruder's entry as Tonya watched from inside their house and Josh watched from outside. The intruder succeeded in opening the door sufficiently to get his revolver around the door and blindly shot Frank. After Frank succumbed to the fatal gunshot wound, Tonya testified that Corrothers entered their home,

standing directly in front of her demanding "dope or money."[16] When she did not immediately appease Corrothers's demand, Corrothers shot her in the neck. Tonya then watched as Taylor charged Corrothers and wrestled with Corrothers, just a few feet away in the living room. She watched as Corrothers continued his unmerciful assault, shooting and killing her son, Taylor. Tonya watched Corrothers head to her bedroom and then re-enter the living room, after rummaging through her bedroom, this time with her husband's rifle. Corrothers approached her again, standing directly over her with the rifle and threatening to shoot her again. Tonya had the presence of mind to know the gun was not loaded, as her husband did not keep his guns loaded. She felt Corrothers's threat was idle. Tonya watched as Corrothers realized that the gun was not loaded, discarding it, but not before taking the time to wipe the rifle clean, to destroy potential incriminating forensic evidence.[17]

¶155. Tonya then watched Corrothers approach her other son, Josh, who by then was inside the house. She then intervened to protect Josh. She forced herself physically between Corrothers and Josh, providing yet another up-close and personal look at Corrothers. She then had the presence of mind to offer Corrothers whatever money she had and a spare key to Taylor's car, in the hope that Corrothers would leave. She then located the cash and the spare key from her purse. She pleaded with Corrothers face-to-face to leave her home. She asked Corrothers "why?" Corrothers responded to her inquiry. He told her Taylor owed him money. Corrothers then moved toward the door and out of the house. Tonya followed

---

[16]Compare to the facts of ***Frazier***, *supra*, "she looked him 'right in the face' during the incident." ***Frazier***, 699 S.E. 2d at 749-50.

[17]The pistol, cartridges, and Taylor's car were clean as well, devoid of forensic evidence.

Corrothers. She watched Corrothers go to the wrong car. She spoke to him again, directing him to the correct car. Finally, she saw him drive away, albeit the wrong way, on a dead-end road which ends at a wooded area.[18] Josh provided similarly detailed testimony on his countless opportunities to observe Corrothers over countless minutes, from some of the same, and some different, vantage points. In sum, Tonya and Josh had countless opportunities, over countless minutes, to observe Corrothers over the course of his killing spree.

¶156. It was in Grand Oaks that Taylor Windham, in the early morning hours, witnessed a black male, not wearing a shirt, with scratches on his upper body, and wearing baggy pants, and otherwise corroborating the description of the suspect given by the victims, wandering around the Grand Oaks neighborhood on foot, miles from Oxford. The man told Windham he had been "jumped." The man was walking away from Highway 7. Windham gave him directions to Highway 7. Within minutes, Kevin Maxey, working at a nearby convenience store, gave corroborating testimony that a black male matching the same description (not wearing a shirt, with scratches, and wearing baggy pants) came into the store. The man told him a story of being "jumped." The man made two phone calls, without conversing. He then purchased goods with cash. The store's video surveillance captured Corrothers in baggy pants, no shirt, and otherwise matching the description given by the Clarks to police. The store video and still photos were exhibited to the jury. All of these corroborating events transpired during the same time frame that Corrothers told the police he was home in bed. Corrothers said he would not be seen on the video, nor was he seen in Grand Oaks. (*See* Maj.

[18]It was the same wooded area which abuts Grand Oaks subdivision, where a man matching Corrothers's description was observed in the early morning hours. The two-mile heavily wooded forest sits between where Taylor's car was found and Grand Oaks.

Op. ¶ 13). Lest we forget, the jury had three days to compare Corrothers to the man in the video.

¶157. In short, the testimony which resulted in Corrothers's convictions, in addition to Josh's eyewitness testimony, was corroborated by Corrothers's confession to two people (one a lifetime friend of Corrothers), direct eyewitness testimony from Tonya, circumstantial testimony from multiple disinterested witnesses, direct corroborating evidence provided by the video surveillance tape, and the police officer's testimony that Corrothers's alibi claims did not check out. The State provided abundant direct and corroborative evidence beyond the testimony of Josh Clark of the crimes which occurred that fatal night, providing the jury ample evidence to establish Corrothers's guilt beyond a reasonable doubt.

1. Neuschatz's testimony is problematic.

¶158. Neuschatz's proffer in this case is problematic. Parts of his proffer were based on a lack of facts; others were based on lack of knowledge of other evidence admitted. Finally, he proffered opinions assuming scenarios in direct contradiction to the facts developed at trial. Such a proffer fails both the relevance[19] and reliability prongs of Rule 702. *See* ***McLemore***, 863 So. 2d at 38. Neuschatz opined that multiple factors "could have" affected the accuracy of Josh's identification of Corrothers – high stress, weapons focus, unconscious transference (the bystander proposition), cross-race identification, exposure time, lighting, and prior injury. Neuschatz also admitted that eyewitness identification is not the main focus of his studies. I respectfully differ with Justice Coleman in his conclusion that Neuschatz has

[19]Neuschatz's proffer included a telling admission, "I have no idea how other people think."

"performed specific studies in the field of eyewitness identification." (Coleman Dis. Op. ¶ 213). The only study Neuschatz described in his testimony was not a study on eyewitness identification, but a study on photo-lineup memory, which involved lineup identifications, not eyewitness identifications.[20]

a. Factual inconsistencies with Neuschatz's proffer

¶159. Neuchatz's proffer was riddled with factual inconsistencies and unsupported assumptions. He proffered that, although "I have done no research on [brain injuries]," Josh's injuries may have affected his identification of Corrothers. He further proffered that Josh's short exposure to the crime and lack of light *could* or *may* have affected his identification. The exact length of Corrothers's crime spree is unknown, and poor lighting conditions were never established by Corrothers. Contrastingly, Josh testified that all the lights were on, and that he had multiple looks at Corrothers over an extended period of time. Neuschatz further sought to undermine Josh's identification by opining Josh *could* or *may* have focused on the gun and not Corrothers. But Josh testified that he had several looks at Corrothers, and the gun was directed at him only once over the entire spree.

b. Neuschatz's proffer is not based on any degree of reasonable certainty.

---

[20] *See* Jeffrey Neuschatz, et al; "*The Effects of Post-Identification Feedback and Age on Retrospective Eyewitness Memory*," Applied Cognitive Psychology (2005). The study "examined the effects of post-identification feedback, age, and retention interval on participants' memories and beliefs about memories for a videotaped event." As more fully discussed *infra* in the "Ecological Fallacy" section, the study consisted of Neuschatz showing college students and senior citizens a video of a crime. He would then provide false memories and false identifications to some of the participants, and see how it affected their recall of the event.

¶160. Neuschatz chose his words carefully, repeatedly using "may" or "could," and "in general." Neuschatz's use of "could" and "may" – an auxiliary verb used to express mere possibility – hardly constitutes a quantifiable, verifiable truth that would assist the jury. We do not allow drug analysts to testify that the leafy, green substance "may" or "could" be marijuana, or the white powder "may" or "could" be cocaine. Instead, experts in their respective fields are required to conduct standard tests, follow accepted protocols, and, if convinced, then state with a reasonable degree of scientific certainty that the substance tested is one or the other. Further, Neuschatz repeatedly opined that certain factors could or may have affected Josh's memory, yet he offered no quantification of how, or to what extent, the factors did influence his identification.

c. Neuschatz's unconscious transference theory lacks factual relevance.

¶161. Neuschatz's bystander/transference theory lacks relevance and a factual basis, as there were no other persons from whom Josh could have unconsciously transferred identification. Josh testified that he had never seen Corrothers before. Yet Neuschatz proffered that Josh had testified that he had seen Corrothers before, which *may* have led Josh to identify Corrothers as the culprit. Tonya and Josh saw only one person, the perpetrator, at the scene of the murders. Moreover, Taylor Windham described seeing only one person. Maxey's testimony and the convenience-store video verify the same description. No testimony provided any factual basis to opine that any witness unconsciously, mistakenly identified Corrothers, for no bystanders were present at any pertinent time.

¶162. Not only is Neuschatz's unconscious-transference theory not relevant in the case *sub judice*, his proffer, based on the article, was flawed. Appendix B, attached to the amicus brief, is Neuschatz's "Report on Eyewitness Identification" in ***State v. Caleb Corrothers***. In it, Neuschatz cites a 1994 article on unconscious transference as a basis of his opinion, which he calls "the most comprehensive set of studies on unconscious transference to date." Tellingly, the same article describes its own limitations, including "limited external validity" and "limited generalizability," and characterizes the proposition as "a theoretical notion," which "need[s] modification and further development," which was "proposed" in the study only to "encourag[e] research in this area," and "not [to] provid[e] the definitive word" on the topic, quite a sharp contrast to Neuschatz's characterization. The Sixth Circuit in ***United States v. Langan*** addressed the 1994 article and pointed out that the article's author conceded that the "literature provides mixed and somewhat weak support . . . [and] the empirical evidence for the theory's existence is rather meager,"[21] hardly a ringing endorsement of a general consensus of reliability. The Sixth Circuit upheld the exclusion of unconscious-transference testimony on the grounds that it was not sufficiently based on "scientific knowledge." I am persuaded this Court should do likewise.

d. Neuschatz's cross-race-bias proffer is fatally flawed.

¶163. As noted by Justice Chandler, no witnesses testified as to the amount of time they had spent in the company of African Americans, the number of African-American friends they had, or the integration of African Americans in their lives, families and communities. Thus, Neuschatz's assumption that Josh's identification *could* or *may* have been affected by cross-

[21] ***United States v. Langan***, 263 F.3d 613, 619 (6th Cir. 2001).

race identification is an underlying assumption without factual support and is not based on facts adduced in this case.

¶164. Neuschatz's exposition offered an intriguing but dubitable statement. After opining that "each race has different facial features," he proffered "I don't know that [it] is common knowledge that each race has different facial features." This is a fact presumably not known to the judge, witnesses, and jury. Other propositions supposedly unknown to common folks (nonexperts) like us, or those who serve on juries, are that "the less time an eyewitness has to observe an event, the less well he or she will remember it," "alcoholic intoxication impairs an eyewitness's recall," "young children are less accurate than adults," and "young children are more vulnerable to suggestion and peer pressure."[22]

E. Trial Court Analysis

¶165. All of the foregoing evidence had been presented before the trial judge considered the admissibility of Neuschatz's proffer. The trial court astutely noted there was substantial corroborative evidence, including eyewitness testimony, in addition to Josh's testimony. Unquestionably, the trial judge is in a superior position to evaluate testimony and determine whether Neuschatz's proffer would assist or mislead and confuse the jury. The learned trial judge ruled:

> the court is in a position to apply [Neuschatz's] proposed testimony to the facts as the court has found them in evidence. In this case there is . . . obviously two eye witnesses and a fair amount of circumstantial evidence that has come in this case combined. It is not a one witness, one eye witness case. There is direct and circumstantial evidence. . . . [T]here has been a fairly vigorous robust opportunity by defense counsel to question the perception of *Josh Clark*

[22]Saul Kassin, *On the "General Acceptance" of Eyewitness Testimony Research*, American Psychologist 408 (2001).

> without the aid or assistance of an expert. . . . [I]n this case *under these facts* that these lay people witnesses have had as good an opportunity to make their own conclusions, draw their own conclusions about memory and perceptions *in this case*. The *risk of confusion I believe is very high* in this case as opposed to the opportunity for anything that might aid in the trier of fact. In this case the proof is clear that these *two eye witnesses had a fairly lengthy period of time to observe the defendant* . . . and *specifically under these facts of this case* the court finds that this particular expert testimony will not assist the trier of fact to understand the evidence or to determine any facts in issue *in this case*.

(Emphasis added.) Neuschatz's proffer Josh offered no aid or assistance to the triers of fact about other eyewitness testimony (that of Tonya, Karen, Windham, and Maxey) and failed to address or acknowledge the damning testimony of Holmes and Hutchins, or other corroborative evidence, including the store videotape. The trial court ruled "the risk of confusion is very high." I agree. Neuschatz "flunked the test." Neuschatz's proffer relied on faux testimony, in direct contradiction to the eyewitnesses (lighting conditions, short duration, *inter alia*).

F. The majority of courts reject expert eyewitness-identification testimony in cases with corroborative evidence.

¶166. Before this court requires our trial courts to admit such testimony, as advocated by the Coleman dissent, we should examine how courts across the country treat the topic. Most find it to be of dubious value, with only a distinct minority holding the opposite viewpoint.[23] A majority of courts have upheld the exclusion of similar testimony in cases factually akin to

[23]Among the circuit courts, the Eleventh Circuit exercises a per se exclusionary rule, while the Third and Sixth Circuits favor admission. The remaining eight circuits generally defer to the district court's discretion and allow such testimony only in narrow circumstances. Lauren Tallent, *Through the Lens of Federal Evidence Rule 403: An Examination of Eyewitness Identification Expert Testimony Admissibility in the Federal Circuit Courts*, 68 Wash. & Lee L. Rev. 765, 786-87 (2011); George Vallas, *A Survey of Federal and State Standards for the Admission of Expert Testimony on the Reliability of Eyewitnesses*, 39 Am. J. Crim. L. 97, 136 (2011).

the case *sub judice*. The learned trial court's decision to exclude Neuschatz's proffer on eyewitness identification is in accord with courts across our nation, state and federal, that will permit this type of testimony, but only in limited circumstances, none of which are present in today's case.

¶167. In general, expert eyewitness-identification testimony is rife with potential hazards. "Outside of . . . narrowly constrained circumstances, jurors using common sense and their faculties of observation can judge the credibility of an eyewitness identification, especially since deficiencies or inconsistencies in an eyewitness's testimony can be brought out with skillful cross-examination." ***United States v. Harris***, 995 F. 2d 532, 535 (4th Cir. 1993) (upholding the exclusion of expert eyewitness-identification testimony). Twelve jurors – using their collective common sense and life experiences and applying reasonable inferences – are best equipped to determine the credibility, veracity, and ultimately the reliability of an eyewitness's identification of the defendant. Generalized expert testimony based on surveys with controlled factors, unlike actual crime-scene conditions, should not be allowed to encroach upon the common sense, knowledge and experience, *inter alia*, of a jury. *See* ***United States v. Brown***, 540 F. 2d 1048, 1054 (10th Cir. 1976) ("Generally, expert testimony . . . cannot invade the field of common knowledge, experience and education of men."). "Such expert testimony will not aid the jury because it addresses an issue of which the jury already generally is aware, and it will not contribute to their understanding of the particular dispute."[24] ***United States v. Hudson***, 884 F. 2d 1016, 1024 (7th Cir. 1989) (rejecting the use

[24]"The advisory committee's notes [to Federal Rule of Evidence 702] make it clear that when the layman juror would be able to make a common sense determination of the issue without the technical aid of such an expert, the expert testimony should be excluded

of expert eyewitness-identification testimony). "The general reliability of eyewitness identification is a matter of common understanding." ***United States v. Martin***, 391 F. 3d 949, 954 (8th Cir. 2004). As one court described, ***Daubert***'s "'helpfulness' standard requires a *valid scientific connection* to the pertinent inquiry as a precondition to admissibility." ***Perry v. Novartis Pharm. Corp.***, 564 F. Supp. 2d 452, 459 (E.D. Pa. 2008) (quoting ***Daubert***, 509 U.S. at 591-92). "This helpfulness requirement . . . is, in the end, "the ultimate touchstone of admissibility." ***Perry***, 564 F. Supp. 2d at 459 (citation omitted).

¶168. In commenting on the "controversial subject" of expert eyewitness-identification testimony, the Sixth Circuit espoused the following concerns, shared by most courts across the county:

> Trial courts have traditionally hesitated to admit expert testimony purporting to identify flaws in eyewitness identification. Among the reasons given to exclude such testimony are [1] that the jury can decide the credibility issues itself, [2] that experts in this area are not much help and largely offer rather obvious generalities, [3] that trials would be prolonged by a battle of experts, and [4] that such testimony creates undue opportunity for confusing and misleading the jury.

United States v. Langan, 263 F. 3d 613, 621 (6th Cir. 2001) (upholding the exclusion of expert eyewitness-identification testimony) (internal citations omitted). The Sixth Circuit further emphasized the concern that the testimony "would not have been based on any personal knowledge of [the witness], but rather on his general knowledge about the type of circumstances in which she had found herself," ultimately concluding that "the hazards of eyewitness identification are within the ordinary knowledge of most lay jurors." ***Id.*** at 623-24.

---

as superfluous." ***United States v. Kime***, 99 F. 3d 870, 884 (8th Cir. 1996).

¶169. The Second Circuit addressed the lack of scientific certainty associated with such testimony and held:

> The expert here was *ignorant of the conditions* under which Castellon identified Cinnante's photograph and his proposed *testimony basically consisted of general pronouncements about the lack of reliability of eyewitness identification*, particularly cross-racial identification. He also acknowledged that many of his conclusions coincided with common sense. . . . [W]e do not think that this expert's proffered testimony would have done anything other than to *muddy the waters*.

United States v. Serna, 799 F. 2d 842, 850 (2d Cir. 1986), *abrogated on other grounds by* ***United States v. DiNapoli***, 8 F. 3d 909 (2d Cir. 1993) (upholding the exclusion of expert eyewitness-identification testimony) (emphasis added).

¶170. The Eighth Circuit has time and again stated that we are "especially hesitant to find an abuse of discretion [in denying expert eyewitness-identification testimony] unless the government's case against the defendant rested exclusively on uncorroborated eyewitness testimony." ***United States v. Villiard***, 186 F. 3d 893, 895 (8th Cir. 1999) (citing ***United States v. Kime***, 99 F. 3d 870, 885 (8th Cir.1996) (quoting ***United States v. Blade***, 811 F. 2d 461, 465 (8th Cir. 1987))). As discussed *supra*, there is not only additional eyewitness testimony, there is substantial corroborative evidence in the case *sub judice*.

¶171. The Ninth Circuit also has found such "general" testimony unreliable. ***United States v. Poole,*** 794 F. 2d 462, 468 (9th Cir. 1986) (affirming the exclusion of expert eyewitness-identification testimony on the grounds that "the court believed that general testimony, not tied to the specific testimony in the case, would not be helpful to the jury"). Such generalized testimony, without more, fails to satisfy our admissibility standards.

¶172. The Supreme Court of Louisiana has ruled such testimony per se inadmissible.[25] ***State v. Young***, 35 So. 3d 1042, 1050 (La. 2010). In ***Young***, a gunman attempted to rob two victims while they were pumping gas. The gunman shot and killed one victim and injured the other. A woman sitting in a nearby car witnessed the attempted robbery and shootings. She described the man to police and later picked the defendant out of a lineup. The trial court allowed the defense to introduce an expert in eyewitness identification. The Louisiana Supreme Court reversed and held that allowing the eyewitness-identification expert to testify was error. The court held that "[t]here is still a compelling concern that a potentially persuasive expert testifying as to the generalities of the inaccuracies and unreliability of eyewitness observations, that are already within a juror's common knowledge and experience, will greatly influence the jury more than the evidence presented at trial." ***Id.*** "By merely being labeled as a specialist in eyewitness identifications, an expert has the broad ability to mislead a jury through the 'education' process into believing a certain factor in an eyewitness identification makes that identification less reliable than it truly is." ***Id.*** The court further held:

> Moreover, expert testimony on eyewitness identifications can be more prejudicial than probative because it focuses on the things that produce error without reference to those factors that improve the accuracy of identifications. The expert testimony presumes a misidentification, in the absence of presenting factors which support the validity of the identification. This fosters a disbelief of eyewitnesses by jurors.

[25]This is a state in which Neuschatz proffered he has testified. No reported cases or unreported cases exist on Westlaw that confirm Neuschatz testified in Louisiana before the blanket rule was adopted.

Id. Additionally, the court ruled that it was "reluctant to allow experts to offer opinions on the credibility of another witness for fear of the expert invading what is considered the exclusive province of the jury." ***Id.*** Finally, the court stated "[t]hese considerations are especially compelling in cases involving eyewitness identifications where any alleged deficiencies could easily be highlighted through effective cross-examination and artfully crafted jury instructions." ***Id.***

¶173. The Pennsylvania Supreme Court likewise affirmed the exclusion of expert eyewitness-identification testimony, holding that "[s]uch testimony would have given an unwarranted appearance of authority as to the subject of credibility, a subject which an ordinary juror can assess." ***Commonwealth. v. Simmons***, 662 A. 2d 621, 631 (Pa. 1995).

¶174. The Tenth Circuit has held that generalized testimony on eyewitness identification would not assist the jury. ***United States v. Rodriguez-Felix***, 450 F. 3d 1117, 1125 (10th Cir. 2006) ("expert psychological testimony is unlikely to assist the jury").

¶175. We have surely held no different. Expert testimony on eyewitness identification improperly invades the province of the jury. *See* ***Hobgood v. State***, 926 So. 2d 847 (Miss. 2006) (holding that an expert's comment on a witness's credibility "is at best of dubious competency"). The jury is the sole judge of the weight of the evidence and the credibility of witnesses. ***Bateman v. State***, 125 So. 3d 616, 624 (Miss. 2013).

¶176. ***United States v. Moore*** and ***State v. Copeland***, relied upon by the Coleman dissent, are clearly distinguishable. ***Moore*** actually upheld the *exclusion* of this kind of testimony. ***United States v. Moore***, 786 F. 2d 1308, 1312 (5th Cir. 1986) ("in the present case we do not find that the district court abused its discretion in refusing to admit this evidence"). In

Moore, the witness based her identification on having seen the defendant for only five to six seconds. ***Moore***, 786 F. 2d at 1311. Even so, the district court excluded the testimony, stating that the "probativeness of eyewitness testimony was not a matter which needed evaluation by experts." ***Id.*** The Fifth Circuit affirmed the district court's exclusion, stating "[w]e have found no federal cases which hold that a trial court abused its discretion by excluding expert eyewitness-identification testimony," and "there is no federal authority for the proposition that such testimony *must* be admitted." ***Id.*** at 1312-1313 (emphasis original). While the ***Copeland*** court held that the trial court erred in refusing to admit expert eyewitness-identification testimony, it emphasized that eyewitness testimony was the only link to the defendant's participation in the murder. ***State v. Copeland***, 226 S.W. 3d 287, 303 (Tenn. 2007). Moreover, the eyewitness testified that she saw the defendant for only "two full seconds." ***Id.*** at 291. The case *sub judice* is easily distinguishable, as there was more than one eyewitness and other substantial corroborating evidence, direct and circumstantial, as well as Corrothers's confession. Moreover, Tonya and Josh had a lengthy time to observe Corrothers, not two-to-six seconds.

G. Cross-examination and jury instructions best expose flaws in eyewitness testimony.

¶177. Any deficiency that may exist in an eyewitness's identification is best exposed through skillful cross-examination. As Justice Kitchens recently wrote, and the United States Supreme Court has long recognized, cross-examination is the "greatest legal engine ever invented for the discovery of truth." ***Johnson v. State***, 2010-CT-01978-SCT, 2014 WL 971542 (Miss. Mar. 13, 2014) (quoting ***Lee v. Ill.***, 476 U.S. 530, 540, 106 S. Ct. 2056, 90 L.

Ed. 2d 514 (1986)); *see also*, 2 John H. Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* § 1367, 1697 (1904) ("cross-examination is our greatest invention for truth seeking.") "[S]killful cross-examination provides an equally, if not more, effective tool for testing the reliability of an eyewitness at trial." ***United States v. Rodriguez-Felix***, 450 F. 3d 1117, 1125 (10th Cir. 2006) (holding that the trial court did not err in excluding expert testimony on the reliability of eyewitness identifications). "We adhere to the position that skillful cross examination of eyewitnesses, coupled with appeals to the experience and common sense of jurors, will sufficiently alert jurors to specific conditions that render a particular eyewitness identification unreliable." ***United States v. Christophe***, 833 F. 2d 1296, 1300 (9th Cir. 1987) (upholding exclusion of expert eyewitness-identification testimony). "[T]he problems of perception and memory can be adequately addressed in cross-examination and . . . the jury can adequately weigh these problems through common-sense evaluation." ***United States v. Smith***, 122 F. 3d 1355, 1357 (11th Cir. 1997) (citation omitted) (upholding the exclusion of expert eyewitness-identification testimony). In the case *sub judice*, Corrothers's attorney skillfully cross-examined Josh on his identification of Corrothers. The trial court's decision to reject Neuschatz's testimony did not deprive Corrothers of an opportunity to present a complete defense.

¶178. Jury instructions further inform jurors to carefully consider the evidence and apply common sense and sound judgment to every piece of evidence, including eyewitness testimony. Expert eyewitness-identification testimony used to usurp the jury's role and offer generalized data obtained from controlled studies, contrary to the testimony adduced at trial, should not be tolerated.

H. Neuschatz's proffer runs afoul of the ecological fallacy.

¶179. One commentator has identified the "ecological fallacy" as a basis for courts rejecting expert eyewitness-identification testimony. Matthew J. Reedy, *Witnessing the Witness: The Case for Exclusion of Eyewitness Expert Testimony*, 86 Notre Dame L. Rev. 905, 925 (2011). The "ecological fallacy" he described is as follows:

> [T]he ecological fallacy is a statistical error of interpretation where a particular characteristic of the population as a whole is applied to an individual. Rather than providing valuable insight into the actions of an individual, "the only reasonable assumption is that an ecological correlation is almost certainly not equal to its corresponding individual correlation."

Id. In the context of eyewitness-identification testimony, "[p]resenting testimony that humans typically have a hard time remembering faces under conditions of great stress or in the presence of a weapon *tells the jury nothing about the individual case of each witness* in the trial. *Id.* (emphasis added). "[S]uch expert testimony runs the very real risk that juries will take that testimony to mean precisely what it does not–that the witnesses they are asked to evaluate are identically susceptible to frailties of memory." *Id.* Finally, "while the expert is technically precluded from speaking directly about any particular witness, they are doing exactly that–their testimony is akin to asking the jury to consider an ecologically fallacious conclusion." *Id.*

¶180. In the case *sub judice*, Neuschatz's use of control-group surveys to attack Josh's credibility equates to an ecological fallacy. Neuschatz swore that eyewitness identification is not the main focus of his studies. Nevertheless, Neuschatz attempted to pass off others' works in the field of eyewitness identification as proof of his expertise. Neuschatz testified

that his survey was based on "video events" shown to a control group.[26] The control group members were not informed they had witnessed a crime on the video until after viewing it. Josh knew he was witnessing multiple crimes. The control group did not include actual victims of crimes. It is unreasonable to extrapolate the findings from a controlled group of persons, whose life experiences are unknown, who did not witness an actual crime, were under no stress, and were not exposed to a live weapon.

¶181. Neuschatz's extrapolation of statistics from his participants and applying those statistics to one individual witness (Josh) run afoul of the ecological fallacy proposition (*see* discussion *infra*). If fifty percent of the control groups misidentified the suspect, that means that fifty percent accurately identified the suspect. Neuschatz's proffer does not get the jury any closer to knowing into which category Josh would fall (the accurate or inaccurate category). Thus, it does not assist the jury, the trial judge, or this Court in determining whether or not Josh's identification is reliable. As ruled by the trial judge, this is exactly the sort of jury confusion our rules of evidence seek to avoid. Compare to "[p]eople committing premeditated murders are almost twice as likely as impulsive murderers to have a history of mood disorders or psychotic disorders – 61 percent vs. 34 percent."[27] Would we allow evidence of a defendant's mood disorders when he was younger to show he is twice as likely

---

[26]The control group was composed of two distinct groups. One group consisted of sixty senior participants recruited from retirement communities with a mean age of 74.5 years. The other group consisted of sixty college students with a mean age of nineteen years.

[27]Robert Hanlon, *Neuropsychological and Intellectual Differences Between Types of Murderers,* Criminal Justice and Behavior (May 2, 2013).

to have committed the premeditated murder he is on trial for? Of course not. Such evidence runs afoul of our rules of evidence.

¶182. Neuschatz not only sought to encourage the jury to consider an ecologically fallacious conclusion, he proffered opinions regarding Josh's individual memory, reliability, and identification accuracy, notwithstanding that opinions directed to an eyewitness's reliability and accuracy are impermissible.[28]

¶183. In closing, as to Issue I, the few jurisdictions that admit such evidence permit it only in very narrowly defined instances, e.g., single eyewitness, with no other corroborating evidence. *See* ***United States v. Villiard***, 186 F. 3d 893, 895 (8th Cir. 1999) ("we are especially hesitant to find an abuse of discretion in denying expert eyewitness identification testimony unless the government's case against the defendant rested exclusively on uncorroborated eyewitness testimony"). The case *sub judice* is not one of these narrow cases. As such, I would affirm the discretionary decision of a learned trial judge, who passed his test. Neuschatz flunked.

II. Whether the trial court erred in neither excluding in-court identification of Corrothers nor admitting expert testimony when the evidence established that the in-court identifications were tainted by improper pre-trial identification procedures.[29]

---

[28]Elsewhere, he opined the opposite in his proffer.

[29]The issue as presented by Corrothers (Appellant's Brief at xii) and the State (Appellee's Brief at 4), *verbatim et literatim*.

¶184. Neuschatz also proffered a criticism of the photo lineups presented to Josh, previously ruled admissible by the trial judge.[30] Such generalized expert testimony in limited circumstances may be pertinent at a hearing on a motion to suppress, but once the court has ruled photo-lineup evidence is admissible, offering such testimony at trial encroaches upon a legal issue already determined and usurps the trial judge's discretionary authority. The admissibility of photo-lineup evidence, *vel non*, is a *legal* determination made by the trial judge, considering the totality of the circumstances. *See* ***Gray v. State***, 728 So. 2d 36, 68 (Miss. 1998). In other words, prior to allowing any testimony regarding photo lineups or in-court identifications, the trial court has considered all evidence on the issue presented and determined that the photo lineup meets the proper *legal* threshold, or it does not. To allow a psychologist to come behind the trial judge and cast aspersions upon evidence already deemed admissible, based on the guidelines proposed by Division 41 of the American Psychological Association (also known as the American Psychological Law Society) is improper, unless we decide to turn the keys of the courthouse over to paid experts and allow them to determine the facts (jury's role) and pronounce the law (judge's role).

III: Whether Corrothers's conviction must be reversed due to unconstitutional racial discrimination by the prosecution in the

---

[30]Although Neuschatz asserted that "the Department of Justice has established four guidelines for compiling and administering lineups," (Coleman Dis. Op. ¶ 230), Neuschatz neglected to mention in his live proffer or in his report that the authority he cites as support states that the "opinions or points of view expressed in this document represent a consensus of authors and *do not necessarily reflect* the official position of the U.S. Department of Justice." *See* National Institute of Justice, *Eyewitness Evidence, A Guide for Law Enforcement* (October 1999) (emphasis added). Any testimony that these "guidelines" are endorsed by the Department of Justice is misleading, much as his general acceptability testimony is misleading, much as his factually contradictory testimony is misleading to the jury.

jury selection process and other jury selection errors by the trial court.[31]

¶185. The record does not reveal any evidence of the State "engag[ing] in purposeful discrimination," a requirement for finding a ***Batson***[32] violation. ***Birkhead v. State***, 57 So. 3d 1223, 1229 (Miss. 2011) ("must make a factual finding to determine if the prosecution engaged in purposeful discrimination.").

¶186. During jury selection, the State tendered twelve potential jurors, using nine strikes along the way, including five strikes against the now-complained-of persons. No claim of a pattern of purposeful discrimination was advanced at the end of the tender. Nor did the trial judge discern any pattern of purposeful discrimination in the State's strikes. The second juror tendered by the State was an African American – Ashley Gates. Corrothers then exercised six of his strikes, leaving the State to tender six additional jurors. After the State tendered six additional jurors, Corrothers again raised no discriminatory concerns. Corrothers then struck three of the six newly tendered persons, leaving the State to tender three more jurors. The State tendered one juror, struck two with its next two strikes, leaving the State out of strikes. The Court added the next two jurors, Mildred Whitaker[33] and

---

[31]The issue as presented by Corrothers (Appellant's Brief at xii), *verbatim et literatim*.

[32]***Batson v. Kentucky***, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

[33]Corrothers on appeal argues that the State impermissibly struck W.C. Brim on the grounds that he had family members who had been charged with a crime, yet "allowed white female venire member Mildred Whitaker . . . to be seated despite the fact that she . . . [had] an uncle who had served for robbery and a cousin presently in custody." This argument is disingenuous. The State did not choose Whitaker. The State was out of strikes when Whitaker was tendered, as evidenced by the record:

> BY THE COURT: . . . That means we have ten impaneled. The State is out of strikes that tenders Mildred Whitaker and Michael Dewitt to the defendant.

Michael Dewitt, to complete a twelve-person tender. Corrothers accepted Whitaker without objection, although he had strikes remaining. The State and Corrothers then selected three alternates.

¶187. Following juror selection, the judge discussed logistical matters related to bussing the fifteen jurors to Lafayette County and hotel accommodations. The judge was attempting to arrange the fifteen to be sent "into the grand jury room . . . to give [the jury] instructions." After the logistical discussion, Corrothers's counsel then stated "before we go, for the record on the I guess my ***Batson*** challenges." The trial judge stated that "the motion should be made as soon as a discriminatory pattern is detected so that the court can take control of the situation at the time . . . and deal with the strikes as they occur and make whatever corrections can be made to the discriminatory pattern if there is one. . . . I'm handicapped now because I can't do that. . . . [T]he court's opinion is that there has not been a prima facias case made. . . . [b]ut I always think that it's a good idea to invite the opponent of the motion to make their record on their reasons and I would invite and ask the State to do so at this time."

¶188. The State then responded with race-neutral reasons for each person complained of by Corrothers as discriminatorily struck. We find nothing to suggest a pattern of "purposeful discrimination." ***Birkhead***, 57 So. 3d at 1229. Carole Ray's questionnaire supports the State's race-neutral reason that "she did not understand some of the questions on the questionnaire." Betty Collins's questionnaire supports the State's race-neutral reason of

---

> Everybody agree?
> BY MRS. USSERY: Yes, Your Honor.
> BY THE COURT: Whitaker 11, Dewitt 12.

excluding her because "she disliked people who sell drugs." ("I am against people that sell drugs and steal.") Phyllis Berry and W.C. Brim indicated their opposition to the death penalty on their questionnaires, supporting the State's race-neutral reason for excluding them.[34] The State struck every person, including Caucasians, who indicated an opposition to the death penalty on their questionnaires.[35]

¶189. No error can be attributed to the trial court on this issue, as Corrothers failed to offer any rebuttal, to any of the persons identified, other than Brim, and the rebuttal offered as to Brim was unpersuasive to the trial judge.[36] This issue has no merit, as the record evidences no pattern of purposeful discrimination. A trial judge cannot be held in error for matters not presented to him or her. ***Neider v. Franklin***, 844 So. 2d 433, 436 (Miss. 2003). Ultimately, the jury selected reflected the demographics of the area.[37]

PIERCE, J., JOINS THIS OPINION. LAMAR AND CHANDLER, JJ., JOIN THIS OPINION IN PART.

KING, JUSTICE, DISSENTING:

---

[34]Question 29 on the Juror Information Questionnaire asked "[w]hat do you think about the death penalty?" Both Berry and Brim circled "[g]enerally [a]gainst" on Question 29.

[35]S4 (Rebbeca Williams), S6 (Phyllis Berry), S7 (W.C. Brim), S8 (Deidra Hereford), S9 (Lane McClellan), and S11 (Mark Williams).

[36]Although Corrothers offered rebuttal to the first race-neutral reason for striking Brim, Corrothers offered no rebuttal for the second race-neutral reason for striking Brim because he was "against the death penalty."

[37]The jury was twenty-five percent African American. African Americans compose twenty-eight percent of the population of Lee County. http://quickfacts.census.gov/qfd/states/28/28081.html (last visited June 25 2014).

¶190. Because the trial court failed to fulfill its responsibilities on the ***Batson*** objections, and because I believe the record reflects merit to Corrothers's ***Batson*** claim, I dissent.

1. *Batson* Procedure in the Trial Court

¶191. In order to prevent the use of peremptory strikes on the basis of race, the United States Supreme Court in ***Batson*** invoked a three-step procedure. ***Batson v. Kentucky***, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). In the first step, the party who objects to a peremptory strike must establish a prima facie case of purposeful discrimination. ***Id.*** at 96, 106 S. Ct. 1712. This step entails three elements:

> (1) To establish such a case, the defendant first must show that he is a member of a cognizable racial group . . . and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. (2) Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." . . . (3) Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.

Id., 106 S. Ct. 1712 (citations omitted).

¶192. Once the opponent of the strike establishes a prima facie case, the second step shifts the burden to the State to provide a race-neutral explanation for the use of the challenged peremptory strike. ***Id.*** at 97, 106 S. Ct. 1712. In the third ***Batson*** step, the trial court determines whether the defendant has established purposeful discrimination. ***Id.*** at 98, 106 S. Ct. 1712.

¶193. In today's case, once Corrothers presented his ***Batson*** challenge – which is quoted in full in the majority opinion – the trial court found that a prima facie case had not been

established. Despite this finding, the trial court invited the State to present race-neutral reasons for its peremptory strikes. The trial court stated:

> Well, first let me say this before I ask the State to respond, you know, it's my understanding that in order to make a ***Batson*** challenge that the motion should be made and I may have this wrong but that the motion should be made as soon as a discriminatory pattern is detected so that the court can take control of the situation at that time. You know, and deal with the strikes as they occur and make whatever corrections can be made to the discretionary pattern if there is one. And I'm handicapped now because I can't do that, number 1.[38] But number 2, the court's opinion is that there has not been a prima facie case made. However, I could be wrong on both points one and point two. I don't have any authority that this is appropriate to do but I always think that it's a good idea to invite the opponent of the motion to make their record on their reasons and I would invite and ask the State to do so at this time.

Because the focus of ***Batson*** is to ensure peremptory strikes are not exercised on the basis of race, if the proponent of a strike provides race-neutral reasons for the strike without the trial court finding a prima facie case, the requirement of a prima facie showing is rendered moot and the trial court must determine if the proffered reasons for the strikes are in fact race-neutral. ***Manning v. State***, 735 So. 2d 323, 339 (Miss. 1999) ("When the prosecution gives race-neutral reasons for its peremptory strikes, the sufficiency of the defendant's prima

---

[38] The trial judge indicated his belief that he had no ability to address any patterns of discrimination in the jury-selection process unless they were immediately called to his attention. Such a position is inconsistent with the responsibility of the trial court to protect both the parties and veniremen from unlawful discrimination. *See* ***Booker v. State***, 5 So. 3d 356, 359 (Miss. 2008) (evaluating ***Batson*** challenge which was made, in part, post-conviction); *see also* ***Flowers v. State***, 947 So. 2d 910, 937 (Miss. 2007) ("[T]he trial court has a duty to look at the State's use of peremptory challenges *in toto*."). The parties exercised their respective challenges in chambers. And, at the time Corrothers raised his ***Batson*** objection, the jurors selected had neither been notified nor sworn. Beyond question, at that point, the trial court still had full control of the jury-selection process. It could then and there have corrected any unlawful discrimination in the selection process by disallowing the discriminatory challenges and placing those persons back into their previous places on the venire list.

facie case becomes moot."); ***Mack v. State***, 650 So. 2d 1289, 1298 (Miss. 1994). *See also* ***Wilson v. Strickland***, 953 So. 2d 306, 312 (Miss. Ct. App. 2007) ("Since [counsel] gave alleged race-neutral reasons without objecting to the [trial court's] request, his argument on appeal that [plaintiff] did not meet his prima facie showing of intentional discrimination is moot.").

¶194. Despite the trial court not finding a prima facie case, the State in today's case provided race-neutral reasons for its peremptory strikes of the five jurors addressed in Corrothers's ***Batson*** challenge – Carol Ray, Betty Collins, Phyllis Berry, W. C. Brim, and Deidre Hereford. After the State addressed each of the five challenged jurors, Corrothers rebutted the State's reasons for striking Brim; but he did not address the other four challenged jurors. Once the defense addressed Brim, the trial court asked the defense if they had "anything else," and the defense responded that they did not:

> By the Court: Anything else for the record?
>
> By Mr. Rushing: No, Your Honor.
>
> By the Court: I told you what I'm doing. Let's call the jury.

¶195. The trial court in today's case failed to perform step three of the ***Batson*** analysis – determining whether the defendant has established purposeful discrimination. ***Id.*** at 98, 106 S. Ct. 1712. This determination hinges on whether the facially nondiscriminatory reasons proffered by the State are credible or are merely pretextual for discrimination. ***Mack***, 650 So. 2d at 1298. And, typically during this step, "the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed." ***Snyder v. Louisiana***, 522 U.S. 472, 485, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008) (citing

Hernandez v. New York, 500 U.S. 352, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991)). Further, we have held that, when presented with a ***Batson*** challenge, "it is necessary that trial courts make an on-the-record, factual determination, of the merits of the reasons cited by the State for its use of peremptory challenges against potential jurors." ***Hatten v. State***, 628 So. 2d 294, 298 (Miss. 1993).

¶196. The trial judge indicated that allowing the State to proffer race-neutral reasons for its strikes was merely for reasons of form, and it is clear from the record that the trial judge began the ***Batson*** hearing with no intention of taking any action. This is even more apparent by the trial court's incorrect assertion that Corrothers's ***Batson*** objection was untimely. Further, the trial judge admitted that he "did not have the demographic or the races of the jurors before me." Instead of analyzing the State's proffered race-neutral reasons and the totality of the circumstances, the trial judge in today's case referred back to his initial findings – which are quoted above – relating to the timing of Corrothers's motion and the prima facie case. Because the trial court failed to perform step three of ***Batson***, this Court should reverse the trial court on this issue.

2. Procedural Bar

¶197. This Court is fond of saying it reviews death penalty cases with heightened scrutiny. ***Batiste v. State***, 121 So. 3d 808, 828-29 (Miss. 2013); ***Grayson v. State***, 118 So. 3d 118, 125 (Miss. 2013); ***Fulgham v. State***, 46 So. 3d 315, 321 (Miss. 2010); ***Moffett v. State***, 49 So. 3d 1073, 1079 (Miss. 2010); ***Gillett v. State***, 56 So. 3d 469, 479-80 (Miss. 2010). The majority and special concurring opinions argue that Corrothers's ***Batson*** challenge is, in part, procedurally barred. Because Corrothers provided rebuttal only for Brim during the ***Batson***

hearing, the majority and special concurring opinion find that he is procedurally barred from challenging the trial court's findings with respect to the four other challenged jurors. Likewise, the majority finds that Corrothers cannot challenge on appeal the State's striking of three jurors who were not specifically mentioned during the ***Batson*** hearing. The suggestion that the ***Batson*** objection is barred from consideration by this Court on appeal appears to be a heightened search for a procedural bar in a death penalty case, instead of an application of the heightened scrutiny it requires under the law.

¶198. For the reasons discussed below, I disagree.

¶199. When presented with a ***Batson*** challenge, the trial court has "a duty to look at the State's use of peremptory challenges *in toto*." ***Flowers***, 947 So. 2d at 937. *See also* ***Miller-El v. Dretke***, 545 U.S. 231, 252, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005) (***Batson*** "requires the judge to assess the plausibility of [the State's reasons] in light of all evidence with a bearing on it."); ***Stewart v. State***, 662 So. 2d 552, 559 (Miss. 1995) ("the trial court must consider all the relevant circumstances, *such as the way prior peremptory strikes have been used* and the nature of the questions posed on voir dire.") (emphasis added). Although Corrothers did not specifically mention during the ***Batson*** hearing three jurors that the State struck through the use of peremptory strikes, these strikes are part of the relevant circumstances that the trial court must consider. As such, Corrothers's argument related to these strikes is not procedurally barred from consideration by this Court.

¶200. Further, Corrothers is not procedurally barred from contesting the State's strikes of the four jurors for whom he did not provide rebuttal during the ***Batson*** hearing. Although the defendant *may* provide rebuttal, ***Batson*** does not *require* the opponent of a peremptory

strike to rebut the opponent's proffered race-neutral basis. Under ***Batson***'s three-step procedure, once the State has presented race-neutral reasons to rebut the defendant's prima facie case, the trial court should determine whether the defendant has established purposeful discrimination. ***Batson***, 476 U.S. at 97-98, 106 S. Ct. 1712.

¶201. This Court's mistaken application of procedural bar to ***Batson*** issues has been addressed previously. *See* ***Pitchford v. State***, 45 So. 3d 216, 266-68 (Miss. 2010) (Graves, J., dissenting). As further addressed in the dissenting opinion in ***Pitchford***, 45 So. 3d at 267, this Court's application of the procedural bar has stemmed either from cases that did not find that the procedural bar should apply to this issue or from pre-***Batson*** cases.

¶202. Further, considering the gravity of the rights protected by ***Batson*** – the defendant's right to a fair trial and a juror's right not to be excluded on account of race – applying a procedural bar is inappropriate. We are "under an affirmative duty to enforce the . . . policies embodied in [the] prohibition" on the discrimination in the selection of jurors. ***Powers v. Ohio***, 499 U.S. 400, 416, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991). For these reasons, I disagree with the application of the procedural bar to this issue.

3. Merits of Corrothers's *Batson* Claim

¶203. A review of the record reveals that Corrothers's ***Batson*** claim has merit.

¶204. The jury pool in today's case consisted of twelve African Americans, eight of whom were struck by the State; and thirty-two whites, seven of whom were struck by the State. While African Americans represented twenty-seven percent of the jury pool, they represented sixty-five percent of the State's strikes. Moreover, just as this Court has said a defendant is not entitled to a jury that reflects area demographics, the fact that it may reflect area

demographics does not establish nondiscrimination. *See* ***Simon v. State***, 688 So. 2d 791, 806 (Miss. 1997).

¶205. Contrary to the inference in the special concurring opinion, the mere fact that the State accepted some African Americans as jurors while rejecting others does not mean there has been no discrimination. This is especially true where the reasons offered for the strikes are flimsy. In this case, the State struck twice as many African Americans (eight) as it accepted (four). It should be noted that the fourth African American (Mark Scales, who was seated as Alternate Three) was seated after the State had exercised all of its peremptory strikes.

¶206. ***Batson*** protects both the defendant and prospective jurors from discrimination. ***Powers***, 499 U.S. at 413, 111 S. Ct. 1364 ("Both the excluded juror and the criminal defendant have a common interest in eliminating racial discrimination from the courtroom."). Since the prospective jurors cannot challenge the proceedings, the trial court has a duty to look for patterns of discrimination. ***Miller-El***, 545 U.S. at 252, 125 S. Ct. 2317; ***Batson***, 476 U.S. at 97-98, 106 S. Ct. 1712. It appears in today's case that the trial court failed in that.

¶207. The State claimed that Carole Ray failed to understand some of the questions on the jury questionnaire. There is no indication of which ones it is claimed that she did not understand. *See* ***Flowers***, 947 So. 2d at 924 ("lack of support in the record for the reason given for a peremptory strike has been identified as an indicator of pretext"). Nor does there appear to have been any effort by the State in voir dire to identify and clarify any of Ray's responses. *See* ***Miller-El***, 125 S. Ct. at 2328 (failing to conduct meaningful voir dire on subject on which State allegedly is concerned suggests that "explanation is a sham and a pretext for discrimination"). In fact, the State did not ask Ray any questions during voir dire.

Further, Corrothers has identified several similar white venire members who did not complete the juror questionnaire correctly and were not challenged by the State. *See* ***Flowers***, 947 So. 2d at 917 ("the presence of unchallenged jurors of the opposite race who share the characteristic given for the basis of the challenge" is suspect). Justin Norwood – a white juror who was tendered by the State – failed to complete and turn in a questionnaire. If the State was concerned about a juror's ability to understand the questions, surely a juror's failure to complete the questionnaire would raise red flags. While failure to understand the questionnaire may be a facially race-neutral basis for a strike, the trial court – and this Court – must look beyond the proffered race-neutral reasons and examine the totality of the circumstances to determine if the proffered reason is discriminatory. When the appropriate review is applied to this case, the State's reason for striking Ray becomes suspect.

¶208. The State struck W.C. Brim because of the belief that a member, or members, of his family had been charged with a crime. Corrothers has identified several similarly situated white jurors who were accepted, while Brim was not. *See* ***id.*** For example, Justin Norwood stated that he had an uncle who was convicted and served time for a crime; but the State tendered Norwood as a juror. Further, Brim stated during voir dire that these convictions would not affect his ability to serve as an impartial juror.

¶209. Moreover, the State struck Brim, Phyllis Berry, and Deidra Hereford because they stated on their questionnaires that they were generally against the death penalty. The special concurring opinion states that "[t]he state struck every person, including Caucasians, that indicated an opposition to the death penalty on their questionnaire." This statement does not support the contention that discrimination did not occur in today's case. As mentioned

above, Justin Norwood – a white juror tendered by the State – failed to complete a juror questionnaire. As such, his views on the death penalty cannot be compared to those of Brim, Berry, and Hereford. Moreover, the portion of the questionnaire for Joseph Putt – another white juror tendered by the State – which addresses the juror's views on the death penalty is not included in the record for today's case. Again, it cannot be said that Putt's views on the death penalty differ from those of Brim, Berry, and Hereford.

¶210. Clearly, the State's excuses for rejecting African Americans as jurors appear to be pre-textual and discriminatory. This, along with the failure of the trial court to honor its responsibilities are sufficient reason to reverse and remand this matter for a new trial.

¶211. Additionally, I join Justice Coleman's opinion that it was error to exclude the testimony of Dr. Neuschatz.

KITCHENS, J., JOINS THIS OPINION.

COLEMAN, JUSTICE, DISSENTING:

¶212. I agree with the majority's disposition of all issues with the exception of Issue I, concerning the proffered expert testimony of Dr. Neuschatz. Instead, I would hold that the trial court abused its discretion when it excluded Dr. Neuschatz's expert testimony on eyewitness identification without the analysis mandated by ***McLemore***[39] and ***Daubert***[40] on the grounds that it would be unhelpful to the jury. Further, I would hold that – based on the evidence existing in the record before us – Dr. Neuschatz's proffered testimony is both relevant and reliable, meeting the controlling standards of Mississippi Rule of Evidence 702,

---

[39]***Miss. Transp. Comm'n v. McLemore***, 863 So. 2d 31, 36 (¶ 13) (Miss. 2003).

[40]***Daubert v. Merrell Dow Pharms., Inc.***, 509 U.S. 579 (1993).

McLemore, and ***Daubert***. Similarly, I also would hold that the trial court improperly excluded Dr. Neuschatz's testimony pertaining to the suggestive nature of photographic lineups. Accordingly, I would reverse Corrothers's convictions and sentences and remand the case for a new trial in which the trial court properly analyzes Dr. Neuschatz's proffered testimony under Mississippi Rules of Evidence 403 and 702 as well as conducts a full ***Daubert*** analysis.

I. Whether the trial court abused its discretion and erred as a matter of law in excluding the testimony of a psychologist with expertise in memory and cognition concerning the reliability of eyewitness identification procedures and testimony and photographic lineups in this case.

A. Reliability of Eyewitness Identification

¶213. The defense attempted to call Dr. Jeffery Neuschatz, a cognitive psychologist, as an expert in memory and cognition related to eyewitness identification. Dr. Neuschatz has a Ph.D. degree in cognitive psychology and is a tenured professor at the University of Alabama at Huntsville. He has done a significant amount of research and has performed specific studies in the field of eyewitness identification, resulting in numerous publications. He has testified as an expert in the field in courts in Tennessee, Kentucky, and Louisiana, as well as in military courts in Florida and Virginia.

¶214. The State objected to Dr. Neuschatz testifying as an expert, arguing that the proposed testimony did not rely on proven scientific principles, that it was not proven to be generally accepted, and that it would not assist the trier of fact. The trial court did not permit Dr. Neuschatz to testify before the jury, but a proffer of his testimony outside the presence of the jury was allowed. Dr. Neuschatz's proffered testimony covered two areas – psychological

factors that affect the accuracy of eyewitness identifications and safeguards that should be employed when administering photo lineups.

¶215. Dr. Neuschatz discussed psychological factors that research has shown to affect adversely the accuracy of eyewitness identifications. He explained that highly stressful situations impair a person's memory. In a phenomenon known as weapon focus, the presence of a weapon also impairs memory because attention is drawn to the weapon as opposed to the person holding the weapon. Another theory is called "unconscious transfer," whereby a witness attributes the wrong person to the situation, such as identifying an innocent bystander as the culprit. Dr. Neuschatz would have testified that cross-racial identification lessens the likelihood of an accurate identification, because people tend to have difficulty identifying someone of a different race. Other issues that affect the accuracy of an eyewitness identification are the length of time the witness saw the person, whether the area was well lit, and whether the witness had seen the person before. Dr. Neuschatz would have testified that memories could have been adversely impacted by several of these factors. The victims, including Josh, were in a high stress situation and had witnessed the murder of two close family members. The assailant was wielding a gun, making "weapon focus" a possible problem. The assailant was a black male, and the Clark family was white, thus, the cross-racial identification could have had added difficulty to their identifications.

¶216. Analysis of the admissibility of expert testimony should begin with Mississippi Rule of Evidence 702:

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

> may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Miss. R. Evid. 702. The United States Supreme Court has further articulated the standard under which courts are to determine the admissibility of testimony of expert witnesses. *See* ***Daubert v. Merrell Dow Pharms., Inc.***, 509 U.S. 579 (1993). "If the expert's testimony involves scientific, technical, or any other special knowledge, the trial judge – as gatekeeper – must determine whether the expert's opinions will help the trier of fact determine the issue in question." ***Hill v. Mills***, 26 So. 3d 322, 329 (¶ 25) (Miss. 2010) (citing ***Daubert***, 509 U.S. at 589-91). The objective of the ***Daubert*** gatekeeping requirement "is to ensure the reliability and relevancy of expert testimony." ***Kumho Tire Co., Ltd. v. Carmichael***, 526 U.S. 137, 152 (1999).

¶217. Under ***Daubert***, for expert opinions to be admissible, "the expert's testimony must be supported and based on what is known, and the expert must have knowledge that is more than subjective or unsupported speculation." ***Hill***, 26 So. 3d at 329 (¶ 26). The ***Daubert*** Court provided the following "non-exhaustive, illustrative list" of factors for trial courts to consider in determining reliability of expert testimony: (1) whether the expert's theory can be or has been tested; (2) whether it has been subjected to peer review and publication; (3) the known or potential rate of error of the technique or theory; (4) the existence of standards to control the technique's operation; and (5) the degree to which the technique or theory has been generally accepted in the relevant scientific community. ***Miss. Transp. Comm'n v.***

McLemore, 863 So. 2d 31, 36 (¶ 13) (Miss. 2003) (citing ***Daubert***, 509 U.S. at 593-94). *See also* ***Hill***, 26 So. 3d at 329 n.6 (¶ 26).

¶218. In ruling that Dr. Neuschatz would not be allowed to testify, the trial court noted that expertise in eyewitness identification "has not been recognized as a field of expertise in Mississippi Courts." However, he recognized that it seemed to be "an emerging field," and he did not disagree that courts could consider it. The trial court rejected the notion that the jury would be aided by such testimony, stating, "there has been a fairly vigorous robust opportunity by defense counsel to question the perception of Josh Clark without the aid or assistance of an expert." The trial court also stated that the jury was "well equipped" to handle the issues related to the eyewitness identifications in this case. Without making any findings specific to ***Daubert***, as is required in Mississippi, the trial court concluded that "this particular expert testimony will not assist the trier of fact to understand the evidence or to determine any facts in issue in this case."

¶219. Respectfully, I would hold that the trial court erred in its determination that the expert testimony would not aid the jury. Further, the trial court erred by not applying the ***Daubert*** factors in its determination of the admissibility of Dr. Neuschatz's testimony. Because the trial court failed to apply the correct legal standard, it abused its discretion. ***Gibson v. Manuel***, 534 So. 2d 199, 204 (Miss. 1988). Accordingly, I would reverse the trial court's judgment and remand for a new trial in which Dr. Neuschatz's expert testimony is analyzed under Rule 702 and ***Daubert***. In my opinion, Dr. Neuschatz's testimony is both relevant and reliable under ***Daubert***.

¶220. First, there is no question that the proposed testimony by Dr. Neuschatz was relevant, as it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Miss. R. Evid. 401. Because the State possessed no forensic evidence, the conviction of Corrothers hinged in large part on the eyewitness identifications, and Corrothers based his defense on the contention that the two eyewitnesses against him had misidentified him. Corrothers had a "fundamental right" to present his theory of the case to the jury, even if he had only minimal evidence in support of it. ***Chinn v. State***, 958 So. 2d 1223, 1225 (¶ 13) (Miss. 2007). The ***Chinn*** Court continued,

> We have held that "it is, of course, an absolute right of an accused to have every lawful defense he asserts, even though based upon meager evidence and highly unlikely, to be submitted as a factual issue to be determined by the jury under proper instruction of the court. This Court will never permit an accused to be denied this fundamental right."

Id. (quoting ***O'Bryant v. State***, 530 So. 2d 129, 133 (Miss. 1988) (citing ***Ward v. State***, 479 So. 2d 713 (Miss. 1985); ***Lancaster v. State***, 472 So. 2d 363 (Miss. 1985); ***Pierce v. State***, 289 So. 2d 901 (Miss. 1974)). Dr. Neuschatz's testimony regarding the reliability of eyewitness identifications rendered the accuracy of the eyewitness identifications at the center of the State's case less probable; accordingly, it was relevant.[41] We must now determine if the proposed expert testimony was reliable under the ***Daubert*** factors.

¶221. The first ***Daubert*** factor – whether the expert's theory can be or has been tested – is satisfied. Research and testing on the theories to which Dr. Neuschatz would testify have

[41]For the foregoing reasons, I disagree with Presiding Justice Randolph's conclusion that Dr. Neuschatz's testimony does not fit the facts of the case.

been ongoing since the 1970s, when some of the first articles on the accuracy of eyewitness identifications were published. *See* Elizabeth Loftus, *Reconstructing Memory: The Incredible Eyewitness*, 15 Jurimetrics J. 188 (1975); Gary L. Wells, et al., *Accuracy, Confidence, and Juror Perceptions in Eyewitness Identification*, 64 J. Applied Psychology 440 (1978); Elizabeth F. Loftus, *Eyewitness Testimony* (1979). In 2007, the Tennessee Supreme Court acknowledged that research on memory and eyewitness identification had been ongoing for thirty years and that "[s]cientifically tested studies, subject to peer review, have identified legitimate areas of concern." ***State v. Copeland***, 226 S.W.3d 287, 299-300 (Tenn. 2007) (citing Jacqueline McMurtrie, *The Role of the Social Sciences in Preventing Wrongful Convictions*, 42 Am. Crim. L. Rev. 1271, 1276, 1277 n.29 (2005)).

¶222. Dr. Neuschatz has done a significant amount of research and testing in the field. Dr. Neuschatz explained that, in his studies, he would show participants a video of events, then tell them they had witnessed a crime. Participants were asked to make an identification from a photo lineup, testing how certain actions and/or instructions would affect their memory. The numerous articles, books, and book chapters he has written reflect the extent of his research in the field of eyewitness identification. His research has been published and peer-reviewed, thus the second ***Daubert*** factor is met.

¶223. The third ***Daubert*** factor, the known or potential rate of error of the applied theory, is also satisfied. Dr. Neuschatz identified a known rate of error for his various studies, and without obtaining a .05 level of significance – meaning that the same result would not happen by chance alone five times out of one hundred – he would not have made his findings. His work also satisfies the fourth ***Daubert*** factor, the existence of standards and controls. By

using control groups, Dr. Neuschatz is able to test how certain variables affect eyewitness identification – he conducts essentially the same test with and without certain variables and compares the outcomes. Further, Dr. Neuschatz explained that he would assimilate a large collection of data and, with the use of random assignments, assuming every person is different, he and fellow researchers would be able to "control for any individual differences" by making sure that the differences occurred equally and would not "unduly affect the results."

¶224. The final ***Daubert*** factor is the degree to which the technique or theory has been generally accepted in the scientific community. General acceptance within the scientific community is a factor to be considered under ***Daubert***; it is not a requirement. ***Watts v. Radiator Specialty Co.***, 990 So. 2d 143, 150 (¶ 18) (Miss. 2008). According to Dr. Neuschatz's testimony, scientific research in the field of eyewitness identification has been conducted since the 1970s and has been "gone over many times now." He testified that several thousand people have been tested over the years in the process of developing the field. Dr. Neuschatz testified, in no uncertain terms, that the field is generally accepted, and the State neither attempted to attack his averment regarding the general acceptance of the field when given the opportunity to cross-examine him nor presented its own evidence contradicting Dr. Neuschatz's testimony. Based on the evidence available to the trial court, the field in question is generally accepted.[42]

---

[42]When determining whether reversible error exists, we confine our review of the trial court's decision to the facts and arguments we find in the record, because we can thereby confirm they were presented to the trial court for its consideration. *See* ***Adams v. Baptist Mem'l Hosp.-DeSoto, Inc.***, 965 So. 2d 652, 657 (¶ 25) ("This Court 'may not act upon or consider matters which do not appear in the record and must confine itself to what actually

¶225. Although reluctant at first, courts across the country have begun to recognize the admissibility of eyewitness-identification testimony. *See, e.g.,* ***State v. Clopten***, 223 P.3d 1103, 1109 (Utah 2009); ***State v. Copeland***, 226 S.W.3d 287, 298-304 (Tenn. 2007). *See also* ***United States v. Stevens***, 935 F.2d 1380, 1401 (3d Cir. 1991); ***United States v. Moore***, 786 F.2d 1308, 1313 (5th Cir. 1986).[43] The United States Supreme Court has stated, with apparent approval, "[i]n appropriate cases, some States also permit defendants to present expert testimony on the hazards of eyewitness identification evidence." ***Perry v. New***

---

does appear in the record.'") (citing ***Shelton v. Kindred***, 279 So. 2d 642, 644 (Miss.1973)). In his opinion, Presiding Justice Randolph relies upon and analyzes evidence that, while cited in briefs, was not made part of the record or presented to the trial court, *i.e.*, the article cited by Dr. Neuschatz to support his uncontradicted testimony that his field of expertise is generally accepted.

[43]In ***Moore***, the Fifth Circuit upheld the exclusion of expert testimony regarding the reliability of eyewitness identifications in the case under review therein. However, the ***Moore*** Court hardly issued a blanket prohibition against it, writing:

> Expert testimony on eyewitness reliability is not simply a recitation of facts available through common knowledge. Indeed, the conclusions of the psychological studies are largely counter-intuitive, and serve to "explode common myths about an individual's capacity for perception. . . ." For example, it is commonly believed that the accuracy of a witness' recollection increases with the certainty of the witness. In fact, the data reveal no correlation between witness certainty and accuracy. Similarly, it is commonly believed that witnesses remember better when they are under stress. The data indicate that the opposite is true. The studies also show that a group consensus among witnesses as to an alleged criminal's identity is far more likely to be inaccurate than is an individual identification. This is because of the effect of the "feedback factor," which serves to reinforce mistaken identifications. *We therefore recognize that the admission of this type of testimony is proper, at least in some cases.*

Moore, 786 F.2d at 1312 (emphasis added).

Hampshire, 132 S. Ct. 716, 729 (2012). The Utah Supreme Court summarized the growing acceptance of eyewitness expert testimony by the courts:

> The admissibility of eyewitness expert testimony was first considered by the nation's courts starting in the 1970s. In general, these early decisions excluded the testimony on grounds that have since been undercut . . . . The majority of courts that have considered the issue since then have held that admission or exclusion of the evidence is within the broad discretion of the trial court. Starting in the 1980s, however, numerous state and federal courts recognized that the statistical evidence on eyewitness inaccuracy was too substantial to ignore. Many of these appellate courts instructed trial judges that, under certain circumstances, it would be an abuse of discretion not to allow expert testimony on the subject.
>
> The first such decision came from the Arizona Supreme Court in ***State v. Chapple***, 135 Ariz. 281, 660 P.2d 1208 (1983). There, the trial court excluded an eyewitness expert on grounds that the testimony would not assist the jury and that cross-examination was sufficient to reveal problems with the identification. ***Id.*** at 1223-24. The Arizona Supreme Court reversed and held that, in cases where the expert would provide information about eyewitness factors relevant to the case, it was error to exclude the testimony as unhelpful. ***Id.*** Over the last two decades, numerous other state courts have either reversed decisions to exclude or encouraged the inclusion of eyewitness expert testimony. *See, e.g.*, ***Campbell v. People***, 814 P.2d 1, 8 (Colo. 1991); ***Johnson v. State***, 272 Ga. 254, 526 S.E.2d 549, 554-55 (2000); ***Commonwealth v. Christie***, 98 S.W.3d 485, 491-92 (Ky. 2002); ***State v. Whaley***, 305 S.C. 138, 406 S.E.2d 369, 372 (1991); ***Nations v. State***, 944 S.W.2d 795, 799 (Tex. Ct. App. 1997); ***State v. Moon***, 45 Wash. App. 692, 726 P.2d 1263, 1267-68 (1986).
>
> Similar positions have been adopted in the federal courts. The Sixth Circuit was the first to hold that eyewitness expert testimony is sufficiently reliable to assist the jury. ***United States v. Smith***, 736 F.2d 1103, 1107 (6th Cir. 1984). The next year, the Third Circuit held that exclusion of expert testimony was an abuse of discretion when the conviction was based solely on an eyewitness identification. ***United States v. Downing***, 753 F.2d 1224, 1226 (3rd Cir. 1985). The Third Circuit further held that the discretion of trial judges was limited in this area, and that rule 702 of the Federal Rules of Evidence "requires . . . that expert testimony on eyewitness perception and memory be admitted at least in some circumstances." ***Id.*** at 1232. The Fifth Circuit reached a similar conclusion in ***United States v. Moore*** and held that "in a case in which the sole testimony is casual eyewitness identification, expert testimony regarding the

> accuracy of that identification is admissible and properly may be encouraged." 786 F.2d 1308, 1313 (5th Cir. 1986).
>
> In short, a growing number of courts have recognized that eyewitness expert testimony is both reliable and helpful to the jury. . . .

Clopten, 223 P.3d at 1111-12 (¶¶26-29) (footnotes omitted).

¶226. The ***Clopten*** Court held that "the testimony of a qualified expert regarding factors that have been shown to contribute to inaccurate eyewitness identifications should be admitted whenever it meets the requirements of rule 702 of the Utah Rules of Evidence." ***Id.*** at 1112 (¶ 30). I agree with the majority in that expert testimony on the subject of eyewitness identification can be admissible at the sound discretion of our trial judges. Such testimony will not be appropriate in all cases and must still satisfy the standards of Rule 702, ***Daubert***, and ***McLemore***.

¶227. I would hold that the proposed expert testimony of Dr. Neuschatz reflected in the record before us meets our standards for admissibility under ***Daubert*** and would have been helpful to the jury. As discussed above, his opinions also are relevant under Rule 401. "Absent other grounds to exclude, an expert's testimony is presumptively admissible when relevant and reliable." ***Gillett v. State***, 56 So. 3d 469, 495 (¶ 65) (Miss. 2010) (quoting ***McLemore***, 863 So. 2d at 39.) Without the benefit of a full ***Daubert*** analysis, the trial court reached the conclusion that "other grounds to exclude" existed, and the majority largely relies on the other grounds.

¶228. However, I do not view the concerns raised by the majority concerning potential factual discrepancies between Dr. Neuschatz's understanding of Josh's testimony and Josh's actual testimony to be of a nature to render Dr. Neuschatz's testimony globally inadmissible.

The primary factual basis for Dr. Neuschatz's opinions lies in the data gathered during years of study, and the prosecution may use discrepancies such as those raised by the majority and Presiding Justice Randolph in cross-examination. *See* ***Gillett v. State***, 56 So. 3d 469, 495 (¶ 65) (Miss. 2010) ("Vigorous cross-examination, presentations of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.") (quoting ***McLemore***, 863 So. 2d at 36). In ***Gillett***, the State offered expert testimony regarding DNA testing. ***Gillett***, 56 So. 3d at 493 (¶ 55). The defense attacked the reliability of the underlying testing via its own expert testimony and claimed that because the State's expert used red-topped tubes, which do not contain a preservative which prevents blood from clotting or otherwise deteriorating, instead of purple-topped tubes, which do contain the preservative, his opinions were not reliable. ***Id.*** at 494 (¶ 58). The defense expert testified that samples from the red-topped tubes behaved in an unexpected way and that the procedure involving the use of red-topped tubes had not been verified. ***Id.*** The ***Gillett*** Court held that the problems with the State expert's procedure would not prohibit admission of his opinions and would have been properly addressed by the defense on cross-examination. ***Id.*** at 495 (¶ 65). I view the factual issues with Dr. Neuschatz's opinions highlighted by the majority in a similar light. The majority writes that Dr. Neuschatz demonstrated "an incorrect and incomplete understanding of" and "total lack of expertise about Josh's memory problems." However, as the majority notes later in its opinion, Josh denied having memory problems when he testified. There exists an inherent contradiction in holding that Dr. Neuschatz's testimony should have been excluded due to a witness's memory problem that the witness himself denied existed, but sousing out such

factual contradictions is the role of a jury. The jury should have been the sole arbiter of the credibility of Josh's testimony regarding the non-existence of any memory problems. ***Butler v. State***, 102 So. 3d 260, 268 (¶ 22) (Miss. 2012). For the foregoing reasons, I would reverse the trial court for failing to analyze properly the admissibility of Dr. Neuschatz's opinions under ***Daubert*** and ***McLemore***.

B. Reliability of Photographic Lineups

¶229. In addition, Corrothers argues that the trial court erred in not allowing Dr. Neuschatz to testify regarding the reliability of the photo lineups. Part of Dr. Neuschatz's proffered testimony included his opinion on the suggestive nature of photo lineups in general. Dr. Neuschatz would have given his opinion about the suggestiveness of the lineup used in this case, but he would not have opined as to whether Josh's identification was accurate, as that would have been outside his personal knowledge.

¶230. Dr. Neuschatz said that the Department of Justice has established four guidelines for compiling and administering lineups: (1) the person administering the lineup should not know the identity of the suspect; (2) a statement should be read to the witness to indicate that the suspect may or may not be in the lineup; (3) the lineup administrator should take "confidence" statements from the witness after the witness makes a choice; and (4) the suspect should not stand out based on the witness's description of the suspect.

¶231. It was Dr. Neuschatz's opinion that the photographic lineup shown to Josh and Tonya violated three of the four guidelines. First, the officers who administered the lineup knew who the suspect was; although, nothing in the record suggests any impropriety by the officers. Second, the officers did not take confidence statements from Josh after he identified

Corrothers. Third, it was Dr. Neuschatz's opinion that Corrothers's photo stood out from the others because Corrothers was wearing a white shirt, not an MDOC jumpsuit like the others; he said the photo was problematic because the witnesses previously had said the shooter was wearing a white shirt.

¶232. Finally, Dr. Neuschatz testified that a suggestive lineup that takes place out of court could affect the reliability of an in-court identification. He explained that the witness might suffer from "commitment effect," whereby the witness feels he must commit to the identification made in the photo lineup when he sees that person in court. Another problem is "post-event suggestion," where the witness may remember a face seen in the photo lineup rather than the face seen during the crime.

¶233. Once again, whether Dr. Neuschatz should have been allowed to testify is controlled by Mississippi Rule of Evidence 702 and ***Daubert*** and ***McLemore***; however, the trial court here failed to apply these standards as required. The full analysis of the relevance and reliability of Dr. Neuschatz's proposed testimony regarding the accuracy of eyewitness identifications and his research in the field was covered in the previous section, thus it is unnecessary to repeat here. Dr. Neuschatz's use of the Department of Justice guidelines for administering lineups is strong evidence of the reliability of his testimony regarding photo lineups. With that said, the testimony must pass Mississippi Rule of Evidence 403, which states, "[relevant] evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." Miss. R. Evid. 403. The jury could be confused or mislead if, on the one hand, the trial court determines, as was done here, that the identifications are legally reliable and the lineups are

not impermissibly suggestive, and, on the other hand, Dr. Neuschatz is allowed to testify as to the suggestiveness and unreliability of lineups in general as well as the specific lineup used in this case.

¶234. The trial court improperly excluded Dr. Neuschatz's expert testimony regarding the accuracy of eyewitness identifications on the basis that it would not aid the jury, and, in so doing, the court also excluded Dr. Neuschatz's testimony pertaining to the suggestive nature of photographic lineups. While the lineup testimony, having been lumped together with the remainder of Dr. Neuschatz's testimony, was excluded for an improper reason, the trial court conceivably could have excluded the lineup testimony within its discretion as confusing the issues or misleading the jury under Rule 403. However, the trial court made no on-the-record analysis of Rule 403; thus, its decision on the issue should be reversed and remanded for a determination of whether the lineup testimony is separately admissible from the remainder of Dr. Neuschatz's testimony.

¶235. In summation, the trial court erred by refusing to allow Dr. Neuschatz's testimony on the science of eyewitness identification without applying the correct legal standard for determining admissibility. Therefore, I would reverse Corrothers's convictions and sentences and remand the case for a new trial.

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

APPENDIX

DEATH CASES AFFIRMED BY THIS COURT

Jason Lee Keller v. State, 2010-DP-00425-SCT, 2014 WL 465676 (Feb. 6, 2014).

Leslie Galloway III v. State, 122 So. 3d 614 (Miss. 2013).

Bobby Batiste v. State, 121 So 3d 808 (Miss. 2013).

Roger Lee Gillett v. State, 56 So. 3d 469 (Miss. 2010).

Moffett v. State, 49 So. 3d 1073 (Miss. 2010).

Pitchford v. State, 45 So. 3d 216 (Miss. 2010).

***Goff v. State*,** 14 So. 3d 625 (Miss. 2009).

Wilson v. State, 21 So. 3d 572 (Miss. 2009).

***Chamberlin v. State*,** 989 So. 2d 320 (Miss. 2008).

Loden v. State, 971 So. 2d 548 (Miss. 2007).

King v. State, 960 So. 2d 413 (Miss. 2007).

Bennett v. State, 933 So. 2d 930 (Miss. 2006).

Havard v. State, 928 So. 2d 771 (Miss. 2006).

Spicer v. State, 921 So. 2d 292 (Miss. 2006).

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

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

Le v. State, 913 So. 2d 913 (Miss. 2005).

Brown v. State, 890 So. 2d 901 (Miss. 2004).

Powers v. State 883 So. 2d 20 (Miss. 2004)

Branch v. State, 882 So. 2d 36 (Miss. 2004).

Scott v. State, 878 So. 2d 933 (Miss. 2004).

Lynch v. State, 877 So. 2d 1254 (Miss. 2004).

Dycus v. State, 875 So. 2d 140 (Miss. 2004).

Byrom v. State, 863 So. 2d 836 (Miss. 2003).

Howell v. State, 860 So. 2d 704 (Miss. 2003).

Howard v. State, 853 So. 2d 781 (Miss. 2003).

Walker v. State, 815 So. 2d 1209 (Miss. 2002). *following remand.

Bishop v. State**,** 812 So. 2d 934 (Miss. 2002).

Stevens v. State, 806 So. 2d 1031 (Miss. 2002).

Grayson v. State, 806 So. 2d 241 (Miss. 2002).

Knox v. State, 805 So. 2d 527 (Miss. 2002).

Simmons v. State, 805 So. 2d 452 (Miss. 2002).

Berry v. State, 802 So. 2d 1033 (Miss. 2001).

Snow v. State, 800 So. 2d 472 (Miss. 2001).

Mitchell v. State, 792 So. 2d 192 (Miss. 2001).

Puckett v. State, 788 So. 2d 752 (Miss. 2001). * following remand.

Goodin v. State, 787 So. 2d 639 (Miss. 2001).

Jordan v. State, 786 So. 2d 987 (Miss. 2001).

Manning v. State, 765 So. 2d 516 (Miss. 2000). *following remand.

Eskridge v. State, 765 So. 2d 508 (Miss. 2000).

McGilberry v. State, 741 So. 2d 894 (Miss. 1999)**.**

Puckett v. State, 737 So. 2d 322 (Miss. 1999). *remanded for ***Batson*** hearing.

Manning v. State, 735 So. 2d 323 (Miss. 1999). *remanded for ***Batson*** hearing.

Hughes v. State, 735 So. 2d 238 (Miss. 1999).

Turner v. State, 732 So. 2d 937 (Miss. 1999).

Smith v. State, 729 So. 2d 1191 (Miss. 1998).

Burns v. State, 729 So. 2d 203 (Miss. 1998).

Jordan v. State, 728 So. 2d 1088 (Miss. 1998).

Gray v. State, 728 So. 2d 36 (Miss. 1998).

Manning v. State, 726 So. 2d 1152 (Miss. 1998).

Woodward v. State, 726 So. 2d 524 (Miss. 1997).

Bell v. State, 725 So. 2d 836 (Miss. 1998).

Evans v. State, 725 So. 2d 613 (Miss. 1997).

Brewer v. State**,** 725 So. 2d 106 (Miss. 1998).

Crawford v. State, 716 So. 2d 1028 (Miss. 1998).

Doss v. State, 709 So. 2d 369 (Miss. 1996).

Underwood v. State, 708 So. 2d 18 (Miss. 1998).

Holland v. State, 705 So. 2d 307 (Miss. 1997).

Wells v. State**,** 698 So. 2d 497 (Miss. 1997).

Wilcher v. State, 697 So. 2d 1087 (Miss. 1997).

Wiley v. State, 691 So. 2d 959 (Miss. 1997).

Brown v. State, 690 So. 2d 276 (Miss. 1996).

Simon v. State, 688 So. 2d 791 (Miss.1997).

Jackson v. State, 684 So. 2d 1213 (Miss. 1996).

Williams v. State, 684 So. 2d 1179 (Miss. 1996).

Davis v. State, 684 So. 2d 643 (Miss. 1996).

Taylor v. State, 682 So. 2d. 359 (Miss. 1996).

Brown v. State, 682 So. 2d 340 (Miss. 1996).

Blue v. State, 674 So. 2d 1184 (Miss. 1996).

Holly v. State, 671 So. 2d 32 (Miss. 1996).

Walker v. State, 671 So. 2d 581 (Miss. 1995).

Russell v. State, 670 So. 2d 816 (Miss. 1995).

Ballenger v. State, 667 So. 2d 1242 (Miss. 1995).

Davis v. State, 660 So. 2d 1228 (Miss. 1995).

Carr v. State, 655 So. 2d 824 (Miss. 1995).

Mack v. State, 650 So. 2d 1289 (Miss. 1994).

Chase v. State, 645 So. 2d 829 (Miss. 1994).

Foster v. State, 639 So. 2d 1263 (Miss. 1994).

Conner v. State, 632 So. 2d 1239 (Miss. 1993).

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

****Shell v. State***, 554 So. 2d 887 (Miss. 1989); ***Shell v. Mississippi,*** 498 U.S. 1 (1990) reversing, in part, and remanding; ***Shell v. State***, 595 So. 2d 1323 (Miss. 1992) remanding for new sentencing hearing.

Davis v. State, 551 So. 2d 165 (Miss. 1989).

Minnick v. State, 551 So. 2d 77 (Miss. 1989).

****Pinkney v. State***, 538 So. 2d 329 (Miss. 1989); ***Pinkney v. Mississippi***, 494 U.S. 1075 (1990) vacating and remanding; ***Pinkney v. State***, 602 So. 2d 1177 (Miss. 1992) remanding for new sentencing hearing.

Clemons v. State, 535 So. 2d 1354 (Miss. 1988); ***Clemons v. Mississippi***, 494 U.S. 738 (1990) vacating and remanding; ***Clemons v. State***, 593 So. 2d 1004 (Miss. 1992) remanding for new sentencing hearing.

Woodward v. State, 533 So. 2d 418 (Miss. 1988).

Nixon v. State, 533 So. 2d 1078 (Miss. 1987).

Cole v. State, 525 So. 2d 365 (Miss. 1987).

Lockett v. State, 517 So. 2d 1346 (Miss. 1987).

Lockett v. State, 517 So. 2d 1317 (Miss. 1987).

Faraga v. State, 514 So. 2d 295 (Miss. 1987).

Jones v. State, 517 So. 2d 1295 (Miss. 1987); ***Jones v. Mississippi***, 487 U.S. 1230 (1988) vacating and remanding; ***Jones v. State***, 602 So. 2d 1170 (Miss. 1992) remanding for new sentencing hearing.

Wiley v. State, 484 So. 2d 339 (Miss. 1986).

Johnson v. State, 477 So. 2d 196 (Miss. 1985).

Gray v. State, 472 So. 2d 409 (Miss. 1985).

Cabello v. State, 471 So. 2d 332 (Miss. 1985).

Jordan v. State, 464 So. 2d 475 (Miss. 1985).

Wilcher v. State, 455 So. 2d 727 (Miss. 1984).

Billiot v. State, 454 So. 2d 445 (Miss. 1984).

Stringer v. State, 454 So. 2d 468 (Miss. 1984).

Dufour v. State, 453 So. 2d 337 (Miss. 1984).

Neal v. State, 451 So. 2d 743 (Miss. 1984).

Booker v. State, 449 So. 2d 209 (Miss. 1984).

Wilcher v. State, 448 So. 2d 927 (Miss. 1984).

Caldwell v. State, 443 So. 2d 806 (Miss. 1983).

Irving v. State, 441 So. 2d 846 (Miss. 1983).

Tokman v. State, 435 So. 2d 664 (Miss. 1983).

Leatherwood v. State, 435 So. 2d 645 (Miss. 1983).

Hill v. State, 432 So. 2d 427 (Miss. 1983).

Pruett v. State, 431 So. 2d 1101 (Miss. 1983).

Gilliard v. State, 428 So. 2d 576 (Miss. 1983).

Evans v. State, 422 So. 2d 737 (Miss. 1982).

King v. State, 421 So. 2d 1009 (Miss. 1982).

Wheat v. State, 420 So. 2d 229 (Miss. 1982).

Smith v. State, 419 So. 2d 563 (Miss. 1982).

Johnson v. State, 416 So. 2d 383 (Miss.1982).

Edwards v. State, 413 So. 2d 1007 (Miss. 1982).

Bullock v. State, 391 So. 2d 601 (Miss. 1980).

Reddix v. State, 381 So. 2d 999 (Miss. 1980).

Jones v. State, 381 So. 2d 983 (Miss. 1980).

Culberson v. State, 379 So. 2d 499 (Miss. 1979).

Gray v. State, 375 So. 2d 994 (Miss. 1979).

Jordan v. State, 365 So. 2d 1198 (Miss. 1978).

Voyles v. State, 362 So. 2d 1236 (Miss. 1978).

Irving v. State, 361 So. 2d 1360 (Miss. 1978).

Washington v. State, 361 So. 2d 6l (Miss. 1978).

Bell v. State, 360 So. 2d 1206 (Miss. 1978).

*Case was originally affirmed in this Court but on remand from U. S. Supreme Court, case was remanded by this Court for a new sentencing hearing.

DEATH CASES REVERSED AS TO GUILT PHASE
AND SENTENCING PHASE

Byrom v. State, 2014-DR-00230-SCT (April 3, 2014) (order).

Ross v. State, 954 So. 2d 968 (Miss. 2007).

Flowers v. State, 947 So. 2d 910 (Miss. 2006).

Flowers v. State, 842 So. 2d 531 (Miss. 2003).

Randall v. State, 806 So. 2d 185 (Miss. 2002).

Flowers v. State, 773 So. 2d 309 (Miss. 2000).

Edwards v. State, 737 So. 2d 275 (Miss. 1999).

Smith v. State, 733 So. 2d 793 (Miss. 1999).

Porter v. State, 732 So. 2d 899 (Miss. 1999).

Kolberg v. State, 704 So. 2d 1307 (Miss. 1997).

Snelson v. State, 704 So. 2d 452 (Miss. 1997).

Fusilier v. State**,** 702 So. 2d 388 (Miss. 1997).

Howard v. State, 701 So. 2d 274 (Miss. 1997).

Lester v. State, 692 So. 2d 755 (Miss. 1997).

Hunter v. State, 684 So. 2d 625 (Miss. 1996).

Lanier v. State, 684 So. 2d 93 (Miss. 1996).

Giles v. State, 650 So. 2d 846 (Miss. 1995).

Duplantis v. State, 644 So. 2d 1235 (Miss. 1994).

Harrison v. State, 635 So. 2d 894 (Miss. 1994).

Butler v. State, 608 So. 2d 314 (Miss. 1992).

Jenkins v. State, 607 So. 2d 1171 (Miss. 1992).

Abram v. State, 606 So. 2d 1015 (Miss. 1992).

Balfour v. State, 598 So. 2d 731 (Miss. 1992).

Griffin v. State, 557 So. 2d 542 (Miss. 1990).

Bevill v. State, 556 So. 2d 699 (Miss. 1990).

West v. State, 553 So. 2d 8 (Miss. 1989).

Leatherwood v. State, 548 So. 2d 389 (Miss. 1989).

Mease v. State, 539 So. 2d 1324 (Miss. 1989).

Houston v. State, 531 So. 2d 598 (Miss. 1988).

West v. State, 519 So. 2d 418 (Miss. 1988).

Davis v. State, 512 So. 2d 129l (Miss. 1987).

Williamson v. State, 512 So. 2d 868 (Miss. 1987).

Foster v. State, 508 So. 2d 1111 (Miss. 1987).

Smith v. State, 499 So. 2d 750 (Miss. 1986).

West v. State, 485 So. 2d 681 (Miss. 1985).

Fisher v. State, 481 So. 2d 203 (Miss. 1985).

Johnson v. State, 476 So. 2d 1195 (Miss. 1985).

Fuselier v. State, 468 So. 2d 45 (Miss. 1985).

West v. State, 463 So. 2d 1048 (Miss. 1985).

Jones v. State, 461 So. 2d 686 (Miss. 1984).

Moffett v. State, 456 So. 2d 714 (Miss. 1984).

Lanier v. State, 450 So. 2d 69 (Miss. 1984).

Laney v. State, 421 So. 2d 1216 (Miss. 1982).

DEATH CASES REVERSED
AS TO PUNISHMENT AND REMANDED
FOR RESENTENCING TO LIFE IMPRISONMENT

Reddix v. State, 547 So. 2d 792 (Miss. 1989).

Wheeler v. State, 536 So. 2d 1341 (Miss. 1988).

White v. State, 532 So. 2d 1207 (Miss. 1988).

Bullock v. State, 525 So. 2d 764 (Miss. 1987).

Edwards v. State, 441 So. 2d 84 (Miss. l983).

Dycus v. State, 440 So. 2d 246 (Miss. 1983).

Coleman v. State, 378 So. 2d 640 (Miss. 1979).

DEATH CASES REVERSED AS TO
PUNISHMENT AND REMANDED FOR A NEW TRIAL
ON SENTENCING PHASE ONLY

Fulgham v. State, 46 So. 3d 315 (Miss. 2010).

Rubenstein v. State, 941 So. 2d 735 (Miss. 2006).

King v. State, 784 So. 2d 884 (Miss. 2001).

Walker v. State, 740 So. 2d 873 (Miss. 1999).

Watts v. State, 733 So. 2d 214 (Miss. 1999).

West v. State, 725 So. 2d 872 (Miss. 1998).

Smith v. State, 724 So. 2d 280 (Miss. 1998).

Berry v. State, 703 So. 2d 269 (Miss. 1997).

Booker v. State, 699 So. 2d 132 (Miss. 1997).

Taylor v. State, 672 So. 2d 1246 (Miss. 1996).

****Shell v. State***, 554 So. 2d 887 (Miss. 1989); ***Shell v. Mississippi***, 498 U.S. 1 (1990) reversing, in part, and remanding; ***Shell v. State*** 595 So. 2d 1323 (Miss. 1992) remanding for new sentencing hearing.

****Pinkney v. State***, 538 So. 2d 329 (Miss. 1989); ***Pinkney v. Mississippi,*** 494 U.S. 1075 (1990) vacating and remanding; ***Pinkney v. State*****,** 602 So. 2d 1177 (Miss. 1992) remanding for new sentencing hearing.

****Clemons v. State***, 535 So. 2d 1354 (Miss. 1988); ***Clemons v. Mississippi***, 494 U.S. 738 (1990) vacating and remanding; ***Clemons v. State***, 593 So. 2d 1004 (Miss. 1992) remanding for new sentencing hearing.

****Jones v. State***, 517 So. 2d 1295 (Miss. 1987); ***Jones v. Mississippi*****,** 487 U.S. 1230 (1988) vacating and remanding; ***Jones v. State***, 602 So. 2d 1170 (Miss. 1992) remanding for new sentencing hearing.

Russell v. State, 607 So. 2d 1107 (Miss. 1992).

Holland v. State, 587 So. 2d 848 (Miss. 1991).

Willie v. State, 585 So. 2d 660 (Miss. 1991).

Ladner v. State, 584 So. 2d 743 (Miss. 1991).

Mackbee v. State, 575 So. 2d 16 (Miss. 1990).

Berry v. State, 575 So. 2d 1 (Miss. 1990).

Turner v. State, 573 So. 2d 657 (Miss. 1990).

State v. Tokman, 564 So. 2d 1339 (Miss. 1990).

Johnson v. State, 547 So. 2d 59 (Miss. 1989).

Williams v. State, 544 So. 2d 782 (Miss. 1989); *sentence aff'd* 684 So. 2d 1179 (1996).

Lanier v. State, 533 So. 2d 473 (Miss. 1988).

Stringer v. State, 500 So. 2d 928 (Miss. 1986).

Pinkton v. State, 481 So. 2d 306 (Miss. 1985).

Mhoon v. State, 464 So. 2d 77 (Miss. 1985).

Cannaday v. State, 455 So. 2d 713 (Miss. 1984).

Wiley v. State, 449 So. 2d 756 (Miss. 1984); resentencing affirmed, ***Wiley v. State***, 484 So. 2d 339 (Miss. 1986); *cert. denied,* ***Wiley v. Mississippi***, 479 U.S. 1036 (1988); resentencing ordered, ***Wiley v. State*****,** 635 So. 2d 802 (Miss. 1993) following writ of habeas corpus issued pursuant to ***Wiley v. Puckett***, 969 So. 2d 86, 105-106 (5th Cir. 1992); resentencing affirmed.

Williams v. State, 445 So. 2d 798 (Miss. 1984). *Case was originally affirmed in this Court but on remand from U. S. Supreme Court, case was remanded by this Court for a new sentencing hearing.

(Revised June 25, 2014).