No. 2001 KA 01826

In the Supreme Court of Mississippi

BLAINE BROOKS,

Appellant,

vs.

STATE OF MISSISSIPPI,

Appellee.

Appeal from the Circuit Court of Pike County, Mississippi
No. 01-179-KB
The Honorable Mike Smith, Judge Presiding

APPELLANT'S BRIEF IN SUPPORT OF APPEAL

PAUL LUCKETT
1121 Delaware
McComb, Mississippi 39648
(601) 250-1144
Bar No. 10224
Attorney for Appellant

RICHARD M. GOLDWASSER
LAW OFFICE OF
RICHARD M. GOLDWASSER
20 North Clark Street
Suite 1700
Chicago, Illinois 60602
(312) 372-3300
Admitted *Pro Hac Vice*
Attorney for Appellant

No. 2001 KA 01826

In the Supreme Court of Mississippi

BLAINE BROOKS,

Appellant,

vs.

STATE OF MISSISSIPPI,

Appellee.

Appeal from the Circuit Court of Pike County, Mississippi
No. 01-179-KB
The Honorable Mike Smith, Judge Presiding

APPELLANT'S BRIEF IN SUPPORT OF APPEAL

PAUL LUCKETT
1121 Delaware
McComb, Mississippi 39648
(601) 250-1144
Bar No. 10224
Attorney for Appellant

RICHARD M. GOLDWASSER
LAW OFFICE OF
RICHARD M. GOLDWASSER
20 North Clark Street
Suite 1700
Chicago, Illinois 60602
(312) 372-3300
Admitted *Pro Hac Vice*
Attorney for Appellant

2001 KA 1826

IN THE SUPREME COURT
OF THE STATE OF MISSISSIPPI

BLAINE BROOKS,	)	Appeal from the
	)	Circuit Court of Pike County
Appellant,	)	
	)	
vs.	)	Cause No. 01-179-KB
	)	
STATE OF MISSISSIPPI,	)	The Honorable
	)	Mike Smith
Appellee.	)	Judge Presiding

CERTIFICATE OF INTEREST

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

Blaine Brooks
State of Mississippi

Richard M. Goldwasser
Attorney of record for Blaine Brooks

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

I

A

B

STATEMENT OF ISSUES

I

WHETHER THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S MOTIONS TO BAR IDENTIFICATION TESTIMONY.

A

WHETHER THE TRIAL COURT ERRED WHEN IT ALLOWED SANDRA GRAHAM TO MAKE AN IN-COURT IDENTIFICATION OF DEFENDANT FOLLOWING AN UNNECESSARY AND IMPERMISSIBLY SUGGESTIVE PHOTOGRAPHIC SHOW-UP.

B

WHETHER THE TRIAL COURT ERRED WHEN IT ALLOWED SANDRA GRAHAM TO MAKE AN IN-COURT IDENTIFICATION FOLLOWING TWO LINEUPS WHERE DEFENDANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO COUNSEL.

C

WHETHER THE TRIAL COURT ERRED WHEN IT ADMITTED SANDRA GRAHAM'S IDENTIFICATION OF DEFENDANT AT THE PHOTOGRAPHIC SHOW-UP INTO EVIDENCE AT TRIAL.

D

WHETHER THE TRIAL COURT ERRED WHEN IT ADMITTED SANDRA GRAHAM'S IDENTIFICATION OF DEFENDANT AT THE FEBRUARY 28TH LINEUP INTO EVIDENCE AT TRIAL.

II

WHETHER THE TRIAL COURT ERRED WHEN IT ALLOWED SHERRY MAXINE HODGES SMITH TO TESTIFY AS TO A HEARSAY STATEMENT FROM TOWANDA NOBLES.

III

WHETHER THE TRIAL COURT ERRED WHEN IT ADMITTED GANG AND OTHER PROPENSITY EVIDENCE AT TRIAL.

IV

WHETHER THE STATE FAILED TO PROVE DEFENDANT GUILTY BEYOND A REASONABLE DOUBT AND THE COURT ERRED WHEN IT DENIED DEFENDANT'S MOTIONS FOR A DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT.

STATEMENT OF THE CASE

Defendant was charged with the murder of Merry Wilson. See Section 97-3-19 of the Mississippi Code of 1972. After a jury trial, defendant was convicted and sentenced to a term of life imprisonment.

STATEMENT OF FACTS

On May 17, 1999, Merry Wilson (the decedent) was found dead in her home at 1006 Smithtown Road in Pike County, Mississippi. (R.230, 233). The Pike County pathologist testified that he could not give a range of the time of the decedent's death with certainty, but that it was his best estimate that the decedent died between May 12th and May 15th. (R. 390-391, 394). The pathologist testified that the decedent died as a result of multiple stab wounds. (R. 378-79). A two pronged fork was recovered from the decedent's body. (R.269-270, 379, Exhibit S-15A). The decedent was about 35 years old. (R. 365).

When police officers first arrived at the decedent's house, they noticed a car parked under the carport. (R.475, 479). An officer observed a hand print on the trunk of the car. (R. 482). Sometime after the officers secured the area on May 17th and before June 23rd, someone broke into the car. (R. 477). Officers found the driver's side window broken, the glove compartment open and some papers on the front seat. (R. 478). The officers did not examine the glove compartment for fingerprints. (R. 478). An officer also testified that they did not analyze the hand print on the trunk because there was too much dust. (R. 478). Then on July 14, 1999, the car was stolen. (R. 477). At the time of trial, the car had yet to be recovered. (R. 480).

The glass was broken out of the front door to the decedent's home. (R. 234). A police officer testified that after initially entering and leaving the house on May 17th, the door slammed shut and locked. (R. 234). Another officer testified that he had to break the glass door to reenter the house. (R.433).

The State's crime scene analyst testified that the officers collected 16 fingerprints from inside the decedent's home. (R. 257). The analyst concluded that a struggle between the decedent and her assailant began in her bedroom, and continued down the hall, past a mirror, on which the analyst found fingerprints and a palm print. (R. 234, 281-82, 288, Exhibit D-17). The analyst testified that the prints

were found near the middle or the bottom of the mirror. (R. 288, 290). On the floor, close to the mirror, the officers found a thermostat that had been knocked off the wall. (R. 250, 290, Exhibits S-7A and S-7D). According to the analyst, the print on the mirror was large enough to have come from an adult and appeared to have been left by a person in kneeling position. (R. 288). The analyst testified that the struggle ended near a washing machine where decedent's body was found. (R. 233-34). The analyst discovered blood and a strand of hair intertwined in a piece of jewelry on the washing machine. (R. 246, 289).

Of the sixteen fingerprints, two matched the decedent. (R. 257). The State was unable to match the any of the remaining fourteen fingerprints. (R. 258). The prints on the mirror did not match either defendant or the decedent. (R. 282). The pathologist took scrapings from the decedent's fingernails and sent them to the crime lab to be tested. (R. 394-95). The sheriff's department never received the results of the tests. (R. 467-68). The crime scene analyst testified that they never tested the strand of hair found intertwined in the jewelry. (R. 289). According to the analyst, he did not have a sample to compare it with. (R. 289).

The decedent had been living in a house bequeathed to her mother by Nathaniel Smith. (R. 297). Nathaniel Smith also left the decedent $10,000.00 when he died. (R. 297). One witness believed that while the decedent called Nathaniel Smith "daddy, " he was in fact her uncle. (R. 297, 302). Nathaniel Smith's sister, Marie Conerly, apparently was unaware that he had left the house to the decedent's mother. (R. 507-08). When the decedent first moved into the house, Ms. Conerly filed a trespass complaint against her. (R. 507).

Initially, the decedent lived alone in the house. (R.297-98). When someone broke into the home, the decedent became frightened to live alone and wanted a man to move into the house. (R. 304). Darrell Smith knew the decedent because his brother had dated her. (R. 504). Darrell Smith and his

wife, Pam, planned to move in with the decedent. (R. 303-04). Darrell began moving furniture into the house using a red truck borrowed from his father, Freeman Smith. (R. 303-05). According to Freeman Smith, the time span of the planned move was around April or May 1st. (R. 305). Later, Darrell Smith learned that the decedent's boyfriend, Ju-Ju Nobles, was moving in, and he decided not to move in. (R. 303-04). On May 14th, Darrell Smith was arrested for driving while intoxicated and spent the weekend in jail. (R. 506).

After he was released from jail, Darrell Smith, his father Freeman Smith, and his mother, were the first to find the decedent's body on May 17th. (R. 299). According to Freeman Smith, he went to see if the decedent was alright after receiving a telephone call from Juanita Barnes. (R. 298). The Barnes family had received information from Meladean Jones. (R. 434). Ms. Jones had in turn received a call from Sherry Maxine Hodges Smith asking if she heard anything about the decedent's death. (R. 407-08, 434). When he discovered the decedent's body, Freeman Smith called the police. (R. 299).

A police officer first contacted Ms. Hodges by telephone from Ms. Jones's house. (R. 408). On May 17th, officers from the Pike County Sheriff's Department interviewed Ms. Hodges at her home. (R. 435). The officers asked Ms. Hodges how she learned about the decedent's death. (R. 435). Ms. Hodges initially told the officers that she had heard about the decedent's death over the police scanner. (R. 435). The officers decided to get more information and asked Hodges to meet them later at the sheriff's department. (R. 435).

Once Ms. Hodges arrived at the sheriff's department, the officers read Hodges her *Miranda* rights. (R. 436). They informed Hodges that they did not broadcast any information about the decedent over the scanner. (R. 436). At that point, Hodges told the officers that her half-sister, Towanda Nobles, had told her that defendant, Blaine Brooks, had admitted stabbing the decedent. (R. 406, 436). Defendant is Ms. Nobles's son. (R. 402-03).

Also on May 17th, after learning that the decedent's body had been found, Sandra Graham called the sheriff's department. (R. 326-27). Ms. Graham reported that she had seen an African-American male with a dark brown complexion in the passenger seat of a red and white pickup truck leaving the decedent's driveway in the early morning of May 13th. (R. 47, 332, Exhibit D-19). According to Graham, it was still a little dark outside and the sun was coming up. (R. 325). Graham stated that she saw the passenger for three to four seconds as the truck drove past her. (R. 49, 344). Graham said the truck looked similar to the red truck Nathaniel Smith had owned. (R. 49). Graham testified that there was no car parked in the carport on May 13th. (R. 321).

On May 25th, Detective Robert Holmes interviewed Graham and showed her three photographs of defendant. (R. 18). Detective Holmes did not show Graham a photograph of any other person. (R.18). Although Graham noted that defendant did not have a dark complexion, she identified him as the passenger she saw on the morning of May 13th. (R. 33, 463-64).

On May 14th due to an illness in his family, defendant left Mississippi to stay with his grandmother in South Holland, Illinois. (R. 637-40, 654). On July 14, 1999, defendant was charged by criminal affidavit with the decedent's murder.[1] (Supp. R., filed May 21, 2003, p.1). One year later, in July 2000, defendant was arrested in Illinois. (R. 654). In late February 2001, defendant was extradited to Mississippi. (R. 132-33).

Upon arriving in Mississippi, defendant was taken into custody. (R. 123, 133). Detective Holmes informed defendant of the charges against him. (R. 123). Defendant told Detective Holmes that he did not have an attorney and that he did not wish to speak to him without an attorney. (R. 127).

A few days to a week later, Detective Holmes conducted two lineups of defendant for Ms.

---

[1] Defendant was subsequently charged by indictment with decedent's murder on May 1, 2001. (C. 4, Rec. Ex. A-4).

Graham. (R. 38, 129). The lineups were conducted on February 27, 2001, and February 28, 2001. (R.21-23). Defendant did not have an attorney present at either lineup. (R.23-24).[2] Graham and Holmes each testified at trial that Graham identified defendant in the February 28th lineup. (R. 331, 464-65, Exhibit S-18). The record is silent as to what happened at the first lineup on February 27th, or as to why a second lineup was necessary.

Prior to trial, defendant moved to bar evidence of all prior identifications as well as all in-court identifications due to the suggestive nature of the photographic show-up and due to the two lineups being conducted without the presence of defense counsel. (Supp. R., filed April 11, 2003, Vol. 1, pp. 4, 12, Rec. Ex. B-4,12). Defendant further moved to bar Ms. Hodges from testifying as to the hearsay statement attributed to Towanda Nobles, encapsulating defendant's supposed admission. (Supp. R., filed April 11, 2003, Vol. 1, p. 8; Rec. Ex. B-8). Defendant also moved to bar evidence of gang and other character evidence. (Supp. R., filed April 11, 2003, Vol. 1, p. 6,10; Rec. Ex. B-6,10). The trial court denied each of defendant's motions. (R. 67-70; 115-117; Supp. R., filed April 11, 2003, Vol. 4, p. 16).

The case was tried before a jury. At trial, Graham identified defendant as the passenger in the pickup truck, Hodges testified that Ms. Nobles told her that her son had admitted stabbing the decedent and the State introduced a litany of gang and other character evidence, including defendant's tattoos, nickname, and rap lyrics, of an unknown origin, laced with violent and inflammatory language, including references to murder. (R. 322, 406, 540-41, 520-21).

The jury returned a verdict finding defendant guilty of murder and the trial court sentenced defendant to a natural life term of imprisonment. (R. 701-02; Rec. Ex. D-1,2). Defendant now appeals. (Rec. Ex. A-31).

---

[2] Defendant was not appointed counsel until his arraignment on May 10, 2001. (Supp. R., filed Feb. 26, 2003, Vol. 1., pp. 1-5).

SUMMARY OF ARGUMENT

The State's case was built entirely on improper evidence.

The State presented no competent evidence of defendant's guilt. The State presented no physical evidence of any kind linking defendant to the decedent's death. The State took fingerprints from the decedent's home; yet no print matched defendant's fingerprints. The State took scrapings from the decedent's fingernails and sent the scraping to the lab for testing; yet the State never received the lab results. The State found a strand of hair found intertwined in a piece of jewelry on the washing machine near the decedent's body; yet the State did not bother testing the hair. The State presented no physical evidence or other competent evidence linking defendant to the decedent's death.

The State argued to the jury that two converging paths of evidence proved defendant's guilt. As the first path, the State presented Sandra Graham's identification of defendant as the man she saw in the passenger seat of a pickup truck leaving the decedent's driveway. As the second path, the State presented the hearsay statement attributed to Towanda Nobles and introduced through Sherry Maxine Hodges Smith. Both paths, however, consisted entirely of improper evidence.

Unconstitutional pretrial identification procedures infected the State's first path with error. The State violated defendant's right to due process when it conducted an impermissibly suggestive photographic show-up for Graham. The State showed Graham three photographs of defendant, and no photographs of any other person. The State also violated defendant's right to counsel when Detective Holmes conducted two lineups for Graham before defendant was appointed counsel. Detective Holmes testified that he knew defendant would eventually be appointed an attorney. So, according to Holmes, he "used his advantage" and conducted the lineups before counsel was appointed.

Following these unconstitutional identification procedures, Graham identified defendant in court as the passenger she saw in the pickup truck. Each procedure tainted Graham's identification and

required the exclusion of her in-court identification. Then in an effort to bolster Graham's tainted in-court identification, the State introduced evidence of both improper pretrial identifications. A *per se* rule applies prohibiting a witness from testifying at trial that he or she identified the defendant at a pretrial lineup conducted in violation of the defendant's right to counsel. The trial court therefore erred when it denied defendant's motions seeking to bar evidence of Graham's pretrial identifications of defendant and to bar Graham from making an in-court identification of defendant. The State's first path of evidence was completely paved with error.

Likewise, the State's second path consisted entirely of error. The trial court improperly admitted a hearsay statement attributed to Towanda Nobles. The hearsay statement itself encapsulated defendant's supposed admission. The State's chain of statements traveled backward from Ms. Hodges, to Ms. Nobles, to defendant. At trial, Ms. Hodges testified that Ms. Nobles told her of defendant's admission.

The trial court admitted the hearsay statement under the excited utterance and catchall exceptions to the rule against hearsay. Neither exception applied. The State conceded that the time between the so-called startling event and the utterance was as long as three days. Moreover, the trial court had no basis to conclude that the hearsay statement had any guarantees of trustworthiness so as to fall within the catchall exception. In fact, the trial court made its determination of trustworthiness without hearing from Ms. Hodges, the very witness through whom the State introduced the hearsay statement. The trial court erred when it denied defendant's motion to exclude the hearsay statement.

Neither path of evidence – the identification testimony nor the hearsay statement – should have been admitted into evidence. These were not insignificant errors; they were of constitutional dimension and they went to the heart of the State's case. The very evidence upon which the State's case was built should never have been admitted at trial.

But the error did not stop there. The State went on to introduce evidence of defendant's gang affiliation, even though there was no evidence suggesting that the decedent's death was in any way gang related. On top of the gang evidence, the State introduced other character evidence to paint defendant as a violent individual bent on murder. Chief among the character evidence were certain rap lyrics read to the jury, which had murder as its theme. The State, however, failed to lay any sort of foundation for the admission of the lyrics into evidence. There was simply no evidence defendant had written the lyrics or that the lyrics had any relevance to the offense of which defendant stood accused. The gang and propensity evidence served only to distract the jury's attention from the issues in the case and retrain its focus on defendant's character which it had besmirched with spurious and repeated references to gangs, tattoos, rap lyrics and violence.

And so it was that the State's case rested entirely on improper evidence – improper identification testimony; an improperly admitted hearsay statement; and improperly admitted gang and character evidence. After viewing the evidence, properly admitted, in the light most favorable to the State, no reasonable juror could have found beyond a reasonable doubt and to the exclusion of every reasonable hypothesis of innocence that defendant was guilty. Accordingly, defendant's conviction and sentence should be reversed. In the alternative, the erroneous admission of the identification testimony, the hearsay testimony and the gang and character evidence, considered independently and certainly together, warrant a new trial. For theses reasons and the reasons that follow, defendant respectfully requests that this Honorable Court reverse his conviction and sentence, or in the alternative reverse his conviction and sentence and grant him a new trial.

ARGUMENT

I

THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S MOTIONS TO BAR IDENTIFICATION TESTIMONY.

Sandra Graham was one of the State's two key witnesses. Through Ms. Graham's testimony the State hoped to establish its first path of evidence by placing defendant at the decedent's home within the four day range of her time of death. As demonstrated below, however, Graham's identification testimony was infected with error from start to finish and to such an extent as to require a new trial.

The State conducted two separate pretrial identification procedures. The first procedure consisted of showing Ms. Graham three photographs of defendant and no photographs of any other person. The second procedure entailed conducting two lineups for Graham without affording defendant the right to counsel.

Each of the procedures created error in two ways. First, the trial court erred when it allowed Graham to make an in-court identification of defendant. The photographic show-up tainted Graham's in-court identification and violated defendant's Fourteenth Amendment right to due process. More significantly, the two lineups conducted in the absence of counsel tainted Graham's in-court identification, and violated defendant's Sixth Amendment right to counsel. Because the two identification procedures violated distinct constitutional safeguards, the in-court identification following each procedure will be analyzed separately. It should not be overlooked, however, that two improper procedures tainted Graham's in-court identification.

Second, the trial court erred when it allowed the State to introduce evidence at trial that Graham had identified defendant in the photographic show-up and at the February 28th lineup. Likewise, because the two procedures concern distinct constitutional safeguards, the admission of each pretrial

identification will also be analyzed separately.

For the sake of analytical clarity, the following argument will be broken down into four parts below. The analysis will follow the chronological order of the error: (1) allowing Graham to make an in-court identification following the photographic show-up; (2) allowing Graham to make an in-court identification following the two lineups; (3) allowing evidence at trial that Graham identified defendant at the photographic lineup and (4) allowing evidence at trial that Graham identified defendant at the February 28th lineup.

Special notice should be taken of the last error. Detective Holmes acknowledged that he knew defendant would eventually be appointed an attorney, and that he exploited the situation by conducting the two lineups before defendant was appointed counsel. As a result, defendant's Sixth Amendment right to counsel was violated and a *per se* rule applies excluding all evidence of the identification made at the illegal lineup. With regard to the first three errors, the State has an opportunity to demonstrate that the totality of the circumstances did not create an intolerable risk of misidentification. The fourth error is a different animal: a *per se* rule applies requiring the exclusion of evidence of the identification at an illegal pretrial lineup and the State does not have an opportunity to explain it away. Viewed together, the entire identification process reflects a steady progression of constitutional error culminating in an error so egregious as to require a *per se* exclusion of evidence.

After learning that the decedent was found dead, Ms. Graham telephoned the Pike County Sheriff's Department on May 17, 1999. (R.326-27). Graham reported that she had seen someone in the passenger seat of a red and white pick-up truck leaving the decedent's driveway in the early morning on May 13th. (R. 327). On May 25th, Detective Robert Holmes interviewed Graham at the Pike County Sheriff's Department. (R.14-15). Graham told Detective Holmes that she saw an African-American male in the passenger seat of a pick-up truck leaving the decedent's driveway at about 6:30 a.m., on May

13th. (R. 14-15, 47). Graham did not notice the driver, nor did she see defendant or anyone else come out of the decedent's house. (R. 49, 348). Graham stated that she saw the passenger for about three or four seconds when the truck passed her as she walked down the street. (R. 44, 344). In her written statement given on May 25th, Graham described the passenger as having a dark brown complexion. (R. 47).

Detective Holmes showed Ms. Graham three photographs of defendant. (R. 18, Exhibits D-1A, D-1B, D-1C). In each picture, defendant was posing with a different person, his mother, his girlfriend, and his mother's boyfriend. (R. 16-17). Holmes did not show Graham photographs of any other person. (R. 18). During the interview, Graham identified defendant from the photographs as the man she saw in the passenger seat in the early morning on May 13th. (R. 20).

On July 14, 1999, a criminal affidavit charging defendant with murder was filed in the Pike County Justice Court and a warrant for defendant's arrest was issued. (Supp. R., filed May 21, 2003, Vol. 1, pp. 1-3, Rec. Ex. C-1-3).

One year later, defendant was arrested in Illinois, and the State of Mississippi sought to extradite him. (R. 654-55). After a contested hearing, the circuit court of Cook County, Illinois, ordered defendant extradited. (R.122, 655). The Illinois court entered an order on February 14, 2001, stating that defendant did not wish to speak to any law enforcement officer from Illinois or Mississippi. (Exhibit D-2).

On February 24 or 25, 2001, defendant arrived in Mississippi. (R. 132). Detective Holmes informed defendant of the charges against him. (R. 127). Defendant told Holmes that he did not want to speak to him and that he was waiting for an attorney. (R. 127). Holmes also advised defendant that he had a right to an attorney. (R. 128). According to Holmes, defendant informed him that "he was waiting for everything, until he got an attorney." (R. 128). Defendant was not appointed counsel until

his arraignment on May 10, 2001. (Supp. R., filed February 26, 2003, Vol. 1, p. 1-6).

On February 27, 2001, Detective Holmes conducted the first of two lineups of defendant for Sandra Graham. (R. 21-23, 119). On February 28, 2001, Holmes conducted a second lineup of defendant for Ms. Graham. (R. 21-23, 119). No counsel for defendant was present at either lineup. (R. 23-24, 122-23). Holmes stated that he intentionally scheduled the lineups before defendant could be appointed counsel. (R. 123). According to Holmes and Ms. Graham, Graham identified defendant during the February 28th lineup. (R. 327-28, Exhibit S-18.). There is nothing in the record explaining what transpired during the February 27th lineup that required the second lineup for Graham. The inference, however, is clear: Graham was unable to identify defendant at the first lineup.

Prior to trial, defendant filed two motions seeking to bar Graham's identification testimony. (Supp. R., filed April 11, 2003, Vol.1, pp. 4,12). Defendant sought to exclude evidence of Graham's pretrial identifications, as well as to bar Graham from making an in-court identification. The trial court conducted separate hearings on each motion. (R. 12, 85). The first hearing addressed defendant's claim that the photographic lineup impermissibly tainted Graham's identification. (R. 12). The second hearing concerned defendant's contention that the lineups conducted without an attorney violated his Sixth Amendment right to counsel. (R. 85). The trial court denied both motions. (R. 69-70, 136).

At trial, Sandra Graham identified defendant as the passenger in the pickup truck she saw in the early morning on May 13, 1999. (R. 322). Ms. Graham testified that with her pace and the speed of the truck, she was able to make eye contact with the passenger. (R. 323). Graham testified that she saw the passenger's profile, and that when he turned she was able to see his eyes, lips and his hair. (R.323). According to Graham's testimony, the passenger was putting a cigarette in his mouth. (R. 323). Graham also stated that his hair looked as if it had just been taken down, as though it had been in braids. (R.323). Graham testified that it was still a little dark out and that she saw the passenger for three or

four seconds. (R.325, 344).

Graham then testified that she had previously identified defendant. First, Ms. Graham stated that she had identified defendant in a photograph Detective Holmes showed her. (R. 327). Graham then testified that she identified defendant in the February 28th lineup. (R. 328-30). At trial there was no mention of the lineup on February 27th. Likewise, at trial, Detective Homes testified that Graham identified defendant as the passenger in the truck, first from the photographs, and then at the lineup. (R. 462-65).

In closing argument, the State argued that two converging paths proved defendant's guilt beyond a reasonable doubt, one of which was Sandra's Graham's identification testimony. (R. 689).

A

THE TRIAL COURT ERRED WHEN IT ALLOWED SANDRA GRAHAM TO MAKE AN IN-COURT IDENTIFICATION OF DEFENDANT FOLLOWING AN UNNECESSARY AND IMPERMISSIBLY SUGGESTIVE PHOTOGRAPHIC SHOW-UP.

This Court has long recognized that the inherent problems with the accuracy of identification testimony raise a haunting question. See *York v. State*, 413 So.2d 1372, 1374 (Miss. 1982). In discussing the problematic nature of witness identification in *York*, this Court quoted the United States Supreme Court as follows:

> The vagaries of eye-witness identification are well known; the annals of criminal law are rife with instances of mistaken identification.

York, 413 So.2d at 1375 (quoting *United States v. Wade*, 388 U.S. 218, 228, 87 S.Ct. 1926, 1933, 18 L.Ed.2d 1149 (1967). It has also been long recognized that certain pretrial procedures enhance the risk of misidentification and violate a defendant's due process rights under the Fourteenth Amendment. See *York*, 413 So.2d at 1376.

Of such procedures, the practice of showing suspects singly to witnesses has receives special condemnation. *Stovall v. Denno*, 388 U.S. 293, 301-02, 87 S.Ct. 1967, 1972-73 18 L.Ed.2d 1199 (1967). Addressing this practice, this Court again quoted the United States Supreme Court:

> It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. A witness may have obtained only a brief glimpse fo a criminal, or may have seen him under poor conditions.
>
> ***
>
> This danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw.

York, 413 So.2d at 1378 (quoting *Simmons v. United State*, 390 U.S. 377, 383-84, 88 S.Ct. 967, 971, 19

L.Ed.2d 1247 (1967).

Accordingly, the practice of showing a witness a photograph of a single individual for the purpose of identification is prohibited, unless some necessity has been established. *York*, 413 So.2d at 1383. A court must bar an in-court identification when based on the totality of the circumstances surrounding the identification the procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. *York*, 413 So.2d at 1383. In making this determination, the following factors are considered: (1) the opportunity for the witness to view the suspect at the scene; (2) the witness's degree of attention; (3) the accuracy of the witnesses's prior description of the suspect; (4) the level of certainty at the confrontation; and (5) the time between the sighting and the confrontation. *York*, 413 So.2d at 1383.

Preliminarily, in the present case, there can be no doubt as to the impermissibly suggestive nature of the photographic show-up. Detective Holmes showed Sandra Graham three pictures of defendant and no pictures of any other person. Likewise, there can be no question that the show-up was not based on necessity. The show-up occurred eight days after Graham had called to report that she had seen someone in the passenger seat of the truck and a week after officers had obtained three photographs of defendant. Detective Holmes simply did not show Graham photographs of any individual other than defendant. The show-up was both impermissibly suggestive and unnecessary.

Applying the relevant factors, based on the totality of the circumstances surrounding the identification, the procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. See *York*, 413 So.2d at 1383. First, Graham had very little opportunity to view the passenger in the pickup truck. According to her own testimony, Graham saw the passenger for three or four seconds when the truck drove past her as she was walked in the street. Moreover, the lighting was less than ideal. Graham testified that it was still a little dark outside. The

passenger was in a sitting position and was drawing a cigarette toward his lips. Thus she was unable to see the passenger's entire body, or provide a weight or height description. Second, Graham had no real reason to heighten her attention. While she testified that she thought it unusual to see activity at the decedent's home early in the morning, she was not witnessing a crime.

Third, Graham's description of the passenger's appearance did not match defendant's appearance. Initially, Graham's description was remarkable for its absence of details. She did not offer a height or weight description. She did not provide a description of the passenger's build. She did not notice any identifying marks. The only identifying description offered by Graham was in conflict defendant's appearance. Graham testified that the passenger was a dark-skinned African-American. After viewing defendant in the photographic show-up, Graham identified him even though she acknowledged that defendant did not have dark skin. (R. 33). When asked to describe defendant's complexion at the hearing on defendant's motion to bar her testimony, Graham again acknowledged that defendant did not have a dark complexion, and in fact had lighter skin than she did. (R.47-48). When asked to compare defendant's complexion at trial to five other African-Americans in the court room, defendant conceded that defendant was the lightest skinned. (R. 347). Ms. Graham also stated that defendant was one of the lighter skinned people in the February 28th lineup. (R. 358).

At this point it is well worth considering that once a witness makes an identification, the witness may be very reluctant to acknowledge the possibility that he or she had been mistaken. See *United States v. Wade*, 388 U.S. 218, 229, 87 S.Ct. 1926, 1933, 18 L.Ed 2d 1149 (1967)("it is a matter of common experience that, once a witness has picked out that accused at the lineup, he is not likely to go back on his word later on. . . ."). Consistent with common experience, Graham stood by her identification. Confronted with the discrepancy between her description of the passenger and defendant's actual appearance, Graham tried to explain away the difference with this statement: "But that was a hot

summer and he could have been out in the heat. And of course, we do tan as well." (R. 47-48). So locked in to her identification was Graham, that she only grudgingly conceded that May 13th falls in the spring. (R.354-55).

Fourth, on the surface, Graham seemed certain in her identification when shown the photographs of defendant. Yet, according to Detective Holmes, she noticed that defendant appeared lighter skinned in the photographs than the passenger she saw in the truck. (R.33). Fifth, the duration between the original sighting on May 13th and viewing the photographs of defendant on May 25th, was 12 days. Twelve days is a considerable period of time in light of the three to four seconds Graham had to view the passenger.

A review of the totality of the circumstances surrounding Graham's identification reveals the identification was borne of an unnecessary and highly suggestive procedure widely condemned. Graham had only three or four seconds to see the passenger she later identified as defendant, and her description of the passenger was not consistent with defendant's appearance. Based on the foregoing, the photographic show-up was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. The trial court therefore erred when it denied defendant's motion to bar Graham's in-court identification.

B

THE TRIAL COURT ERRED WHEN IT ALLOWED SANDRA GRAHAM TO MAKE AN IN-COURT IDENTIFICATION FOLLOWING TWO LINEUPS WHERE DEFENDANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO COUNSEL.

Not only did the suggestive photographic show-up taint Graham's in-court identification, the two lineups conducted in the absence of defense counsel tainted her identification as well. While the prohibition against suggestive identification procedures is grounded in the Fourteenth Amendment, a lineup conducted in the absence of counsel violates the Sixth Amendment.

The Sixth Amendment provides in part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have Assistance of Counsel for his defence.

U.S. Const., Amend. VI.

The Sixth Amendment guarantees an accused the right to counsel during every critical stage of a criminal prosecution. *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967). The right to counsel attaches once adversarial proceedings have commenced. *York v. State*, 413 So.2d 1372, 1383 (Miss.1982). The filing of criminal charges constitutes the commencement of adversarial proceedings. *Bankston v. State*, 391 So. 2d 1005, 1007 (Miss. 1980). Accordingly, after a defendant has been charged, he is entitled to have counsel present at his lineups. *York v. State*, 413 So.2d at 1383.

In Mississippi, it has also been held that the right to counsel attaches after arrest and at the point when the initial appearance ought to have been held. See *Jimpson v. State*, 532 So.2d 985, 988 (Miss. 1988). Indeed, the initial appearance is required to be held "without unnecessary delay and within 48 hours." Rule 6.03, Miss.Unif.Crim.R.Cir.Ct.Prac.

The presence of counsel at lineups assures that the "accused's interests will be protected

consistent with our adversary theory of criminal prosecution." *Wade*, 388 U.S. at 227, 87 S.Ct. at 1932. The underlying concern informing the right to counsel is the potential for improper influence, intentional or not, surrounding identifications at lineups. *Wade*, 388 U.S. at 36-37, 87 S.Ct. at 1937.

The United States Supreme Court in *Wade* recognized that an accused's fate may be settled at a lineup reducing the trial to a mere formality. The Supreme Court in *Wade* quoted from *Escobedo v. State of Illinois*:

> The rule sought by the State here, however, would make the trial no more than an appeal from the interrogation; and the right to use counsel at formal trial (would be) a very hollow thing (if), for all practical purposes, the conviction is already assured by pretrial examination. . . . One can imagine a cynical prosecutor saying: "Let them have the most illustrious counsel, now. They can't escape the noose. There is nothing that counsel can do for them at trial."

Wade, 388 U.S. at 226, 87 S.Ct. at 1931-32 (quoting *Escobedo v. State of Illinois*, 378 U.S. 478, 487, 84 S.Ct. 1758, 1763, 12 L.Ed.2d 977).

Concern about the reliability of eye witness testimony and the potential for mistaken identification was also expressed by the Supreme Court in *Wade* follows:

> The vagaries of eye witness identification are well known; the annals of criminal law are rife with instances of mistaken identification. Mr. Justice Frankfurter once said: "What is the worth of identification testimony even when uncontradicted. The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trial. These instances are recent – not due to the brutalities of ancient criminal procedure.
>
> ***
>
> Moreover, it is a matter of common experience that, once a witness has picked out that accused at the lineup, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for practical purposes be determined there and then, before trial.

Wade, 388 U.S. at 228-29, 87 S.Ct. at 1933.

The Supreme Court in *Wade* continued:

> But as is the case with secret interrogations, there is serious difficulty in depicting what transpires at lineups and other forms of identification confrontations.
>
> ***
>
> In short, the accused's inability effectively to reconstruct at trial any unfairness that occurred at the lineup may deprive him of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification.

Wade, 388 U.S. at 230-32, 87 S.Ct. at 1934-35.

Finally, it stressing the importance of a pretrial confrontation, the Court stated:

> The trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation with the State aligned against the accused, the witness the sole jury, and the accused unprotected against the overreaching, intentional or unintentional, and with little or no effective appeal from the judgment there rendered by the witness – "that's the man."

Wade, 388 U.S. at 235-36, 87 S.Ct. at 1937.

And so it was in the present case. There is no question that defendant was deprived of his right to counsel at the lineups conducted on February 27, 2001 and February 28, 2001. Adversarial proceedings commenced 21 months earlier on July 14, 1999, when the criminal complaint charging defendant with murder was filed. Defendant's right to counsel therefore attached well before Detective Holmes conducted the two line-ups on February 27th and 28th. Moreover, in an adversarial hearing, the State of Mississippi successfully sought defendant's extradition making the lineups possible. Defendant was clearly charged, under arrest and in custody for "a few days to week" before Holmes conducted the lineups. (R. 38). Defendant's initial appearance should have been held. See Rule 6.03, Miss.Unif.Crim.R.Cir.Ct.Prac.

What is more, Detective Holmes purposefully frustrated defendant's right to counsel. During the hearing on defendant's motion to suppress Graham's in-court identification, Holmes stated that he

intentionally scheduled the lineups before defendant was appointed counsel. In the words of Detective Holmes, "he used his advantage." Holmes testified:

> **Q** So, in fact, there was a proceeding in the State of Mississippi and he fought extradition and had already made a statement that he did not want to speak with law enforcement authorities?
>
> **A** Correct.
>
> **Q** And had that – had both of those identifications, he did not have the opportunity to speak with or have an attorney present, correct?
>
> **A** Mr. Bates, now I don't – wasn't aware whether he had been at an arraignment or not with a judge to have a lawyer present.
>
> **Q** And you don't know –
>
> **A** But one thing I can clearly state is that he did not speak to me. I didn't talk to him other than to inform him what he was charged with. After that, I felt I had just a limited amount of time, before he was appointed an attorney, to try to conduct a physical lineup. And that's what I did.
>
> **Q** Excuse me, sir. You figured that you had a limited time before –
>
> **A** Yes, sir –
>
> **Q** – he was appointed counsel to represent him to do your lineup?
>
> **A** Correct. Because he was – you are in jail for murder which means that you just fought extradition from another state, which means that as soon as they found out that you're in jail, you're going to be appointed an attorney sooner or later. After I –
>
> **Q** You –
>
> **A** Let me finish. After I had talked to Mr. Brooks in February of 2001, advising him what he was being charged with, he informed me then, also, that he did not have an attorney. So at that point in time, I used my advantage. I conducted a physical lineup on the 27th and 28th before he was appointed an attorney.

(R. 122-24) (Emphasis supplied.)

Clearly the lineups were conducted in violation of defendant's Sixth Amendment right to counsel, and intentionally so.

A court will permit an in-court identification by a witness who viewed a proscribed lineup only where the State shows by clear and convincing evidence that the in-court identification is free of the taint of the impermissible pretrial lineup. *York v. State*, 413 So.2d 1372, 1383 (Miss. 1982). Among the factors considered in determining whether the State has met its burden are: (1) the opportunity for the witness to view the suspect at the scene; (2) the existence of any discrepancy between any pre-lineup description and the defendant's actual description; (3) any identification prior to lineup of another person; (4) the identification by picture of the defendant prior to the lineup; (5) failure to identify the defendant on a prior occasion; and (6) the lapse of time between the sighting and the confrontation. *United States v. Wade*, 388 U.S. 218, 241 87 S.Ct. 1926, 1940,18 L.Ed.2d 1149 (1967).

Considering these factors, the State failed to meet its burden by establishing with clear and convincing evidence that Sandra Graham's in-court identification was free of taint from the two illegal lineups. First, the opportunity of Sandra Graham to view the passenger in the truck suggests that the lineups tainted her in-court identification. Sandra Graham testified that she saw the person she identified as defendant for three or four seconds, in less than ideal lighting, as the pickup truck passed her on the street. Three or four seconds is a very short time. *Cf. Magee v. State*, 542 So.2d 228, 232 (Miss. 1989) (witness had three to five minutes to view the defendant). Moreover, Ms. Graham was moving as was the passenger in the truck.

Second, Graham's description of the suspect was at odds with defendant's actual description and strongly suggests that the her in-court identification was tainted by the two lineups. As discussed above, Graham's only identifying description – the passenger's skin complexion – did not match defendant's actual appearance. Graham gave no other identifying details. *Cf. Magee v. State*, 542 So.2d at 232

(witness gave height and weight descriptions close to defendant actual height and weight).

Third, the record does not reveal any identification by Graham of a person other than defendant. Fourth, Graham had identified defendant in an unduly suggestive photographic show-up. It thus appears that Graham's lineup identification, itself, had been tainted. Fifth, it appears that Graham failed to identify defendant at the first lineup on February 27th. The record reveals that two lineups were held for Graham's benefit, and that Graham identified defendant at the February 28th lineup. The question that naturally arises is why a second lineup was needed. The record contains no explanation, and defendant was deprived of an attorney who would have been able to provide one.

Sixth, the lapse in time between seeing the passenger and the lineups also suggests that Graham's in-court identification was tainted. Here, Graham claimed she saw defendant on May 13, 1999. The two lineups occurred at the end of February 2001, 21 months later. *Cf. Magee v. State*, 542 So.2d at 232 (witness identified the defendant at a lineup one day after the crime).

The concern underlying the right to counsel is on vivid display in the present case. Without counsel present at the lineups, defendant was helpless to subject the lineups to effective scrutiny at trial. Sandra Graham viewed two different lineups, one on February 27th and one on February 28th. Yet, without counsel present at the lineups, defendant was unable to cross-examine Ms. Graham as to the necessity of the second lineup. As a result, the State was able to portray Graham's identification as certain and without hesitation.

Based on the foregoing, the State failed to demonstrate by clear and convincing evidence that the Sandra Graham's in-court identification was free of the taint of the two illegal lineups. The trial court therefore erred when it denied defendant's motion to bar Graham from making an in-court identification of defendant.

Finally, with regard to the taint of the State's in-court identification, it must be pointed out that

there were two separate faulty procedures at play. One was the unnecessary and impermissibly suggestive photographic show-up, and the second were the illegal lineups. While consideration of each procedure rests on different constitutional grounds, the combined effect of the taint cannot be underestimated. Viewed separately the employment of each improper procedure and the resulting taint was sufficient to preclude Graham's in-court identification. The combination of the faulty pretrial identification procedures, however, creates an even greater likelihood of misidentification that is overlooked when evaluating the claims independently. It is submitted that where an in-court identification follows on the heels of, not one, but two impermissible pretrial procedures, the likelihood of misidentification is too great to withstand scrutiny.

C

THE TRIAL COURT ERRED WHEN IT ADMITTED SANDRA GRAHAM'S IDENTIFICATION OF DEFENDANT AT THE PHOTOGRAPHIC SHOW-UP INTO EVIDENCE AT TRIAL.

Quite apart from the issue of excluding an in-court identification based on a suggestive photographic show-up is the question of admitting evidence that a witness identified the defendant at the improper show-up. *York v. State*, 413 So.2d 1372, 1381 (Miss. 1982).

Testimony that a witness identified the defendant at a suggestive pretrial photographic show-up will be excluded at trial where based on the totality of the circumstances surrounding the identification the procedure was so impermissibly suggestive as to give rise to a "very substantial likelihood of misidentification." *York*, 413 So.2d at 1383. This standard is similar to the standard for excluding an in-court identification following a suggestive procedure. *York*, 413 So.2d at 1383. The present standard, however, is less stringent since it does not require "irreparable" misidentification. *York*, 413 So.2d at 1383.

In the present case, Sandra Graham and Detective Holmes both testified that Ms. Graham identified defendant from the suggestive photographic show-up. (R. 327). And in closing argument, the State argued that Graham's in-court identification was reliable because she had also identified defendant in the photograph. The State introduced this testimony and argument together with the testimony and argument that Graham identified defendant at the February 28th lineup. Accordingly, the detailed reference to the record regarding the photographic show-up will be set forth in the following section.

The relevant factors for excluding a witness's testimony that he identified the defendant at a suggestive photographic show-up are the same factors the court considers when excluding an in-court

identification. Those factors have been analyzed in section A, above, and the analysis need not be repeated here. For the reasons stated in subsection A, above, the trial court erred when it denied defendant's motions and admitted evidence at trial of Graham's identification of defendant at the photographic show-up.

D

THE TRIAL COURT ERRED WHEN IT ADMITTED SANDRA GRAHAM'S IDENTIFICATION OF DEFENDANT AT THE FEBRUARY 28TH LINEUP INTO EVIDENCE AT TRIAL.

With each of three preceding errors – the impermissible photographic lineup, the two illegal lineups, and the admission of evidence that Graham identified defendant at the photographic show-up – a steady progression of error can be seen. The most egregious error, however, was yet to come.

The State may not present testimony that a witness identified defendant at a pretrial lineup conducted in violation of a defendant's Sixth Amendment right to counsel. *Gilbert v. State of California*, 388 U.S. 263, 273-74, 87 S.Ct. 1951, 1956-57, 18 L.Ed.2d 1178 (1967). In this regard, a *per se* exclusionary rule applies prohibiting the introduction of an identification made at an illegal lineup. *Gilbert*, 388 U.S. at 273-74, 87 S.Ct. at 1956-57. The rationale of the exclusionary rule is simple: the State is not permitted to benefit from its illegal conduct. See *Gilbert*, 388 U.S. at 273-74, 87 S.Ct. at 1956-57. And "only a *per se* exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup." *Gilbert*, 388 U.S. at 273, 87 S.Ct. at 1957.

In the present case, the State introduced evidence that Sandra Graham identified defendant at the February 28th lineup. The State introduced this testimony throughout the trial and strongly argued the identification testimony to the jury. In fact, this testimony played a pivotal role in the State's case

as it sought to bolster Sandra Graham's in-court identification of defendant. See *Gilbert*, 388 U.S. at 273-74, 87 S.Ct. at 1956-57 (the exclusionary rule "is buttressed by the consideration that the witness' testimony of his lineup identification will enhance the impact of his in-court identification on the jury and seriously aggravate whatever derogation exists of the accused's right to a fair trial.").

While the *per se* exclusionary rule bars the introduction of any evidence of an unconstitutional lineup, it is instructive in the present case to detail the extent to which the State introduced and relied on evidence of the illegal lineup. The State walked two witnesses – Ms. Graham and Detective Holmes – step by step through Graham's pretrial identification of defendant in an effort to bolster her in-court identification. The State went on to introduce Graham's illegal identification during its cross-examination of defendant and then argued extensively to the jury the significance of the lineup identification.

As set forth in detail below, the testimony surrounding the unconstitutional pretrial identification was exhaustive. It was reversible error for the trial court to allow into evidence the fruit of the illegal lineup.

The State's direct examination of Graham on this point follows:

Q Okay. Did someone come to your house or did you go to the sheriff's department?

A I went to the sheriff's department.

Q Did – did – who was it that you talked to at the sheriff's department?

A I talked to the sheriff himself and I also talked to Detective Robert Holmes.

Q Okay. Detective Robert Holmes, is that – is that the young man that's seated at the table?

A Yes, sir. With the black suit.

Q Okay. Did he show you a photograph?

A Yes, he did.

Q And you were able to identify the photograph that he showed you?

A Yes, I was.

Q Who was in that photograph?

A Mr. Brooks.

Q Now was there ever a time when you had an opportunity to view a lineup?

A Yes.

Q And where was that lineup?

A At the sheriff's department.

Q How long after – after you had – how long after May the 13th of '99, did you view the lineup?

A It was awhile.

Q Was it months or years?

A It was this year.

Q This year.

A Yeah.

Q Tell the ladies and gentleman of the jury how a line-up is conducted at the sheriff's office, at least from what you observed.

A What I observed was, they brought a group of young men in dressed in their orange attire, lined them up, and then I was to identify the person that I felt was the accuser of this crime.

Q Let me show you what is marked as – actually the defense, the defendant – excuse me. Let me show you a photograph and ask you if you recognize the photograph?

A Yes, I do.

Q And what does it show?

A It shows – excuse my expression – some criminals.

Q Well, well, let's try not to use that expression. And let's – let me ask it a different way.

A Okay.

Q Is this the lineup, a photograph of the lineup you viewed?

A Yes.

***

Q And – how were the – how were the men dressed?

A In the orange suits like they are in the picture.

Q Okay. And where were you positioned when you viewed this line-up?

A Outside the glass.

Q Okay. All right. Could you see them clearly?

A Yes, I could.

Q And do you know whether they could see you?

A They could not.

Q All right.

State Your Honor, at this time, the State would offer into evidence this photograph.

Def. Cnsl. I reiterate my objection to this photograph. There is no proper foundation laid for it. That she'd seen the photograph before.

Court I think she has identified the photograph. I'm going to let it be admitted into evidence. Overruled.

State Okay. May I publish this to the jury, Your Honor?

Court Yes, sir.

Q Mrs. Graham, while the jury is looking at that photograph, I would ask what, if any, assistance did you have in identifying the defendant when you aw this line-up?

A None.

Q Did anyone assistance you?

A No, sir.

Q Did anyone help you in any way whatsoever?

A No, sir.

Q Did you have any difficulty, or what, if any, difficulty did you have identifying the defendant.

A None.

Q Okay. And where you able to identify the defendant in that lineup?

A Yes, sir.

Q Okay. The defendant, is he the same person that you saw coming out of the house, out of Merry Wilson's house on the early morning hours of May the 13th of 1999?

A Yes, sir.

(R327-331).

As the above testimony demonstrates, the State did not merely ask Graham if she had identified defendant in a lineup, which would have been error in and of itself. But the State actually recreated the unconstitutional lineup by walking Graham through it step by step, and introducing into evidence and publishing to the jury the photograph of the illegal lineup.

So convinced was the State of the persuasive effect of Graham's pretrial identification, that it was not satisfied with recreating the lineup through the testimony of Ms. Graham. The State went on

to introduce evidence of the pretrial identification a second time though the testimony of Detective Holmes. Holmes' testimony in this regard follows:

Q And would you tell the ladies and gentlemen of the jury not what [Graham] told you but where did you conduct that interview?

A At the Pike County Sheriff Department on May 25th, 1999.

Q And for what purpose?

A Basically with the items that we had trying to get an identification and a statement as far what she witnessed on the date that she notified Sheriff Johnson that she saw an individual coming from that residence.

Q Okay. At that time – at the time you interviewed her, did you present photographs to her?

A Yes, sir. The only photographs that I had in my possession.

***

Q Would you tell me what if any assistance you gave Mrs. Graham in identifying the person she saw?

A None.

Q Would you tell me, please what if any, difficulty you witnessed her having in identifying the person in the photograph?

A With the photographs that I had given Mrs. Graham, she basically had hardly any trouble identifying Mr. Brooks. She stated that the only difference that there was to Mr. Brooks was that when she identified – witnessed him the morning of the 13th of May, 1999.

***

Q Would you continue, Officer.

A In interviewing Mrs. Graham, after she was able to identify Mr. Brooks on the photograph I provided for her, she stated the only difficulty that she had was that Mr. Brooks looked more dark complexion.

***

Q Now, at any time, did you have – do you have any knowledge of whether Mrs. Graham had an opportunity to identify the defendant, Blaine Brooks.

A Yes, sir, she did.

Q And would you tell us please the circumstances. Or the occasion. I'm sorry.

A February 2001, once we notified Mr. Brooks – I was notified Mr. Brooks was transported back here on the charges of murder, I conducted a physical lineup with Mrs. Sandra Graham on May 28, 2001.

Q Tell the ladies and gentleman of the jury how you conducted that physical lineup.

A On that – on most lineups that we do, the only opportunity that we have to do some of the lineups are with individuals on the street or individuals within our correctional facility. That particular day, I had to basically get as many individuals the same height, same/similar height, similar in weight and similar in complexion to Mr. Brooks. That particular day I was able to get four to five individuals to-- along with Mr. Brooks made six, for that physical lineup, as far as complexion, height, weight comparisons.

Q Okay. And where did you obtain the participants in that lineup from?

A On that particular day, each participant came with out -- within the detention facility at the Pike County Sheriff Department.

Q And there is a photograph that has been offered into evidence of that lineup. Does that photograph fairly and accurately show the way that those individuals would have appeared?

A Yes, sir, it did. Because I'm the one that took that photograph.

Q Okay. All right. And were they all dressed the same?

A Yes, they were.

Q How was Mrs. Graham positioned in relation to the participants

in the lineup?

A Mrs. Graham never saw any of the individuals prior to walking into the interview room. Once I had gotten the participants inside the interview room, there is was a second door that she would enter. Once she enters, there was a tint, dark tint which she can see out but they cannot see in. And when Mrs. Graham went in, she viewed and she immediately identified Mr. Brooks as the subject that she saw on May the 13th, 1999.

Q Did anyone, in your presence, give any assistance to her or aid her, in any way, in identifying the witness?

A No, sir.

Def Cnsl. Objection, leading, Your Honor.

Court Overruled.

A No, sir, we didn't.

(R. 461-65).

As with Graham's testimony, the State was not satisfied to merely call the lineup identification to the jury's attention. For a second time, the State introduced into evidence and recreated, step by step, the unconstitutional pretrial identification itself. The State, however, was not finished.

On re-cross examination of defendant, the State again raised the unconstitutional lineup identification. According to the State, Graham was able to identify defendant at the lineup because she had actually seen him driving away from the decedent's home. The State's rhetorical inquiry follows:

Q And that's my point. And that's my last question to you. You said that if you see me today, two years later you could pick me out. That's why Sandra Graham was able to pick you out even two years later, in a lineup, behind a mirror, with other individuals dressed just alike, all about the same height, two years later. She was able to pick you out because she had seen you, just like you said that you have seen me today, that, in fact is what happened, isn't it?

(R. 651) (Emphasis supplied).

Having introduced evidence of the unconstitutional lineup identification through three witness – Ms. Graham, Detective Holmes and defendant – the State hammered home its point by arguing in closing that Ms. Graham could not be mistaken about her in-court identification because she had identified defendant at a lineup. The State argued:

> But, perhaps, some of the most revealing some of the most damning, some of the most pertinent information and evidence to come through here came from Sandra Graham. She came here yesterday and gave an in-court identification of whom she saw leave the residence of the victim on May 13th, 1999, that morning. And she made no bones about it. She identified Blaine Brooks as the one who left the residence that morning, May 13th, 1999.
>
> * * *
>
> But not only did she come in here and ID the defendant in court, she IDed him in a single photograph and she IDed him in a lineup. . . .
>
> ***
>
> And as far as the identification go, Officer Holmes testified and she testified, she had no problem IDing him. . . .But there is an out-of- court identification. There is an in court identification. What motive does she have to lie?

(R. 669-70) (Emphasis supplied).

Finally, in case the State's point was lost on any of the jurors, the State continued along this theme in rebuttal:

> She sees this defendant. Now she is either lying or she is telling the truth. She's not mistaken. She's either lying or telling the truth. Let me ask you this. Is it more likely that she picked him out two years later from briefly seeing a photograph or is it more likely that she was able to do that – which is amazing – but it's not so amazing if you accept her testimony that she picked him out of a lineup because she saw him that morning. . . .
>
> * * *
>
> Not only that but she picks him – she identifies him in a photograph. And then, amazingly, two years later, now, without any assistance and

> behind a mirror and look at that photograph with all these bodies lined up there. All in orange, she picks him out. Why? Because she saw him.

(R.690-92) (Emphasis supplied).

Despite the *per se* rule requiring the exclusion of an illegal lineup identification, the State was able to recreate that very identification in a methodical, repetitive and highly prejudicial manner. It is difficult to imagine any case where a defendant's right to counsel has been so violated in such a cavalier fashion. First, Detective Holmes "uses his advantage" and conducts two lineups before defendant is appointed counsel, and then to the fullest extent the State exploited the illegal lineup at trial.

The present case is very similar to *Frisco v. Blackburn*, 782 F.2d 1353 (5th Cir. 1986). There, the court vacated a conviction based on the introduction into evidence of an unconstitutional lineup. In *Frisco*, the court stated that the lineup "served a pivotal role in the state's case." *Frisco*, 782 F.2d at 1356. In arriving at its conclusion, the court noted that at trial the prosecution introduced the unconstitutional lineup identification five times and that the identification served as a unifying theme. *Frisco*, 782 F.2d at 1356. The court also considered the "thoughtful placement of those references" and the use of the tainted evidence to bolster the in-court identification. *Frisco*, 782 F.2d at 1356.

Likewise in the present case, the unconstitutional lineup identification played a pivotal role in the State's case. The State adduced detailed step by step testimony, recreating the lineup through two witnesses, Sandra Graham and Detective Homes. The State even went so far as to introduce into evidence a photograph of the February 28th lineup and published it to the jury. The State then introduced the illegal lineup a third time when the State rhetorically asked defendant, in what the State must have felt was it's *coup de grace*: "And that's my point. And that's my last question to you. . . . That's why Sandra Graham was able to pick you out even two years later, in a lineup, behind a mirror, with other individuals dressed just alike, all about the same height, two years later." (R. 651).

And in closing argument, referring to the most "damning, revealing and pertinent" evidence, the State argued: "But not only did [Graham] come in here and ID the defendant in court, she IDed him in a single photograph and she IDed him in a lineup." (R. 669-70). And then with its last opportunity to address the jury, the State continued its unifying theme: "And then, amazingly, two years later, now, without any assistance and behind a mirror and look at that photograph with all these bodies lined up there. All in orange, she picks him out. Why? Because she saw him." (R.692).

Defendant was denied a fair trial. This is a clear case of unconstitutional lineup identification being repeatedly introduced into evidence and improperly exploited at trial. The court therefore erred when it denied defendant's motion seeking to bar all pretrial identifications at trial and permitted the State to adduce evidence that Graham identified defendant in the February 28th lineup.

II

THE TRIAL COURT ERRED WHEN IT ALLOWED SHERRY MAXINE HODGES SMITH TO TESTIFY AS TO A HEARSAY STATEMENT FROM TOWANDA NOBLES.

Sherry Maxine Hodges Smith (Ms. Hodges) was the State's other key witness. Ms. Hodges testified at trial that Towanda Nobles told her that defendant admitted to Nobles that he had stabbed the decedent. Ms. Hodges's testimony constituted the State's second path of evidence. The court erred when it denied defendant's motion to bar the hearsay statement attributed to Towanda Nobles.

When police officers interviewed Hodges, they asked her how she learned of the decedent's death. Hodges initially told the officers that she had heard about the decedent's death on the police scanner. (R. 435). The officers decided to gather more information and asked Hodges to come to the sheriff's department. (R. 435).

Once at the sheriff's department, the officers gave Hodges her *Miranda* warnings. (R. 436). They told her that no information went out over the police scanner and they knew she was lying. (R.

435-36). Hodges "broke down" according to the Detective Holmes. (R. 436). Hodges told the officers that she got the information from Towanda Nobles. (R. 436). Towanda Nobles is defendant's mother and Hodges's half-sister.

Prior to trial, defendant moved to bar Ms. Hodges from testifying as to the hearsay statement she attributed to Ms. Nobles. (Supp. R., filed April 11, 2003, Vol. 1, p. 8; Rec. Ex. B-8). The trial court denied defendant's motion. (R. 116-17). The court held that the hearsay statement attributed to Ms. Nobles fell within two exceptions to the rule against hearsay, as an excited utterance and under the catchall exception. (R. 116-17).

At trial, Ms. Hodges testified that Ms. Nobles came to her house and told her that defendant had told Nobles that he had gotten into an argument with the decedent and stabbed her. Ms. Hodges testified:

> **Q** Okay. Did she tell you – what, if anything, did she say about Blaine Brooks?
>
> **A** She said Blaine did it.
>
> **Q** Okay. What did she tell you? What else did she – what else did she tell about what Blaine had done?
>
> **A** She said Blaine had stabbed her. Stabbed Marry [*sic*]. Said they got into an argument and Blaine stabbed her. They said Blaine left and come where she was. She was on her job. That Blaine come on her job to tell her about it. And said he had bloody clothes. And she told them to get those bloody clothes out of there and get rid of them. And say he left. And I said where is Blaine now? She says he's gone. He's in Chicago.

(R. 406).

A hearsay statement is an out of court statement offered into evidence to prove the truth of the matter asserted. Miss. R. Evid. 801(c). In the present case, Ms. Hodges's testimony presented two statements. The first is the statement by defendant to his mother; the second statement is by defendant's

mother to Hodges, encapsulating the first statement. The first statement may be classified as non hearsay since it is an admission of a party opponent. See Miss. R. Evid. 801(d)(2). The second statement, which repeats the first statement, however is clearly hearsay. It is a statement by an out of court declarant, Ms. Nobles, offered into evidence to prove the matter asserted, *i.e.*, that defendant admitted stabbing the decedent. Hearsay statements are not admissible unless they fall within an exception provided by law. Miss. R. Evid. 802.

The excited utterance exception is provided for by statute and reads:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> ***
>
> (2) Excited Utterance. A statement relating to startling event or condition made while the declarant was under the stress caused by the event or condition.

Miss. R. Evid. 803(2). As the comment to Rule 803(2) notes, the essential ingredient is spontaneity. And while "the rule sets no specific time limit this Court has not allowed the admission of an excited utterance exception when the time frame was more than twenty-four hours." *Smith v. State*, 733 S.2d 793, 798 (Miss. 1999). The proponent of the statement must provide evidence of the time between the startling event and when the statement was made. *Griffith v. State*, 584 So.2d 383 (Miss.1991).

The catchall exception is also provided for by statute and reads:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> ***
>
> (24) Other Exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will be best served by admission of the statement into evidence. . . .

Miss. R. Evid. 803(24).

As a preliminary matter, the trial court determined that Ms. Hodges would be allowed to testify as to Ms. Nobles's statement, without ever hearing from Hodges. At the hearing on the admissibility of the hearsay statements, Detective Holmes testified for the State. (R. 85-95). Holmes, however, was not present at the conversation between Hodges and Nobles. Holmes's testimony was based solely on his interview with Hodges. (R. 86). Holmes was therefore not competent to testify as to the conversation between Hodges and Nobles. Holmes's testimony was pure hearsay; it was based entirely on Hodges's out of court statements.

The hearing resembled a children's game of telephone. Holmes testified as to statements from Hodges who had told Holmes about statements from Nobles who had told Hodges about statements made by defendant. Going the other direction, defendant supposedly made a statement to Nobles, who repeated the statement to Graham, who repeated the statement to Holmes, who repeated defendant's statement to the court. Accordingly, there was no competent evidence before the trial court when it made it's determination that the hearsay statement fell within the excited utterance exception and the catchall exception. Without hearing from the witness through whom the State intended to offer the hearsay statement, the trial court could not properly conclude that the hearsay statements satisfied the requirements of either exception. On this basis alone the trial court abused its discretion when it denied defendant's motion to exclude the hearsay statements attributed to Ms. Nobles.

Moreover, the State failed to carry its burden to establish that the hearsay statement attributed to Ms. Nobles fell within an applicable exception to the rule against hearsay. In the present case, the State failed to present evidence of the time between the startling event and when the statement was made. Here, the State cites as the startling event the point at which defendant allegedly told his mother that he stabbed the decedent. The State offered no evidence of when this supposed statement was made.

It can be concluded , however, that it was made before defendant left Mississippi on May 14, 1999. Accordingly, the latest the startling event could have occurred was sometime before defendant left on May 14, 1999.

According to Holmes, Ms. Nobles' did not tell Ms. Hodges of defendant's statement until the evening of May 16, 1999, between 7:00 p.m. and 7:30 p.m. (R. 95). At the shortest, the lapse in time would have far exceeded twenty-four hours. In fact, the State conceded that the lapse in time could have been up to three days. (R. 108-09). Accordingly, the State failed to offer any evidence of spontaneity.

It should further be noted that there was no competent evidence that Ms. Nobles was in an excited state when she allegedly made the statement. The only witness to her state of mind would have been Ms. Hodges, who did not testify. And Detective Holmes was not competent to testify as to whether Ms. Nobles was in an excited condition. The trial court had no evidence before it to support either the spontaneity requirement or a finding that Nobles's made the statement under the stress of a startling event. The trial court therefore abused its discretion when it ruled that the hearsay statement attributed to Ms. Nobles fell within the excited utterance exception.

Moreover, the State failed to present evidence establishing sufficient guarantees of trustworthiness so as to bring the statement within the catchall exception. In this regard it is significant that the trial court arrived at its determination without hearing from Hodges, the witness through which the State would introduce the hearsay statement. In addition, the evidence before the court called into question the trustworthiness of the hearsay statement. According to Detective Holmes, he interviewed Ms. Nobles, and she denied making the statement attributed to her. (R. 87).

Further the guarantee of reliability offered by the State at hearing is unconvincing. The State argued and the trial court accepted the premise that a mother would never say something terrible about her son unless it were true. (R.106, 115-16). Based on this premise, practically all out of court

statements of a negative character made by family members about other family members would be admissible, and the exception would swallow the rule. That is not the intention of the catchall exception. The hearsay statement contained no guarantees of trustworthiness.

The State's second path of evidence consisted solely of the hearsay statement. Based on the foregoing, the trial court erred when it denied defendant's motion to bar the hearsay statement attributed to Ms. Nobles.

III

THE TRIAL COURT ERRED WHEN IT ADMITTED GANG AND OTHER CHARACTER EVIDENCE AT TRIAL.

Not only did the State create its two paths of evidence out of error, but the State paved a third path of error. On the eve of trial, the State came upon a new theory for its case. The State now asserted that the decedent's death was gang related. The State acknowledged that it's theory was entirely circumstantial. The State speculated that defendant belonged to a gang whose symbol was a three pronged pitchfork and that the two-pronged fork found in the decedent's body was defendant's "calling card."

On October 1, 2001, one week prior to trial, the State informed defendant that it intended to introduce certain gang evidence at trial. (Supp. R., filed April 11, 2003, Vol.4, p. 2 of the Oct. 2, 2001, hearing.). According to the State, the reason it had not previously disclosed its intention to use gang evidence, was that in preparing for trial, the State saw "something [it] felt was relevant that makes this paraphernalia relevant and you know that's the explanation." (Supp. R., filed April 11, 2003, Vol.4, p. 3 of the Oct. 2, 2001, hearing).

The State's Attorney explained to the court:

> I had looked at it 100 times and it had never occurred to me. But when I looked at it, for some reason the carving fork, that clicked and that's

> when I started to call these various experts in Chicago and then Southaven, or in the Memphis area. Now, none of these experts are going to testify that this is a habit or ritual of this particular gang or this defendant; they don't know him. But I do believe that from all the evidence and the wound patterns and the position of the fork in the body, that the State can build a circumstantial evidence case, and it will be for the jury to decide that the defendant purposely chose a carving fork that resembles a part of his gang symbol. . . It's circumstantial, but I believe nonetheless, under the law the State can ask the jury to reasonably infer from the circumstantial evidence. And that's why it's important for us to call an expert on the gang paraphernalia. Not to connect the defendant to a particular gang because none of these experts that I've talked to know him. Not to testify about rituals, . . .
>
> ***
>
> I admit that it is circumstantial, but nonetheless, it's something a jury could look at and perhaps a jury will say, "We just don't believe that there's a connection." And if they don't think so, then so be it. But I believe that there are enough circumstances that we would be entitled to present the evidence and argue the point, however circumstantial it is.

(Supp. R., filed April 11, 2003, Vol.4, p. 6-8 of the Oct. 2, 2001, hearing)(Emphasis supplied).

Defendant's motion to exclude gang and other character evidence was denied, and the flood gates opened. (Supp. R., filed April 11, 2003, Vol.4, p. 16 of the Oct. 2, 2001, hearing).

Evidence of a defendant's gang affiliation and other evidence of a defendant's character is governed by Mississippi Rule of Evidence 404. Evidence of a defendant's character cannot be introduced to show that a defendant acted in conformity therewith in committing the charged offense. *Goree v. State*, 748 So.2d 829, 836 (Miss. App. 1999). Likewise, evidence of a defendant's prior acts are not admissible to show that he acted conformity therewith in committing the charged offense. *Goree*, 748 So.2d at 836. Evidence of a defendant's prior acts may be admitted to prove, motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Goree*, 748 So.2d at 836.

Gang evidence falls within the general rule prohibiting evidence of prior bad acts and character

evidence. *Goree*, 748 So.2d at 837. Even where gang evidence is relevant, courts have been cautioned to "take care when making a determination that the probative value of the evidence of gang affiliation or membership was substantial enough to outweigh its obvious prejudicial effect." *Goree*, 748 So.2d at 837.

The State's theory of relevance was that the murder weapon established defendant's identity in that the State asserted that it was his "calling card." The State, however, failed to present any evidence to support its theory. Indeed, the State's own expert witness contradicted the State's theory that the murder weapon was a "calling card" left by defendant.

To lay the predicate for its theory, the State presented the testimony of Wayne Hissong, a gang expert. (R. 526). Hissong testified at length about many gang related issues. Pertinent to the State's theory, however, he testified about gang symbols. (R. 529-33). Hissong testified that gang members display their own symbols in an upright position and that as a sign of disrespect gang member display the symbols of their rival gangs upside down. (R. 531-36).

Hissong testified that a three pronged pitchfork is a symbol of the Gangster Disciples. He further testified:

> **Q** If a person wanted to show represent to another person using a fork, would he put it in an up position or would he put it in a down position?
>
> **Defense Counsel** Objection, Your Honor, to pure speculation.
>
> **State** Just asking the officer if he knows.
>
> **The Court** He's been qualified as an expert. If he knows, I'll allow him to answer.
>
> **A** Represent would be pitchfork up. Disrespect, pitchfork down.

(R. 535-36).

On cross-examination, Hissong continued:

Q And I believe you testified about what the forks up, what the forks down meant. Tell me – tell me what – which way means represent.

A Respect would be up. Disrespect would be down.

Q Would a Gangster Disciple member ever put a fork down?

A The only times that I've seen that, ma'am, would be if it was a false flagging. And, generally, that's going to be dealt with very harshly. So, if he had any sense, or she had any, they probably would not.

Q And what's a false flagging?

A That's someone who claims to be something that they're not. For instance, maybe a person is a Christian person who acts like a heathen out in public, maybe he's false flagging or she's false flagging what they actually are.

***

Q Okay. And only – with the information you have just shared with me about that false flagging – only a member of an opposite gang with [*sic*] a fork down; is that right?

A Yes, ma'am.

***

A And this morning you've had an opportunity to view the tattoos on Mr. Brooks' body; is that right?

Q Yes, ma'am I have.

A All right. Would you say – would classify him, in your opinion, would you classify him as a false flagger?

Q No, ma'am. I wouldn't classify him as a false flagger.

A Okay. So it would be totally disrespectful for him to put a fork down right?

Q It would be disrespectful, yes.

(R. 545-47).

Based on this testimony, the State's gang theory was fatally flawed. According to the State's own expert, defendant would never place a fork upside down as a calling card, since it would be a sign of disrespect to the Gangster Disciples, his alleged gang. According to the State's own witness, the fork simply did not establish defendant's identity.

Notwithstanding that the State's gang theory was rebutted by its own expert, an avalanche of gang and other character evidence was admitted at trial. In fact, the gang and character evidence was so prevalent as to become the unstated third path of evidence.

In previewing its case, the State hinted at what was to come:

> And there's something else too. At some point during this case – I won't tell you what it is now. But at some point during this case, you're going to find that when the defendant, when he killed Merry Wilson, when he stabbed her 70 to 80 times, he left a calling card, it was sticking to her body. And as this case unravels, I promise you at this time, that you're going to find, beyond a reasonable doubt, that he left his calling card sticking in Merry Wilson's throat.

(R. 228).

Sergeant Greg Martin, the crime scene analyst, testified that he searched the house in which defendant had been living and found papers that appeared to have some gang graffiti. (R. 260-61). The papers were admitted over defendant's objection. (Exhibits S-11, S-12, and S-13). In addition, Sergeant Martin testified that he found some posters of rap singers. (R. 265). A collage depicting the rap singer Tupac Shakur, another unidentified male looking through the scope of a rifle, and what appears to be defendant holding a pistol, was also introduced into evidence. (R.450; Exhibit S-14A). Another photograph showing defendant's torso with a tattoo was likewise admitted into evidence. (Exhibit S-14F). Sergeant Martin testified that the above items were taken from defendant's bedroom. (R. 267-68).

Detective Holmes testified as to the same gang related exhibits that Sergeant Martin had identified. (R448-51). Holmes further testified that defendant's gang name was Lunatic. (R. 514).

Like Martin, Holmes also testified that he found gang paraphernalia at the home where defendant resided. (R. 469).

Holmes also testified that they found rap lyrics from defendant's home. (R. 514). The lyrics which Holmes read to the jury follow:

> Murder is the mother fucking agenda, when I'm finna send da spoke without the spinner. To you finder, my minds gone so you know my kinds on some shit, rappin' what we wrote shit. This hopeless gun-playing, glock spraying, parlaying life gone leave me folkless. No dope, crystal or pistol in the ride. But the Pope's just keep telling me pull over to the side. And I know this is just part of my life and dying – and die. So' I'm try deep, to cleva, me, a lunatic, you bet not sleep or yo life is what I keep. Pull this heat and make you count sheep forever. No evidence, this devilment got me jackin' for a settlement. Ruining niggers, doing niggers daily for the hell of it. An I know someday, not far away, I'll probable go to jail for it. But the hell with it, I got one life to live and one night to give. Five shots to a punk, have'em laying in the trunk. Oh you didn't know, down south we get crunk. Pistol grip pump ah four five to a 30-30 we down an dirty.

(R.520-21).

Holmes also testified that State's Exhibit 12 had a six pointed star on it as did a tattoo on defendant's right hand. (R. 522). Defendant was asked to display his right hand to jury. (R. 522).

After the officers testified about the gang paraphernalia and other evidence found in defendant's home, the State called its gang expert. Wayne Hissong provided the jury with a history of gangs and their migration from Chicago to Mississippi. He informed the jury about the different gangs and how they developed. (R. 529-30). Hissong stated that gang members operate under nicknames. (R.533). Hissong testified: "A lot of times it's chosen upon how they operate. How their personality is. So you see Lunatic G. . . ." (R. 533). During Hissong's testimony, the jury was excused so he could view the defendant's exposed upper body. (R. 537-38).

When the jury returned, Hissong testified as to defendant's tattoos. (R. 540). Hissong testified that defendant had a cross on his right shoulder, a faceless grim reaper with a pitchfork on his left

shoulder, the name "Gypsy" on his left pectoral muscle, and the name "Lunatic G." across his stomach. (R. 540-41). Hissong further testified that three dots were tattooed above the grim reaper. (R. 541). Hissong testified that the three dots refer to "my crazy life." (R. 541).

And of course once defendant took the stand, the State hit him hard with the gang evidence. The State opened by asking defendant whether his nickname was Lunatic G, and asked him whether he was the author of the gang paraphernalia and the rap lyrics. (R. 620-21). Defendant stated that he did not draw the pictures, nor did he write those rap lyrics. (R. 621).

Continuing with its gang theory, in closing argument the State reminded the jury of the gang paraphernalia. (R. 668-69). Then in rebuttal argument the State told the jury: "Let's look at not what [defendant] said today but the kind of life that he lived." (R. 696). And finally near the end of its argument, the State continued to draw the jury's attention to defendant's tattoos. (R. 697).

All of the above testimony and argument should have been excluded pursuant to defendant's motion. None of it was relevant, and all of it was highly prejudicial. In this regard, the rap lyrics deserve special attention.

The State failed to lay any foundation for the lyrics. The State contended that defendant wrote the lyrics, but utterly failed to make any showing that he did. The lyrics were not signed by defendant. The State presented no witness that he or she saw defendant write the lyrics. The State presented no evidence that the handwriting matched defendant's writing. The State did not produce any fingerprint or other evidence that defendant had even handled the paper on which the lyrics were written. Defendant denied writing the lyrics and an examination of the actual lyrics supports his claim. Indeed, the lyrics refer to defendant in the third person.

The lyrics include the phrase: "I'm tri-deep, 2 cleva, me an Luna-t-i-c." While certainly not the Queen's English, the phrase refers to three people: the (1) the first person author, as in "I'm" and "me";

(2) a person named "2 cleva"; and (3) a person named "Lunatic," probably defendant since his rap name was Lunatic G. Certainly, whatever inference that can be made as to authorship of the lyrics, leads to the conclusion that the author is the person described in the first person not defendant who was described in the third person. In fact, this is exactly what defendant told the jury. "It says right here, I'm three deep, two clever, me and L-U-N-A-T-I-C. Meaning, whoever wrote this was saying two clever; me, the author, and L-U-N-A-T-I-C." (R. 627). Moreover, the lyrics, regardless of who wrote them, had no relevancy to the trial. There was no similarity between the lyrics and the charged offense.

That defendant had the lyrics in house, or even wrote them, does not make it more likely that he was guilty of the decedent's murder. Any infinitesimal relevancy the State could squeeze from the lyrics and other gang and character evidence was greatly outweighed by its unfair prejudicial effect.

Based on the foregoing, the trial court erred when it allowed the State to introduce into evidence gang and character evidence.

IV

THE STATE FAILED TO PROVE DEFENDANT GUILTY BEYOND A REASONABLE DOUBT AND THE COURT ERRED WHEN IT DENIED DEFENDANT'S MOTIONS FOR A DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT.

The State failed to prove defendant's guilt beyond a reasonable doubt with properly admitted evidence. The standard on review is whether after viewing the evidence in the light most favorable to the State, any rational juror could find that defendant committed the offense charged beyond a reasonable doubt and to the exclusion of all reasonable hypothesis of the defendant's innocence. *Tubbs v. State*, 402 So.2d 830, 834 (Miss. 1981). Under this standard, it is clear that the State failed to prove defendant guilty of the decedent's murder.

This case is remarkable for complete absence of any physical or other direct evidence linking defendant to the death of the decedent. Despite, recovering 16 sets of fingerprints from the crime scene, and matching only two to the decedent, the State was unable to match any print to defendant. The State also took scrapings from the decedent's fingernails, but failed to present any evidence linking the scrapings to defendant. Despite recovering hair near the decedent's body, the State failed to present any evidence linking the hair to defendant. In fact, the State's excuse was that it did not have a hair sample from defendant to make a comparison. Clearly, the State could have obtained a hair sample from defendant had it so chosen. Of all the possible physical evidence collected, the State was unable to link any of it to defendant.

The only evidence offered to prove defendant's guilt was the State's two converging paths of evidence and the gang and character evidence. Without the identification testimony of Sandra Graham, without the hearsay statement attributed to Towanda Nobles, and without the gang and character evidence, the State has no case. It is not even a circumstantial case; it is no case at all.

Based on the foregoing, the State failed to prove defendant guilty beyond a reasonable doubt and to the exclusion of all reasonable hypotheses of defendant's innocence. The trial court erred when it denied defendant's motion for a directed verdict (R. 559) and motion for a judgment notwithstanding the verdict (Rec. Ex. A-27-29). Defendant's conviction and sentence should be reversed.

CONCLUSION

Based on the foregoing reasons, defendant, Blaine Brooks, respectfully requests that this Honorable Court reverse his conviction and sentence, or in the alternative, reverse his conviction and sentence and remand the case for further proceedings, not inconsistent with the Court's opinion, including for a new trial.

Respectfully submitted,

RICHARD M. GOLDWASSER
LAW OFFICE OF
RICHARD M. GOLDWASSER
20 North Clark Street
Suite 1700
Chicago, Illinois 60602
(312) 372-3300
Admitted *Pro Hac Vice*
Attorney for Appellant

PAUL LUCKETT
1121 Delaware
McComb, Mississippi 39648
(601) 250-1144
Bar No.10224
Attorney for Appellant

PROOF OF MAILING

I, Richard M. Goldwasser, attorney for appellant Blaine Brooks, certify that I have this day filed this Brief with the clerk of this Court, and have served a copy of this Brief by United States mail X / Federal Express ___ overnight mail with postage prepaid on the following persons at these addresses:

Clerk of the Supreme Court
Clerk of the Supreme Court of Mississippi
P.O. Box 249
Jackson, MS 39205
(An original and three copies)

Attorney for Appellee
Jean Smith Vaughan
Special Assistant to the Mississippi Attorney General's Office
P.O. Box 220
Jackson, Mississippi 39205
(One copy)

Prosecuting Attorney
Honorable Danny Smith
District Attorney
223 East Bay Street
Magnolia, Mississippi 39652
(One copy)

Trial Court Judge
Honorable Mike Smith
Circuit Court Judge
P.O. Box 549
McComb, Mississippi 39649
(One copy)

This the 12th day of August 2003.

Richard M. Goldwasser, Attorney for Appellant