CAPITAL CASE

QUESTIONS PRESENTED

I. **THE MISSISSIPPI STATE SUPREME COURT'S DECISION WHICH UPHELD THE ADMISSION OF EXPERT DNA TESTIMONY WAS CONSISTENT WITH AND A PROPER INTERPRETATION OF *BULLCOMING V. NEW MEXICO*.**

II. **THE MISSISSIPPI STATE SUPREME COURT'S RULING WHICH AFFIRMED THE EXCLUSION OF IRRELEVANT EVIDENCE DURING THE PENALTY PHASE WAS PROPER.**

III. **EVEN THOUGH NO SUCH ERROR OCCURRED HERE, A HARMLESS ERROR ANALYSIS CAN BE APPLIED IN CAPITAL CASES WHERE THE SENTENCER WAS PRECLUDED FROM CONSIDERING MITIGATION EVIDENCE DURING THE PENALTY PHASE.**

PARTIES TO THE PROCEEDING

Respondent is the State of Mississippi.

Petitioner, Leslie Galloway, III, is an inmate at the Mississippi State Penitentiary at Parchman, Mississippi, who has been sentenced to death.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES

CONSTITUTION

STATE STATUTES

NO. 13-761

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2014

LESLIE GALLOWAY, III
Petitioner

versus

STATE OF MISSISSIPPI
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION

This matter is before the Court on the petition of Leslie Galloway, III, for a Writ of Certiorari to the Supreme Court of Mississippi wherein the court below affirmed Petitioner's capital murder conviction and death sentence.

OPINION BELOW

The opinion of the Mississippi State Supreme Court, affirming the petitioner's conviction and sentence is *Galloway v. State*, 122 So.3d 614 (Miss. 2013), *reh'g denied* (September 26, 2013).

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to the authority of 28 U.S.C. § 1257(a). He fails to do so.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner seeks to invoke the provisions of U.S. Const. amend. VI.,VIII. and XIV. He fails to do so.

STATEMENT OF THE CASE

On September 23, 2010, the petitioner, Leslie Galloway, III, was convicted of rape and the brutal murder of seventeen year-old Shakeylia Anderson in Harrison County, Mississippi. The following day, the jury sentenced Galloway to suffer the penalty of death for capital murder. Galloway perfected an appeal raising thirty (30) assignments of error. Oral argument was held on February 3, 2013. Thereafter, the Mississippi State Supreme Court issued its decision in a published opinion.

Galloway v. State, 122 So.3d 614 (Miss. 2013).[1] The Mississippi State Supreme Court rejected each claim for relief and affirmed Galloway's conviction and sentence.

Rehearing was denied on September 26, 2013. Aggrieved, the petitioner filed the present petition for writ of certiorari on December 20, 2013, attacking the decision of the State Supreme Court.

SUMMARY OF THE ARGUMENT

The petitioner's assignments of error are unfounded. The Mississippi State Supreme Court's decision was consistent with the holding of *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011) and other precedent of this Court. The court properly upheld the exclusion of proposed mitigation testimony and evidence under *Lockett v. Ohio*, 438 U.S. 586, 605, 98 S. Ct. 2954, 2965, 57 L. Ed. 2d 973 (1978), that was irrelevant or unrelated to the petitioner's character, record or circumstances of his crime. The court's finding that the sustained objection to defense counsel's closing penalty phase argument was harmless is permissible under this Court's precedent.

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[1] Appended to the Petitioner's Brief and hereinafter cited as "Pet. App."

RELEVANT FACTS

On December 5, 2008, Dixie Brimage watched as her cousin, Shakeylia Anderson, left their grandmother's house in a white car with a man. Pet. App. 3a. It was the last time anyone would ever see seventeen year-old Shakeylia Anderson alive. Two days later, Shakeylia's lifeless, burned, mangled body was found by a hunter in a remote wooded area. *Id*. at 4a.

After observing the crime scene and the condition of the body, investigators and a forensic pathologist determined that she had likely been run over by a car. *Id*. Having identified the victim, investigators learned that Shakeylia was last seen leaving her grandmother's house with a light skinned black man believed to be named Bo who drove a white Ford Taurus. *Id*. at 5a.

Officials discovered that Leslie Galloway, who used the name "Bo," matched the description. *Id*. Local law enforcement located Galloway and found a white Ford Taurus at his residence. *Id*. Galloway was arrested a short time later leaving his residence in the car. The car was taken to a secure location where crime scene technicians collected evidence including: broken glass; blood from several locations in and on the car; and, human tissue from different areas beneath the car. *Id*. at 5-6a. Through DNA testing, both the blood

and tissue retrieved were later matched to Skakeylia. *Id*.

Pursuant to a search warrant, other items of evidentiary value were taken from Galloway's residence including: a pair of Nike shoes; an Atlanta Braves baseball hat; a Burger King shirt with the name "Bo"; and, an empty bottle of New Amsterdam gin which was the same type of bottle found near Shakeylia's body. *Id*. at 6-7a. Again, DNA testing revealed the presence of Shakeylia's blood on the shoes and her DNA on the baseball hat. *Id*. Upon autopsy, vaginal and anal swabs were collected. *Id*. at 7a. Analysis of the vaginal swab indicated the presence of DNA from Shakeylia and Galloway.[2] *Id*.

While in custody, Galloway acknowledged that he went by the name "Bo." *Id*. He admitted that he picked Shakeylia up from her grandmother's house in the white Ford Taurus. *Id*. at 7-8a. In an attempt to explain the presence of his DNA, he later admitted, and it was the defense's theory, that he had consensual sex with Shakeylia. *Id*.

At trial, all of this physical evidence, along with a great deal more, was admitted. *Id*. at 28-

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[2] DNA from James Futch, the victim's boyfriend, was also identified.

32a. Bonnie Dubourg, a forensic DNA analyst, was accepted as an expert and fact witness. Tr. 625-29. Her testimony linked various pieces of biological evidence to Shakeylia and Galloway. On cross examination, Ms. Dubourg acknowledged that another DNA analyst, Ms. Julie Golden, actually conducted the testing but that she, Ms. Dubourg, "analyzed the data." Tr. 654.

Following his conviction, the sentencing phase began with a hearing on the State's motion to exclude testimony regarding the conditions at the penitentiary on death row. Pet. App. 41a. The trial court granted the motion disallowing any testimony not related to the defendant's characteristics. *Id.* at 42a. At the close of the sentencing phase, the jury found four statutory aggravating factors were not outweighed by the mitigation proof and sentenced Galloway to suffer death for the brutal murder of seventeen year-old Shakeylia Anderson.

ARGUMENT

I. THE DECISION OF THE MISSISSIPPI STATE SUPREME COURT REGARDING THE ADMISSIBILITY OF EXPERT TESTIMONY IS CONSISTENT WITH THE *BULLCOMING V. NEW MEXICO* AND OTHER PRECEDENT OF THIS COURT.

The petitioner suggests that this Court should grant certioari to consider whether the affirmance of his conviction contradicted this Court's holding in *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011). The respondent submits that the Mississippi State Supreme Court's decision did not contravene *Bullcoming* and is also entirely consistent with this Court's plurality opinion in *Williams v. Illinois*, ––– U.S. ––––, 132 S.Ct. 2221, 183 L.Ed.2d 89 (2012).

The Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The Confrontation Clause essentially prohibits the introduction, at a criminal trial, of out-of-court testimonial statement unless the witness is unavailable to testify and the defendant had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 148 L.Ed.2d 177 (2004). The Confrontation Clause, however, does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Id.* at 59 n.9.

Beginning with the decision in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) where the Court held that a forensic laboratory report stating that a suspected substance was cocaine ranked as

testimonial for purposes of the Sixth Amendment's Confrontation Clause; thus, the report may not be admitted as evidence without offering a live witness competent to testify to the truth of the statements made in the report. *Id.*

Next, in *Bullcoming*, the Court better defined who is or, rather, who is not constitutionally competent to testify to the truth of statements memorialized in forensic laboratory reports. 131 S.Ct. at 2710. In that case, Bullcoming was charged with aggravated drunk driving. *Id.* At trial, a blood alcohol report was tendered through the testimony of a scientist from the lab that generated the report. *Id.* at 2711-12. The testifying scientist was knowledgeable of the lab's procedures and protocol, however, he had no independent knowledge of the report; he had neither observed nor performed the actual analysis and, thus, was not a constitutionally acceptable surrogate for purposes of the Confrontation Clause. *Id.* Stated permissively, the decision implies that the right to confrontation is satisfied if the witness testifying about a forensic report has personally observed or participated in the actual analysis or creation of the report. *Id.* at 2709-10.

In a concurring opinion, Justice Sotomayor specifically noted that the *Bullcoming* decision did not address circumstances in which "an expert witness was asked for his independent opinion

about underlying testimonial reports that were not themselves admitted into evidence;" and, "this is not a case in which the person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue. [ ] It would be a different case if, for example, a supervisor who observed an analyst conducting a test testified about the results or a report about such results." *Id.* at 2722.

The first situation described by Justice Sotomayor presented itself in *Williams v. Illinois*, ––– U.S. ––––, 132 S.Ct. 2221, 183 L.Ed.2d 89 (2012) where this Court tackled the constitutionality of allowing an expert witness to discuss a non-testifying expert's statements that were not admitted in evidence. The defendant in *Williams* was convicted of rape based, in part, on a DNA evidence. *Id.* at 2227. At trial, an expert testified that a DNA profile, produced by an outside laboratory, matched a profile produced by the state lab. *Id.* Williams claimed that the expert's testimony regarding the outside laboratory profile, which was not admitted in evidence, violated his right to confrontation. *Id.* at 2227-28. In a plurality opinion, Justice Alito, Chief Justice Roberts, Justice Kennedy, and Justice Breyer reasoned that the non-testifying expert's statements could be discussed by the testifying expert because they were not offered for their truth, but only to explain the assumption on which

the witness based her opinion. *Id*. at 2235–40. Several crucial factual underpinnings of the decision emerged; that the testifying expert referred to the report only to explain the factual basis of her opinion–not for the truth of the matter asserted therein; that the report (the DNA profile) itself was not testimonial; and, the forensic report was not introduced into evidence.

The testimony elicited at Galloway's trial with regard to DNA evidence was consistent with the *Bullcoming* and *Williams* decisions. At trial, Ms. Dubourg was tendered and accepted as an expert in the field of forensic DNA analysis. She was also qualified to give information about the operating procedures for testing at the lab. Under cross examination, Ms. Dubourg explained that another analyst, Ms. Golden, conducted the tests and that she, Ms. Dubourg, analyzed the data from those tests. Ms. Dubourg compared the profiles generated by Ms. Golden to determine whether there was a match and calculated the statistical probabilities associated with each match. Trial counsel objected claiming that the absence of the testing analyst, Ms. Golden, violated his Sixth Amendment right to confrontation.

The issue was briefed on appeal. In its review, the Mississippi Supreme Court noted the controlling law and categorized "forensic lab reports" as testimonial under *Crawford*, 541 U.S. at 59. Pet.

App. 29a. Relying on its prior interpretation of *Bullcoming*, the court employed a two part test to determine whether a witness satisfies the defendant's right to confrontation:

> First, we ask whether the witness has intimate knowledge of the particular report, even if the witness was not the primary analyst or did not perform the analysis firsthand. Second, we ask whether the witness was actively involved in the production of the report at issue. We require a witness to be knowledgeable about both the underlying analysis and the report itself to satisfy the protections of the Confrontation Clause.

Pet. App. 30a (citing *Grim v. State*, 102 So. 3d 1073, 1079 (Miss. 2012), *as modified on denial of reh'g,* (Dec. 20, 2012), *cert. denied*, 133 S. Ct. 2856, 186 L. Ed. 2d 914 (2013)) (when the testifying witness is a court-accepted expert in the relevant field who participated in the analysis in some capacity, such as by performing procedural checks, then the testifying witness's testimony does not violate a defendant's Sixth Amendment rights).

On direct review, the state court found that Ms. Dubourg was much more involved than the testifying scientist in *Bullcoming*. The court noted that Ms. Dubourg was a technical reviewer

assigned to the case; she was familiar with each step of the complex testing process conducted by the absent analyst; she performed her own analysis of the data; and, signed the report. Pet. App. 32a. Thus, the court held that there was no Sixth Amendment violation. *Id.* at 32-33a. Also noteworthy, the DNA lab report was never entered into evidence.

The respondent submits that the state court decision was an entirely consistent interpretation and application of *Bullcoming*. In *Bullcoming*, this Court expressly held there was a Confrontation Clause violation where the signed and certified report of the petitioner's blood alcohol concentration was admitted during the testimony of an expert witness who did not "ha[ve] any 'independent opinion' concerning Bullcoming's BAC." 131 S.Ct. at 2716. Just as discussed by the Mississippi Supreme Court, *Bullcoming* is distinguishable for two reasons.

First and most importantly, not only was Ms. Dubourg, the forensic DNA expert, intimately familiar with the policies and procedures of the testing laboratory, she was clearly involved in the creation of the DNA report. Indeed, she supplied the ultimate conclusions matching DNA profiles to known DNA samples and calculated statistical probabilities. Ms. Dubourg's testimony regarding the identity of the individuals who matched DNA

profiles was proper under *Bullcoming*. Her "comparison testimony" merely relayed the fact that the DNA profiles, upon which she relied to form her opinion, were created at the lab.

Ms. Dubourg did not vouch for or bolster the reliability of the specific tests conducted by Ms. Golden. To the contrary, under cross-examination, she explained that Ms. Golden conducted the tests and even acknowledged the possibility of contamination and human error. Tr. 654-56. Ms. Dubourg rendered an independent expert opinion as to whom the DNA matched. In doing so, she relied on information and data obtained from another analyst. Ms. Dubourg, unlike the witness in *Bullcoming*, was involved and participated in the process of determining whether and if the DNA samples matched a known source–the victim and/or the petitioner.

Different from *Bullcoming*, there is no indication that Ms. Dubourg was merely reciting the contents of a lab report created entirely by another analyst. Instead, Ms. Dubourg gave her own expert opinion, her interpretation of the data generated from testing. *Bullcoming*, 131 S.Ct. at 2716 ("the state [did not] assert that Razatos had any 'independent opinion' concerning Bullcoming's BAC."). Also, Ms. Dubourg was more than a mere supervisor reviewing and approving a report. *Id.* at 2722 (Sotomayor, J., concurring in part.

Implying that testimony from a supervisor may be sufficient to satisfy the confrontation clause). Unlike the witness in *Bullcoming*, Ms. Dubourg actually participated in the creation of the forensic report. Thus, not only was Ms. Dubourg knowledgeable of the polices and procedures of the lab, but she also participated in reaching the ultimate conclusions contained in the report.

Secondly, the forensic DNA report containing Ms. Dubourg's conclusions was not entered into evidence at Galloway's trial–unlike *Bullcoming* where the BAC report was admitted to conclusively demonstrate a critical fact in issue. *Melendez-Diaz*, 577 U.S. at 311. Here, the DNA results alone, did not establish Galloway's guilt or innocence. Admittedly, the DNA findings in Galloway's trial were important to establish a connection between the petitioner and the crime scene. Different, however, from the inherently inculpatory report in *Bullcoming*, the DNA results alone did not necessitate a finding of guilt. Taken in isolation, the DNA results established only that Galloway and Shakeylia had sexual contact and that they were both inside and near the white Ford Taurus.[3] *Williams*, 132 S.Ct. at 2232 (identifying blood alcohol level as the "central fact in question" in *Bullcoming*).

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[3] Both of these facts were admitted by the petitioner in statements made to officials.

Notwithstanding that this case was entirely consistent with the *Bullcoming* decision, the State submits that the facts of this case are more similar to the circumstances presented in *Williams v. Illinois*. Like the facts of *Williams*, this case involved forensic DNA results memorialized in a report that was not admitted into evidence. 132 S.Ct. at 2228, 2240. Also similar to *Williams*, Ms. Dubourg referred to DNA profiles created by a non-testifying analyst. *Id.* Here in Galloway's case, Ms. Dubourg briefly referenced the underlying DNA profiles only to explain how she reached her ultimate opinion as to whether the profiles matched any known samples. At least four Justices in Williams, found this type of testimony acceptable under the rules of evidence and not violative of the Sixth Amendment.[4]

Consistent with *Williams*, Ms. Dubourg did not refer to out-of-court statements for their truth but only to explain the basis of her opinion. *Id.* at

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[4] Even the dissenting opinion acknowledged as much: "there was nothing wrong with [the witness] testifying that two DNA profiles–the one shown in the [outside lab] report and the one derived from Williams's blood–matched each other; that was a straightforward application of [the witness's] expertise." *Williams*, 132 S.Ct. at 2270 (Kagen, J. dissenting, joined by Scalia, Ginsburg, and Sotomayor, J.J.).

2241. Thus, as held in *Williams*, Ms. Dubourg's statements relaying information provided by an absent analyst fall "outside the scope of the Confrontation Clause." *Id*. at 2228; Fed. R. Evid. 703. Here, as was the case in *Williams*, the defense was permitted to test the reliability the expert's opinion by confirming that another analyst conducted the testing upon which the expert's opinions were based; defense counsel continued by highlighting the potential for contamination of the DNA through improper handling. *Id*. at 2239-40. To the extent the facts of this case align with *Williams*, the respondent submits that the admission of Ms. Dubourg's testimony was not violative of the Confrontation Clause.

Ignoring these facts, the petitioner argues that the State failed to prove that Ms. Dubourg observed the testing or had been on-site when the testing was performed. Neither *Bullcoming* nor *Williams*, however, require any such demonstration. The import of *Bullcoming* contemplates some involvement by the witness, be it participation or observation; it does not set forth strict parameters defining what may constitute sufficient involvement. 131 S.Ct. at 2709-10. In any event, as noted above, Ms. Dubourg's participation easily survives any objection under *Bullcoming*. She was knowledgeable of the lab's testing procedures and was actually the technical reviewer assigned to Galloway's case, comparing

DNA profiles and determining statistical probabilities of finding a match.

The petitioner complains that Ms. Dubourg was not an acceptable surrogate because she could not discuss exactly what steps the testing analyst took to prevent contamination or what influence, if any, conversations with police had on the testing. Through cross-examination, however, trial counsel sufficiently exposed the potential for contamination and other possible influences that could have adversely impacted testing. Pet. App. 32a; Tr. 654-59. Importantly, Ms. Dubourg specifically stated that she could not answer those types of questions because she did not perform the testing. Tr. 654-59. She did not elaborate with inadmissible hearsay; nor did she attempt to bolster or vouch for the accuracy of Ms. Golden's data. *Williams*, 132 S.Ct. at 2227, 2235. Moreover, if the petitioner had wished to further probe the reliability of the DNA testing, the defense was free to subpoena any analyst who participated in testing evidence in this case. *Id.* at 2228, 2244 (noting that numerous technicians work on each DNA profile).

It is difficult to discern any basis upon which the state court decision departed from *Bullcoming* or *Williams*. As discussed above, the respondent submits that the holding of the Mississippi State Supreme Court is in keeping with *Bullcoming's* requirement that the testifying analyst have some

involvement. The decision is also consistent with *Williams's* plurality opinion permitting an expert to refer to out-of-court statements to explain an opinion or conclusion without running afoul of the Sixth Amendment. For each of the foregoing reasons, the state court decision did not contravene *Bullcoming* or *Williams*. Accordingly, the petitioner has not demonstrated any compelling reason for the Court to take this matter up for review.

A. THE DECISION OF THE MISSISSIPPI SUPREME COURT DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS.

Without regard to the unavoidable facts of this case, the petitioner claims that review is necessary to resolve a split of authority. For support, the petitioner cites to a number of cases. He does so, however, through rose colored glasses that have distorted these holdings.

He first calls attention to *United States v. Soto*, 720 F.3d 51, 59 (1st Cir. 2013), *cert. denied*, 134 134 S.Ct. 336 (2013), for the proposition that the testimony of a special agent who referred to the original non-testifying analyst's conclusions was constitutional error. The petitioner's summary, however, is missing an important qualification. The First Circuit distinguished its decision from

Bullcoming noting that in the case before it (1) the forensic report was not introduced into evidence and (2) the testifying agent offered conclusions drawn from his own "independent examination" rather than an unsubstantiated recitation of another analyst's report. *Id.* at 59-60. The court, however, found error to the extent the witness's statements conformed the accuracy of the absent analyst's findings which improperly bolstered the credibility of the testifying witness. *Id.* at 60. The court nevertheless held that the testimony did not amount to plain error. *Id.* at 60 (decided prior to *Williams v. Illinois*, 132 S.Ct. 2221 (2012)).

The *Soto* case is not inconsistent with the facts presented here. The forensic DNA report was never entered into evidence. Ms. Dubourg provided testimony about her own conclusions after reviewing the data generated by another analyst. There is no proof that the absent analyst drew any conclusions. Rather, she tested samples and generated information upon which Ms. Dubourg drew her expert opinions regarding matching DNA profiles to known DNA samples. Ms. Dubourg did not attempt to bolster or vouch for Ms. Golden's credibility.

In *United States v. Ignasiak*, 667 F.3d 1217, 134 (11th Cir. 2012), the court found a Confrontation Clause violation where five autopsy reports were admitted into evidence during the

testimony of an expert who had neither performed nor been present during the autopsies. The holding is clearly consistent with *Bullcoming*. Galloway's case, however, is different. The witness here, Ms. Dubourg was personally involved in the creation of the DNA report. Furthermore, as the reviewing analyst, she was charged with determining if the DNA profiles matched and statistical probabilities associated therewith.

In *United States v. Moore*, 651 F.3d 30 (D.C. Cir. 2011), *cert. denied*, 132 S.Ct. 2272 (2012), the court found a violation of the right to confrontation where thirty autopsy reports and twenty drug analyses produced by non-testifying experts were admitted into evidence. The court recognized–as is the case here–that "it could well be a different case where an expert witness discussed out-of-court testimonial statements that 'were not themselves admitted as evidence.'" *Id.* at 72 n.15. *See, United States v. Pablo*, 696 F.3d 1280, 1292-93 (10th Cir. 2012) (analysts provided expert DNA opinion based on data and reports prepared by two other analysts is not error) (on remand from the grant of certiorari, "We distinguish Pablo's case from *Bullcoming* and determine that *Bullcoming* does not compel reversal on our review in this case for the same reason stated above with respect to *Melendez-Diaz*: namely, the challenged report was actually admitted into evidence in *Bullcoming*, but not in this case. Primarily due to that important

distinction, our review in the present case is more directly controlled by *Williams* than by either *Bullcoming* or *Melendez-Diaz*.").

In *State v. McLeod*, 66 A.3d 1221, 1230 (N.H. 2013), the State's highest court agreed "with the proposition that the Confrontation Clause is not violated when an expert testifies regarding his or her own independent judgment, even if that judgment is based upon inadmissible testimonial hearsay." Like this case, there is nothing about the *McLeod* decision that is inconsistent with *Bullcoming* or *Williams*.

In *State v. Kennedy*, 735 S.E.2d 905, 922 (W.Va. 2012), the court found that a substitute medical examiner was a "mere conduit" for the opinions of a non-testifying pathologist. The court also acknowledged that the witness's independently formed opinions did not violate the confrontation clause. *Id.* at 922. Again, the rationale of the West Virgina court is consistent with both *Bullcoming* and *Williams* as well as the Mississippi State Supreme Court's decision in this case.

In *Burch v. State*, 401 S.W.3d 634 (Tex. Crim. App. 2013), the court found a Confrontation Clause violation where a non-testifying analyst's report was admitted as the sole evidence of the identity of a controlled substance. The court

remarked that the report–unlike the expert testimony in the present case– "was not merely mentioned as an underlying basis of the expert's opinion." *Id*. at 639.

Finally, the petitioner cites to a case pending before this Court, *Brewington v. North Carolina*, 743 S.E.2d 626 (2013) pending petition 82 U.S.L.W. 3283 (October 17, 2013) (No. 13-504). Again, *Brewington* does not represent a departure from this Court's Confrontation Clause precedent. The witness in *Brewington* testified that a substance was cocaine even though she did not, herself, conduct the testing. Like the facts of this case and consistent with *Bullcoming* and *Williams*, the witness's testimony was not admitted for the truth but merely relayed information upon which her expert opinion was based; and, she did not vouch for the accuracy of the underlying testing.

Reviewing these cases, it is clear that none of them represent a radical departure from this Court's precedent. To the extent the holdings may appear inconsistent, a more than superficial review of the facts of each case is required to reveal important distinctions such as insufficient involvement by the witness or the absence of an independent opinion by the testifying expert. Again, the petitioner has failed to substantiate further review of these issues.

II. DURING THE PENALTY PHASE OF A CAPITAL MURDER CASE, THE PETITIONER HAS NO CONSTITUTIONAL RIGHT TO INTRODUCE EVIDENCE AND TESTIMONY, SUCH AS GENERAL CONDITIONS OF CONFINEMENT, THAT ARE UNRELATED TO HIS CHARACTER, HIS RECORD OR CIRCUMSTANCES OF HIS CRIME.

The petitioner claims that, during the sentencing phase, he was wrongfully denied the opportunity to present mitigating evidence regarding harsh prison conditions. On appeal, the Mississippi State Supreme Court expressly held that the claim was barred from consideration due to the petitioner's failure to properly preserve the issue. Therefore, the respondent submits that this ground for relief is not properly before the Court. To the extent that the State Court addressed Galloway's propensity to pose a danger in the future, (a separate but related issue), the State submits, without waiving the applicability of any bar, the claim is unworthy of relief.

At the trial, during the penalty phase, the court excluded testimony from a former prison guard regarding the harshness of prison

conditions.[5] On appeal, the Mississippi State Supreme Court affirmed exclusion of the witness, relying on its interpretation of *Lockett v. Ohio*, 438 U.S. 586, 605, 98 S. Ct. 2954, 2965, 57 L. Ed. 2d 973 (1978). The court held that testimony and evidence regarding the conditions at the State Penitentiary were properly excluded because they were in no way related to the defendant's character, his record, or the circumstances of the crime. Pet. App. The court cited to its holding in *Wilcher v. State*, 697 So.2d 1123 (Miss. 1997), which affirmed exclusion of the exact same testimony and evidence of prison conditions proffered at Galloway's trial. *Id.* at 1133. This Court denied certiorari. *Wilcher v. Mississippi*, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998). The state court also noted that evidence of Galloway's good behavior was presented in testimony from two corrections officers who testified that Galloway had not caused any problems during his prior incarceration. Thus, the

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[5] At trial, Galloway also proposed testimony from a psychologist to the effect that he would pose no future danger if sentenced to life in prison. The psychologist, however, was ultimately not available to testify. Nevertheless, the appellate court found that any testimony purporting to predict future behavior is too speculative unless the expert is qualified and accepted in the field of predicting future behavior. Pet. App. 44a.

jury was free to infer that he would not pose a threat in the future. Pet. App. 44a.

Undeterred by the law, the petitioner contends that he was entitled to introduce evidence regarding prison conditions in mitigation of the death penalty (1) to rebut the State's suggestion that a life sentence was not adequate punishment; (2) to rebut the State's implication that he posed a future danger;[6] and, (3) as constitutionally relevant

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[6] While acknowledging that the issue of future dangerousness may be inherent in every criminal case, *Simmons v. South Carolina*, 512 U.S. 154, 162, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), the respondent disputes that the State exacerbated or specifically "implicated" the issue of future dangerousness. Moreover, the petitioner has never argued that evidence of prison conditions should have been admissible to rebut the purported implication of future dangerousness. The issue has not preserved for further review and is not appropriate for consideration in this petition.

Rather, on direct appeal, the petitioner argued that evidence of prison conditions should have been admitted to (1) rebut the State's argument that a life sentence would be insufficient punishment; and, (2) as relevant mitigation evidence to help the jury reach an informed sentencing determination. Appellant's Br. at 54-56. Galloway has never asserted that evidence of prison conditions was relevant to his future dangerousness as he does in the instant petition.

mitigation evidence. Although the petitioner has attempted to parse his argument into three distinct categories, the respondent contends the answer is the same no matter how the issue is presented. Galloway was not entitled to introduce irrelevant testimony.

It is well established that a defendant is entitled to individualized consideration of his sentence. *Williams v. New York*, 337 U.S. 241, 247, 69 S.Ct. 1079, 1083, 93 L.Ed. 1337 (1949). To achieve individualized sentencing, this Court held that under the Eighth and Fourteenth Amendments a defendant facing a sentence of death has the right to present any mitigation evidence related to his character, record and circumstances of the offense. *Lockett v. Ohio*, 438 U.S. 586, 605, 98 S. Ct. 2954, 2965, 57 L. Ed. 2d

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Moreover, although the trial court ruled that no one could testify as to how Galloway would behave in the future, the defense's expert who was expected to testify regarding future dangerousness ultimately was unavailable to testify at trial. *See* n.5, *supra*. Accordingly, the respondent contends that any claim regarding future dangerousness is not appropriate for review either as a stand-alone claim or as it related to the admissibility of other evidence for three reasons: first, because Galloway never tendered a witness qualified to testify regarding future behavior; second, because any claim regarding future dangerousness was not preserved for review; and, third, because Galloway has never argued that evidence of prison conditions was relevant to how he would behave in the future.

973 (1978). The rule was reiterated in *Skipper v. S. Carolina*, 476 U.S. 1, 4, 106 S. Ct. 1669, 1670-71, 90 L. Ed. 2d 1 (1986), wherein the Court stated,

> There is no disputing that this Court's decision in *Eddings* requires that in capital cases the sentencer ... not be precluded from considering, as a mitigating factor, *any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death*. Equally clear is the corollary rule that the sentencer may not refuse to consider or be precluded from considering relevant mitigating evidence.

Id. at 1670-71 (internal citations and quotations omitted) (emphasis added); *see, also*, *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) ("the fundamental respect for humanity underlying the Eighth Amendment ... requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.").

However, the Court expressed in *Lockett*, "[n]othing in this opinion limits the traditional

authority of a court to exclude, *as irrelevant*, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." 438 U.S. at 605 (emphasis added). The Constitution does not require that "a jury be able to give effect to mitigating evidence in every conceivable manner in which the evidence [may] be relevant." *Johnson v. Texas*, 509 U.S. 350, 372, 113 S. Ct. 2658, 2671, 125 L. Ed. 2d 290 (1993).

Moreover, "in most cases evidence of good behavior in prison is primarily, if not exclusively, relevant to the issue of future dangerousness." *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 251, 127 S. Ct. 1654, 1667, 167 L. Ed. 2d 585 (2007). The day to day activities of prisoners and conditions of confinement, however, are irrelevant to the defendant's propensity to pose a threat in the future and, more importantly, are wholly unrelated to the defendant's character, record or crime. *See Skipper v. S. Carolina*, 476 U.S. 1, 7, n.2 106 S. Ct. 1669, 1672, 90 L. Ed. 2d 1 (1986) ("We do not hold that all facets of the defendant's ability to adjust to prison life must be treated as relevant and potentially mitigating. For example, we have no quarrel with the statement ... that 'how often [the defendant] will take a shower' is irrelevant to the sentencing determination.").

The type of evidence proposed here, that of prison conditions, is irrelevant to rebut an

accountability argument by the prosecution. The prosecution did not introduce evidence tending to show that a life sentence was insufficient. Instead, the prosecutor merely implied such an opinion in argument. Evidence of prison conditions represents a broader policy argument, an opinion, not "evidence" in the traditional sense tending to prove or disprove a fact in issue; and, not evidence related to the defendant's character, record of the circumstances of the crime. *California v. Brown*, 479 U.S. 538, 545, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987) (O'Connor, J., concurring) ("Thus, the sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime."). A proper response to the "accountability argument," was for the defense to argue that the conditions of the penitentiary render life in prison a just and fair sentence but the introduction of such evidence supporting that argument is completely irrelevant under *Lockett* and its progeny. *See* Miss. Code Ann. § 99-19-101(1) (parties may present arguments both for and against the death penalty).

The law is clear. A defendant facing the imposition of death may introduce all mitigation evidence related to his character, his record and the circumstances of his offense. *Lockett*, 438 U.S. at 605. The law is equally clear that the States are free to exclude irrelevant evidence or evidence unrelated to a defendant's character, his record

and the circumstances of his offense. *Lockett*, 438 U.S. at 605; *Johnson*, 509 U.S. at 373 ("To rule in petitioner's favor, we would . . . of course, remove all power on the part of the States to structure the consideration of mitigating evidence a result we have been consistent in rejecting.").

The evidence and testimony Galloway offered regarding the general conditions of prison were irrelevant–the proffered testimony was not related to Gallway's character, his record or the circumstances of his crime. The testimony was properly excluded under *Lockett* and its progeny. No court has held otherwise.

This Court has never held that a defendant has a constitutional right to present evidence generally related to prison life and security as mitigating evidence. *See*, *Schmitt v. Kelly*, No. 05-22, 189 F. App'x 257, 266 (4th Cir. 2006) (defendant is not entitled to present evidence of general conditions of confinement in mitigation of the death penalty) *cert. denied*, 549 U.S. 1028, 127 S. Ct. 577, 166 L. Ed. 2d 425 (2006); *Taylor v. Cain*, 190 F.3d 538 (5th Cir. 1999) (exclusion of witness testimony regarding general prison conditions was proper) *cert. denied*, 529 U.S. 1088, 120 S. Ct. 1722, 146 L. Ed. 2d 643 (2000); *Hanna v. Ishee*, 694 F.3d 596, 619 (6th Cir. 2012) (same) *cert. denied*, 134 S. Ct. 101, 187 L. Ed. 2d 74 (2013); *State v. Plath*, 281 S.C. 1, 15, 313 S.E.2d 619, 627 (S.C. 1984) ("A jury

needs to know how a given defendant came to commit a given aggravated murder, to include aspects of his background, his character and the setting of the crime itself which may explain or even mitigate the conduct of which he has been found guilty. A jury does not need to know how often he will take a shower or whether or not he will be lonely and withdrawn during his tenure at CCI."), *cert. denied, sub nom. Arnold v. S. Carolina*, 467 U.S. 1265, 1266, 104 S. Ct. 3560, 82 L. Ed. 2d 862 (1984).

To the contrary, this Court has repeatedly required that mitigating evidence relate to the individual defendant and why that defendant should or should not be sentenced to death. *Skipper*, 476 U.S. at 4; *Lockett v. Ohio*, 438 U.S. 586, 605, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality opinion); *Eddings v. Oklahoma*, 455 U.S. 104, 113-14, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); *see, also United States v. Johnson*, 223 F.3d 665, 674-75 (7th Cir. 2000) (noting that a defendant should not have been entitled to "present to the jury ... evidence of the existence of maximum-security federal prisons decked out with control units, in order to establish a mitigating factor. A mitigating factor is a factor arguing against sentencing this defendant to death; it is not an argument against the death penalty in general.") *cert. denied*, 534 U.S. 829, 122 S. Ct. 71, 151 L. Ed. 2d 37 (2001).

Finally and briefly, to the extent the Court finds that future dangerousness was an issue the respondent argues that no relief is required. *See* nn.5-6 *supra*. First, as discussed above, any claim that the prosecution raised future dangerousness has not been properly preserved. Pet. App. 40a. Second, in Mississippi, the prosecution is not permitted to introduce evidence related to a defendant's future dangerousness; and, none was admitted here. Miss. Code Ann. § 99-19-101(5). Finally, the petitioner presented two corrections officers during the penalty phase. Both of the witnesses testified that Galloway had not caused them any problems during his previous incarceration. To the extent that future dangerousness was inadvertently implicated, the jury was free to infer from the testimony that the petitioner would not pose a danger in the future.

In short, the petitioner was not entitled to introduce irrelevant evidence of general prison condition during the penalty phase. Such evidence is unrelated to the defendant's character, his record, or the circumstances of his crime. The petitioner was not entitled to introduce this evidence to rebut argument by counsel nor was he entitled to introduce the irrelevant evidence to simply persuade the jury to impose life, and he certainly was not entitled to introduce this evidence to rebut a purported implication of future

dangerousness. The petitioner is not entitled to relief.

III. THE JURY WAS NOT PREVENTED FROM GIVING EFFECT TO ANY MITIGATION EVIDENCE PRESENTED DURING THE PENALTY PHASE BUT, EVEN IF SUCH ERROR HAD OCCURRED, THIS COURT HAS APPROVED OF THE APPLICATION OF A HARMLESS ERROR ANALYSIS.

With his third justification for relief, the petitioner has manufactured an issue that has not been presented in the State Court and is, thus, not appropriate for review or relief. Not to mislead the Court, the petitioner aggrieves the State Court's application of a harmless error standard but he attempts to bolster the issue to one of national significance by claiming this Court has never approved of such a procedure.

At the penalty phase closing arguments, defense counsel argued to the jury:

> The bottom line is, you don't need to do that. You don't need to kill Leslie Galloway. You can send him to jail for the rest of his life, and he will die there in jail. That is punishment. And there's one other thing that that would

> do. There's one other affect that that would have if you decide that Mr. Galloway should go to jail for the rest of his life. And it would be a good thing. It would end all of the killing in this situation, wouldn't it.

Tr. 866. The prosecution lodged an objection which was sustained. On appeal, the Mississippi Supreme Court held that the trial court erred in sustaining the objection because the plea for mercy, just as an argument to "send a message," was proper. Pet. App. 83-84a. The court found, however, that the error was harmless because the jury had already heard the remark and had been instructed that counsel's arguments were not evidence. *Id.*

Now, the petitioner is attempting to elevate this tangential error to one of constitutional significance by suggesting the trial court "took away the jurors' right to exercise mercy" which can never be considered harmless. Pet. Br. at 28. The respondent submits that to the extent there was an error it was harmless and such a finding does not run afoul of the Constitution.

Next, the petitioner seeks to invoke this Court's reviewing authority by framing a perceived larger issue as thus;

> This Court has not yet explicitly ruled on whether preventing a jury from forming a "reasoned moral response" based on a consideration of all the *relevant evidence* can ever be deemed harmless in a capital case.

Pet. Br. at 30 (emphasis added). The petitioner's claim misses the mark. In this case, there was no relevant *evidence* excluded. The complained of sustained objection did not preclude the introduction of *evidence* but, rather, was directed at counsel's *argument*. It is well established that an attorney's argument is not evidence. Accordingly, even if the petitioner's issue as framed above is true, this case is not appropriate for its resolution.

More importantly, however, and contrary to the petitioner's claim, the respondents submit that this Court has approved the application of a harmless error analysis to the omission of mitigating evidence during the penalty phase of a capital murder case. *See Singletary v. Smith*, 507 U.S. 1048, 113 S. Ct. 1940, 123 L. Ed. 2d 646 (1993). In *Smith*, the petitioner argued that the sentencing statute and corresponding jury instruction denied the sentencer the opportunity to consider several non-statutory mitigating factors in violation of *Lockett*. The court of appeals agreed and affirmed a conditional grant of habeas relief based on this claim and finding that the error was

not harmless. *Smith v. Singletary*, 970 F.2d 766 (11th Cir. 1992) (applying harmless error test found in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)), *cert. granted*, *judgment vacated*, 507 U.S. 1048, 113 S. Ct. 1940, 123 L. Ed. 2d 646 (1993). This Court granted certiorari, vacated the judgment and instructed the appellate court to consider harmless error under the newly announced standard in *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). *Smith v. Singletary*, 61 F.3d 815 (11th Cir. 1995) (on remand), *cert. denied*, 516 U.S. 1140, 116 S. Ct. 972, 133 L. Ed. 2d 892 (1996). *See also*, *Horsley v. State of Ala.*, 45 F.3d 1486, 1492-93 (11th Cir. 1995) (assuming an error based on the sentencer's failure to consider mitigating evidence but finding the error harmless) *cert. denied*, 516 U.S. 960, 116 S. Ct. 410, 133 L. Ed. 2d 328 (1995). Thus, this Court has approved and even ordered the application of a harmless error analysis to claims where the sentencer was precluded from considering mitigating evidence.

Returning to the present case and without regard to the petitioner's incorrect assertions, the respondent calls the Court's attention to the fact that no relevant *evidence* was excluded in Galloway's sentencing hearing. The trial court merely sustained, without elaboration, an objection to defense counsel's closing *argument*–not *evidence*. By sustaining the objection the trial court did not

expressly or by implication instruct the jury to wholly disregard sympathy or mercy. Even if this was error, as the Mississippi State Supreme Court held, there was no corresponding harm. Any such error was harmless as the jury was not prevented from considering sympathy or mercy. The petitioner's current argument simply has no merit and should receive no further consideration. There is no split of authority or issue of unsettled law worthy of the grant of the writ.

CONCLUSION

For the each of the above and foregoing reasons, the petition for writ of certioari should be denied.

Respectfully submitted,

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March 19, 2014

CERTIFICATE OF SERVICE

I, Cameron L. Benton, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed, via United States Postal Service, first-class postage prepaid, two (2) true and correct copies of the foregoing **Brief in Opposition** to the following:

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This, the 31st day of March, 2014.

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