IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

LEON LAMAR TROTTER — APPELLANT

VS. — NO. 2005-KA-0379

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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LEON LAMAR TROTTER **APPELLANT**

VS. **NO. 2005-KA-0379-COA-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

PROCEDURAL HISTORY:

On June 15-16, 2004, Leon Lamar Trotter, "Trotter" was tried for murder of Mr. Ricky Hill before a Humphrey's County Circuit Court jury, the Honorable Jannie M. Lewis presiding. R. 1. Trotter was found guilty and given a life sentence in the custody of the Mississippi Department of Corrections. C.P. 36. From that conviction, Trotter appealed to the Mississippi Supreme Court. C.P. 46.

ISSUES ON APPEAL

I.

WAS THE VICTIM'S STATEMENT TO OFFICER GRAYSON PROPERLY ADMITTED?

II.

DID THE TRIAL COURT ERR IN DENYING A MISTRIAL FOR IMPROPER REMARKS FROM THE PROSECUTION?

III.

WAS TROTTER'S STATEMENTS TO INVESTIGATORS PROPERLY ADMITTED?

IV.

DID TROTTER RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL?

V.

DID CUMULATIVE ERRORS DENY TROTTER A FAIR TRIAL?

VI.

WAS TROTTER'S SENTENCE CRUEL AND UNUSUAL PUNISHMENT?

STATEMENT OF THE FACTS

On January 13, 2004, a Humphrey's County Grand Jury indicted Totter and Alvin Earl Pittman for the murder of Mr. Ricky Hill on June 12, 2003 and manufacture of marijuana plants. C.P. 1.

On June 15-16, 2004, Trotter was tried for murder of Mr. Ricky Hill before a Humphrey's County Circuit Court jury, the Honorable Jannie M. Lewis presiding. R. 1.

Trotter was represented by Mr. Joe Buchanan and Mr. Michael Mallette. R. 1. Co-defendant Pittman with the assistance of separate counsel filed for and was granted a severance by the trial court. C.P.

10.

Officer Thuron Grayson testified to seeing Hill laying in the door way to his trailer home. R. 101. This was on June 12, 2003. Grayson testified that Hill told him he had been shot. Hill could not move from his prone position and he was "cold." Grayson saw "the bullet hole" on Hill's upper chest. When Grayson asked him who had shot him, Hill told him 'Pooh Man' did. R.103. Hill further identified the shooter as the man who drove "a blue Cadillac" and lived in a trailer. R. 103; 135.. Grayson knew who Hill identified since Trotter was a relative, "the cousin of his stepfather." R. 104.

The trial court admitted Hill's identification statement made to Officer Grayson over an objection. It was admitted as a "dying declaration." R. 116. The objection was that there was insufficient evidence for determining that Hill was aware of his impending death at the time he made the statement. R. 115-116.

Officer Earl Pitchford testified that Trotter was given his **Miranda** rights. He indicated that he understood his rights, and signed the waiver. There were no promises made and no coercion involved. R. 159-160. Trotter indicated that he understood his rights and would talk about the circumstances involved in the slaying of Hill.

Trotter then made an attempted exculpatory statement. He admitted that he was with Pittman when his companion shot the victim. R. 162. A second statement which was more detailed was also made after a second signed **Miranda** waiver. There were no promises or coercion involved on this second occasion by Officer Pitchford or any other officer present. R. 163-164. In the second statement, Trotter admitted that he went with Pittman to collect on a $35 debt that Hill owed him for some drugs. R. 163.

Ms. Latoya Cook testified that she gave the .380 handgun found in Trotter's car to Trotter.

This was in June, 2003. R. 126 The .380 handgun found in Trotter's car was state's exhibit 2. R. 174. Trotter admitted to receiving the handgun from Cook. R. 244.

Dr. Steven Hayne testified that he performed an autopsy on the decedent, Mr. Ricky Hill. This was on June 26, 2003. He found that Hill died as a result of being shot in his upper left chest and left lung. R. 201. Hayne found a projectile or bullet inside the body of the decedent, which was submitted to the Mississippi Crime Lab. R. 202.

Mr. Steven Byrd testified that the bullet removed from the body of Mr. Hill had been fired from the .380 handgun found in the car Trotter was driving. The bullet had sufficient metallic markings for determining that it matched the groves in the barrel of the handgun, exhibit 2. This bullet recovered during the autopsy was exhibit 12, and the handgun was exhibit 2. R. 203; 224.

At the conclusion of the prosecution's case, the trial court overruled a motion for a directed verdict. R. 228-229.

Trotter testified in his own behalf. R. 232-255. Trotter admitted making his statements to investigators, exhibits 6 and 7 contained in manila envelop marked Exhibits. He admitted that these were his statements and that they were "the truth." R. 243. In his testimony he admitted to using his nickname, "Poohman" when he spoke to the victim at his trailer. R. 237. He admitted he was driving "a blue Cadillac." R. 243.

While he admitted to being at Hill's trailer, he denied having a gun or knowing that Pittman was going to shot the victim. R. 251-252.

On cross examination, Trotter admitted that his testimony included information not included in his statements to investigators. R. 246-255. He admitted that he had not included the fact that Pittman wanted him to go to Hill's home. He wanted him to go in order to collect $35.00 drug debt. He also did not included the fact that he parked his car at a nearby church because he was

supposedly low on gas, and that the handgun used in the slaying belonged to him and had come from Latoya Cooks. R. 248-250. Trotter admitted that he kept that handgun under the seat in his blue Cadillac, but yet claimed that he did not see Pittman retrieve it before they went to the victim's door. R. 251.

Trotter's counsel argued in opening and closing in conformity to Trotter's testimony that Trotter was not responsible for the murder of Hill. He was merely present when unexpectedly his co-defendant surprised him by shooting the victim in the chest. His counsel also successfully had the jury instructed on manslaughter, as a lesser included offense. C. P.20-21.

The jury found Trotter guilty of murder. He was given a life sentence in the custody of the Mississippi Department of Corrections. R. 302-304. C.P. 36. From that conviction, Trotter appealed to the Mississippi Supreme Court. C.P. 46.

SUMMARY OF THE ARGUMENT

1. The record reflects that the victim's statement to Officer Grayson was properly received as "a dying declaration." This was under M. R. E. 804(a)(3), and (b)(5), Statement Under Belief of Impending Death. The record reflects that Hill knew he had been shot in the chest, near his heart, and was losing consciousness. He told Officer Grayson he was "cold" and could not move himself. R. 102-103; 134-135; 144-145; 212, 242; and the autopsy report in the exhibits volume showing Hill died as a result of being shot in "the left lung." R. 211. The record reflects that Hill never recovered from his bullet wound to his chest and died on June 25, 2003. R. 211. This was sufficient evidence for accepting the statement into evidence. This was sufficient for supporting the fact that at the time of the statement Hill realized that he was in imminent danger of death.

2. The trial court did not err in denying a mistrial where none was ever requested. R. 54-55; C.P. 38-39. In addition, remarks during voir dire about the murder charge did not interfere with Trotter receiving a fair trial. The jury was instructed to decide the case against Trotter based only upon the evidence presented before them during the trial. C.P.13-14.

3. The record reflects that Trotter's inculpatory statements were voluntarily and intelligently given after a signed and witnessed **Miranda** warning. See exhibits 6 and 7 in manila envelop marked "Exhibits." for signed and witnessed statements of Leon Trotter The record reflects that Trotter was eighteen at the time of trial and seventeen when Hill was shot and killed, not thirteen as was Tyler Edmonds. There was no evidence of promises having been made, any coercion by investigators, or any influence from anyone else on Trotter to confess. R. 142-143; 159-166; 177.

In addition, Trotter testified under oath that his attempted exculpatory statements to investigators were "the truth. " R. 243. He has yet to claim any coercion, promises or any influence from anyone whatsoever caused him to confess. Trotter wanted the jury to know he made these

exculpatory statements to investigators. He admitted at least to being present during the murder. However, he was supposedly not armed and did not know that co-defendant Pittman was going to shot the victim.

In addition, appeal counsel relied upon Judge Diaz's "dissenting opinion" in **Edmonds v. State**, 955 So. 2d 787, 806 (¶51-78) (Miss. 2007). The majority did not reach any conclusion on the admissibility of Tyler's incriminating statements after an acknowledged and signed **Miranda** waiver. (¶1-¶78). Judge Randolph's opinion jointed by Judges Carlson, Smith, and Waller specifically dealt with the confessions. These Judges found that under the standards of the United States and the Mississippi Supreme Court, Tyler Edmond's confessions was voluntarily and intelligently entered. (¶ 79-¶99). Judge Easley's dissenting opinion found no reversible error, and therefore also accepted the trial court's admission of Tyler Edmond's inculpatory statements to investigators. (¶100-127). On December 3, 2007, the United States Supreme Court denied a writ of certiorari on the issue of Tyler Edmond's confession in **Edmonds v. Mississippi**, No. 07-5787.

The record also reflects that the Youth Court Act did not divest the Circuit Court of jurisdiction because Trotter by his own admissions was involved in a murder which could result in a life imprisonment sentence. See M. C. A. §43-21-151(1)(a)(Rev 2004).

4. Trotter received effective assistance of counsel, given the overwhelming evidence against him. Mr. Joe Buchanan defended Trotter adequately given the evidence against him. Buchanan can not be faulted for his client's statements prior to and during the trial. He defended Trotter before the jury in opening, and in closing in conformity with Trotter's attempt to blame his co-defendant for the murder while excusing himself. R. 232; 274-289.

5. There were no errors individually, or collectively that interfered with Trotter receiving a fair trial. The victim's statement to Officer Grayson was properly received, as was Trotter's attempts at

excusing himself by blaming his co-defendant. There was no request for a mistrial and none would have been granted under the facts of this case.

6. Trotter's life sentence was not cruel and unusual punishment. Trotter's life sentence was that provided by statute for one convicted of murder. A co-defendant's twenty year sentence for manslaughter was for a separate conviction based upon a plea. Additional evidence about Pittman's admissions or lack of admissions about the murder was not introduced in the instant cause. There was credible, corroborated substantial evidence in support of Trotter's conviction and sentence .

ARGUMENT

PROPOSITION I

THE VICTIM'S IDENTIFICATION STATEMENT WAS PROPERLY ADMITTED.

Trotter's appeal counsel believes that statement made by the victim to Officer Grayson were improperly admitted as a "dying declaration." It was improperly admitted because she thinks there was insufficient evidence for satisfying the requirements for its admission as a statement made by one who knows he is dying. Appellant's brief page 9-13.

To the contrary, the record reflects that the trial court found that the requirements for admission had been satisfied. As stated by the trial court:

> Court: Court finds that the statement made by the alleged victim in this case to the officer–to Officer Grayson does come within the exception, hearsay exception 804(b)(2), and the Court will allow that testimony from Officer Grayson.
>
> Mallette: We ask the Court for a specific ruling as to how that meets the prongs of the test set up by the Supreme Court.
>
> Court: It meets the prongs of the test under 804(b)(2). Okay. Anything else before I bring the jury in? R. 116.

Officer Grayson testified at a suppression hearing that he found Mr. Hill laying in his door way. He was laying in the doorway to his trailer. Hill told him that he had been shot by "Pooh Man." The shooter was driving "a blue Cadillac." R.102; 135. Grayson knew this was Trotter since he was related to him. Hill also told Grayson he "needed help" and that he was "cold." Hill also showed Grayson where he had been shot, which was in his upper left chest. R.103; 134. He had been shot near his heart. R. 103; 152; 242. See autopsy photographs showing bullet wound on the victim. Grayson testified that Hill was going in and out of consciousness while he was talking to him. Hill also told him that he could not move himself. R. 152.

Q. Okay. And at that time , describe what his condition was, how he appeared to you.

A. **Well, when we approached, he looked up and saw me and he told me, "Man, I need help. I'm cold."**

Q. Okay.

A. **He was blinking out of consciousness. I was there talking to him to keep him conscious.** R. 102.

...

Q. Okay. And was he able to respond to that question?

A. Yes, sir. He told me he had been shot.

Q. Okay. Did you make any identification of the person who shot him?

A. My next question was, "who shot you?" And he told me Pooh Man did. R. 103.

...

Q. All right. Do you know subsequently what happened to Mr. Hill?

A. **Other than being shot? I mean, he showed–when I asked him where had he been shot, he moved his arm, and I could actually see the bullet hole.** R. 104. (Emphasis by Appellee)

...

Q. Did he tell you why he couldn't get up?

A. I asked him why hadn't he got up, and he just said he couldn't move.

Q. **Said he couldn't move?**

A. **Yes, sir.** R. 152. (Emphasis by Appellee).

In **Watts v. State** 492 So. 2d 1281, *1289 (Miss.1986), the Court affirmed the trial court's admission of the murder victim's statements to witnesses. The Court found that it would not disturb a trial court's factual determination in accepting a statement as being a dying declaration. It would accept it where there was substantial evidence in support of its admission. In that case, as in the instant cause, the defense argued that there was insufficient evidence for determining that the victim understood that he was mortally wounded without hope of recovery. The trial court correctly found

that a victim's concern for medical services or for notice to his family did not necessarily indicate a hope of recovery, as argued by the defense.

> [20]...Watts' contention is based on the testimony of the victim's wife that the victim himself did not understand how badly he was injured, and that he expressed hope of recovery because he was concerned about the ambulance arriving and getting medical attention. He further expressed concern about his children.
>
> [21] We apply the rationale of **Neal v. State**, 451 So. 2d 743, 753 (Miss.1984), in which we held that when the trial judge's determination is largely based upon a finding of fact, and if he applied the correct legal standards, his determination should not be overturned unless his findings of fact were clearly erroneous, as not being supported by substantial evidence. Here the judge's finding that the statement was admissible as a dying declaration was supported by substantial evidence. The case is factually similar to **Fuson**, wherein the victim, though certainly in extremis, pleaded for someone to take her to the hospital. We affirmed the trial court's finding that her statements were dying declarations.

The record cited above indicates there was sufficient evidence for inferring that Ricky Hill knew he had been mortally wounded without hope of recovery. He had been shot in the upper left chest, near his heart. He was aware that he was "cold," indicating inadequate circulation of his blood. He was losing consciousness. He told the Officer he needed help. He was unable to move from his doorway. R. 152. He had been laying there helplessly for many hours. R. 140. Hill never recovered from his chest and lung wound. R. 211.

The Appellee would submit that there was sufficient evidence in support of the trial court's finding that the victim's statement to Officer Grayson was admissible. This issue is lacking in merit.

PROPOSITION II

THIS ISSUE WAS WAIVED. IT IS ALSO LACKING IN MERIT.

Trotter's counsel believes that the trial court erred in not granting a mistrial during voir dire. This was when the prosecution mentioned to the jury that the death penalty was not an issue they would consider in this case. She believes that this improperly focused the jury's attention on sentencing issues rather than upon the evidence they would consider in determining if Trotter should be found guilty of murder. Appellant's brief page 12-13.

The record reflects that Trotter's trial counsel did not request a mistrial, and this issue was also not mentioned in Trotter's motion for a JNOV. R. 54-55; C.A. 38-39. It was therefore waived.

In **Duplantis v. State** , 708 So. 2d 1327, 1346 (Miss. 1998), the Supreme Court found failure to object at trial on the same grounds argued on appeal waived the issue on appeal.

> In the case at bar, Duplantis failed to object at trial on the same grounds that he alleges on appeal. The rule is that when counsel objects to evidence, he must point out to the trial judge the specific reason for or the ground of the objection or else the objection is waived. **Norman v. State**, 302 So. 2d 254, 259 (Miss. 1974).

The comments about sentencing came up during voir dire, prior to any jury having been selected for Trotter's trial. While there was an objection, it was overruled. To the best of the Appellee's knowledge there was no request for a mistrial based upon the remark being prejudicial to Trotter's defense made at any time during the trial.

> Powell:...This is not a capital murder trial. The death penalty is not a possible sentence in this case. Murder is limited to a term of imprisonment. So I want to make sure--
>
> Buchanan: Your Honor, I'm sorry. I don't think this is proper voir dire examination on what the penalties would be. The jury will be instructed as to what their job is. The Court will give them the law on what their job is. And to give them any information about possible sentences as to any crime that may be charged I think would be improper at any stage of the trial, certainly at this early stage.

Court: Objection overruled. R. 54-55.

> Powell:... I just don't want anybody–and the reason I ask this is because people have all kind of views about capital cases. I want to make sure that everybody understands that you're not going to be asked to impose the death penalty, or any sentence for that matter. Does everybody understand that? R. 55

In the **Marks v. State**, 532 So. 2d 976, 983 (Miss 1988) case, relied upon by Trotter, the statements about sentencing came during closing argument. There was no objection, and while the court stated its disapproval of such remarks, it did not find it was reversible error.

The Appellee would submit that this issue is lacking in merit.

PROPOSITION III

THE RECORD REFLECTS THAT TROTTER'S INCULPATORY STATEMENTS WERE VOLUNTARILY AND INTELLIGENTLY ENTERED.

Trotter's counsel believes that his inculpatory statements were improperly admitted into evidence. She believes that they were not proper because he was seventeen and supposedly subject to Youth Court jurisdiction, and his mother or guardians should have been present. In addition, she thinks that Trotter did not supposedly know what he would be charged with when he talked to investigators. Appellant's brief page 14-15.

To the contrary, the record reflects that Trotter testified under oath that his attempted exculpatory statements to investigators were "the truth." R. 243. He has yet to claim any coercion, promises or any influence from anyone whatsoever caused him to confess. There is a lack of evidence that Trotter had a mother or any other family member with whom he was in contact at that time in Mississippi. According to record evidence, Trotter was originally from Chicago, Illinois. C.P. unnumbered page 2. In his testimony, Trotter wanted the jury to know that he did not allegedly participate in any murder. He merely admitted to being present during the alleged unexpected murder of Hill by Trotter's companion Pittman. R. 243-246.

Appeal counsel's argument is based upon Judge Diaz's "dissenting opinion" in **Edmonds v. State**, 955 So. 2d 787, 806 (¶51-78) (Miss. 2007). To the best of appellee's knowledge, the majority did not reach any conclusion on the admissibility of Tyler's incriminating statements. This was after an acknowledged and signed **Miranda** waiver. (¶1-¶78).

Judge Randolph's opinion joined by Judges Carlson, Smith, and Waller specifically dealt with Tyler's confession in detail. They found that under the standards of the United States and the Mississippi Supreme Court, Tyler Edmond's confession was voluntarily and intelligently entered.

(¶ 79-¶99). Judge Easley's dissenting opinion found no reversible error, and therefore implicitly also accepted the trial court's admission of Tyler Edmond's inculpatory statements to investigators. (¶100-127).

On December 3, 2007, the United States Supreme Court denied a writ of certiorari on the issue of Tyler Edmond's confession in **Edmonds v. Mississippi**, No. 07-5787.

In addition, the Appellee would submit that the Youth Court Act did not divest the Circuit Court of jurisdiction because Trotter was by his own admission present during a murder which could result in a life imprisonment sentence. See M. C. A. §43-21-151(1)(a)(Rev. 2004).

Trotter's attempted exculpatory statements were read to the jury. Officers Grayson, Roseman and Pitchford testified that there were no promises, and no coercion involved. Trotter indicated he understood his **Miranda** rights, did not request an attorney, or refuse to speak to officers about the circumstances involved in the murder of Mr. Ricky Hill. R. 158-163; 177..

> Q. Would you read Mr. Trotter's statement for the jury?
>
> A. "It was 12:00 a. m. Me and Al went to Ricky Hill's house and knocked on the door. He said, 'Who is it?' I said, 'It's Cliff.' He opened the door and Al shot him." R. 161-162.
>
> ...
>
> Q. Would you read that statement for the jury? (Trotter's second more factually detailed statement to investigators.
>
> A. "At about 12:00 a.m., Al and myself decided to go to Ricky Hill's house and get $35 he owed me for the drugs that I gave him on credit. We parked by the church and walked to Ricky Hill's house. When we arrived at his house, I knocked on his door. He asked, 'Who it is?' I said, 'Cliff,.' and Ricky opened the door. Al then pulled out a gun and shot Mr. Hill. I watched Ricky fall to the floor, and I looked back. Al was running, so I ran, too. We went to a car, and then we went-when we made it to his house, we ate. R. 163-164.

In **Edmonds v. State**, 955 So. 2d 787, 811-819 (¶ 79- ¶99)(Miss. 2007), Judge Randolph joined by Judges Carlson, Smith and Waller found the trial court, Judge James T. Kitchens, Jr., of Oktibbeha County correctly admitted Tyler Edmonds' confession. The Court also pointed out that Judge Diaz's dissent was "clearly distinguishable" by the facts of the case and the case law both federal and state.

> I conclude that the trial court clearly did not err in deeming Tyler's confession admissible. Given the deferential standard of reviewing that decision, see **Dancer v. State**, 721 So. 2d at 587; the opportunity that the jury had, at trial, to weigh the confessions and Tyler's recantation on its own; and our body of law, I conclude that the trial court was eminently correct in allowing the jury to consider the evidence.

The Youth Court Act did not divest the Circuit Court of jurisdiction because Trotter was involved in a murder which could result in a life sentence. See M. C. A. §43-21-151(1)(a)(Rev. 2004).

The Appellee would submit that this issue is lacking in merit.

PROPOSITION IV

TROTTER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Trotter's appeal counsel believes that he did not receive effective assistance of counsel. She believes this included inadequate review of discovery, failure to seek out, interview and use alleged available crucial witnesses, including co-defendant Pittman, and failure to contest Trotter's statements as voluntary , and to request the assistance of a separate forensic expert. Appellant's brief page 14-19.

To the contrary, the record reflects that Trotter received effective assistance of counsel. The record reflects overwhelming evidence against Trotter, including his attempted exculpatory statements. Trial counsel can not be faulted for the choices made by a defendant prior to and during his trial. Rather defense counsel must defend the accused given their own independent choices. A defendant is not entitled to separate forensic experts without specific statement of how this is crucial to his defense. In addition, trial counsel can not be faulted for not calling a co-defendant with separate counsel who has specifically requested a severance from Trotter's trial which was granted. C.P. 10.

For Trotter to be successful in his ineffective assistance claim, he must satisfy the two-pronged test set forth in **Strickland v. Washington**, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064-65, 80 L. Ed. 2d 674, 693-95 (1984) and adopted by this Court in **Stringer v. State**, 454 So. 2d 468, 476-477 (Miss. 1984). Trotter must prove: (1) that his counsel's performance was "deficient," and (2) that this supposed deficient performance "prejudiced his defense." The burden of proving both prongs rests with Trotter. **McQuarter v. State**, 574 So. 2d 685, 687 (Miss. 1990). Finally, Trotter must show that there is "a reasonable probability" that but for the errors of his counsel, the sentence

of the trial court would have been different. **Nicolau v. State**, 612 So. 2d 1080, 1086 (Miss. 1992), **Ahmad v. State**, 603 So. 2d 843, 848 (Miss. 1992).

The second prong of the **Strickland v. Washington,**, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) is to determine whether there is a reasonable probability that but for the alleged errors of his counsel, the result of Trotter's trial would have been different. This is to be determined from "the totality of the circumstances" involved in his case.

Appellee would submit that based upon the record we have cited, there is a lack of evidence for holding that there is a reasonable probability that Mr. Buchanan erred in his representation of Trotter. This was given the evidence against him including his own voluntary statements to investigators. Trial counsel submitted jury instructions for manslaughter in keeping with Trotter's decision to admit being present without allegedly knowing that co-defendant Pittman was going to fatally shot the victim. C.P. 20-21.

The record indicates that trial counsel filed motions for discovery. C.P. 6-8. The record also reflects that counsel for co-defendant Pittman requested a motion to sever. This was based upon the fact that Trotter and Pittman were blaming each other for the murder. C.P. 10. As to the calling or not calling of witnesses to testify in support of Trotter, there is a presumption that this was a matter of trial strategy.

In **Cole v. State**, 666 So. 2d 767, 777 (Miss. 1995), the Supreme Court found no evidence of ineffective assistance for failure to make certain objections during the trial. In doing so the Court also stated that failure to call certain witnesses would not be considered ineffective assistance.

> Complaints concerning counsel 's failure to file certain motions, call certain witnesses, ask certain questions, or make certain objections falls within the ambit of trial strategy

In **Caldwell v. State**, 443 So.2d 806, *812 (Miss. 1983), the Court pointed out a defendant

is not entitled to his own expert witness without clear statement of the purposes and value of such witnesses to one's defense.

> In the case of **Bullock v. State**, 391 So.2d 601 (Miss.1980), this Court went further to say that the failure to outline specific costs and in specific terms the purposes and value of such requested expert rendered the trial court's refusal to authorize such expenditure non reversible. In the instant case Caldwell's motion simply included the general statement that the requested expert "would be of great necessarius witness." It did not estimate the cost of such expert nor the specific value. Therefore, the trial court's failure to provide the requested expert witness or investigator did not constitute reversible error.

As stated in **Strickland**: and quoted in **Mohr v. State** , 584 So. 2d 426, 430 (Miss. 1991):

> Under the first prong, the movant 'must show that the counsel's performance was deficient and that the deficient performance prejudiced the defense. Here there is a strong presumption of competence. Under the second prong, the movant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' The defendant must prove both prongs of the test. Id. 698.

Trotter bears the burden of proving that both parts of the tests have been met. **Leatherwood v State**, 473 So. 2d 964, 968 (Miss. 1985).

> The burden of proving ineffective assistance of counsel is on the defendant to show that the counsel's performance was deficient and that the deficient performance prejudiced the defense.

When an appeal involves post conviction relief, the Mississippi Supreme Court has held, "that where a party offers only his affidavit, then his ineffective assistance of counsel claim is without merit." **Lindsay v. State**, 720 So. 2d 182, 184 (6 (Miss. 1998); **Smith v State**, 490 So. 2d 860 (Miss. 1986). There were no affidavits filed with testimony from witnesses relevant to his claims on appeal.

In **Johnston v . State**, 730 So. 2d 534, 538 (Miss. 1997), the Court stated that the burden of showing prejudice could not be met by merely alleging it.

> Additionally, there is a further requirement which Johnston must hurdle, prejudice. Claims alleging a deficiency in the attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. **Strickland**, 466 U. S. at 693., 104 S. Ct. at 2067. However, Johnston fails to make any allegations of prejudice. As in **Earley**, Johnson must affirmatively prove, not merely allege that prejudice resulted from counsel's deficient performance. *Earley*, 595 So. 2d at 433. Johnston has failed on the second prong of **Strickland**. Having failed to meet either prong of the **Strickland** test, we find that there is no merit to the ineffective assistance of counsel claim raised by Johnston.

In **Ferguson v. State**, 507 So. 2d 94, 97 (Miss. 1987), quoting **Strickland**, 466 U S at 687, 104 S. Ct. 2052.

> Although it need not be outcome determinative in the strict sense, it [deficient assistance of counsel] must be grave enough to 'undermine confidence' in the reliability of the whole proceeding.

The Appellee would submit that there was insufficient evidence in the record of either deficient performance of professional responsibilities or of any prejudice to Trotter's defense that would have undermined confidence in the fairness of his trial. This issue is also lacking in merit.

PROPOSITION V

THE RECORD REFLECTS TROTTER WAS GIVEN A FAIR TRIAL.

Appeal counsel believes that Trotter's trial counsel committed errors during the trial which when taken together were sufficient for denying him a fair trial by his peers. Appellant's brief page 19.

To the contrary, as shown under prior propositions, there was no deficient performance by counsel for Trotter. Trial counsel defended Trotter, given Trotter's choice of attempting to shift blame for the murder to co-defendant Pittman. Mr. Buchanan argued Trotter's position before the jury in keeping with his pre-trial statements and his testimony before the jury. R. 232; 274-289.

In **Gibson v. State**, 731 So. 2d 1087, 1098 (Miss. 1998), this Court found no errors individual or cumulative that had deprived Gibson of a fair trial.

> Where there is ' no reversible error in any part,...there is no reversible error to the whole.' **McFee v. State** , 511 So. 2d 130, 136 (Miss. 1987). We have examined each one of Gibson's complaints and hold the cumulative effect of all alleged errors was not such as to deny the defendant a fundamental fair trial.

The Appellee would submit that this issue is also lacking in merit.

PROPOSITION VI

TROTTER'S LIFE SENTENCE WAS THE SENTENCE PROVIDED FOR ONE CONVICTED OF MURDER.

Appeal counsel believes that Trotter's sentence was harsh, and excessive when compared with the twenty year sentence received by co-defendant Pittman. She believes that this made Trotter's sentence cruel and unusual.

To the contrary, the record reflects that Trotter was found guilty of murder. R. 302. Under M. C. A. § 97-3-21 the sentence for one convicted of murder would be a life sentence.

The record reflects that although the jury were given instructions for manslaughter, they, nevertheless, found Trotter guilty of murder. C.P. 20-21. The sentence for murder is established by statute as being life imprisonment.

Co-defendant Pittman's twenty year sentence was for a separate manslaughter conviction. C.P. ii. This was based upon a plea agreement with the prosecution. A twenty year sentence is within the guidelines established for a conviction for manslaughter. While there is evidence that Pittman made pre-trial statements to prosecutors about the circumstances surrounding the murder of Mr. Ricky Hill, the Appellee can find nothing in the record of this cause about how his account differed from that given by Trotter.

In **Mason v. State**, 440 So. 2d 318, 319 (Miss. 1983) the court stated facts which are not supported by record evidence should be ignored on appeal.

> We have on many occasions held that we must decide each case by the facts shown in the record, not assertions in the brief, however sincere counsel may be in those assertions. Facts asserted to exist must and ought to be definitely proved and placed before us by a record, certified by law; otherwise we cannot know them. **Phillips v. State**, 421 So. 2d 476 (Miss. 1982); **Branch v. State**, 347 So. 2d 957 (Miss. 1977);...

In **Barnwell v. State**, 567 So. 2d 215, 221-222 (Miss. 1990), this Court stated that when

sentences are within the guidelines provided for punishment by the legislature, they would not be considered cruel and unusual punishment. As stated:

> There are general principles which can be drawn from the Supreme court's rulings in **Rummel** and **Solem** which have been adopted by a number of jurisdictions and which we now adopt. In cases factually similar to **Rummel,** ***Rummel*** **(** ***Rummel v. Estelle***, 445 U. S. 263, 100 S. Ct. 1133, 63 L. Ed. 382 (1980) provides the rule. Apart from the factual context of **Solem** (***Solem v. Helm***, 463 U. S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637(1983) - a sentence of life in prison without the possibility of parole - or a sentence which is manifestly disproportionate to the crime committed (e.g. life sentence for overtime parking, see, ***Rummel***, 445 U. S. at 274 n.11, 100 S. Ct. at 1139 n.11) extended proportionality analysis is not required by the Eighth Amendment. ***Moreno v. Estelle***, 717 F. 2d 171, 180 (5th Cir 1983), cert. denied, 466 U.S. 975, 104 S. Ct. 2353, 80 L. Ed. 2d 826 (1984); ...

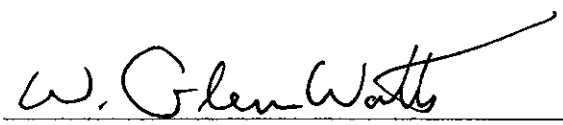
The Appellee would submit that Trotter's sentence was that provided by statute. Pittman's twenty year sentence for manslaughter was for a separate conviction based upon a plea agreement with the state. That sentence does not in any way indicate that Trotter's was excessive, cruel or unusual. This issue is also lacking in merit.

CONCLUSION

Trotter's conviction and sentence should be affirmed for the reasons cited in this brief.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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CERTIFICATE OF SERVICE

I, W. Glenn Watts, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 17th day of December, 2007.

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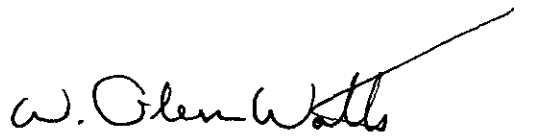
This the 18th day of December, 2007.



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