IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
COURT OF APPEALS

LEON LAMAR TROTTER — APPELLANT

VS. — NO. 2005-KA-00379-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT
LEON LAMAR TROTTER

APPEAL FROM THE CIRCUIT COURT OF
HUMPHREYS COUNTY, MISSISSIPPI

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record for Appellant Leon Lamar Trotter 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 this Court may evaluate possible disqualification or recusal.

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(4) Honorable Jannie Lewis
Humphreys County Circuit Court Judge
Post Office Box 149
Lexington, MS 39095
Trial Judge

REQUEST FOR ORAL ARGUMENT

COMES NOW, the Appellant, Leon Trotter and requests oral argument. Oral argument would be beneficial to the Court's understanding of the facts as they apply to the law on the issues raised in this appeal.

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STATEMENT OF THE ISSUES

1. WHETHER THE TRIAL COURT ERRED IN ADMITTING THE PURPORTED STATEMENT OF THE VICTIM

2. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DID NOT *SUA SPONTE* DECLARE A MISTRIAL WHEN THE PROSECUTOR REPEATEDLY STATED THAT LEON TROTTER WAS NOT CHARGED WITH A CAPITAL CRIME AND WAS NOT ELIGIBLE FOR THE DEATH PENALTY AND DID NOT INSTRUCT THE JURY TO DISREGARD THE PROSECUTOR'S STATEMENTS

3. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT ADMITTED THE STATEMENTS OF LEON TROTTER

4. WHETHER LEON TROTTER'S TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO SEEK A CONTINUANCE BECAUSE LEON TROTTER WHO WAS CHARGED WITH A CAPITAL CRIME WAS NEVER ARRAIGNED; FAILING TO CONDUCT AN ADEQUATE INVESTIGATION INTO THE FACTS OF THE CASE; FAILED TO SUBPOENA WITNESSES, INCLUDING BUT NOT LIMITED TO LEON TROTTER'S CO-DEFENDANT, ALVIN PITTMAN; FAILED TO MOVE TO SUPPRESS LEON TROTTER'S STATEMENTS; FAILED TO OBJECT WHEN A WITNESS CALLED BY THE STATE TESTIFIED ABOUT WHAT LEON TROTTER'S CO-DEFENDANT SAID; FAILED TO CHALLENGE DR. STEVEN HAYNES' DESIGNATION AS AN EXPERT; FAILED TO DESIGNATE AN EXPERT TO COUNTER DR. STEVEN HAYNES' TESTIMONY; AND FAILED TO REQUEST A JURY INSTRUCTION ON RICKY HILL'S DYING DECLARATION

5. WHETHER THE TRIAL COURT'S SENTENCING OF LEON TROTTER WAS SO HARSH THAT IT CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

6. WHETHER THE CUMULATIVE ERRORS IN THE CASE DENIED LEON TROTTER RIGHT TO A FAIR TRIAL.

PROCEDURAL HISTORY

On January 13, 2004, the Humphreys County Grand Jury returned a two count indictment against Alvin Earl Pittman (hereinafter "Pittman") and Leon Trotter (hereinafter "Trotter"). (C.P. 001). Pittman and Trotter were charged with the June 12, 2003 murder of Ricky Hill and the manufacture of more than one once and less than a kilogram of marijuana.[1] (C.P. 001).

Trotter was served with the instanter capias on January 22, 2004. (C.P. 003). There is no evidence in the record that Trotter was ever arraigned on the charge of murder and/or manufacture of more than one ounce and less than a kilogram of marijuana. (C.P. ii). According to the Docket Sheet, an Order setting trial date and motion deadline was entered on January 29, 2004. (C.P. ii). Said Order was not found among the court papers. (C.P. ii-047).

One day before trial, June 14, 2004, Joe M. Buchanan, trial counsel for Trotter, filed a "Request for Discovery" "pursuant to Rule 4.06 of the Uniform Criminal Rules of Circuit Court Practice, as adopted and amended by the Mississippi Supreme Court, and as permitted by *Hentz v. State*, 489 So.2d 1386 (Miss. 1986)." (C.P. 008-009). On the same day, Trotter's trial counsel filed a Motion to Produce seeking the names and addresses of all witnesses in chief proposed to be offered by the prosecution at trial; copy of any recorded statement (written or voice recording) of the Defendant to any law enforcement officer; copy of the crime lab report or reports of any test made; exhibits and physical evidence and photos to be offered in evidence; and a copy of any exculpatory material concerning the Defendant. (C.P. 006-007).

On or about June 15, 2004, counsel for Pittman filed a Motion for Severance. (C.P. 010-011). In his Motion for Severance, Pittman stated "that the defendants have made statements to law enforcement that indicates the other was responsible for the murder. That more than likely one of the Defendant's statement will be introduced into evidence and as such will cause the other

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1 There is no indication in the record regarding the disposition of Leon Trotter's manufacture of marijuana charge. The Docket Sheet in this case reflects that Alvin Earl Pittman entered a guilty plea to the charge of manslaughter and conspiracy to commit murder. (C.P. ii).

Defendant to have to testify in an effort to rebut what the statement says and would consequently violate his constitutional right to remain silent." (C.P. 010-011). Judge Lewis granted the Motion for Severance. (C.P. 012).

Trotter's two-day trial got underway the same day at the Humphreys County Circuit Court. (C.P. 035, 036). On June 16, 2004, Trotter was found guilty and sentenced to life imprisonment without the possibility of parole and/or early release. (C.P. 035, 036). Pittman entered a plea of guilty to manslaughter and conspiracy to commit murder. (C.P. ii). Pittman was sentenced to 20 years in the custody of the MDOC. (C.P. ii).

On June 25, 2004, Trotter filed a Motion for New Trial or in the Alternative a Judgment Notwithstanding the Verdict. (C.P. 038). Trotter contends "the jury in the trial of this matter was allowed to hear and consider evidence that should have been excluded under current Mississippi law, the Mississippi Rules of Evidence, the Mississippi Constitution and the United States Constitution." (C.P. 038). Trotter contends that "testimony concerning statements made by Ricky Hill that were admitted in error because they were hearsay. (C.P. 038). On June 25, 2004, Judge Lewis denied the Motion for New Trial. (C.P. 041).

STATEMENT OF FACTS

Without relief from this Court, Leon Trotter will the rest of his life in the custody of the Mississippi Department of Corrections solely on the basis of testimony of witnesses who were not present when Ricky Hill was shot on June 12, 2003 in Silver City, Mississippi and who did not appear to testify against Leon Trotter during his trial and were not subjected to cross-examination.

One of the witnesses the State called to testify against Leon Trotter at his murder trial was Officer Truvon Russell Grayson, (hereinafter "Grayson" who worked for the Belzoni Police Department. (T.p. 100, l. 15-29, p. 101, l. 1-17, T.p. 132, l. 11-19). Grayson testified that he saw Ricky Hill on June 12, 2002 lying in the front door of his trailer. (T.p. 100, l. 15-29, p. 101, l. 1-17, T.p. 132, l. 11-19). Grayson testified he went to Hill's trailer around 4:45 p.m. after Harry/Henry Richardson told him "he would recognize Ricky was just laying in the door, that I need to go around there and check on him." (T.p. 101, l. 18-26, T.p. 133, l. 3-11, T.p. 151, l. 7-13). Grayson testified he was playing basketball in Silver City a couple of blocks away from Hill's trailer when Richardson approached him. (T.p. 101, l. 25-29, T.p. 133, l. 1-10).

Grayson testified when he went to Hill's trailer, he found Hill lying in his doorway. (T.p. 102, l. -11, T.p. 133, l. 19-21). "When we approached, he looked up and saw me, and he told me, 'man, I need help. I'm cold'." (T.p. 102, l. 12-16, T.p. 134, l. 8-10). "He was blinking out of conscious. I was there talking to him to keep him conscious." (T.p. 102, l. 18-19, T.p. 134, l. 11-18). Grayson testified that he asked Hill what happened to him. (T.p. 103, l. 1-7, T.p. 134, l. 22-25). Hill purportedly told Grayson he had been shot. (T.p. 103, l. 8-10, T.p. 134, l. 26-29). Grayson testified he was the only person who could have heard the conversation between him and Hill, even though he claims that "we approached" Hill. (T.p. 106, l. 17-24). Grayson testified he asked Hill "who shot you?' and he told me Pooh Man did." (T.p. 134, l. 27-29) Grayson testified he associated the name with a guy he knew as Pooh Man, "but I asked him, 'Pooh Man who?' And he said 'the guy that drives the blue Cadillac that lives down in the trailer.'" (T.p. 103, l. 19-24, T.p. 135, l. 7-13). Grayson

testified he determined who the person was from Hill's description. (T.p. 103, l. 25-29, T.p. 135, l. 4-6). Grayson testified that the person was Leon Trotter. (T.p. 104, l. 1-2, T.p. 135, l. 29, T.p. 136, l. 1-4). Grayson says Trotter is his stepfather's cousin. (T.p. 104, l. 3-5, T.p. 135, l. 4-6).

Grayson claims that after he questioned Hill, Grayson called the Humphreys County Sheriff's Department and requested an ambulance. (T.p. 104, l. 6-9, T.p. 135, l. 22-28). Hill was taken to the Humphrey's County Memorial Hospital. (T.p. 104, l. 16-19). Grayson testified on cross-examination that he was asked to give a written statement about the events of June 12, 2003. (T.p. 107-108). There is no mention in Grayson's statement that Hill told him "Man I need some help. I'm cold." In addition, Grayson testified Hill's reference was to get help was related to an attempt to get medical or emergency services. (T.p. 108-109, l. 1-9). Grayson did not testify that Hill thought he was dying and that there was no hope of recovery.

While Grayson claims Hill had much to say to him, Officer Pitchford testified Hill didn't have much to say. (T.p. 157, l. 19-21).

Grayson testified that he passed the information he gathered on to Chief Roseman. (T.p. 136, l. 12-17). Grayson testified he went with Chief Roseman to try to find Leon Trotter and Pittman. (T.p. 136, l. 19-21). Grayson testified that law enforcement officials saw Alvin Pittman when they went to the trailer where Leon Trotter lived. (T.p. 136, l. 22-26). Grayson testified "well, when we was approaching the trailer where Leon normally lived, we noticed the Cadillac further down the road traveling south. At that time, we approached the Cadillac, and it was two young men in the car at that time. That's when we recovered a weapon (380 caliber semi automatic handgun) and a purple crown royal bag. (T.p. 137, l. 1-6). The Cadillac belonged to Leon Trotter's grandmother. (T.p. 155, l. 1-8). The gun was under the front driver's seat. (T.p. 137, l. 14-16). Pittman was sitted on the passenger side of the vehicle. (T.p. 137, l. 17-19). Michael Trotter was seated on the driver's side of the vehicle. (T.p. 137, l. 20-21). "At that time, the deputy took Alvin Pittman into custody. After transporting – "well, another deputy came and transported Pittman to

the Sheriff's department. We turned around and went another route. And at that point, we spotted Leon in a white Grand Am traveling west. So that's when we took him into custody." (T.p. 137, l. 7-13). A small handgun was found in the console of the white Grand Am. (T. p. 154, l. 4-8).

Latoya Renee Cooks testified she owned a 380-caliber semi automatic handgun in June of 2003. (T.p. 121, l. 22-29). Cooks testified she purchased the handgun from Howard's Pawn Shop in Belzoni, Mississippi. (T.p. 122, l. 1-13). The receipt for the Byrco Arms 380 was purchased from L. & K Pawn Shop. (State Exhibit 1). Cooks purchased the handgun on March 28, 2003. (T.p. 123, l. 1-5). Cooks testified that she kept the handgun at her house for about a month and then took the handgun to her aunt's house. (T.p. 123, l. 6-14). Cooks testified that she considered selling the handgun to Pamela Trotter. (T.p. 123, l. 13-17). Cooks says she gave the handgun to Pamela Trotter on June 8, 2003, a Sunday, and they were going to put the handgun in Pamela Trotter's name on June 9, 2003. (T.p. 123, l. 15-22). Cooks says Pamela Trotter went with her to pick up the handgun from her aunt's home. (T. p. 125, l. 17-21). Cooks and Pamela Trotter then went to Pamela Trotter's home. (T.p. 125, l. 17-21). According to Cooks, Leon Trotter and Carlos Anthony were at Pamela Trotter's home. (T.p. 125, l. 22-25). Cooks testified Pamela Trotter did not pay her for the gun on June 8, 2003. (T.p. 125, l. 26-28). Cooks testified she gave the gun to Leon Trotter because Pamela Trotter "was going to get it for Leon in her name." (T.p. 126, l. 1-7). Pamela Trotter is Leon Trotter's aunt. (T.p. 126, l. 8-10).

Cooks testified she never transferred ownership of the 380 handgun to Pamela Trotter. (T.p. 126, l. 11-16). Cooks claims she did not have possession of the firearm after June 8, 2003. (T.p. 126, l. 21-23).

Cooks and Leon Trotter used to be "boyfriend and girlfriend." (T.p. 127, l. 6-8). They broke up in December of 2002. (T.p. 127, l. 9-10).

After Leon Trotter, who was 17-years-old at the time, was apprehended, he was transported to jail, where he was interviewed by Officer Pitchford. (T.p. 141, l. 11-13). Grayson claims

Pitchford advised Leon Trotter of his Miranda rights before being to question him. (T.p. 141, l. 14-17). According to Grayson, Leon Trotter signed the Miranda sheet. (T.p. 142, l. 1-6). Grayson testified Leon Trotter was not offered any hope of reward or leniency. (T.p. 142, l. 14-16). Neither Grayson nor David Pitchford or Deputy J. D. Roseman testified that they informed Leon Trotter he was a suspect when they questioned him. (T.p. 132, l. 185).

Without speaking to his mother and/or an attorney and without knowing that he was a suspect, at 9:03 p.m., law enforcement officials induced Leon Trotter to sign a statement. In the 9:03 p.m. statement, Leon Trotter, under pressure from law enforcement officers, stated "it was 12:00 a.m. me and Al went to Ricky Hill house knocked on the door he said who is it. I said Cliff he open the door and Al shot him." (State Exhibit 6).

Law enforcement officials apparently were not satisfied with Leon Trotter's first coerced statement so they forced Leon Trotter to give another statement. In the statement law enforcement officials obtained fifty-five (55) minutes after the 9:03 p.m. statement, Leon Trotter allegedly stated, "at about 12:00 a.m. Al and myself decided to go to Ricky Hill's house to get the $35.00 he owed me for the drug that I gave him on credit. We parked the car at the church and walked to Ricky Hill house. When we arrived at his house, I knocked on his door. He asked who is it and I said Cliff. And Ricky opened the door. Al then pulled out a gun and shot Ricky Hill. I watched Ricky fall to the floor and I looked back Al was running so I ran to. We went to the car and then went. When we made it to the house we ate. When my aunt and her friends left he started talking about where he shot Ricky. I said that he might die. And Al said he is cause I shot him in the heart. Then Al said the only reason I shot him one time is because the gun jammed up then we went to sleep. (State Exhibit 7).

On June 13, 2003, law enforcement officials continue to badger Leon Trotter. (State Exhibit 9). That statement said "I received the first 380 from Renee. She had giving (sic) it to me then I had went to Chicago and sold it. The reason she gave me the gun is because I ask her for it. She

gave me the second gun because I ask for it. This was just before I got stop by the sheriff department in Giffine (sic) Circle."

During Leon Trotter's trial, Leon Trotter was called as a witness. Trotter's trial counsel did not call any other witnesses. More importantly, he did not call Alvin Pittman, Leon Trotter's co-defendant, and/or any other witnesses to support Leon Trotter's version of the events. On cross-examination of Officer Pitchford, he testified, "He put in the statement that they were going to shoot someone else." Pitchford explained, "That was another statement. That was the other guy."

SUMMARY OF ARGUMENT

1. THE TRIAL COURT ERRED IN ADMITTING THE PURPORTED STATEMENT OF THE VICTIM

2. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DID NOT *SUA SPONTE* DECLARE A MISTRIAL WHEN THE PROSECUTOR REPEATEDLY STATED THAT LEON TROTTER WAS NOT CHARGED WITH A CAPITAL CRIME AND WAS NOT ELIGIBLE FOR THE DEATH PENALTY AND DID NOT INSTRUCT THE JURY TO DISREGARD THE PROSECUTOR'S STATEMENTS

3. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT ADMITTED THE STATEMENTS OF LEON TROTTER

4. LEON TROTTER'S TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO SEEK A CONTINUANCE BECAUSE LEON TROTTER WHO WAS CHARGED WITH A CAPITAL CRIME WAS NEVER ARRAIGNED; FAILING TO CONDUCT AN ADEQUATE INVESTIGATION INTO THE FACTS OF THE CASE; FAILED TO SUBPOENA WITNESSES, INCLUDING BUT NOT LIMITED TO LEON TROTTER'S CO-DEFENDANT, ALVIN PITTMAN; FAILED TO MOVE TO SUPPRESS LEON TROTTER'S STATEMENTS; FAILED TO OBJECT WHEN A WITNESS CALLED BY THE STATE TESTIFIED ABOUT WHAT LEON TROTTER'S CO-DEFENDANT SAID; FAILED TO CHALLENGE DR. STEVEN HAYNES' DESIGNATION AS AN EXPERT; FAILED TO DESIGNATE AN EXPERT TO COUNTER DR. STEVEN HAYNES' TESTIMONY; AND FAILED TO REQUEST A JURY INSTRUCTION ON RICKY HILL'S DYING DECLARATION

5. THE TRIAL COURT'S SENTENCING OF LEON TROTTER WAS SO HARSH THAT IT CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

6. THE CUMULATIVE ERRORS IN THE CASE DENIED LEON TROTTER RIGHT TO A FAIR TRIAL.

THE TRIAL COURT ERRED IN ADMITTING THE PURPORTED STATEMENT OF THE VICTIM

In the instant case, Trotter's trial counsel moved to exclude the alleged statement that Ricky Hill allegedly gave to Officer Grayson on June 12, 2003. According to Grayson, Hill told him that Pooh Man shot him.

In *Morris v. State*, 777 So.2d 16, 23 (Miss. 2001), the defendant filed a Motion in Limine to prevent two witnesses from testify about statements the victim made to the victim's wife and another person. According to those witnesses, the victim, told them that "Jack Carey's grandson" shot him. The defendant in *Morris* argued that the statement did not fall under the auspices of a dying declaration. Id. The trial judge allowed the victim's statement to come into evidence over the objection of the defendant in that case. Id.

On appeal, the Mississippi Supreme Court stated that the requirements regarding the admissibility of dying declarations is set forth in *Watts v. State*, 492 So.2d 1281, 1287 (Miss. 1986). The general requirements concerning the admissibility of dying declarations are as follows: (1) The wounded person is in extremis and dies after making the statement; (2) The person realizes that he is mortally wounded, and (3) He has no hope of recovery.

Trotter's trial attorney attempted to exclude Hill's statement that Pooh Man shot him. The trial judge heard testimony from Officer Grayson. He testified that he left a basketball court in Silver City and went to Hill's trailer after Harry/Henry Richardson told him that Hill was lying in the floor of his trailer and may need help. Upon his arrival, Grayson testified that he asked Hill who shot him. According to Grayson, Hill stated that Pooh Man shot him. No one witnessed Hill make the statement to Grayson although Grayson was accompanied by others when he went to Hill's trailer. During the hearing on the Motion to Exclude Hill's statement, no testimony was offered that Hill realized when he allegedly spoke to Grayson on June 12, 2003 that he was mortally wounded and/or that he had no hope of recovery.

Despite the evidentiary short comings, the trial judge stated, the "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? Anything further in response?" Trotter's counsel asked the trial court "for a specific ruling as to how that meets the prongs of the test set up by the Supreme Court." The trial judge responded and stated "It meets the prongs of the test under 804(b)(2). Okay. Anything else before I bring the jury in?"

The trial court's action in the case *sub judice* is in stark contrast to the manner the same trial judge dealt with a similar motion in *Morris*. In *Morris*, the trial judge in the case *sub judice*, addressed the three requirements set forth in *Watts* in the order denying Morris's motion. *Morris*, 777 So.2d at 23. In *Morris*, the trial court stated, "[t]he Court finds that when the statements were first made the victim/decedent was being transported by ambulance in an emergency condition, the victim realized that he had been shot and was being transported by ambulance to a larger hospital. The victim died 29 days later without his condition improving. The Court further finds that while in the hospital the victim/decedent made the state 'Jack Carey's grandson shot me' a number of times, at a time according to the wife's testimony that the doctors gave them no hope of the victim/decedent recovery. The Court finds no evidence to suggest bad feelings between the victim/decedent and Jack Carey's grandson, the defendant. As to any misstatements, the evidence is clear that the victim/decedent made the same statement a number of times before he died. This Court therefore finds beyond a reasonable doubt that the out of court statements made by the victim/decedent is in this case were indeed dying declarations and is therefore, admissible under dying declaration exception to the hearsay rule." Id.

In the case *sub judice*, the trial judge refused to state the basis for her determination that Hill's purported statement was indeed a dying declaration. In fact, no evidence was proffered that Hill knew that he was mortally wounded and/or that he had no hope of recovery. Officer Grayson

testified that Hill asked him to get him some help. Officer Grayson did not offer any testimony that would have lead the Court to believe beyond a reasonable doubt that Hill knew he was mortally wounded and that he had no hope of recovery. Although Hill lived more than five days after he was shot, the State did not produce any witnesses to testify about whether Hill knew that he was mortally wounded and had no hope of recovery.

In *Morris*, the victim's wife testified that her husband told her "he knew he would never come home." *Morris*, 777 So.2d at 23. In addition, the victim's wife in *Morris* testified that the doctors never gave them any hope of recovery. Id. In the instant case, no one testified that Hill said he was dying and/or that he was never coming home. In addition, no one testified that the physicians did not offer Hill any hope of recovery.

In *Kidd v. State*, 258 So.2d 423, 427 (Miss. 1972), the Court stated "[t]his Court said that the question as to whether or not a declaration is to be admitted as being a dying declaration is not what other people thought concerning whether or not the deceased would die, but whether the deceased himself thought he was going to die." The *Kidd* Court quoted *Lea v. State*, 138 Miss. 761, 770, 103 So. 368, 370 (1925) wherein the Court stated, "[a] dying declaration is made without the sanctity of an oath and without an opportunity to cross-examine the declarant. To take the place of that sanctity and that right there must be an undoubting belief in the mind of the declarant, at the time the declaration is made, that death is upon him. If it shall appear in any manner that there was hope of recovery, however faint it may have been, still lingering in his breast, the required sanctity is not afforded, and the statement cannot be received. The belief by the declarant that he may ultimately die as a result of his injury is not sufficient to authorize the admission of his statement as a dying declaration. The predicate must exclude all hope of life. It must reach the point of absolute certainty in the mind of the declarant. All hope must be gone. He must feel sure that the finger of death is upon him."

Because the prosecutor did not offer any testimony in support of the last two prongs of the *Watts* test, and the trial judge did not state the basis for her presumed belief that Hill knew he was mortally wounded and there was no hope of recovery, this Court should find that the trial court erred in admitting Hill's statement. Consequently, this Court should reverse the trial judge's ruling and/or remand this matter to the trial court to allow the trial court to state the facts upon which she based her decision that Hill's statement was indeed a dying declaration.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DID NOT *SUA SPONTE* DECLARE A MISTRIAL WHEN THE PROSECUTOR REPEATEDLY STATED THAT LEON TROTTER WAS NOT CHARGED WITH A CAPITAL CRIME AND WAS NOT ELIGIBLE FOR THE DEATH PENALTY

The prosecutor's remarks were so prejudicial that it deprived Trotter of his right to a fair trial. *Smith v. State*, 457 So.2d 327, 333-34, (Miss. 1984). During voir dire, the prosecutor told the jury, "[t]he charge in this case is murder. It's not capital murder, and I just want to clear that up. There is a distinction. If someone were charged with the crime of capital murder, then a jury would have to determine not only guilt or innocence, but what sentence would be imposed. All right? Because the death penalty is a possibility in a capital murder trial. This is not a capital murder trial. The death penalty in not a possible sentence in this case. Murder is limited to a term of imprisonment. So I want to make sure – ....The only purpose of this question is make sure that everybody understands, first, what your job will be in this case, solely the determination of guilt or innocence, and that the sentence is up to the Court. 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 sentence, or any sentence for that matter. Does everybody understand that?" (T. p. 54-55).

Trotter's counsel objected to the prosecutor's comments during voir dire. (T. p. 54-55). The trial court overruled the objection. (T. p. 55). The trial judge erred when she did not sustain the objection. In fact, the trial court *sua sponte* should have declared a mistrial and/or instructed the jury to disregard the prosecutor's comments. Instead, the trial judge allowed the prosecutor to continue with the comments in the face of an objection by Trotter's counsel.

In *Marks v. State*, 532 So.2d 976, 983 (Miss. 1988), this Court stated that '[w]e have consistently disapproved of arguments which refer to the potential sentence in a given case." In *Marks*, the court stated that the problem with arguments about potential sentences in a given case is "they invite the jury to convict with regard to the punishment, not with regard to evidence before them, and the jury should have no concern with the punishment to be imposed."

In the case *sub judice*, the prosecutor told the jury during voir dire that Trotter, who was accused of murder, not capital murder, was not eligible for the death penalty. If that wasn't enough, the prosecutor also misled the jury by telling them that murder is "limited to a term of imprisonment" and "the sentence is up to the judge." In Mississippi, a conviction of murder mandates a sentence of "life imprisonment" and the trial judge is not "limited to a term of imprisonment" but must sentence a person convicted of murder to life imprisonment. Allowing the prosecutor to tell the jury that the death penalty would not be imposed in Trotter's case undoubtedly was prejudicial and invited the jury to convict Trotter of murder without regard to the evidence presented in the case. Consequently, this Court should find that the trial court committed reversible error in overruling Trotter's objection and in failing to instruct the jury to disregard the prosecutor's statements about the punishment that could be imposed in Trotter's case.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT ADMITTED THE STATEMENTS OF LEON TROTTER

Whether there was a voluntary, intelligent and knowing waiver requires a totality-of-the-circumstances test. *Edmonds v. State*, 955 So.2d at 806. "The totality approach permits-indeed, it

mandates-inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.

The fact that Leon Trotter, who was 17 years old, was questioned without being informed that his mother had a right to be present violates the Mississippi Youth Court Act. Because Leon Trotter had not been charged with a crime when he was interrogated, the Youth Court Act was applicable and failure to inform him that his mother had a right to be present violated. Miss Code Ann. § 43-21-303(3) (Rev. 2004). M.A.C. v. Harrison Cty. Family Ct., 566 So.2d 472 (Miss. 1990). In Edmonds, it was stated, " [c]onsidering the absence of a parent or guardian during the interrogation of a minor goes directly to the issue of voluntariness, such a violation renders the statement inadmissible as a violation of basic constitutional guarantees... The United States Supreme Court has consistently recognized that juveniles under interrogation are particularly vulnerable and as such require heightened levels of protection."

In the instant case, there are several factors that weigh in favor of suppression. Leon Trotter was not told that he was suspected of committing a crime, he had not been charged with a crime that would have taken him outside the purview of the Youth Court, his mother was not present when he was interrogated and he was only 17 years-old.

LEON TROTTER'S TRIAL COUNSEL WAS INEFFECTIVE IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ART. 3 § 26 OF THE MISSISSIPPI CONSTITUTION

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d (1984), sets forth a two-part test to establish claims of ineffective assistance of counsel. First, the defendant must show the counsel's performance was deficient, and second, the defendant must show that the deficient performance prejudiced the defense. 466 U.S. at 687, 104 S.Ct. 2052. The two-part test set forth in

Strickland was adopted by the Mississippi Supreme Court in *Stringer v. State*, 454 So.2d 468 (Miss. 1984).

In the instant case, Trotter's trial counsel failed to review the court record to determine if Leon Trotter had been arraigned on the charge of murder. The court record is void of any indication that Leon Trotter was arraigned prior to trial. Rule 8.01 provides that "[a]rraignment will be in open court, and will consist of reading the indictment to the accused, and calling upon the defendant to plead to the charge in the indictment. Prior to arraignment a copy of the indictment must be served on the defendant. Defendants who are jointly charged may be arraigned separately or jointly within the discretion of the court... .Arraignment is deem waived where the defendant proceeds to trial without objections." In *Thomas v. State*, 26 So.2d 469, 470 (Miss. 1946), the Court held that arraignment is waived when defendant takes part in the trial without objection as to the arraignment.

Had Leon Trotter's counsel reviewed the court file prior to trial, he would have discovered that Leon Trotter had not been arraigned. Upon discovering that Leon Trotter had not been arraigned, trial counsel should have requested a continuance to allow him to adequately investigate Leon Trotter's case. It cannot be said that Leon Trotter's trial counsel adequately investigated his case and/or prepared for Leon Trotter's trial. Trotter's attorney did not seek discovery until the eve of this murder trial. At trial, Grayson testified that Hill told him that Pooh Man shot him. Grayson testified that Harry/Henry Richardson walked two blocks from Hill's home to a basketball court in Silver City, Mississippi to tell him that Hill was lying in his doorway and may need help. The question that begs to be answered is how Harry/Henry Richardson knew that Hill was in need of assistance, whether Hill said anything to Harry/Henry Richardson, why Harry/Henry Richardson did not summon help for Hill immediately if he had no involvement in the crime, and why Harry/Henry Richardson sought out a rookie officer like Grayson to report Hill's condition, instead of simply calling authorities.

There is no question that Harry/Henry Richardson was a crucial witness in this case. The State of Mississippi would have us to believe that Hill was shot 17 hours before Grayson went to his house to provide assistance and that Hill knew that he was mortally wounded and thought that he had no hope of recovery. Yet the State of Mississippi did not subpoena Harry/Henry Richardson as a witness and there is no evidence that Leon Trotter's trial counsel even interviewed Harry/Henry Richardson. Certainly, if Harry/Henry Richardson saw Hill before Grayson and Hill knew that he was mortally wounded and had no hope of recovery, Hill would have made his dying declaration, if any, to the first person within earshot of him, including but not limited to Harry/Henry Richardson.

In addition, Trotter's trial counsel did not interview witnesses who were playing basketball with Grayson on the day in question. Upon information and belief, those witnesses rushed to Hill's trailer with Grayson. On the morning of trial, Leon Trotter's mother, Angela Trotter carried Carl Lee to the Humphreys County Courthouse to be interviewed by Leon Trotter's lawyers. Upon information and belief, Carl Lee told Leon Trotter's attorney Joe Buchanan that he went to Hill's trailer with Grayson and he heard Hill tell Grayson that "Pooh Man's buddy" shot him. Carl Lee has since died.

In *Brown v. State*, 798 So.2d 481, 495 (Miss. 2001), the Court noted that a lawyer's failure to investigate a witness who has been identified as crucial may indicate an inadequate investigation. The record shows that Leon Trotter's trial counsel filed a Request for Discovery and Motion to Produce on the eve of a murder trial. The record does not show when the State served its responses to the defendant's requests. This Court should find that such a lackadaisical effort by Leon Trotter's trial counsel violated Leon Trotter's Sixth Amendment right to competent counsel.

In addition, had Leon Trotter's attorney provided adequate representation, he would have sought to call Alvin Pittman as a witness as Leon Trotter stated that Alvin Pittman shot Hill and Alvin Pittman presumably received a deal in exchange for making incriminating statements to authorities that Leon Trotter shot Hill. "A criminal defendant is entitled to present his defense to

the finder of fact, and it is fundamentally unfair to deny the jury to opportunity to consider the defendant's defense where there is testimony to support the theory. *Terry v. State*, 718 So.2d 1115, 1123 (Miss. 1998) citing *Love v. State*, 441 So.2d 1353, 1356 (Miss. 1983). In addition, it is elementary in Mississippi that defense counsel can cross-examine a witness regarding an alleged "deal" to show bias or interest. See, *Smith v. State*, 733 So.2d 793, 801 (Miss. 1999). Under the Sixth Amendment's guarantee to call witnesses, it is generally accepted that a defendant may call a witness who intends to invoke the Fifth to the stand in order that the jury can observe the witness's responses. *Edmonds v. State*, 955 So.2d 787, 793 (Miss. 2007), citing *Stewart v. State*, 355 So.2d 94, 95-96 (Miss. 1978), *Bell v. State*, 812 So.2d 235, 238-39 (Miss. Ct. App. 2001) *Hall v. State*, 490 So.2d 858 Miss. 1986); and *Coleman v. State*, 388 So.2d 157, 159 (Miss. 1980).

By failing to file the Motion to Reveal Deal, Leon Trotter's trial counsel passed up an opportunity to bolster Leon Trotter's version of events and/or to allow the jury not to see Alvin Pittman who no doubt was biased and had an interest in telling authorities that Leon Trotter shot Hill. Trial counsel passed up an opportunity to cross-examine the co-defendant to the alleged crime. And if that was not enough, Trotter's trial counsel sat by idly and did not object when one of the state's witnesses testified about what Alvin Pittman told him that he and Leon Trotter planned to rob somebody else. Said testimony was hearsay and evidence of other bad acts both of which are prohibited by Mississippi Rules of Evidence, 404(b) and 802.

In *Harrington v. State*, 793 So.2d 626 (Miss. 2001), the court stated "generally, out-of-court statements by a co-defendant which incriminate the defendant should not be admitted into evidence during the State's case-in-chief since it cannot be known whether the co-defendant will testify and be subject to cross-examination to avoid violating the defendant's right to confront witnesses against him. This principle was established by the United States Supreme Court in *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). In *Bruton*, the court held that the Confrontation Clause of the Sixth Amendment is violated when a co-defendant's incriminating statement is

introduced at a joint trial, even if the jury is instructed to consider the statement only against the person who made it. The *Bruton* Court noted that "[t]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations on the jury system cannot be ignored." The Court recognized that a defendant's natural "motivation to shift blame onto others and found that incriminations between co-defendants are inevitably suspect. According to the Court, the unreliability of such evidence is intolerably compounded when the alleged accomplice ... does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the Confrontation Clause was directed.

In the instant case, there was no joint trial. If a co-defendant's statements implicating a co-defendant cannot be presented to the jury in a joint trial, where the co-defendant does not testify, and cannot be tested by cross-examination, there is no question that anything Alvin Pittman said should not have been presented to the jury in Leon Trotter' trial.

In addition, if Leon Trotter's trial counsel performance had been adequate, he would have sought to suppress the statements of a 17-year-old who did not even know what charge, if any he was facing when he allegedly gave law enforcement officials three different statements. *Edmonds*, 955 So. 2d at 806-807 (stating that the defendant could not have understood the nature of the charges against him or the consequences of waiving his Fifth Amendment constitutional rights if he was never told that he was suspected of murder). In the instant case, there is no evidence that Leon Trotter was told that he was suspected of aggravated assault when he allegedly signed the three statements in question.

Moreover, if Leon Trotter's counsel had sought discovery prior to the eve of trial, he could have determined that he needed to hire an forensic expert to refute the testimony of Dr. Steven Haynes. An expert also could have testified whether Hill's injuries were consistent with Leon

Trotter's description of events, i.e. that he went to the door and Alvin Pittman shot Hill. Without such an expert, the testimony offered by Dr. Haynes went unchallenged.

Moreover, Leon Trotter's counsel should have requested a jury instruction on the weight, if any, the jury should give Hill's dying declaration. In *Marley v. State*, 69 So. 210, 212, the Court stated, "[]t is the province of the trial court to determine whether the declaration was made in extremis, and whether declarant realized his condition and whether it should be submitted to the jury at all. It is for the jury to say, under proper instructions, when such declaration is admitted in evidence, what weight shall be attached to it. It is therefore important to consider the instructions granted and refused defendant with reference to the dying declaration."

For the reasons outlined above, this Court should find that Leon Trotter's trial counsel failed to provide adequate representation and that the jury may have reached another result if Leon Trotter's trial counsel had adequately defended him.

THE CUMULATIVE ERRORS IN THIS CASE DENIED LEON TROTTER HIS RIGHT TO A FAIR TRIAL

When viewing the prejudicial impact of the errors set forth above denied, it is clear that Leon Trotter was denied his right to a fair trial. While "[i]t is true that not one of these errors, when considered separately and apart from the other is sufficient to justify a reversal of the case, but when they are considered as a whole it is our view that they resulted in the appellant being denied a fair trial. *Hansen v. State*, 592 So.2d 114, 142 (Miss. 1991). Due to the numerous errors, there is no way that this Court can say that Leon Trotter enjoyed a fair trial as guaranteed by the Mississippi and United States Constitutions.

THE TRIAL COURT'S SENTENCING OF LEON TROTTER IS SO HARSH THAT IT CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT

In *Davis v. State*, 724 So.2d 342 (Miss. 1998), this Court remanded the defendant's case for further reconsideration of the sentence imposed. This Court recognized that "even as to

those circumstances for which the statutes provide mandatory sentences, the punishment must be weighed against the prohibition imposed in the Eighth Amendment to the United States Constitution against cruel and unusual punishment." *Davis*, 724 So.2d at 345.

In the instant case, Leon Trotter's co-defendant was only sentenced to 20 years imprisonment. Recall, Alvin Pittman stated that shot Hill. Leon Trotter testified that Alvin Pittman shot Hill. Based on the evidence adduced at trial, there is no way that anyone can be certain that Leon Trotter was in fact the gunman. As such, this Court should find that Leon Trotter's sentence of life imprisonment when juxtaposed to Alvin Pittman's 20 year sentence violates the Eighth Amendment to the United States Constitution against cruel and unusual punishment. Consequently, should this Court uphold Leon Trotter's conviction, this Court nevertheless should remand this matter to the Circuit Court of Humphreys County for resentencing.

CONCLUSION

For the reasons set forth above, this Court should reverse the conviction in this matter and order a new trial for Leon Trotter, and/or in the alternative, remand this matter for resentencing.

RESPECTFULLY SUBMITTED, this the 28th day of November, 2007.

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CERTIFICATE OF SERVICE

I, Lisa M. Ross, attorney for Leon Trotter, certify that a true and correct copy of the above and foregoing document has been forwarded to the following, via regular mail:

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SO CERTIFIED, this the 20th day of November, 2007.

Lisa M. Ross

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