IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

PATRICIA L. SIMPSON — APPELLANT

VS. — NO. 2006-KA-1366

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: JOHN R. HENRY
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO[redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

PATRICIA SIMPSON **APPELLANT**
A/K/A PATRICIA L. SIMPSON

vs. **CAUSE No. 2006-KA-01366-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against a judgment of the Circuit Court of George County, Mississippi in which the Appellant was convicted and sentenced for her felony of **MANSLAUGHTER**.

STATEMENT OF FACTS

Tonya Miller, daughter of the victim, one Donald Simpson, testified that she received a telephone call on 23 December 2003 from her brother to say that her father had been killed in an automobile accident. Later on that day, however, she found out that her father had been shot to death. Miss Miller then called hospitals and funeral homes in an attempt to find her father. When Miss Miller finally found out more about her father's demise, she learned that he had been taken to a hospital in South Alabama. She was told that her father was to be cremated.

Later, at a memorial service for Mr. Simpson, Miss. Miller saw and spoke to the Appellant. The Appellant was calm. Over the course of several months afterwards, Miller and the Appellant spoke by telephone. During those conversations the Appellant told Miller that the

shooting had been a "horrible accident." (Vol. 3, pp. 99 - 113).

Lawrence Maples, a shift sergeant with the George County Sheriff's Department on 22 December 2003, testified that he responded to a report of a shooting at the Appellant's home. When he arrived there, he observed Mr. Simpson. Simpson was lying on the kitchen floor, next to an island. Simpson appeared to have been shot in the chest. Emergency medical technicians were attempting to assist Simpson.

The Appellant was present. She told Maples that Mr. Simpson, the Appellant's husband, was cleaning or was going to clean a gun. She told Maples that she was upstairs in the house and heard the report of a gun. She told Maples that she was not present when the gun fired and did not see what occurred. The Appellant was quiet during this conversation; she seemed to withdraw. Maples took other information and a gun, which he found on a door mat by the back door. He noticed that the telephone in the kitchen was covered with blood.

Maples looked for a gun cleaning kit in the house but could not find one. Failing to find anything that was used or would be used to clean a gun, he called in an investigator. (Vol. 3, pp. 114 - 133).

Paula K. Henderson, a paramedic, was one of those who responded to a report of a shooting. The telephone call came in 8.03 on the evening of 22 December 2003. When she arrived at the Appellant's home, the door was shut. Henderson knocked on the door and the Appellant came to open it. The Appellant's demeanor was calm.

The Appellant showed Henderson where her husband lay. He was on the kitchen floor, lying face down, next to a refrigerator. Henderson saw no one else in the house besides Mr. Simpson and the Appellant. She did see a handgun lying on the kitchen lying next to Mr. Simpson's right knee and thigh. Henderson used an oxygen cylinder to move the gun to the side

door. When she first observed the gun, it was pointing up toward Mr. Simpson's body.

As Henderson and the other technician were about to intubate Mr. Simpson, the Appellant picked the gun up, the Appellant's finger on the trigger. Henderson told her three times to put it down before the Appellant complied.

Henderson noticed that the victim had a gunshot wound in the middle of the chest about nipple high. Simpson was not breathing and the technicians could detect no pulse. As they worked, a man came into the house. The Appellant at that point appears to become upset.

As Henderson prepared to take the victim away, she told the Appellant where they were taking him. By this time, the Appellant had changed clothes. (Vol. 4, pp. 156 - 169).

A Mrs. Faye Holifield was then brought in to testify. She said that she and the Appellant attended the same church and occasionally went shopping together. She recalled that the Appellant asked her on three occasions where she could get a gun cleaned. She asked this some three or four weeks before Mr. Simpson's death.

Mrs. Holifield went to the Simpson home on the night of 22 December 2003 after she learned of Mr. Simpson's death. Someone named Thrower called Mrs. Holifield to tell her of the death. Mrs. Holifield arrived just as the medical technicians were preparing to take Mr. Simpson away. Entering the house, Holifield noticed that the kitchen cabinets were clean and that there was only a small amount of blood on the floor. There were dentures on one cabinet. There was also vomit on the floor.

The Appellant was upstairs in the house. Holifield first saw here standing at the head of the stairs. She was calm, but she did say that she was going to take a tranquilizer before leaving for Mobile.

After the Appellant left, Mrs. Holifield remained in the house along with another friend.

These ladies tried to clean the kitchen, but they could not find a mop. They did not find any gun - cleaning kit or equipment. Not long after the Appellant left, the Appellant rang Mrs. Holifield and asked her to retrieve a book the Appellant left on a coffee table. The Appellant had filled out this book in the course of a marriage enrichment weekend. The Appellant did not want law enforcement to find it.

At about midnight the Appellant returned. Mrs. Holifield decided to stay the night with her. The Appellant did not go to sleep; she stayed up the rest of the night mopping the kitchen floor and doing laundry. The washer and dryer ran all night. The Appellant said nothing about her husband's death. The Appellant said nothing about suicide. She was very quiet. (Vol. 4, pp. 169 - 185).

A fellow - employee of the decedents was then called. He said he learned of Mr. Simpson's death on the following day. On the day after that, the Appellant rang him to request that Mr. Simpson's be deposited. She also asked him to be a pallbearer. The Appellant gave no indication of being upset.

When asked how Mr. Simpson came to his death, the Appellant said that he was cleaning an old gun. The Appellant said she had gone upstairs to change clothes; while there she heard what sounded like a gunshot. She returned to the kitchen to find her husband lying on the floor. She said that she first thought that her husband's wound was minor. She said she pulled his shirt down and then discovered that he was badly wounded. As she related this, she was quite calm. But as she described what happened next, she seemed to become upset. She was not coherent at that point.

She then related the trip to the hospital in Mobile, the fact that no attempt was made to revive her husband, and that she spent a couple of hours with her husband at the hospital. As she

described these things, she became clear again, no longer upset.

The Appellant then asked whether she could go to her husband's office to retrieve a photograph for use during the funeral. When she was told that the office was locked, the Appellant responded that she had her husband's keys. The Appellant came to the office late at night, while no one was there. It was not known what she took, but the picture she had mentioned was not used in the funeral. (Vol. 4, pp. 186 - 194).

Mr. Simpson's employer, Mr. Wayne Cook, Jr., was then called. He said he had known Simpson for many years. Prior to Simpson's marriage to the Appellant, he was "pretty comfortable" financially. After Simpson married the Appellant, Simpson's way of living changed dramatically. Simpson was never one to live a flashy lifestyle, yet after his marriage to the Appellant he starting driving a Mercedes - Benz rather than a truck. Simpson also changed his personal appearance.

After the marriage, Simpson found it necessary to borrow money from his employer, He borrowed a thousand dollars a week against future commissions. This began in the last year and a half of his life.

At some point after the funeral, the Appellant and her son came to see Simpson's employer. The Appellant's son said that he would speak for the Appellant, saying that the Appellant was too upset to speak. The son told Cook that the Appellant's husband was cleaning an old, rusty gun and that the gun went off. The son told Cook that Simpson had been trying to extract a bullet from the gun with a screwdriver when the gun went off. He also told Cook that the Appellant's father had given her the gun. As the son said these things, the Appellant was nodding her head in agreement. The Appellant appeared to be crying as these things were related.

The son then asked Cook, on his mother's behalf, whether she could continue to collect her husband's salary, even though he had died.

In 2002, Simpson's income was approximately $123, 289.00; in 2003, it dropped considerably, falling to $42, 981.00.

Cook further testified that Simpson was not an alcoholic and denied having seen him inebriated at an office function. The company Simpson worked for terminated the Appellant's health insurance in January, 2004. It also warned the Appellant not to come onto the company's property under pain of being arrested if she did not comply. This happened in consequence of a heated conversation between the Appellant and Cook about the termination of her health insurance. (Vol. 4, pp. 194 - 224).

Cook's father then testified. He was also present when the Appellant's son spoke for his mother and recounted the tale of how Simpson came to his death. The elder Cook testified that Simpson would not have been so stupid as to try to extract a bullet from a gun with a screwdriver. He said that Simpson had requested loans in order to purchase or improve a house, this after he had married the Appellant. Simpson was not an alcoholic or a problem gambler. (Vol. 4, pp. 225 - 235).

Simpson had two life insurance policies, one in the amount of $175,000.00 and the other in the amount of $200,000.00. The latter policy was taken out n April, 2003. The Appellant was the primary beneficiary on the other. The Appellant was present when the second was applied for. She told the agent that her husband needed additional insurance in order to refinance their house. (Vol. 4, pp. 236 - 242).

Investigator Ronnie Lambert testified that he took possession of a .22 caliber revolver, loaded with five rounds, and one spent cartridge from the Appellant's kitchen. He looked for a

gun - cleaning kit or supplies but found none. Later, he learned that Mr. Simpson had been pronounced "dead on arrival" in Mobile. The next morning, or the day after that, Lambert took the gun to Alabama so that it could be examined in the course of the autopsy.

Lambert interviewed the Appellant in January. In a telephone conversation with her, the Appellant said that she did not know where the gun had come from. A few days later, while law enforcement was searching her house for a gun - cleaning kit, she told Lambert that her father had given her the gun. However, Lambert had already run a gun trace on the weapon. He found that the Appellant herself bought the gun in 1976 at a store in Pascagoula. She purchased it under the name of Patricia Tomkins, Tompkins being her married name at the time. (Vol. 4, pp. 242 - 282).

Dr. Leroy Riddick was qualified and accepted as an expert witness in the field of forensic pathology. He testified that Mr. Simpson had suffered a penetrating gunshot wound to the chest, ten and a half inches beneath the top of his head. The entrance wound showed no trace of soot or muzzle imprint. The bullet's direction of travel was front to back, right to left, and downward. The bullet penetrated the aorta. The bullet was recovered from the body and was a .22 caliber bullet.

Riddick had been informed that it had been said that Mr. Simpson shot himself while cleaning the gun. So Riddick measured Simpson's arm length. Riddick further testified that he examined the clothing the Appellant was dressed in. The bullet hole in the shirt showed no sign of gunpowder or burning. Simpson's hands showed no gunshot residue.

On one slide containing tissue samples, several small black dots were observed. Riddick thought them insignificant. He did not think they were gunpowder residue because there was so little of it, because they did not have the distinctive shape of gunpowder residue, and because

there was no searing of the skin and no soot.

While, Riddick was at first unsure of whether Simpson's death was a homicide, he ultimately concluded that it was on account of the fact that he found no powder residue or searing around or in the wound. The gun was fired three feet or more from Simpson. (Vol. 4, pp. 292 - 300; Vol. 5, pp. 301 - 415).

The gun was examined by a firearms examiner. The gun was a single action, double action gun. One safety feature it was equipped with was a hammer block. This feature prevented the gun from firing by merely pushing on the hammer. The gun was working properly at the time it was examined. The gun showed no sign of rust; it was not particularly dirty.

The muzzle of the revolver was tested for the presence of tissue or hair. None was found.

After testing -firing the gun and comparing the test - fired bullet with the bullet found in Simpson's body, the expert concluded that the bullet found Simpson's body was fired by the gun found beside Simpson.

The gun was also tested to determine how far away it could be fired from a piece of cotton without leaving soot. Gunpowder residue could be observed on the cotton when the gun was fired thirty-six inches from the cotton. (Vol. 5, pp. 419 - 443).

The defense opened its case - in - chief with the testimony of Dr. Steven Hayne. He reviewed the autopsy report from the Alabama forensic pathologist, and he also examined several slides containing tissue samples from the victim. While he did observe some black, foreign material in one slide, it was his opinion that that material was not powder residue. The black specks were not in the tissue samples but were sitting in free space in the glass slide. They were artifacts.

He also testified that one would see a large amount of powder residue in a contact

gunshot wound. He did not observe this in the slides he examined.

While Hayne allowed it as a possibility that powder residue on a tee shirt might be missed on account of blood staining, he did not think there was any residue on the shirt in the case at bar. The shirt was thin and he observed no powder residue at the site of the tear in the shirt. Nor did he observed a cherry red color in the skin that one would expect to see in the case of a hard contact wound. The doctor simply saw nothing to indicate that the gun that killed the victim was in direct contact with the victim's body. It was Hayne's opinion that the wound was a distant gunshot wound. He thought the gun could not have been any closer than two feet away from the victim when the bullet was fired. (Vol. 6, pp. 451 - 512).

Mrs. Betty Gregory testified that she was the Appellant's sister, lining in Panama City in 2003. She said that the Appellant and her husband were expected to some to her home for Christmas that year, arriving on December 23rd or 24th. After being informed of Mr. Simpson's death – after being initially told that he had died in an accident – Gregory cancelled her plans for the holidays and drove to be with her sister.

Mrs. Gregory further testified that the Appellant was distraught when she arrived at the Appellant's home. The Appellant told her that the shooting had been an accident. The next day, though, the Appellant left for most of the day to attend to "personal things," the Appellant leaving her parents and her sister and another relative at the Appellant's home. The Appellant returned after or just at nightfall, ate and went to bed.

After the memorial service for Mr. Simpson, Mrs. Gregory returned to her home; the Appellant came to visit for about a week. Gregory said that the Appellant sank into depressed state in the months afterwards. (Vol. 6, pp. 515 - 534).

The Appellant then testified. She said she was fifty seven years of age, had come college

education, and had done secretarial work. She had been married before marrying the decedent; there were two sons by that earlier marriage. She met the decedent at their church and married him about nine months later.

She said she did use the photograph on the decedent's desk in the memorial service, contrary to the testimony of the decedent's employer. She was locked out of her husband's office, she said, on account of "spite."

The Appellant quit working in 1999, six months after she had gotten herself married. However, Mr. Simpson's income dropped from a high of $123,289.46, in 2002, to a low of $35,226.28 in 2003. This was due to a "slump" in business, said the Appellant.

The Appellant then told a tale of finding food and beer bottles and roll of toilet paper somewhere on the Simpson property, which she surmised was evidence that a hobo was living there.

The Appellant then told the court about her "panic room" and of certain renovations her husband and she had done. She stated that they kept the gun in a file cabinet in her husband's office.

According to the Appellant, Mr. Simpson had become increasingly annoyed with the company he worked for. At an office Christmas party in 2003, Simpson, according to the Appellant, was worsted by liquor and said some things that he should not have said concerning a bonus he received. She also claimed that the owner of the firm treated her husband with disrespect. There was also some testimony to the effect that somebody had told the owner that Mr. Simpson stayed laid up drunk in motel rooms during business trips.

The Appellant denied having told Detective Lambert that she did not know where the gun came from and denied having a telephone call with him in which she said that. She admitted that

she owned the gun while the search warrant was being executed. She also admitted telling Lambert that her father had purchased the gun for her. She explained the fact that the gun was in her name by saying that her father had taken her to a store to purchase the gun, purchased it, but put it in her name. She denied having purchased ammunition for the gun in 2000, but then she admitted purchasing a box of ammunition but then claimed no knowledge of another box of ammunition.

The Appellant said her husband was to begin traveling more in 2004. She was concerned about being alone in their house. She was also concerned about the gun, though she said she knew nothing about guns. She wanted the gun cleaned and checked, and so asked her husband to do so.

The Appellant denied having shot and killed her husband. She claimed that they loved their time together. She denied having asked her friend to hide the marriage weekend books; she said she asked her to put them away. She said she did that while her husband was on the way to the hospital because of certain intimate things in them.

She then identified a letter from her husband that she did not want introduced into evidence. She identified love notes that her husband supposedly wrote her each morning.

As for the day of her husband's death, the Appellant testified that her husband and she began the day by having breakfast. Then she sorted clothes in preparation for their trip to Florida and did other housework. Then she went to Ocean Springs for lunch and shopping. She said she bought a wristwatch for her husband. Then she went to Pascagoula to visit her mother and wrap packages. Then she went to Lucedale, and thence home, arriving at about a quarter of eight in the evening.

She went in the house, spoke to her husband, told him she was tired, and told him she was

going to take a bath. So she did that, and while she was preparing for her bath she claimed that she heard her husband in the "panic room." Later, she heard something. She was not sure what she heard but she went downstairs, only to find her husband lying face up on the kitchen floor. She went to him but did not see anything amiss. She pulled his shirt down, saw a hole, and then called emergency services. She told the emergency operator that her husband had been cleaning a gun. She said the gun accidentally discharged. She asked the operator for instructions as to what first aid she could give. One thing she did to help her husband was to take his dentures out.

She claimed that she picked the gun up while the technicians were working on her husband in order to show them the size of the gun and what caused the wound.

As for the meeting with her husband's employer, she admitted that she took one of her sons with her. That son, it seems, was married to an attorney on the Gulf Coast. She admitted that her son might have mentioned that the decedent was using a screwdriver on the gun, but she claimed that her husband's employer was badgering and being rude to her. Her son was simply trying to help her, she said. She claimed that she dropped her head while she was crying but that she was not nodding her head in agreement with her son's statement about the screwdriver.

The Appellant also testified that she did not know how to load the gun that killed her husband, even though she had a derringer in her car. She was adamant that she had not shot a gun, or learned to shoot a gun, even though she had the guns for protection. She was afraid of guns, she said. It was her husband who put her gun in the panic room and another in her car.

Examining the gun, the Appellant testified that she saw no rust on it. She testified that she did not know what she was doing when she picked the gun up as the technicians were working on her husband.

As for the marriage book that the Appellant did not want to fall into police hands, she

said she wanted it put away because of the personal statements concerning her that her husband had written in it. She claimed that the book was later destroyed during Hurricane Katrina.

She stated that she and her husband stayed at the Grand Hotel in Fairhope during the marriage retreat; others of the church they attended who went to that retreat stayed at lesser quality motels. She stated that she was not aware that her husband had quit supporting his disabled daughter after he married the Appellant. She did know that her husband had life insurance policies worth $375,000 on his life. She denied that she had made a claim on those policies on 29 December 2003. However, she also stated that an attorney had filed claims on her behalf, but that she had later relinquished the claims. Her son was the second beneficiary of the policies, but she claimed that she did not know whether he was pursuing a claim. Her son could not be found for service of a subpoena.

She claimed that she had never seen letters from the insurance companies asking her whether she intended to execute a disclaimer. But when shown letters to that effect, she said they were not addressed to her.

While she believed that her husband's employer was trying to undercut him at his work, she nonetheless asked him to be a pallbearer. She said she did this because no on else was available.

She did admit that she told the dispatcher for emergency services that her husband accidentally shot himself. She denied having shot him in the course of marital dispute over money. She did admit that she did not want an autopsy done on her husband.

The prosecutor then played several snippets of the tape recording of the Appellant's call to emergency services. The Appellant, who had testified that she found her husband lying on his back, admitted that she said she had turned him on his side, but she could not explain how the

technicians found him on his stomach. She denied having turned him on his stomach. She also denied faking an attempt to perform CPR on her husband.

The Appellant claimed to have had $62,000.00 of her own at the time of her husband's death. (Vol. 6, pp. 536 - 600; Vol. 7, pp. 601 - 694)

The defense then called Dr. Paul McGarry. He testified that he was asked by the defense to review the autopsy protocols. It was his opinion that Mr. Simpson had committed suicide. This opinion was based on the location of the wound and the angle of the bullet track.

He also testified that determining whether a wound caused by a small caliber weapon is a contact wound or not can be difficult. He thought the size of the collar of abrasion of the wound was the same as the muzzle of the gun. He thought he observed, in fact, gunpowder residue in the tissue samples.

He thought that the fact that the skin and tee shirt were not scorched was because the relatively small amount of gunpowder in a .22 caliber bullet. As for the lack of a cherry red coloration in the wound, he thought the notation of a bluish color at some point should have indicated the need for further study.

McGarry further testified that he thought it a bad practice to wash a corpse before beginning the autopsy. He believed that important evidence could be lost by doing so. However, he did not testify that anything was so lost in the case at bar. He also thought that the victim's hands should have been tested for the presence of gunpowder, even though he admitted that such a test had "pitfalls."

McGarry participated in a demonstration, the purpose of which, apparently, was to show that it was unlikely that Mr. Simpson was shot by another person. McGarry believed that Mr. Simpson committed suicide. (Vol. 7, pp. 696 - 750; Vol. 8, pp. 751 - 763).

The Appellant made a claim on her husband's life insurance policies in late 2003 or early 2004. The insurer requested certain information of her, but she never responded. Finally, an attorney on her behalf wrote the insurer to say that the Appellant would not be making a claim. However, as of the time of trial, the Appellant had not signed a disclaimer concerning the insurance policies. The status of the Appellant's claim was open and pending at the time of trial. (Vol. 8, pp. 765 - 774).

Mr. Simpson's employer was recalled. He testified that Simpson was not on salary, only on commission, and that his commissions decreased on account of a reduction in work force. The decreased earnings had nothing to do with the person the Appellant claimed was working against Simpson. (Vol. 8, pp. 779 - 781).

Lawrence Maples was called to testify. He stated that the Appellant told him on the night of the shooting that Simpson was cleaning a gun. The Appellant said she was upstairs, heard a gunshot, came down to the kitchen and found Simpson lying face down on the floor. (Vol. 8, pp. 781 - 784).

Wilma Thrower was called to testify. She stated that as the Appellant was preparing to leave for Mobile to be with her husband, she was asked if she wanted her family notified. The appellant replied that she did not. (Vol. 8, pp. 785 - 787).

Dr. Hayne was recalled. He stated that, if Simpson's wound had been a contact wound, he would have expected to see a cherry red discoloration to the skin and some charring. There would have been gunpowder residue in the wound track, and this would not have been entirely obliterated by blood flow. In this instance, most of the bleeding was into the chest, and not through the wound. (Vol. 8, pp. 788 - 801).

The case at bar was a bench trial. The Circuit Court, sitting as the finder of fact, found

the Appellant guilty of manslaughter, explaining its reasons for that finding. (Vol. 8, pp. 838 - 841).

STATEMENT OF ISSUES

1. WAS THE EVIDENCE SUFFICIENT TO SUPPORT THE VERDICT OF MANSLAUGHTER?

2. DOES THE CONVICTION OF MANSLAUGHTER OFFEND DUE PROCESS?

3. IS THE VERDICT CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE?

SUMMARY OF ARGUMENT

1. THAT THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE VERDICT

2. THAT THE APPELLANT'S CONVICTION DOES NOT OFFEND DUE PROCESS

3. THAT THE VERDICT IS NOT OPPOSED BY THE GREAT WEIGHT OF THE EVIDENCE

ARGUMENT

1. THAT THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE VERDICT

In the First Assignment of Error, the Appellant contends, firstly, that the rule set down in *Weathersby v. State*, 165 Miss. 207, 147 So. 481 (1933) should have secured her acquittal, and, secondly, that there was no evidence to support a conviction of manslaughter. In considering the Appellant's claims, we bear in mind the standard of review applicable to sufficiency of evidence issues. *May v. State*, 460 So.2d 778 (Miss. 1984). We also, of course, bear in mind the familiar *Weathersby* rule.

A. *WEATHERSBY*

Stated essentially, the Appellant's account of her husband's death was that she was upstairs when she heard the report of the gun. She went to the kitchen and found her husband

lying on the floor, face up she said. She called emergency services and reported the shooting, saying that the shooting had been an accident. She told others that her husband had been cleaning a gun and that it went off accidentally.

The Appellant's account of the shooting was substantially contradicted in material particulars in the following ways:

1. The testimony of two of the three pathologists who testified. These two noted the absence of indicators of a close or contact gunshot wound. Specifically, there was no charring of the tee shirt, no gunpowder residue at and in the wound, and no discoloration of skin.

The significance of this testimony, obviously, was that the shooting did not occur in the way the Appellant said it did. This was substantial evidence that Simpson did not shoot himself but was shot by another person. That person would have been the Appellant since no one else was in the house.

It is true that the third pathologist disagreed with the findings of his colleagues. However, this disagreement created an issue of fact for the judge to determine.

2. There was nothing found to show that Simpson was cleaning the gun at the time of his death. There were no cleaning supplies, nothing at all.

3. The fact that the Appellant claimed that her husband was cleaning the gun. The Appellant, by her account, was not present when her husband was allegedly cleaning the gun; indeed, she did not claim to know that he had the gun before he was shot. This being so, how could she have known that he was cleaning the gun? There was no physical evidence in the kitchen to lead to such a conclusion.

4. Then there is the fact that the gun - cleaning scenario had more than one form. In the Appellant's first version, her husband was simply cleaning a gun. Later, her son, in her presence

and with her agreement, said that Mr. Simpson set the gun off when he tried to remove a shell with a screwdriver. She did not say this on the night of her husband's death. There was no testimony about the finding of a screwdriver. It is also significant that the Appellant's son could not be found for service of a subpoena. One would think that had the story about the screwdriver been untrue he would have made himself available to testify.

Another trouble with the gun - cleaning scenario was that, in contradiction to what the Appellant said in the beginning, the gun was not rusty, nor particularly dirty. The Appellant admitted that it was not rusty during her cross - examination.

5. Yet another inconsistency lies in the fact that the scenario of an accidental shooting changed into a suicide scenario by the time of trial. Presumably, the testimony concerning Simpson's troubles at work was offered in support of this theory. However, the Appellant's testimony in this regard was contradicted by Simpson's employer.

6. Another inconsistency lay in the varying accounts of how the Appellant came to own the gun not to speak of the fact that at one point she denied knowledge of where the gun came from

7. Then there is the inconsistency between the appellant's account of finding her husband lying face up on the floor and the fact that he was found lying face down.

Weathersby has no application in a case in which an accused's account is contradicted by the physical facts of the case or where the accused has given conflicting stories about the killing. *Taylor v. State*, 795 So.2d 512 (Miss. 2001). The Appellant's account of the killing was materially contradicted by the testimony of Doctors Riddick and Hayne, by the fact that no gun - cleaning equipment was found in the kitchen or anywhere in the house, and by the fact that the body was found in a different position than what the Appellant stated. The Appellant contradicted herself by the different stories concerning how she came by the gun, and by the

version of the killing which added the "fact" that the decedent was using a screwdriver to free a shell.

The Appellant says the location of the bullet wound supports her theory that her husband either committed suicide or accidentally killed himself. However, whether this is so or not is beside the point. The issue, for purposes of *Weathersby*, is not whether there is evidence that might be construed to support an accused's theory of the case; the issue is whether the accused's account has been materially contradicted, by other evidence or his own conflicting accounts. Where there is a conflict, then it is not error to deny the *Weathersby* instruction. The conflicts in the evidence are to be resolved by the trier of fact.

The Appellant suggests that the decedent fired the gun by holding it out at arm's length and firing it with his thumbs. There was no evidence of this claim at trial. The tack taken by the defense was to assert that the gun muzzle was held against Simpson's chest, not that it was fired at arm's length. This is a rather silly scenario suggested by the Office of Indigent Appeals, and one can readily understand why it was not advanced in the trial court. If a person is intent upon shooting himself, that would hardly be a likely way to accomplish the aim.

It is true that there was no confession. But that fact hardly compels the conclusion that the Appellant should have been discharged under *Weathersby.*

The Appellant then claims Simpson was under great strain at the time of his death on account of his straitened financial circumstances. The Appellant, though, overstates the evidence on this point. It is true that there was evidence of a lower income, but there is no evidence that Simpson was driven to despair on account of that. On the other hand, there was evidence that marriage to the Appellant came at a high cost to Simpson. In any event, none of this evidence on motive – motive on the part of the Appellant to kill her husband or motive on the part of

Simpson to kill himself -- was relevant in resolving the *Weathersby* issue. Again, the question in cases of this kind is whether the accused's account has been materially contradicted. Here it was.

The trial court did not err in refusing to acquit the Appellant under *Weathersby.*

B. SUFFICIENCY OF THE EVIDENCE

The Appellant then asserts that there was no evidence to show that the Appellant killed her husband in circumstances amount to "heat of passion" manslaughter.

Since the Appellant's account of the killing was contradicted in a number of ways, the trial court could well have found her guilty of murder. The unexplained (or falsely explained) killing of another is presumed to be malicious. *Blanks v. State*, 547 So.2d 29, 33 (Miss. 1989). The evidence presented in the trial was sufficient to support a conviction for murder. The trial court, though, found the Appellant guilty of manslaughter. It explained its reasons for that verdict, which we will discuss presently.

Regardless of the court's reasons and verdict, since the evidence would have supported murder, the Appellant is in no position to complain of having been convicted of manslaughter. This is true even in cases where there is no evidence of manslaughter. *Jackson v. State*, 551 So.2d 132, 146 *and cases cited therein* (Miss. 1989). In such an instance, any alleged error in permitting the finder of fact to consider manslaughter and to convict of manslaughter is an error of significant benefit to the accused, given the substantial difference in the sentences for the felonies. An accused will not be hearing to complain of putative errors that were of benefit to him. *Adams v. State*, 841 So.2d 151 (Miss. Ct. App. 2002).

The Circuit Court found manslaughter because it was of the view that malice aforethought was not established, this being on account of the evidence which tended to show that the Appellant sought assistance for her husband immediately after he was shot. (Vol. 8, pg.

840). The Mississippi Supreme Court has held that, if there is any evidence in a case that would warrant a manslaughter instruction, one should be granted. *Roberts v. State*, 458 So.2d 719, 721 (Miss. 1984). In *Roberts* the Court held that the post - shooting comment by the defendant that "I didn't mean to do it baby, my baby" was a sufficient evidentiary predicate for a manslaughter instruction. In the case at bar, the Circuit Court apparently considered the Appellant's actions and the words she said just after the killing supported manslaughter. Since *Roberts* appears to permit post - killing words and actions to potentially support manslaughter, we do not think the Circuit Court erred in considering manslaughter here.

Perhaps more to the point, in *Jackson v. State*, 551 So.2d 132, 145 - 146 (Miss. 1989), the facts were quite similar to those at bar. The Mississippi Supreme Court found the evidence there sufficient to allow a manslaughter instruction. Similarly, there was a sufficient evidentiary predicate here to permit the trial court to consider manslaughter.

2. THAT THE APPELLANT'S CONVICTION DOES NOT OFFEND DUE PROCESS

The Appellant claims that the rule set in *Jackson v. State*, 551 So.2d 132 (Miss. 1989), cited above, effectively permits criminal defendants to be convicted of crimes for which there is no evidence. This, she claims, is a violation of due process.

First of all, we do not find that this claim was raised in the trial court. Since it was not raised there, it may not be raised here. *Stockstill v. State*, 854 So.2d 1017 (Miss. 2004). Moreover, we do not find that the Appellant objected to the Circuit Court's consideration of manslaughter. While it is true that the Appellant asserted that the verdict was not supported by the evidence, there was not also an argument that it should not have been considered.

Assuming the Second Assignment of Error is properly before the Court, though without intending to waive the foregoing reason why it is not, there is no merit in the Appellant's

contention.

The rule that an appellant will not be heard to complain of having been found guilty of a lesser - included offense where the evidence would have supported the greater offense cannot work a violation of due process. While the Office of Indigent Appeals complains mightily that there was no evidence of heat of passion manslaughter, and that for that reason the Appellant effectively stands guilty of a crime she was not proved to have committed, we think the Office of Indigent Appeals simply does not understand the rule.

The key to the application of the rule is an assessment as to whether the evidence was sufficient to convict an appellant on the greater charge. It is not an assessment as to whether the evidence was sufficient to convict on the lesser - included charge. There is no need to consider the lesser - included charge since, by definition, the greater charge includes the elements of the lesser. In the case at bar, then, the analysis would be whether the evidence sufficiently demonstrated murder. The Office of Indigent Appeals has not asserted or argued that the evidence failed to sufficiently demonstrate murder. In fact, it acknowledges that malice is presumed where the use of a deadly weapon to kill another is unexplained or falsely explained. In any event, we think the evidence clearly demonstrated murder.

Where the evidence was sufficient to convict on the greater charge, an appellant simply has no prejudice to complain of in finding himself convicted of the lesser. It is actually of benefit to him.

The Office of Indigent Appeals, though, urging this Court to consider what it regards as "modern law," tells this Court that this rule produces "a level of unreliability and uncertainty into the conviction in violation of the Due Process clause . . . ." But of course the Court is not told what might be "reliable" or "certain."

The Court's attention is directed to *Beck v. Alabama*, 447 U.S. 625 (1980) and *Spaziano v. Florida*, 468 U.S. 447 (1984). The Appellant says that the United States Supreme Court rejected, in *Spaziano*, the notion that juries should, in death cases, be instructed on offenses for which the accused may not be convicted.

We do not think *Spaziano* is relevant in the case at bar. First of all, unlike the situation in *Spaziano* the lesser - included crimes involved were barred for prosecution by Florida's statute or statutes of limitation. The question before the United States Supreme Court was whether an accused in a death case could be required to waive a statute of limitation in order to have the benefit of lesser or lesser - included instructions. Here, manslaughter was not barred by the statute of limitations. The Appellant was not faced with the dilemma that the accused in *Spaziano* faced.

The language the Appellant quotes from *Spaziano* should be taken in context. The argument before the Supreme Court was, apparently, that the accused in *Spaziano* should not have been forced to waive the statute of limitations or forego lesser - included offense instructions. The Court did reject the notion that lesser - included offense instructions for which an accused could not be convicted of should be given. But the reason he could not be convicted, absent waiver, was because of the statute of limitations.

Beck and *Spaziano* concern the propriety of refusing to give lesser - included instructions in death cases. The rule of practice in this Court attacked by the Appellant is a different matter. The rule simply states that there is no prejudice to an accused if he is convicted of a lesser - included offense where the proof would have supported conviction of the greater. It does not permit an accused to be convicted on no proof; it simply provides that he has no complaint to make if he might have been convicted of a more severe offense, one for which the lesser one is

necessarily included.

The Appellant then says that the United States Supreme Court held this rule to be constitutionally deficient in *Roberts v. Louisiana*, 428 U.S. 325 (1976). This decision did not do any such thing. First of all, as pointed out by the Appellant, the opinion in *Roberts* is a plurality opinion. As such, it does not constitute precedent. Secondly, the Appellant has wrenched certain statements in *Roberts* out of context.

In *Roberts*, the United States Supreme Court was considering Louisiana's then - existing death penalty statutes. At the time, there was but one sentence for capital murder, that being death. In an apparent attempt by Louisiana to provide a measure of discretion on the part of the jury, one provision of those statutes provided that juries were to be instructed on lesser - included offenses to capital murder, regardless of whether there was evidence to support such instructions. The Supreme Court found this scheme to be insufficient to "channel" jury verdicts.

Roberts is a death penalty decision, decided under the "death is different" mentality of the United States Supreme Court. It is not precedent, but in any event its importance, if any, should be considered only within the context of death cases. The rule the Appellant attacks on this appeal is not similar to that which was under review in *Roberts*. The law in this State, in contrast to what was before the Court in *Roberts*, is that instructions are not to be given if they are not warranted by the evidence. On appeal, however, in the event that a lesser - included instruction was improperly given, and the appellant convicted of it, it is simply a kind of harmless error where the evidence would have warranted conviction of the greater felony. This rule of appellate practice is simply not the same thing that was considered in *Roberts*.

Thompson v. City of Louisville, 362 U.S. 199 (1960) is not revealing here. That decision did not involve a conviction on a lesser - included offense. There is no question about the notion

that it would offend due process to convict a man on no evidence; but that basic principle is not involved here.

The rule attacked here by the Appellant is not unconstitutional. The Appellant has cited no decision to demonstrate that it is. The rule does not permit an accused to stand convicted on no evidence. What the rule does provide, quite simply, is that where the evidence produced in a case would support a verdict of a greater charge, an appellant will not be heard to complain of having been convicted of a lesser - included offense of that charge. This is merely a specific example of the general principle that an appellant will not be heard to complain of alleged errors that were of benefit to him. This rule seems to be well - nigh universal in the appellate courts of the country.

There was certainly evidence sufficient to have supported a verdict of murder. The greater charge, by definition, includes all elements of the lesser - included offense. Consequently, it is simply untrue that there was no evidence of the Appellant's guilt of manslaughter

The Second Assignment of Error is without merit.

3. THAT THE VERDICT IS NOT OPPOSED BY THE GREAT WEIGHT OF THE EVIDENCE

In considering the Third Assignment of Error, we bear in mind the standard of review applicable to it. *May v. State*, 460 So.2d 778 (Miss. 1984).

The Appellant claims that the State did not establish a motive for Mr. Simpson's murder, and she further claims that she waived any interest in Mr. Simpson's life insurance policies. The evidence of insurance, the lifestyle the Appellant was living and the Mr. Simpson's decline in income were certainly facts that would establish motive. As for the claim that the Appellant

waived her interest in the life insurance policies, that was not a fact. The insurer never received a document to that effect signed by the Appellant, and the insurer considered it a pending claim. Moreover, since the Appellant's son was the second beneficiary, it seems to us that it would be hard to say that insurance simply could not have been a factor.

The Appellant says she called emergency services immediately after the shooting. That is what she said; what she did could be another thing.

The facts in *Jackson v. State*, 551 So.2d 132 (Miss. 1989) are strikingly similar to those of the facts at bar. In that case, a man and his wife went to the man's business one night. About thirty minutes later, he called the police department to report a robbery. He also reported that his wife had been injured. The wife had been assaulted, and she died of her injuries the next day. A Coca - Cola bottle was found, which was apparently the murder weapon, but no blood was found on the husband's person, no other persons were proved to have been present at the time, and no motive was established. There was no evidence of marital discord.

The husband was indicted for murder but convicted of manslaughter. In addition to finding that there was sufficient evidence to allow a manslaughter instruction, the Court further found that the verdict was not contrary to the weight of the evidence. *Jackson*, at 147 - 148.

In the case at bar, the Appellant and her husband were the only ones present when Mr. Simpson was shot. Her stories, especially about the gun, were inconsistent. Her demeanor, like the husband in *Jackson*, was mostly calm. The husband, like the Appellant in the case at bar, gave inconsistent statements about how the crime occurred.

Two pathologists testified that Mr. Simpson could not have met his death in the way the Appellant claimed.

We will also note that the Appellant's story did not add up. The Appellant claimed that

she was upstairs in the house when the shooting occurred. Though she did not see her husband with the gun, somehow she knew he had it and that he was cleaning it when he was shot. How indeed could she have known this if he never told her that he was about to clean the gun or saw him with the gun. How could she have known it was an accident, if he shot himself? Why did that story change to suicide at trial? Given the Appellant's inconsistent statements, the testimony of the pathologists, it cannot be said that the trial court abuse its discretion in denying relief on the motion for a new trial.

The Third Assignment of Error is without merit.

CONCLUSION

The Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: _____

JOHN R. HENRY
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

CERTIFICATE OF SERVICE

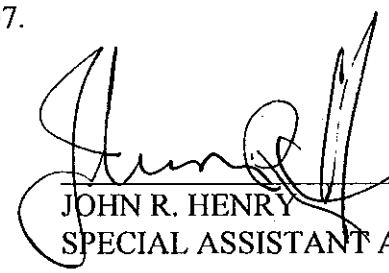
I, John R. Henry, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Dale Harkey
Circuit Court Judge
P. O. Box 998
Pascagoula, MS 39568-0998

Honorable Anthony Lawrence, III
District Attorney
P. O. Box 1756
Pascagoula, MS 39568-1756

Glenn S. Swartzfager, Esquire
Attorney At Law
Mississippi Office of Indigent Appeals
301 North Lamar Street, Suite 210
Jackson, MS 39201

This the 13th day of August, 2007.



JOHN R. HENRY
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680