IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

PATRICIA L. SIMPSON — APPELLANT

V. — NO. 2006-KA-1366-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

ORAL ARGUMENT REQUESTED

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STATE OF MISSISSIPPI **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Patricia L. Simpson, Appellant
3. Honorable Anthony (Tony) Lawrence, III, District Attorney
4. Honorable Dale Harkey, Circuit Court Judge

This the 16th day of May, 2007.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

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STATEMENT OF THE ISSUES

I. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT.

II. DUE PROCESS WILL NOT ALLOW THE CONVICTION FOR MANSLAUGHTER TO STAND.

III. THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

STATEMENT REGARDING ORAL ARGUMENT

The Appellant requests oral argument before the Court in this case. This case involves, *inter alia*, a complex constitutional analysis, as well as intensive factual analysis of the record in this case. The Appellant therefore believes that oral argument will greatly aid the Court in its disposition of this case, and accordingly, requests oral argument before the Court.

SUMMARY OF THE ARGUMENT

The Appellant was entitled to an acquittal as a matter of law pursuant to the ***Weathersby***

Rule which is found in ***Weathersby v. State***, 165 Miss. 207, 209, 147 So. 481, 482 (1933) and its progeny. Here, the Appellant was the only one who was home when her husband was shot. She testified that she had nothing to do with the shooting, but rather was upstairs when she heard the gun go off. Her version of the events was not substantially contradicted by the evidence, and therefore she was entitled to an acquittal as a matter of law.

The evidence in this case was insufficient to support the verdict. Here, Patricia Simpson was charged with murder, but she was convicted of manslaughter. Patricia denied any involvement in the shooting, and there was no evidence whatsoever which showed that the shooting took place in the heat of passion, or as the result of a confrontation or a fight of some sort between Patricia and her husband, and therefore could not be found to constitute manslaughter.

Present day due process standards will not allow the conviction of the Appellant for manslaughter to stand. While the current precedent of the Court states that where the evidence shows that the defendant is either guilty of murder or nothing but is convicted of manslaughter, he or she cannot be heard to complain because the any error is favorable to the defendant. However, that rule does not take into account the more recent decisions of the United States Supreme Court which are meant to eliminate uncertainty and unreliability in the factfinding process so as to avoid arbitrary results. The rule in question violates those principles set forth by the United States Supreme Court, and therefore violates the Due Process Clause of the United States Supreme Court, as well as Article III, section 14 of the Mississippi Constitution of 1890.

Finally, the verdict was against the overwhelming weight of the evidence. By all counts, Patricia and Don Simpson had a blissful marriage. There was no evidence of any disagreements between them, and in fact, they had just been to a marriage encounter weekend. Patricia had no

motive to kill her husband, and she waived all rights to any of his life insurance proceeds. She called 911 immediately after she found her husband, and she ultimately ended up in the hospital diagnosed with depression and post-traumatic stress disorder.

Conversely, Don was under severe financial strain and was very distraught over the fact that his income had decreased by nearly $40,000 from the previous year, and he was also upset with the small size of the recent Christmas bonus he had received.

STATEMENT OF THE CASE

Patricia Simpson was charged with the murder of her husband, Don Simpson. (C.P. 4). She waived a jury trial, and she was tried before Hon. Dale Harkey. (C.P. 105-06). After deliberation, Judge Harkey found her not guilty of murder, but guilty of manslaughter. (Tr. 839-41; C.P. 112-13; R.E. 4-6; 13-18). Judge Harkey sentenced Patricia to fifteen (15) years in the custody of the Mississippi Department of Corrections followed by five (5) years post-release supervision. (C.P. 115; R.E. 4-6; 13-18). Patricia Simpson is presently out on an appeal bond in the amount of $75,000. (C.P. 131-32; R.E. 10).

FACTS

This is a case of a tragedy turned into a criminal conviction for manslaughter. Patricia and Don Simpson began dating after the met while attending the same church. (Tr. 540). They were married in 1998, and they subsequently moved into their home in Lucedale, Mississippi. (Tr. 541). There as no evidence of any discord between them during the course of their marriage. Quite the contrary, there was evidence which showed that their marriage was quite harmonious, and in fact the morning before Mr. Simpson's death on December 22, 2004, he had left Patricia a note saying that he loved her. (Tr. 583-85; Def. Ex. 28).

On December 22, 2004, Patricia had been doing some last minute Christmas shopping with

her granddaughter. (Tr. 589). After returning her granddaughter to her home in Pascagoula, Patricia returned to her own home in Lucedale. (Tr. 590). Don Simpson was already home. (Tr. 591). Patricia went upstairs to take a bath. (Tr. 591-92). As she was getting out of the bathtub, she heard a loud noise downstairs. (Tr. 592-93) She went downstairs and saw Don Simpson on the floor. (Tr. 593). After examining him, she realized that he had been shot in the chest. Patricia immediately called 911 and began performing CPR and following the directions of the 911 dispatcher. (Tr. 593-96). Don was flown to the hospital at the University of South Alabama in Mobile. (Tr. 578). He was pronounced dead on arrival. (Tr. 253).

Patricia was subsequently indicted for murder by a George County grand jury. (C.P. 4). She waived a jury trial, and she was tried by Hon. Dale Harkey in a bench trial. (C.P. 105-06). After a multi-day trial, the trial court found that the gunshot was a distant gunshot wound, and thus could not have been self-inflicted. The trial court stated in its ruling that the case came down to either a case of murder or one of an accident or suicide. Having found that the gunshot wound was from a distant gunshot, the trial court concluded that it was not self-inflicted. However, the trial court then went on to say that it did not know what happened that night, but that he believed that Patricia did not intend to kill Mr. Simpson. The trial court went on to find Patricia guilty of manslaughter and sentenced her to fifteen (15) years in the custody of the Mississippi Department of Corrections and five (5) years post-release supervision. (Tr. 839-41; C.P. 112-15; R.E. 4-6; 13-18).

ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT.

A. Standard of Review.

The Mississippi Supreme Court has set forth the standard of review for the sufficiency of the evidence as follows:

> We must, with respect to each element of the offense, consider all of the evidence-not just the evidence which supports the case for the prosecution-in the light most favorable to the verdict. The credible evidence which is consistent with the guilt [of the accused] must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. Matters regarding the weight and credibility to be accorded the evidence are resolved by the jury. We may reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty.

Gleeton v. State, 716 So.2d 1083, 1087 (Miss.1998)(citing ***Wetz v. State***, 503 So.2d 803, 808 (Miss.1987)).

B. The Appellant Was Entitled Acquittal Pursuant to *Weathersby v. State*, 165 Miss. 207, 209, 147 So. 481, 482 (1933).

The Appellant asserts that she was entitled to an acquittal based on the rule set forth by the Mississippi Court in ***Weathersby v. State***, 165 Miss. 207, 209, 147 So. 481, 482 (1933). In ***Weathersby***, the Court held:

> [W]here the defendant or the defendant's witnesses are the only eyewitnesses to the homicide, their version, if reasonable, must be accepted as true, unless substantially contradicted in material particulars by a credible witness or witnesses for the state, or by the physical facts or by the facts of common knowledge.

Weathersby, 165 Miss. at 209, 147 So. at 482. The ***Weathersby*** "rule is alive and well and living in the courtrooms of this state." ***Heidel v. State***, 587 So.2d 835, 839 (Miss. 1991)(citing ***Pritchett v. State***, 560 So.2d 1017, 1019 (Miss.1990); ***Blanks v. State***, 547 So.2d 29, 33 (Miss.1989); ***Lanier v. State***, 533 So.2d 473, 490 (Miss.1988)).

"The ***Weathersby*** rule requires that the reasonable, uncontradicted story of the defendant or his witnesses must be accepted as true. ***Wetz v. State***, 503 So.2d 803, 808 (Miss.1987), quoting ***Weathersby v. State***, 165 Miss. 207, 209, 147 So. 481, 482 (1933)." ***Green v. State***, 631 So.2d 167, 174 (Miss. 1994). "Where the ***Weathersby*** rule applies and the defendant's version affords an absolute legal defense, the defendant is entitled to a directed verdict of acquittal." ***Green v. State***,

631 So.2d 167, 174 (Miss. 1994)(quoting ***Blanks v. State***, 547 So.2d 29, 33 (Miss.1989)). "But where the defendant's story is materially contradicted, the ***Weathersby*** rule has no application and the matter of conviction versus acquittal becomes a question for the jury." ***Id.***

"It is for the court and not the jury to determine whether the defendant receives the benefit of the ***Weathersby*** rule." ***Green v. State***, 631 So.2d 167, 175 (Miss. 1994)(citing ***Null v. State***, 311 So.2d 654, 658 (Miss.1975)). "***Weathersby***, of course, is nothing more than a particularized version of our general standards according to which courts must decide whether in a criminal prosecution the accused is entitled to a judgment of acquittal as a matter of law." ***Jackson v. State***, 551 So.2d 132, 136 (Miss. 1989)(citing ***Lanier v. State***, 533 So.2d 473, 490 (Miss.1988); ***Shaw v. State***, 521 So.2d 1278, 1282 (Miss.1987); ***Wetz v. State***, 503 So.2d 803, 809 (Miss.1987); ***Harveston v. State***, 493 So.2d 365, 371 (Miss.1986)).

In the present case, there is no dispute that Patricia was the only other person present in the home when Mr. Simpson was shot. (Tr. 591-92). Patricia testified at trial that she had nothing to do with the death of the victim. She testified that she was upstairs when she heard the shot ring out. She then came downstairs and discovered her husband on the floor. (Tr. 591-96).

The evidence showed, and the trial court found that Patricia called 911 immediately after she discovered the victim on the floor. The testimony was that the wound suffered by Don Simpson would cause death in approximately ten (10) minutes. (Tr. 840). The EMTs arrived in nine (9) minutes. (Tr. 840). They testified that they were supposed to wait for the police before they entered the premises, but Patricia met them at the door and hurried them inside to attend to her husband. (Tr. 603).

Of interest in this case is the location of the gunshot wound itself. The gunshot wound is in the exact center of the victim's chest. (Tr. 298; State Ex. 21). An expert marksman could not have

placed a better shot. The bullet severed the aorta. (Tr. 298). While admittedly the pathologists disagreed on whether the gunshot wound was a contact wound or a distant wound, there does not appear to be any disagreement on the trajectory of the bullet. Dr. Riddick who actually performed the autopsy testified at trial that the bullet was traveling "from front to back, right to left, and downward." (Tr. 298). The wound would certainly be consistent with the victim holding the gun out with both hands at arm's length and pulling the trigger with his thumbs.

There was no alleged confession in this case, and Patricia steadfastly and consistently maintained that the gunshot would was self-inflicted by her husband either as the result of an accident or a suicide. The judge ruled out suicide because there was no testimony that the victim was not of the mind to commit suicide. The trial court specifically found that there was a "lack of evidence as to any state of mind to produce a suicide . . . ." (Tr. 840). Again, there is no evidence in the record to support such a finding, and in fact, the evidence shows just the opposite.

Around the time of Don's death, he was under a serious financial strain. (Tr. 216; 226; 547). His income, which was based at least in part on commission, had significantly dropped over the past year.[1] (Tr. 216; 547). Don was having to borrow around $1,000 a week from his employer in order to meet his rather large financial obligations. (Tr. 199). The couple was remodeling their home, and Don had recently purchased a Mercedes-Benz. (Tr. 197-98). Additionally, Patricia testified that Don was very upset over the small Christmas bonus he had recently received from his employer. (Tr. 565). The Court has recognized financial strain as a motive for suicide. *See* ***Jefferson Standard Life Ins. Co. v. Jefcoats***, 143 So. 842, 843 (1932).

In light of the evidence elicited at trial, Patricia's version of the events on the night in

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[1]The record reflects that Mr. Simpson's income had fallen from approximately $123,000 in 2002 to around $80,000 in 2003, which is a drop of nearly $40,000. (Tr. 547; Def. Ex. 3-4; State Ex. 29).

question are more than reasonable. Her version of those events was not substantially contradicted in material particulars, and therefore she was entitled to an acquittal under ***Weathersby*** and its progeny. Accordingly, the trial court erred in not granting Patricia's motion for a directed verdict. The Appellant asserts that the Court should reverse and render on this issue.

C. The Evidence Did Not Support a Verdict of Manslaughter.

Miss. Code Ann. § 97-3-37 provides, "The killing of a human being, without malice, in the heat of passion, but in a cruel or unusual manner, or by the use of a dangerous weapon, without authority of law, and not in necessary self-defense, shall be manslaughter."

> The Mississippi Supreme Court has defined heat of passion manslaughter as:
> [A] state of violent and uncontrollable rage engendered by a blow or certain other provocation given, which will reduce a homicide from the grade of murder to that of manslaughter. Passion or anger suddenly aroused at the time by some immediate and reasonable provocation, by words or acts of one at the time. The term includes an emotional state of mind characterized by anger, rage, hatred, furious resentment or terror.

Tait v. State, 669 So.2d 85, 89 (Miss. 1996)(quoting ***Buchanan v. State***, 567 So.2d 194, 197 (Miss.1990)).

"This passion should be an emotion brought about by some insult, provocation, or injury, which would produce in the minds of ordinary men "'the highest degree of exasperation.'" ***Phillips v. State***, 794 So.2d 1034, 1037 (Miss. 2001)(quoting ***Graham v. State***, 582 So.2d 1014, 1018 (Miss. 1991)). "Mere words, no matter how provocative, are insufficient to reduce an intentional and unjustifiable homicide from murder to manslaughter." ***Gates v. State***, 484 So.2d 1002, 1005 (Miss.1986)(citing ***Stevens v. State***, 458 So.2d 726, 731 (Miss.1984); ***Johnson v. State***, 416 So.2d 383, 387-88 (Miss.1982)). "Angry or reproachful words are insufficient provocation to constitute manslaughter." ***Turner v. State***, 773 So.2d 952, 954 (Miss.App. 2000)(citing ***Johnson v. State***, 416 So.2d 383, 387-88 (Miss.1982)).

Furthermore, "[w]hen a deadly weapon is used, as here, malice is implied. In order to overcome that implication, there must be some evidence in the record from which the jury could determine that the act was not the result of malice, but a result of the heat of passion." ***Turner v. State***, 773 So.2d 952, 954 (Miss.App. 2000)(citing ***Wilson v. State***, 574 So.2d 1324, 1336 (Miss.1990)). When the defendant argues that the death was the result of an accident or that he had nothing to do with the killing, a heat of passion manslaughter instruction is not warranted. ***Wetz v. State***, 503 So.2d 803 (Miss.1987). "Wetz's claim that he had no role in the killing at all meant that his evidence did not support heat of passion; neither was there evidence from other sources to support the manslaughter instruction." ***Turner v. State***, 773 So.2d 952, 954 (Miss.App. 2000)(citing ***Wetz v. State***, 503 So.2d 803 (Miss.1987)). "Turner testified that he had nothing whatever to do with the killing. Therefore, his testimony does not provide any support for a juror to find heat of passion." ***Turner v. State***, 773 So.2d 952, 954 (Miss.App. 2000).

In the present case, there is no dispute that the victim died from a gunshot would, nor is there any question that a gun is a deadly weapon. Therefore, the implication of malice must be overcome by some evidence that the act was done without malice. ***Turner*** at 954. Here, there was absolutely no evidence which would overcome the implication of malice in the event it was found that Patricia shot the victim. There was no evidence whatsoever of any disagreement between Patricia and the victim on the night in question. There was no evidence of an insult, provocation, a struggle, or anything else which would justify a finding of heat of passion manslaughter, nor was there even any evidence of any angry or reproachful words between the Patricia and the victim.

At trial, Patricia testified that she had nothing to do with the killing of the victim. Rather she testified that she was upstair when she heard a noise, and when she came down to investigate she found the victim lying on the floor. (Tr. 591-96). Under the holdings of ***Turner***, ***Wilson*** and ***Wetz***,

supra, the evidence did not support a finding of heat of passion manslaughter.

Indeed, the trial judge stated, "I do not presume to know what exactly occurred in the home on December 22, 2003, but I'm not convinced that it was deliberate design, given those facts which indicated to me that immediately upon the incident occurring, help was sought and help was received." (Tr. 840; R.E. 17). That is the only evidence upon which the trial court based its decision. In essence, the trial court based its decision on a lack of proof as opposed to an affirmative finding of heat of passion. (Tr. 840-41; R.E. 13-18).

Furthermore, this is a circumstantial evidence case, and the prosecution is required to prove its case beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis consistent with innocence. ***Leflore v. State***, 535 So.2d 68, 70 (Miss.1988)(quoting ***Guilbeau v. State***, 502 So.2d 639, 641 (Miss.1987)); ***Baker v. State***, 317 So.2d 901, 902 (Miss. 1975). As shown immediately above, as well as in the previous section, suicide, *inter alia*, was a reasonable hypothesis which was not excluded by the evidence.

In light of the foregoing, the Appellant asserts that the trial court erred in convicting her of manslaughter because the evidence was insufficient to support the verdict. Accordingly, the Appellant asserts that the Court should reverse and render her conviction.

II. DUE PROCESS WILL NOT ALLOW THE CONVICTION FOR MANSLAUGHTER TO STAND.

A defendant cannot be heard to complain that he or she was convicted of manslaughter when the evidence showed the defendant was guilty of murder or nothing. ***Mallette v. State***, 349 So.2d 546, 550 (Miss. 1977). The Appellant respectfully submits that for the reasons shown, *infra*, the above-stated rule cannot withstand analysis under present day due process standards.

In this case, Patricia Simpson was charged with murder. (C.P. 4). The Court returned a

verdict of guilty of manslaughter.[2] (Tr. 839-41; C.P. 112-13; R.E. 4-6; 13-18). In so doing, the Court stated:

> This case comes down to the determination as to whether this killing was caused by a self-inflicted gunshot wound or suicide or a homicide committed unlawfully by another person. (Tr. 838).
>
> * * * * * * * *
>
> The lack of various characterizations by the pathologists, for one thing, the lack of any gunpowder residue according to Dr. Riddick and Dr. Hayne and the lack of any significant gunshot residue finding by Dr. McGarry convinced me that this was a distant gunshot would. Those two facts, lack of evidence as to any state of mind to produce a suicide and those medical findings, preclude in my mind a suicide. That leaves only the conclusion that this was a homicide.
>
> However, I am not convinced beyond a reasonable doubt and to the exclusion of every reasonable hypothesis consistent with innocence that it has been shown that this homicide was committed with deliberate design. I am persuade in that regard by the fact that the pathologist indicate that this would have been fatal within 10 minutes, give or take a few; that the EMTs arrived at the home within nine minutes; that the 911 tape, from what I heard on the 911 tape, had to have been commenced almost immediately after the incident that occurred in the home. Although Ms. Henderson found no pulse, there was electrical activity. I do not presume to know what exactly occurred in the home on December 22, 2003, but I'm not convinced that it was deliberated design, given those facts which indicated to me that immediately upon the incident occurring, help was sought and help was received.
>
> I do find, having excluded the possibility of suicide, that the testimony and evidence convinces me beyond a reasonable doubt and to the exclusion of every reasonable hypothesis consistent with innocence that what occurred was sudden, unexpected, without malice, without authority of law, and resulted in the killing of Don Simpson.

(Tr. 839-41; R.E. 13-18).

Later at the hearing on the post trial motions, the Court stated in regard to this issue:

> In regard to it being manslaughter, not murder, based upon what I heard, had a jury been seated, I certainly would have, if requested, by either party, allowed a

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[2]The fact that the trier of fact in this case was a judge and not a jury is of no constitutional significance. ***Jackson v. Virginia***, 443 U.S. 307, 318, 99 S.Ct. 2781, 2788 n.8 (1979).

> manslaughter heat of passion instruction to go to them as a lesser-included offense. I believe, statutorily, the juries are allowed to consider not only the principal charge as laid in the indictment, but any lesser-included offense should there be evidence to support same. And I believe that is statutory. And if it's good for a jury, it is good enough for me. And if I am in error with that respect, then certainly the Supreme Court will tell me so.

(Tr. 885).

However, there was absolutely no evidence in this case that Don Simpson's death occurred in the heat of passion, or as the result of a provocation or argument. None whatsoever. Indeed, Patricia denied that she shot Don Simpson. Her defense was that Mr. Simpson either shot himself either as the result of a suicide or an accident. There was no evidence that there was any sort of a disagreement between Patricia and Don Simpson around the time in question. In fact, there was no evidence whatsoever of any discord between Patricia and Don Simpson at any time during their marriage. Indeed, by all counts it was a very harmonious marriage. They had just been to a marriage enrichment weekend with their church. (Tr. 565). Their grandchild had spent the weekend with them. They were getting ready to go visit family members for Christmas. (Tr. 589). There was no evidence of any sort of discord between the Patricia and Don Simpson, and there was no evidence of an argument between Patricia and Don Simpson on the night in question. Critically, even the trial judge stated that he did not know what happened that night. (Tr. 839-41; R.E. 13-18).

In spite of the fact that there was not a scintilla of evidence at trial that Don Simpson's death occurred in the heat of passion or otherwise constituted manslaughter, Patricia cannot be heard to complain under the current precedent of this Court that she was convicted of manslaughter instead of murder. "A defendant cannot complain of a manslaughter verdict where the evidence would support a conviction of murder." ***Mallette v. State***, 349 So.2d 546, 550 (Miss. 1977)(citing ***King v. State***, 251 Miss. 161, 168 So.2d 637 (1964)). *See also* ***Triplett v. State,*** 132 So. 448 (Miss. 1931); ***Calicoat v. State***, 131 Miss. 169, 95 So. 318 (1923). The Appellant respectfully submits that the

foregoing rule cannot withstand analysis under present day due process standards.

In ***Triplett v. State***, 132 So. 448 (Miss. 1931), the Mississippi Supreme Court explained its rationale for the rule in. There, the Court stated:

> The verdict of the jury in such case establishes that the killing was wrongful and unlawful. The fact that the evidence makes murder rather than manslaughter is a matter of which the defendant cannot complain, as the verdict of manslaughter is favorable to him. Having found that the killing was unlawful and wrongful, he is given a more merciful verdict than he was entitled to.

Triplett v. State, 132 So. 448, 450 (Miss. 1931).

Prior to ***Calicoat v. State,*** there was a dual line of authorities in Mississippi regarding this issue. One line of authorities held that if the evidence pointed to murder or acquittal, then the verdict of manslaughter would not be allowed to stand. ***Calicoat v State***, 131 Miss. 169, 95 So. 318 (1923)(citing ***Virgil v. State***, 63 Miss. 317 (1885); ***Parker v. State***, 102 Miss. 113, 58 South. 978 (1912); ***Rester v. State***, 110 Miss. 689, 70 South. 881(1916)). The other line of authorities held that the error was not reversible error because it worked in favor of the defendant. ***Calicoat v State***, 131 Miss. 169, 95 So. 318 (1923)(citing ***Rolls v. State***, 52 Miss. 391 (1876); ***Lanier v. State***, 57 Miss. 102 (1879); ***Powers v. State***, 83 Miss. 691, 36 South. 6 (1904); ***Moore v. State***, 86 Miss. 160, 38 South. 504 (1905); ***Huston v. State***, 105 Miss. 413, 62 South. 421 (1913)). Since ***Calicoat***, the Court seems to have consistently adhered to its holding a defendant cannot be heard to complain of a manslaughter verdict because it works to his or her benefit. *See cf.* ***Mallette v. State***, 349 So.2d 546, 550 (Miss. 1977); ***King v. State***, 251 Miss. 161, 168 So.2d 637 (1964); ***Triplett v. State,*** 132 So. 448 (Miss. 1931).

Ironically, a defendant is not entitled to a manslaughter instruction unless there is evidentiary support for it, and therefore the denial of a manslaughter instruction when there is no evidence to support it does not constitute error. ***In re Hill***, 467 So.2d 669, 672 (Miss. 1985); ***Colburn v. State***,

431 So.2d 1111 (Miss.1983). In ***Hill***, the Court pointed out, "An instruction on a lesser included offense or a guilty verdict of such an offense does not necessarily have anything to do with mercy. We have repeatedly held that where the evidence does not support the granting of an instruction on a lesser included offense that instruction should not be given." ***In re Hill***, 467 So.2d 669, 672 (Miss. 1985)(citing ***Colburn v. State***, 431 So.2d 1111 (Miss.1983)).

The problem with the present line of authorities is that they presume that the finder of fact, usually a jury, discounted the defendant's evidence and found beyond a reasonable doubt that he or she killed the individual wrongfully and unlawfully. However, the Appellant asserts that under modern law such an assumption is inappropriate because, *inter alia*, it introduces a level of unreliability and uncertainty into the conviction in violation the Due Process Clause of the 14th Amendment of the United States Constitution, as well as Article III, section 14 of the Mississippi Constitution of 1890.

In ***Beck v. Alabama***, 447 U.S. 625, 100 S.Ct. 2382 (1980), the United States Supreme Court pointed out the original rationale behind the lesser included offense rule. There the Court stated, "At common law the jury was permitted to find the defendant guilty of any lesser offense necessarily included in the offense charged. This rule originally developed as an aid to the prosecution in cases in which the proof failed to establish some element of the crime charged. *See* 2 C. Wright, Federal Practice and Procedure § 515, n. 54 (1969)." ***Beck v. Alabama***, 447 U.S. 625, 633-634, 100 S.Ct. 2382, 2387 - 2388 (1980)(footnote omitted)(citing 2 M. Hale, Pleas of the Crown 301-302 (1736); 2 W. Hawkins, Pleas of the Crown 623 (6th ed. 1787); 1 J. Chitty, Criminal Law 250 (5th Am. ed. 1847); T. Starkie, Treatise on Criminal Pleading 351-352 (2d ed. 1822)).

In ***Spaziano v. Florida***, 468 U.S. at 455-56, 104 S.Ct. at 3160, the United States Supreme Court found that due process requires the defendant in a capital case be given the choice of whether

to assert the statute of limitations on a lesser included offense and thus bar the trial court from giving it to the jury. There the Court held:

> If the jury is not to be tricked into thinking that there is a range of offenses for which the defendant may be held accountable, then the question is whether ***Beck*** requires that a lesser included offense instruction be given, with the defendant being forced to waive the expired statute of limitations on those offenses, or whether the defendant should be given a choice between having the benefit of the lesser included offense instruction or asserting the statute of limitations on the lesser included offenses. We think the better option is that the defendant be given the choice.

468 U.S. at 456, 104 S.Ct. at 3160.

In so holding, the Court in ***Spaziano*** found,"There may well be cases in which the defendant will be confident enough that the State has not proved capital murder that he will want to take his chances with the jury. If so, we see little reason to require him not only to waive his statute of limitations defense, but also to give the State what he perceives as an advantage-an opportunity to convict him of a lesser offense if it fails to persuade the jury that he is guilty of capital murder." ***Spaziano v. Florida***, 468 U.S. 447, 456-457, 104 S.Ct. 3154, 3160 (1984).

One of the observations of the Court in ***Spaziano*** was that requiring the jury in capital cases to "be instructed on lesser included offenses for which the defendant may not be convicted, however, would simply introduce another type of distortion into the factfinding process." In ***Hopper v. Evans***, the Court also voiced concerns over the potential unreliability of the factfinding process of the jury in ***Beck***. "While in some cases a defendant might profit from the preclusion clause,[3] we concluded that 'in every case [it] introduce[s] a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case.'" ***Hopper v. Evans***, 456 U.S. 605, 610, 102 S.Ct. 2049, 2052 (1982)(quoting ***Beck v. Alabama***, 447 U.S. at 643, 100 S.Ct. at 2392)).

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[3]The preclusion clause in Beck was an Alabama law which precluded juries from being given an instruction on a lesser-included offense in all capital cases regardless of whether there was evidence to support it. ***Beck v. Alabama***, 447 U.S. 625, 100 S.Ct. 2382 (1980).

In ***Hopper***, the Court also discussed ***Roberts v. Louisiana***, 428 U.S. 325, 96 S.Ct. 3001 (1976) at length.

> In ***Roberts v. Louisiana***, *supra*, the Court considered a Louisiana statute which was the obverse of the Alabama preclusion clause. In Louisiana, prior to ***Roberts***, every jury in a capital murder case was permitted to return a verdict of guilty of the noncapital crimes of second-degree murder and manslaughter, "even if there [was] not a scintilla of evidence to support the lesser verdicts." ***Id.***, 428 U.S., at 334, 96 S.Ct., at 3006 (plurality opinion). Such a practice was impermissible, a plurality of the Court concluded, because it invited the jurors to disregard their oaths and convict a defendant of a lesser offense when the evidence warranted a conviction of first-degree murder, inevitably leading to arbitrary results. ***Id.***, at 335, 96 S.Ct., at 3007. **The analysis in *Roberts* thus suggests that an instruction on a lesser offense in this case would have been impermissible absent evidence supporting a conviction of a lesser offense.**
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> ***Beck*** held that due process requires that a lesser included offense instruction be given when the evidence warrants such an instruction. But due process requires that a lesser included offense instruction be given only when the evidence warrants such an instruction. The jury's discretion is thus channelled **so that it may convict a defendant of any crime fairly supported by the evidence.**

Hopper v. Evans, 456 U.S. 605, 611, 102 S.Ct. 2049, 2053 (1982).

In ***Thompson v. City of Louisville***, the United States Supreme Court held where there is no evidence in the record to support a conviction, it would violate due process to allow it to stand. "Thus we find no evidence whatever in the record to support these convictions. Just as 'Conviction upon a charge not made would be sheer denial of due process,' so is it a violation of due process to convict and punish a man without evidence of his guilt." ***Thompson v. City of Louisville***, 362 U.S. 199, 206, 80 S.Ct. 624, 629 (1960)(citing ***De Jonge v. State of Oregon***, 299 U.S. 353, 362, 57 S.Ct. 255, 259, 81 L.Ed. 278 (1937); ***Cole v. State of Arkansas***, 333 U.S. 196, 201, 68 S.Ct. 514, 517, 92 L.Ed. 644 (1948)).

In ***Garner v. State of La.***, the Court held the convictions to be "so totally devoid of evidentiary support as to render them unconstitutional under the Due Process Clause of the

Fourteenth Amendment." ***Garner v. State of La.***, 368 U.S. 157, 163, 82 S.Ct. 248, 251 (1961)(citing ***Thompson v. City of Louisville***, 362 U.S. 199, 206, 80 S.Ct. 624, 629 (1960)). The Court in ***Garner*** went on to state, "In addition, we cannot be concerned with whether the evidence proves the commission of some other crime, for it is as much a denial of due process to send an accused to prison following conviction for a charge that was never made as it is to convict him upon a charge for which there is no evidence to support that conviction." ***Garner v. State of La.***, 368 U.S. at 163-64, 82 S.Ct. at 251-252 (1961)(footnote omitted).

This standard, as later explained by the Court in ***Jackson v. Virginia***, 443 U.S. 307, 314, 99 S.Ct. 2781, 2786 (1979), ensures the due process right of freedom from a wholly arbitrary deprivation of liberty. "The 'no evidence' doctrine of ***Thompson v. Louisville*** thus secures to an accused the most elemental of due process rights: freedom from a wholly arbitrary deprivation of liberty." ***Jackson v. Virginia***, 443 U.S. 307, 314, 99 S.Ct. 2781, 2786 (1979). "The power of the factfinder to err upon the side of mercy, however, has never been thought to include a power to enter an unreasonable verdict of guilty." ***Jackson v. Virginia***, 443 U.S. 307, 318, 99 S.Ct. 2781, 2788 n.10 (1979)(***citing Carpenters & Joiners v. United States***, 330 U.S. 395, 408, 67 S.Ct. 775, 782, 91 L.Ed. 973 (1947); ***Capital Traction Co. v. Hof***, 174 U.S. 1, 13-14, 19 S.Ct. 580, 585-586, 43 L.Ed. 873 (1899)).

In ***Jackson***, the Court went on to state:

> The question whether a defendant has been convicted upon inadequate evidence is central to the basic question of guilt or innocence. The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless. E. g., ***Mullaney v. Wilbur***, 421 U.S., at 697-698, 95 S.Ct., at 1888-1889 (requirement of proof beyond a reasonable doubt is not "limit[ed] to those facts which, that if not proved, would wholly exonerate" the accused). Under our system of criminal justice **even a thief is entitled to complain that he has been unconstitutionally convicted and imprisoned as a burglar.**

Jackson v. Virginia, 443 U.S. 307, 323-24, 99 S.Ct. 2781,2791 (1979)(emphasis added).

Thus, from the foregoing, we learn the following: The factfinding process must be free from distortion, uncertainty and unreliability. Inviting jurors to disregard their oaths and convict a defendant of a lesser offense when the evidence warrants conviction of the greater offense leads to unacceptable arbitrary results, and therefore, the jury may only be allowed to convict a defendant of a crime which is fairly supported by the evidence. If a conviction is not fairly supported by the evidence, the Due Process Clause of the Fourteenth Amendment is violated. These principles protect the due process rights of individuals by helping prevent wholly arbitrary deprivations of liberty.

The present case results in a gross miscarriage of justice because the rule in question here falls far short of the above principles. First, it arbitrarily assumes that the jury found the defendant guilty of committing an unlawful killing, but then decided to show mercy. However, that is not necessarily true in all cases. Borrowing from Justice Fortas who was dissenting in another context, "[T]o give both instructions 'is apt to induce a doubtful jury to find the defendant guilty of the less serious offense rather than to continue the debate as to his innocence.'" ***Cichos v. State of Indiana***, 385 U.S. 76, 87 S.Ct. 271, 17 L.Ed.2d 175)(Fortas, J. dissenting)). Furthermore, that assumption runs directly counter to the findings of the United States Supreme Court in ***Beck***, ***Roberts***, and ***Hopper***, which held that such similar inflexible rules can cause unacceptable uncertainties, unreliability and arbitrariness in the jury factfinding process.

The rule in question also allows convictions for lesser-included offenses to more or less go unchallenged and unreviewed under the illusion that the defendant has been done a service by the jury. That, however, runs counter to the principles set forth in ***Jackson*** and ***Mullaney*** that "even a thief is entitled to complain that he has been unconstitutionally convicted and imprisoned as a burglar." ***Jackson v. Virginia***, 443 U.S. 307, 323-24, 99 S.Ct. 2781,2791 (1979).

Finally, the rule allows convictions of lesser included offenses to be upheld even when there is absolutely no evidence to support a conviction that offense. Such a conviction, as is the case here, violates the principles set forth by the Supreme Court in ***Thompson***, ***Garner***, and ***Jackson*** which provide that a conviction not supported by the evidence is unconstitutional.

This case is a prime example of just what the United States Supreme Court sought to eliminated in ***Beck***, ***Roberts***, ***Garner***, and ***Hopper.*** Here, the trial court based its decision on a lack of proof suicide as opposed to an affirmative finding of heat of passion. This sort of uncertain and unreliable factfinding process is exactly what the United States Supreme Court has endeavored to eliminate through its decisions in those cases. As shown above, there was no evidence whatsoever that Patricia acted in the heat of passion, and, as a result of its flawed factfinding process in this case, the trial court reached a wholly arbitrary result. Accordingly, the Appellant respectfully suggest that under present law, ***Calicoat***, ***Triplette***, and its progeny are outdated, violate due process. These cases should be overruled, and the Appellant's conviction reversed and rendered.

III. THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

"When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, we will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." ***Bush v. State***, 895 So.2d 836, 844 (Miss. 2005)(citing ***Herring v. State***, 691 So.2d 948, 957 (Miss.1997)). In reviewing such claims, the Court "sits as a thirteenth juror." ***Bush v. State***, 895 So.2d 836, 844 (Miss. 2005)(citing ***Amiker v. Drugs For Less, Inc.***, 796 So.2d 942, 947 (Miss.2000)(footnote omitted)).

"[T]he evidence should be weighed in the light most favorable to the verdict." ***Herring***, 691 So.2d at 957. "A reversal on the grounds that the verdict was against the overwhelming weight of the

evidence, 'unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict.'" ***Bush v. State***, 895 So.2d 836, 844 (Miss. 2005)(quoting ***McQueen v. State***, 423 So.2d 800, 803 (Miss.1982)). It means that "as the 'thirteenth juror,' the court simply disagrees with the jury's resolution of the conflicting testimony," and "the proper remedy is to grant a new trial." ***Bush v. State***, 895 So.2d 836, 844 (Miss. 2005)(quoting ***McQueen v. State***, 423 So.2d 800, 803 (Miss.1982)(footnote omitted)).

In the present case, even if the Court finds that the evidence was sufficient to support the verdict, and the Appellant is not entitled to an acquittal as a matter of law, she is at a minimum entitled to a new trial as the verdict was clearly against the overwhelming weight of the evidence.

In the case *sub judice*, there was absolutely no evidence that Patricia had any reason or motive to shoot her husband. Patricia waived any interest in the life insurance policies held on her husband. (Tr. 622; 771). There were never any calls to law enforcement for domestic violence, or other evidence of any marital discord between Patricia and Don Simpson. (Tr. 276-77). By all accounts, they had a blissful marriage, and in fact, they had just recently been to a marriage enrichment weekend with their church group. (Tr. 565). Don had even left Patricia a note that morning saying that he loved her. (Tr. 583-85; Def. Ex. 28). Moreover, there was no evidence whatsoever that there was a fight, disagreement or that anything else untoward occurred between Patricia and Don on the night in question.

Patricia called 911 immediately after she discovered the victim on the floor. The testimony was that the victim's would cause death in around ten (10) minutes. (Tr. 840; R.E. 17). The EMTs arrived in nine (9) minutes. (Tr. 840; R.E. 17). They testified that they were supposed to wait for the police before they entered the premises, but Patricia met them at the door and hurried them inside to attend to her husband. (Tr. 603). She begged the EMTs to AirVac him to Mobile where

she thought they would have a better chance of saving him. (Tr. 606). She had a neighbor drive her over to the hospital in Mobile where her husband had been flown by helicopter. (Tr. 578). Even some weeks after the death of Don, Patricia was visibly grieving. (Tr. 233). She later spent time in the hospital for depression, and she was diagnosed with post-traumatic stress disorder. (Tr. 621).

Again, this is a circumstantial evidence case, and the prosecution is required to prove its case beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis consistent with innocence. ***Leflore v. State***, 535 So.2d 68, 70 (Miss.1988)(quoting ***Guilbeau v. State***, 502 So.2d 639, 641 (Miss.1987)); ***Baker v. State***, 317 So.2d 901, 902 (Miss. 1975). Suicide, *inter alia*, was a reasonable hypothesis which was not excluded by the evidence. The Appellant therefore respectfully asserts that the foregoing facts demonstrate that the verdict was against the overwhelming weight of the evidence, and the Court should reverse and remand for a new trial.

CONCLUSION

For the foregoing reasons, the Appellant contends that the evidence was insufficient to support the verdict. She further contends that the conviction cannot stand based on present day due process standards. Therefore, the Appellant contends that the Court should reverse and render her conviction. However, should the Court not reverse and render, the Appellant contends that the verdict was against the overwhelming weight of the evidence, and therefore the Court should reverse and remand for a new trial.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I, Glenn S. Swartzfager, Counsel for Patricia L. Simpson, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

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This the 16th day of May, 2007.

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