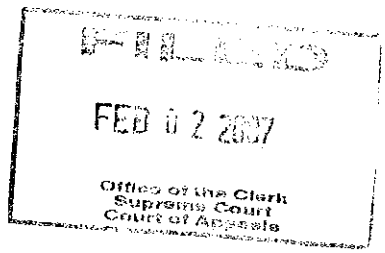
COPY

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO.2006-KA-01065-COA

DESMOND WALTON — APPELLANT



V.

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
George T. Holmes, MSB No. [redacted]
Jenna Koger, Legal Intern
Billy G. Burk, Legal Intern
301 N. Lamar St., Ste 210
Jackson MS 39201
601 576-4200

Counsel for Appellant

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO.2006-KA-01065-COA

DESMOND WALTON — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

CERTIFICATE OF INTERESTED PERSONS

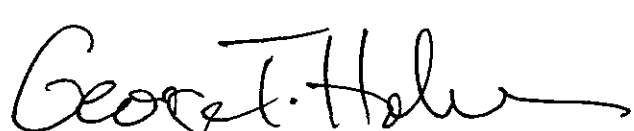
The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Desmond Walton

THIS 2nd day of February 2007.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Desmond Walton, Appellant

By: 

George T. Holmes, Staff Attorney

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES

OTHER AUTHORITIES

STATEMENT OF THE ISSUES

ISSUE NO. 1: WHETHER WALTON'S STATEMENTS TO POLICE SHOULD HAVE BEEN SUPPRESSED?

ISSUE NO. 2: WHETHER WALTON'S TRIAL COUNSEL WAS INEFFECTIVE BY NOT SEEKING A JURY INSTRUCTION FOR THE LESSER INCLUDED OFFENSE OF MANSLAUGHTER?

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Forrest County, Mississippi, and a judgment of conviction for the crime of murder against Desmond Walton and a resulting mandatory life sentence following a jury trial conducted August 1-2, 2006 with Honorable Robert B. Helfrich, Circuit Judge, presiding. Desmond Walton is presently incarcerated with the Mississippi Department of Corrections.

FACTS

Patrick Anderson (a/k/a "PoBill"), a drug dealer in Forrest County MS, was found shot to death face down in a pool of blood in his driveway around 7:30 p. m. June 1, 2004. Anderson was in a gang called "The Gangster Disciples" and his home located at 106 Lakewood Loop, Hattiesburg MS had a closed-circuit surveillance system complete with video recording capabilities. The shooting, however, was not caught on tape. [T. 191, 246-48, 288-89, 306-14, 363; Exs. 12, 24] No eyewitnesses came forth, Police investigators had sketchy information and had to turn to informants. Id.

A. The events which led to the prosecution of Desmond Walton

Within a day or two of Anderson's death, Lucedale, MS native Jonah Pinkney heard that his automobile, a dark colored Lincoln, had been reported as being involved in Anderson's shooting and that police were looking for him [T. 98-99, 312-13] Pinkney turned himself in June 6, 2004, and gave investigating officers information which implicated Eric Love, Michael Love, Jerry Street and another person whose name Pinkney did not know. [T.199, 313-19] Pinkney testified at trial that on the morning of the shooting, June 1, 2004, he, Michael Love, Eric Love, Jerry Street, and the appellant, whose name he did not know at the time, drove to Hattiesburg to "meet up with some girls." [T.185]. While riding around in Hattiesburg, they saw Anderson drive past and they followed him back to his residence. [T. 192]. After reaching the victim's residence, Pinkney alleges that Walton got out of the car, had a conversation with Anderson and then Walton shot Anderson. Id.

Jerry Street, also implicated by Pinkney, turned himself into authorities soon thereafter. [T. 318] Street testified for the state also; but, did not describe any conversation between the shooter, whom he identified as Walton, and Anderson before the shooting. [T. 275] Street also added that the shooter was wearing a Halloween mask and simply got out of the car and shot Anderson in the back after Eric Love spoke with the victim. Id. Street testified that after the shooting, the group headed back to Lucedale MS, and while in transit, someone threw the Halloween mask out the window. [T. 195,

277].

The mask allegedly used in the shooting was found by Jeff Wilson, a Mississippi Department of Transportation worker, while spraying for weeds along Highway 98. [296-99]. The mask was turned into authorities and introduced into evidence as Exhibit 9. Id.

Following the pattern of others implicated by Pinkney, Michael Love turned himself in as well [T. 320]; and his testimony for the state conflicted with both Street and Pinkney in that Michael alleged his cousin Eric Love, who incidently likes to rob drug dealers [T. 253], came to him to go to Hattiesburg to "score" some drugs. [T. 227-30]. Michael informed the jury that Anderson was a drug dealer with whom Michael had a long running business relationship [T. 248].

No weapon was ever recovered. [T. 326-27] Eric Love was also arrested but did not testify in Walton's trial. [T. 324-25]

Investigative officers were advised that the unidentified shooter resided in Mobile, Alabama, and the Mobile Police Department (MPD) was contacted. Forrest County Sheriff's Office investigator David Jarrell went to Mobile with Pinkney; and, with the help of MPD, a photo line-up was prepared and shown to Pinkney. [T. 22, 200, 321-22; Ex. 10] Pinkney identified Desmond Walton as the person who shot Patrick "PoBill" Anderson. Id.

B. The two custodial interrogations of Walton.

Walton was taken into custody by MPD on June 11, 2004 based on the Mississippi warrant. [T. 5, 323] Walton was questioned in two interviews. [T. 2-53] The first one was started by MPD Detective Don Gomien with MPD Officer Neal Fulton; but U. S. Drug Enforcement Agency (DEA) Agent Todd Hickson took over until Walton advised that he did not want to talk to the officers, but wanted to wait until Mississippi authorities arrived. [T. 8, 14, 31, 377-78] In this first interview, which lasted approximately two hours and fifty-six minutes, Walton was not advised of his rights under Miranda[1] until well into the interview. [T. 12, 15, 392, 397] Throughout the first interview, both Hickson and Gomien threatened that Walton would get the death penalty unless he cooperated. [T. 81, 376-99] The questioning during the first interview from Hickson was described as very hostile and aggressive [T. 26, 39, 45]

The first interview was suppressed by the trial court because DEA Agent Hickson refused to come testify either voluntarily or under subpoena. [T. 52-53, 61]. In the first interview Walton was repeatedly told that he was going to get a needle shoved in his arm because Mississippi has the death penalty. [T. 81, 393]. After about three hours of this, Walton advised that he did not want to talk to any of the officers there; but wanted to wait for Mississippi authorities to arrive. [T. 12, 15, 392, 397] Interview number one was hence shut down. Id.

---

[1] Miranda v. Arizona, 384 U. S. 436, 478-479, 86 S. Ct. 1602, 1630, 16 L. Ed. 2nd 694, 726 (1966).

About 10 to 15 minutes after the first interview was adjourned, MPD Police Officer Fulmer was escorting Walton back to a cell and told Walton that if he was going to talk, "now was the time". [T 9-10, 28, 14-15, 27] Walton reportedly told Fulmer he was willing to talk to Gomien, but not the DEA Agent Hickson. [T. 9-10] Walton was taken back to Gomien to talk. Walton was not re-Mirandised or given a waiver form to sign before the second interview took place or any time thereafter. [T. 9, 28, 396, 399]. Both interviews were video recorded but only the second interview was played during the trial and made a part of the record here. [Ex. 25; T 391]

In the second interview, ultimately, Walton provided a version of events implicating himself shooting Anderson in a drug disagreement when Anderson pulled a gun out on him. [Ex. 25] A pretrial motion to suppress both interviews was filed and a hearing conducted. [R. 90; T.2-58] The court suppressed evidence of the first but not the second interview. [T. 61] At trial, defense counsel requested to be allowed to cross examine the police officers about certain aspects of the first interview however, and the court allowed it. [T. 376-99] Walton testified after the ruling. [T. 63-84]

C. What is on the video tape, Exhibit 25.

The first interview is not on Exhibit 25, only the second. In the beginning of the video the only thing visible is Walton with his head down alone in a room, his hands cuffed behind his back. Det. Gomien then comes into the picture and invites Walton to talk. The first thing uttered by Walton are words to the effect of "I didn't shoot

anybody", a position he maintains for approximately thirty (30) minutes. After persistent questioning by Gomien, Walton admits that he was present when the shooting of Anderson occurred and implicates Jonah Pinkney as the shooter; but, at the end, Walton describes, as best as can be determined through poor audio, a drug deal gone bad where the victim draws a gun and Walton shoots without intending to do anything but defend himself.

Det. Gomien was not aggressive in the second interview, but does prompt Walton with words of "it's time to go" to Mississippi, and Gomien does advise Walton that other defendants have implicated Walton as the shooter and that telling the truth is the right thing to do from a religious standpoint, and that the truth would be better when Gomien testifies than something else.

SUMMARY OF THE ARGUMENT

The trial court should have excluded evidence of Walton's inculpatory statements; and, a manslaughter instruction should have been requested by trial counsel.

ARGUMENT

ISSUE NO. 1: WHETHER EVIDENCE OF FULTON'S STATEMENTS TO POLICE SHOULD HAVE BEEN SUPPRESSED?

For a resolution of this issue, the court need look no further than Jones v. State , 461 So. 2d 686 (MS 1984). In Jones, the defendant, who had been arrested for capital

murder and questioned by law enforcement officers in two separate interviews. Miranda[2] warnings were given in both. Initially Jones, similarly to Walton here, advised officers that he participated in the killing of the victim but did so with an accomplice and gave them a name. 461 So. 2d at 688-89, 697. The officers did not believe Jones and, as Gomien to Walton, informed Jones of their incredulity; and, in the second interview officers pressed Jones to admit that he acted alone. Jones responded, "I prefer not to speak on that", which the court found to be a clear invocation of Jones' Fifth Amendment privilege against self-incrimination. Id. The investigating officers in Jones however, did not "scrupulously honor" the invocation of the privilege and continued to press Jones to admit he acted alone; and, he ultimately complied. 696-701.

Considering the totality of circumstances and pointing out that Jones' confession was without counsel, as Walton's is here, the Jones court reminded:

> When an accused makes an in-custody inculpatory statement without the advice or presence of counsel, even though warnings and advice regarding his privilege against self-incrimination have been fully and fairly given, the state shoulders a heavy burden to show a knowing and intelligent waiver. [cites omitted] That burden is proof beyond a reasonable doubt. Id.

Unlike Jones, however, Walton was never advised of his Miranda rights in interview number two. Yet, giving of the Miranda warnings alone is not the test of admissibility of an inculpatory statement resulting from custodial interrogation, regardless of how careful or how frequent. 461 So. 2d 696. There are two required steps; the warning is step one.

Step two is a finding beyond a reasonable doubt that the rights and privileges explained in the warnings "...were thereafter waived-intelligently, knowingly and voluntarily" under a totality of the circumstances. Id.[3] However, "[u]ntil compliance with the strictures of Miranda has been shown ..., the question of voluntariness is never reached." Id.

It is indisputable that here, Walton, like Jones, invoked his privilege against self incrimination by stating he did not want to talk anymore in the first interrogation. [T. 15, 26] Even though Walton's first interview is laced with textbook Miranda violations, by ending Walton's first interview, the officers did finally comply with that requirement of Miranda; but, as is shown in the record, the malignant effects of the officers' violations in the first interview carry over into the second. Following an invocation of the privilege of silence, further questioning is not always prohibited if the invocation is of a limited nature, such as, when a defendant says, "I do not want to talk about *this*, but I'll talk about *that*." Id. at 700.

Nevertheless,

> [o]nce a suspect invokes his right to terminate questioning, ***in whole or in part***, [emphasis added] the interrogation must cease. Before the interrogation may resume, it is generally required that [three] things happen. First, there must be a cooling-off period. The officers must allow some time to go by before the questioning is resumed. ... Second, there must be a

---

3

The burden is on the state to prove beyond a reasonable doubt that a confession is voluntary. Haymer v. State, 613 So. 2d 837, 839 (Miss.1993); Kirkland v. State, 559 So. 2d 1046 (Miss.1990). The burden is met and a prima facie case is established with testimony from officers, or persons with knowledge of the facts, that the confession was voluntarily given free from threats, coercion, or offers of reward. Cox v. State, 586 So. 2d 761, 763 (Miss.1991).

reasonable basis for inferring that a suspect has *voluntarily* changed his mind. [cites omitted] **Third, new and adequate *Miranda* warning must be given** [emphasis added]. Id. at 700-01 See also, Barnes v. State, 854 So. 2d 1 (Miss. App. 2003).

Applying the requirements from Jones, supra, to the record in the case at bar, it is clear that:

1. Walton invoked his right not speak which ended the first interview. [T. 15, 26]

2. Although disputed by Walton, there was at least an arguably reasonable basis for Det. Gomien to re-instigate the interrogation. [T.9-10]

3. Approximately ten to fifteen minutes had transpired between the two interviews. [T.9, 28]

4. No new Miranda warnings were given in the second interview. [T.28, 44]

The fact that the first interview stopped and no new Miranda warnings were given could be the *sine qua non* of the appellant's argument up to this point. There is no need to even address whether Gomien had the right to re-question, and there is no need to address whether 10 to 15 minutes is a sufficient cooling off period. In Barnes v. State, 854 So. 2d 1, 3 (MS App. 2003), the period was about 85 minutes; in Griffin v. State, 504 So. 2d186, 195 (MS 1987), it was an hour.

The Jones court stated succinctly that "any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise." 461 So. 2d at 699. If a statement is a product of compulsion, it is not voluntary, and fails the two part requirement for admission into evidence. Id. at 696; see

also Cox v. State, 586 So. 2d 761, 763 (Miss.1991). The Jones court reversed the conviction there, and the same result is required here.

Further examination of the totality of the circumstances of Walton's interrogations only strengthens the appellant's position as the record reveals a coercive environment much worse than in Jones. Here there were threats of the death penalty using phrasing which included "stick the needle up your arm" with offers of reward for cooperation. [T. 39-40, 81, 392-93] According to Det. Gomien, Agent Hickson told Walton if he didn't help himself, he was going to Mississippi and get the death penalty and a needle shoved in his arm. [T. 39-40, 392-93] Det. Gomien admitted using and "feeding off" the hostile first interview in the second interview [T. 26, 39, 45, 47]

In Abram v. State, 606 So. 2d 1015, 1031 (MS 1992), the court said:

> "We have repeatedly condemned the practice whereby law enforcement interrogators, or related third parties, convey to suspects the impression, however slight, that cooperation by the suspect might be of some benefit." See also, Robinson v. State, 157 So. 2d 49, 51 (1963) and Layne v. State, 542 So. 2d 237, 240 (MS 1989)

In Abram, the Supreme Court reversed based on a confession induced by the defendant being "confronted with the possibility of mercy or the death penalty" by the sheriff and was given the impression that a confession to a murder would "work to his advantage" and was coaxed to consider the "religious consequences of his actions" and told "that the law would cooperate with Abram if Abram cooperated with the law", plus was reassured

that "it would look better" if he cooperated. 606 So. 2d at 1031. Does this not sound exactly like what Gomien tells Walton when he says on the video, that things would appear better for Walton when Gomien testifies, if Walton would just tell what "really happened" consistent with what the co-defendants were saying? [Ex. 25]

In reversing, the Abrams court also stated:

> A confession made after the accused has been offered some hope of reward if he will confess or tell the truth cannot be said to be voluntary.
>
> * * *
>
> [T]he plain fact is that Abram was given hope of leniency, and was confronted with the legal and religious consequences of his refusal to cooperate."

In Abram, the sheriff, who was crucial in these communications was not called to testify under Agee v. State, 185 So. 2d 671 (Miss.1966). Here, Hickson did not testify.

In Miller v. State, 243 So. 2d 558 (Miss.1971), the court ruled a confession involuntary and inadmissible because the defendant was induced by prodding from the sheriff that the defendant would be better off by telling the truth. 243 So. 2d at 559; see also, Robinson v. State, 157 So. 2d 49, 51 (1963).

For Walton here, the implied benefit from confessing was that if you confess you won't get the death penalty. It is both a threat and a promise of leniency. In the second interview with Gomien there's talk of Gomien's testimony at trial being more favorable if Walton told the truth, and Gomien caps his interview with prompts of doing the right

thing from a religious standpoint and references to God [Ex. 25] It was admitted that Walton was definitely in custody and being questioned about a crime and that if threats of the death penalty were used to induce a confession that it would have been improper. [T. 17-19].

The state cannot argue that Walton made his "confession" without any solicitation. Walton's inculpatory statements did not come until late in the second interview following questioning and further interview techniques used by Gomien. Under the totality of circumstances, since there was no cooling off period, the threats and tricks from the first interview were still taking its effects on Walton. Plus, Gomien intentionally "fed off" the first interview in the second. [T. 26, 39, 45, 47] Recall too that Walton was handcuffed during the second interview but not the first [T. 46]

Nor is this a situation as in Taylor v. State, 789 So. 2d 787, 793-94 (MS 2001), where there is a brief pause in questioning requiring no new Miranda warning. Here the custodial interrogation was clearly terminated following an invocation of the privilege. [T. 8-10, 14, 31, 377-78]. The officers left the room, or otherwise went about their business, and the defendant was being escorted back to his cell. Id.

In Miranda v. Arizona, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the court recognized the definition of "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."

As the video tape [Ex. 25] here shows, even though Walton indicated he wanted to talk to Gomien, his confession did not come until well into the second custodial interview. Walton initially asserts his non-involvement in the killing of Anderson; then he says he was there and that Pinkney shot Anderson, and then after about 30 to 40 minutes of interrogation he implicates himself as the shooter and that the victim pulled a gun during a drug transaction disagreement.

The recommencing of the interrogation of Walton was something that Officer Gomien surely expected to elicit an incriminating response as he advises Walton that there is already evidence against him and that Gomien does not believe Walton, and actually tells Walton that Gomien thinks Walton was the shooter. See, e. g. Snow v. State, 800 So. 2d 472, 497-98 (MS 2001), citing Rhode Island v. Innis , 446 U. S. 291, 301, 100 S. Ct. 1682, 1690, 64 L. Ed 297 (1980).

In Snow, the defendant was handcuffed in the back seat of a patrol car, naked, when he voluntarily said "What are they going to do to me for this?" The officer responded with a Miranda warning and said, "[s]hooting those deputies sure was a stupid thing for you to do", and the defendant responded, "[i]t sure was." 800 So. 2d at 496-97 Ultimately, the court determined that even though Snow blurted out his first question, both the question and response to the officer's investigative question, were both voluntary under the circumstances because of the Miranda warning and Snow's familiarity with law enforcement. Id.

The facts here are quite different from Snow. In the second interview, Walton did not blurt anything out; rather, he initially stood by his position that somebody else shot Anderson, not him.

Another circumstance in the totality for consideration here is that DEA Agent Hickson refused to appear to testify, and being a federal agent, advised that he would not honor a subpoena. So, the state's requirement to produce all witnesses under Agee v. State, 185 So. 2d 671 (Miss.1966) to testify and establish voluntariness was not met. Even though Hickson was not present during the second interview he is relevant because Gomien used the effects of the first interview in the second interview. [T. 26, 39, 45, 47]

Finally, the error here is not harmless. Each of the state's key witnesses were substantially impeached on material issues. Additionally, the state's witnesses contradicted themselves about several important events and the conviction was based, otherwise, totally on the conflicting testimony of co-defendants, who by the way were all related as cousins. [T.252, 273]. Jones v. State, 368 So. 2d 1265, 1270 (MS 1979) . Moreover, there was evidence that Michael Love, Pinkney and Street, while in custody, had the opportunity to fabricate a story implicating Walton. [T.330-36, Exs. 13, 14]. In other words, without Walton's confession there was sufficient fuel for reasonable doubt.

ISSUE NO. 2: WHETHER WALTON'S TRIAL COUNSEL WAS INEFFECTIVE BY NOT SEEKING A JURY INSTRUCTION FOR THE LESSER INCLUDED OFFENSE OF MANSLAUGHTER?

It is clear from the video tape of the second interview [Ex. 25] that Walton told Det. Gomien that Walton shot Anderson in a drug transaction gone awry. Walton describes for Gomien how the victim drew a gun and that Walton shot out of fear and self-defense. [Ex. 25].

Under this scenario, there was a factual basis for a manslaughter instruction, either under MCA §97-3-27 (1972)[4] or MCA §97-3-35 (1972). [5] "If there is any evidence which would support a conviction of manslaughter, an instruction on manslaughter should be given." Graham v. State, 582 So. 2d 1014, 1018 (MS 1991).

In Dabney v. State, 717 So. 2d 733, 738 (MS 1998), Dabney and a co-defendant, Jason Phalo, were tried together in a murder case and both were convicted. Phalo claimed on appeal that since most of the evidence pointed to Dabney as the actual shooter that he was entitled to a manslaughter instruction under MCA §97-3-27, and the court

---

4

MCA §97-3-27 (1972): The killing of a human being without malice, by the act, procurement, or culpable negligence of another, while such other is engaged in the perpetration of any felony, except those felonies enumerated in Section 97-3-19(2)(e) and (f), or while such other is attempting to commit any felony besides such as are above the enumerated and excepted, shall be manslaughter.

5

MCA §97-3-35 (1972): 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.

agreed citing Manuel v. State, 667 So. 2d 590, 593 (Miss.1995), where it was stated:

> In homicide cases, the trial court should instruct the jury about a defendant's theories of defense, justification, or excuse that are supported by the evidence, no matter how meager or unlikely, and the trial court's failure to do so is error requiring reversal of a judgment of conviction. [cite omitted]. (See also, Butler v. State, 608 So. 2d 314, 320 (MS 1992)).

Concerning MCA §97-3-35 (1972), in Roberts v. State, 458 So. 2d 719, 720 (Miss.1984), the Court said that the defendant's statement "I didn't mean to do it baby" was a sufficient basis for a heat of passion manslaughter instruction. The law of what is manslaughter in Mississippi has been consistently characterized as "liberal" and the courts have made "considerable allowance for the frailties of human passion." Windham v. State, 520 So. 2d 123, 127 (MS 1988).

In Williams v. State, 729 So. 2d 1181,1186 (MS 1998),where the defendant had joined with several other defendants in the beating death of the victim for no apparent reason, the court pointed out that a heat of passion manslaughter instruction was required there because the record, as here, contained sufficient evidence from which "the jury could infer that Williams acted on impulse or in the heat of the moment." See also Wells v. State, 305 So. 2d 333 (MS 1975), and Clemens v. State, 473 So. 2d 943 (MS 1985).

It is well established that:

> [A] lesser included offense instruction should be granted unless the trial judge -- and ultimately this Court -- can say, taking the evidence in the light most favorable to the accused, and considering all reasonable favorable inferences which

> may be drawn in favor of the accused from the evidence, that no reasonable jury could find the defendant guilty of the lesser included offense (and conversely not guilty of at least one essential element of the principal charge). Graham v. State, 582 So. 2d 1014, 1017 (MS 1991), citing Gates v. State, 484 So. 2d 1002, 1004 (MS 1986).

Therefore, Walton would have been entitled to a manslaughter instruction. Failure to seek proper jury instructions is a fundamental right effecting a defendant's constitutional right to a fair trial, as a defendant is entitled to have the jury fully and properly instructed on theories of defense for which there is a factual basis in evidence. Green v. State, 884 So. 2d 733, 735-38 (MS 2004).

In Madison v. State , 932 So. 2d 252, 255 (MS App. 2006), the court reiterated:

> [the Supreme] Court applies the two-part test from Strickland v. Washington, 466 U.S. 668 (1984), to claims of ineffective assistance of counsel. McQuarter v. State, 574 So. 2d 685, 687 (Miss. 1990). Under Strickland, the defendant bears the burden of proof to show that (1) counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense. Id. There is a strong but rebuttable presumption that counsel's performance fell within the wide range of reasonable professional assistance. Id. This presumption may be rebutted with a showing that, but for counsel's deficient performance, a different result would have occurred. Leatherwood v. State, 473 So. 2d 964, 968 (Miss. 1985). This Court examines the totality of the circumstances in determining whether counsel was effective. Id.

If the issue of ineffective assistance of counsel is raised, as is here, on direct appeal the court will look to whether:

> (a) . . . the record affirmatively shows ineffectiveness of constitutional dimensions, or (b) the parties stipulate that the record is adequate and the

> Court determines that findings of fact by a trial judge able to consider the demeanor of witnesses, etc. are not needed. Id.

The appellant hereby stipulates through present counsel that the record is adequate for this court to determine this issue and that a finding of fact by the trial judge is not needed.

The prejudice to Walton under the Strickland test was that the jury was simply not given the opportunity to consider the lesser offense of manslaughter. It is also important to note that Jury Instruction S-1 [R. 114] included both deliberate design murder plus depraved heart murder which does not require any intent to kill[6]; therefore, there is no way to know which prosecution theory the jury here based its verdict. Since the state saw fit to include a lack of intent murder option for the jury, then the state's position cannot change here to say that there was no factual basis for a homicide *sans* deliberate design. The fair result would be a new trial. Havard v. State, 928 So. 2d 771, 789-90 (MS 2006).

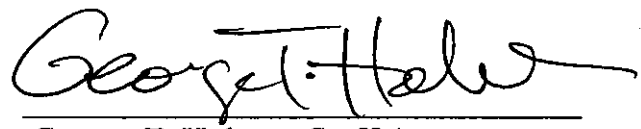
6

MCA § 97-3-19(1)The killing of a human being without the authority of law by any means or in any manner shall be murder in the following cases:(a) when done with deliberate design to effect the death of the person killed, or of any human being; and (b) when done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual.

CONCLUSION

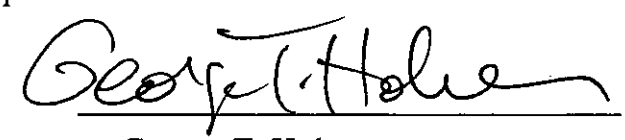
Desmond Walton is entitled to have his murder conviction reversed with remand for a new trial.

Respectfully submitted,
MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Desmond Walton, Appellant

By: 
George T. Holmes, Staff Attorney

CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 2nd day of February, 2007, mailed a true and correct copy of the above and foregoing Brief Of Appellant to Hon. Robert B. Helfrich, Circuit Judge, P. O. Box 309, Hattiesburg MS 39403, and to Hon. John Mark Weathers, Asst. D. A. , P. O. Box 166, Hattiesburg MS 39043, and to Hon. Charles Maris, Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid.


George T. Holmes

MISSISSIPPI OFFICE OF INDIGENT APPEALS
George T. Holmes, MSB No. [redacted]
Jenna Koger, Legal Intern
Billy G. Burk, Legal Intern
301 N. Lamar St., Ste 210
Jackson MS 39201
601 576-4200