IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2006-KA-01612-COA

BRADFORD STATEN — APPELLANT

VS.

STATE OF MISSISSIPPI — APPELLEE

APPEAL FROM THE CIRCUIT COURT OF GRENADA COUNTY

BRIEF OF THE APPELLANT
BRADFORD STATEN

Oral Argument Is Not Requested

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I. 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.

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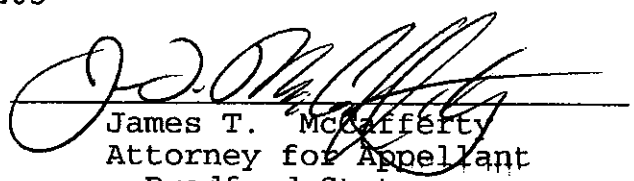

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II. TABLE OF CONTENTS

III. TABLE OF AUTHORITIES

CASES:

RULES, RULES, STATUTES and CONSTITUTIONAL PROVISIONS:

NOTE: Copies of the above rules, statutes, and constitutional provisions are appended to this brief.

IV. STATEMENT OF THE ISSUES

A. THE JURY VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE

B. TRIAL COURT ERRED IN DENYING THE MOTION FOR PSYCHIATRIC EVALUATION

C. THE PHOTOGRAPHIC EVIDENCE ADMITTED WAS CUMULATIVE, INFLAMMATORY, AND UNNECESSARY

D. TRIAL COURT ERRED IN GIVING INSTRUCTIONS S-2 and S-4

E. TRIAL COURT ERRED IN DENYING APPELLANT'S PROFFERED INSTRUCTIONS

F. THE COURT ERRED IN FAILING TO GIVE AN ACCIDENT INSTRUCTION

G. THE COURT ERRED IN FAILING TO GRANT A DIRECTED VERDICT AT THE CLOSE OF THE STATE'S CASE AS TO DELIBERATE DESIGN MURDER AND PERMITTING STATE TO PROCEED UNDER A THEORY OF DEPRAVED HEART MURDER.

H. APPELLANT WAS DENIED ADEQUATE ASSISTANT OF COUNSEL

I. CUMULATIVE ERROR REQUIRES REVERSAL

J. THE COURT'S SENTENCE WAS GROSSLY DISPROPORTIONAL AND UNCONSTITUTIONAL AND IMPROPER ON THE EVIDENCE

V. STATEMENT OF THE CASE

A. PROCEEDINGS BELOW.

Appellant Bradford Staten [Staten] was indicted 1 July 2005 by a Grenada County Grand Jury for the murder of his wife, Angela Fleming Staten, with malice aforethought in violation of Miss. Code Ann. § 97-3-19. CP 6, RE 17. Staten was tried August 1-3, 2006 [T 1], convicted [CP 201, RE 13], and sentenced to life in the state penitentiary. CP 214, RE 15. He appeals that conviction and sentence. CP 239.

B. FACTS OF THE CASE.

Shortly after 6:30 p.m., May 28, 2005, 911 dispatcher Susan Russo received a call from Bradford Staten frantically requesting help for his wife, Angela. T 198-201. Bradford reported that his Angela had fallen, had hit her head against a door, and was unconscious. T 201. The emergency operations center dispatched an ambulance and EMTs. T 205. Bradford, following instructions from Russo, sought to administer CPR, but with no apparent success. T 206-208.

The ambulance arrived on the scene about 6:55. T 217. Emergency Medical Technician [EMT] Scott Alexander entered the Staten home and found Bradford alone with Angela and their 2 1/1 month old twin boys. T 222.

Angela was lying on the floor of the couple's bedroom, head toward the door, feet toward the bed. T 223. There was blood on the frame of the bedroom door. T 238. Alexander observed

injuries to Angela's hips, outer thighs, face, lip, head, and elbow. T 231. Angela was also pulseless, not breathing, and cold to the touch. T 219-220. EMT Alexander's monitor showed no electrical activity in Angela's heart. T 220. Alexander began emergency resuscitation measures. T 220, T 228, T 229. Bradford pled with Alexander to help his wife.[1]

While Alexander was treating Angela, Deputies Ratliff and Latham arrived. T 244. Alexander was able to restore Angela's vital signs, and he transported her to Grenada Lake Medical Center. T 229. Angela died at the hospital that night. T 229.

On May 31, 2005, Dr. Steven Hayne, a pathologist, performed an autopsy on the body of Angela Staten. T 158. Dr. Hayne classified the death as a homicide. T 60. He determined that the 32-year-old [T 159] woman had "multiple injuries suffered at or about the time of death," [T 164] but that she had died of a closed head injury (*i. e.*, no skull fracture [T 188]) and internal bleeding [T 185] in the neck "suggestive of manual strangulation (i e., strangulation by hand rather than by a rope or other instrument)." T 189.

Dr. Hayne admitted that Angela's body did not show signs of death by strangulation. T 192. He also admitted that Angela's brain injury could have been caused by a single blow or from a fall, [T 194] and that injuries to Angela's body were consistent with those inflicted by someone overcome with "extreme emotion," or

---

[1]At a pre-trial hearing, Alexander testified that Bradford "started out [saying] 'Help her. Help her.' And then it went to 'Please help her.'" T 44. By the time of trial, Alexander changed his story, saying that, instead of "Help her," Bradford was saying, "Help me; help me." T 221.

passion. T 188. State senior crime scene analyst, Grant Graham, said that the blood evidence at the scene of Angela's injuries was consistent with a fight or struggle of some kind. T 381.

Bradford was convicted [CP 201, RE 13] and sentenced to life in the state penitentiary. CP 214, RE 15. It is from that conviction and sentence that he now appeals. CP 239.

VI. SUMMARY OF THE ARGUMENT

A. THE JURY VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

State pathologist Hayne testified that Angela died from a closed head injury and internal bleeding in the neck "suggestive of manual strangulation." On cross-examination he admitted that he could not say which occurred first, and that Angela's body did not have the signs that accompany a death by strangulation. Clearly, the head injury caused her death. Dr. Hayne testified that the head injury could have been caused by a single blow or from a fall. Evidence indicated that is just what happened. It cannot be said that a preponderance of the evidence supports the theory that Bradford caused Angela's death.

The state also failed to prove "deliberate design" or that Bradford committed an act "eminently dangerous to others and evincing a depraved heart . . . ." There was only evidence of an altercation in the house.

Absent evidence of deliberate design, the state had to prove depraved heart murder. It did not. Bradford's actions in calling 911 and his dealings with the emergency response personnel

indicated a desire to save his wife and to provide aid to her and were not consistent with a "depraved heart" theory of the case.

B. TRIAL COURT ERRED IN DENYING THE MOTION FOR PSYCHIATRIC EVALUATION.

The court denied counsel's motion for a psychiatric evaluation, despite counsels' opinion evidence that Bradford needed such an examination. Mississippi law says defense counsel is in the best position to know whether or not the defendant is mentally competent to stand trial. The court erred in denying the motion.

C. THE PHOTOGRAPHIC EVIDENCE ADMITTED WAS CUMULATIVE, INFLAMMATORY, AND UNNECESSARY.

Cumulative photographic evidence was placed before the jury. While some of these photographs may well have had some probative value, the cumulative nature of the photographs could not but have had a prejudicial effect on the jury. The numerous photos, particularly of bloodstains, did not connect defendant with the homicide but served only to give the appearance of a mountain of evidence.

D. TRIAL COURT ERRED IN GIVING INSTRUCTIONS S-2 and S-4.

Over the objection of the Defendant's counsel, the trial court granted State's "lesser included offense" instruction S-2 that erroneously assumed jurors understood the legal significance of the terms "lesser included offense" and "elements." S-2 overemphasized a particular aspect of the case and was wordy. Instruction S-4 only added to the confusion of S-2. It said that the "lesser included offense" option was not to "relieve you from the performance of an unpleasant duty," which rendered it impermissibly argumentative.

E. TRIAL COURT ERRED IN DENYING APPELLANT'S PROFFERED INSTRUCTIONS.

Where there is even a scintilla of evidence supporting a defendant's theory of the case, an instruction on that theory must be granted. Defendant is entitled to it "no matter how meager [the evidence] or unlikely" the theory is. *See Manuel v. State*, 667 So. 2d 590, 593 (Miss. 1995).

1. The Trial Court Erred in Denying a Heat of Passion Instruction.

In this case there existed at least a scintilla of evidence to support Defendant's theory of the case. Yet, the trial court denied Bradford's proffered instructions [D-2 and D-12] concerning a heat of passion/manslaughter theory.

2. The Trial Court Erred in Denying Appellant's Other Instructions.

a. D-7.

The Court also refused defense instruction D-7 as a "comment on the evidence." D-7 did not suggest to the jury how facts should be decided, effectively tell the jury to disregard certain evidence, or assume certain facts to be true. Moreover, it used the introductory words, "[i]f you find from the evidence," which eliminated any "comment" objection. It should have been granted.

c. D-13.

Instruction D-13 [CP 199] would have explained to the jury what it must find in order to convict Bradford Staten of "depraved heart" murder. Denial of this instruction was especially egregious given the erosion in this state of the distinction between "depraved heart" murder and culpable negligence manslaughter.

d. D-14.

Instruction D-14 (on culpable negligence) was erroneously refused as "already given." CP 200. In view of the now fine line between manslaughter and depraved heart murder, D-14 and D-13 were needed.

e. Other Instructions.

The Court also refused other instructions that should have been granted.

F. THE COURT ERRED IN FAILING TO GIVE AN ACCIDENT INSTRUCTION.

The Court recognized that an accident instruction was warranted under the evidence. T 387. Even though he subsequently said otherwise, [T 418] nothing had changed evidentially. Plainly, an accident instruction was warranted on the evidence and the court had an obligation to see that one was given.

G. THE COURT ERRED IN FAILING TO GRANT A DIRECTED VERDICT AT THE CLOSE OF THE STATE'S CASE AS TO DELIBERATE DESIGN MURDER AND PERMITTING STATE TO PROCEED UNDER A THEORY OF DEPRAVED HEART MURDER.

The court denied defendant's motion for a directed verdict and gave a depraved heart murder instruction, despite the fact that the indictment specified "deliberate design" murder. As a result, the defendant was convicted on the basis of facts [*i. e.*, depraved heart] not known to have been found by, and perhaps not even presented to, the grand jury which indicted him, and was subjected to "trial by ambush." Defendant was prepared to defend upon an indictment of deliberate design murder, yet was tried on a theory of depraved heart murder. He thereby was effectively prevented from presenting an adequate defense on that charge to the jury.

H. APPELLANT WAS DENIED ADEQUATE ASSISTANT OF COUNSEL.

Counsels' representation of Bradford was inadequate and ineffective under the standards of *Strickland v. Washington*, 466 U. S. 668 (1984), and *Leatherwood v. State*, 473 So. 2d 964, 968 (Miss. 1985).

I. CUMULATIVE ERROR REQUIRES REVERSAL.

Even if not reversible error in and of themselves, the foregoing errors, taken together, amount to cumulative, prejudicial error requiring reversal in this case.

J. THE COURT'S SENTENCE WAS GROSSLY DISPROPORTIONAL AND UNCONSTITUTIONAL AND IMPROPER ON THE EVIDENCE.

Under the circumstances of this case, life imprisonment, without the possibility of parole, under the circumstances, is unduly harsh. At minimum, the sentence should be reversed and this case remanded for resentencing.

VII. ARGUMENT

A. THE JURY VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

1. Standard of Review.

It is an ancient principle of law in Mississippi jurisprudence that, while a verdict of a jury should not be lightly set aside, a conviction cannot be permitted to stand where the verdict is clearly not supported by evidence. *Allen v. State*, 1 Miss. Dec . 126 (1885); *Conner v. State*, 632 So. 2d 1239 (Miss.), *cert. denied*, 115 S. Ct. 314, 130 L. Ed. 276 (1993). Moreover, the state must make its case to a moral certainty. An accused need only raise reasonable doubt of guilt to be entitled to an acquittal. *Cumberland v. State*, 110 Miss. 521, 531, 70 So. 695, 696 (1915). Where the evidence is such that on one or more elements of the offense charged no reasonable hypothetical juror could have resolved the issue against the defendant beyond a reasonable doubt, the Supreme Court has no authority to affirm and must order the defendant discharged. *Bullock v. State*, 447 So. 2d 1284, 1287 (Miss. 1984).

The evidence before the jury in this case was purely circumstantial. In such cases, Mississippi law requires a jury, as a prerequisite to returning a verdict of guilty, to find for the state on each element of the crime to the exclusion of every reasonable hypothesis consistent with innocence. *Brown v. State*, 556 So. 2d 338, 340 (Miss. 1990).

Applying those rules, the verdict below must be overturned. A murder conviction in this case had to be based upon a jury

finding that Bradford (1) caused Angela's death (2) with deliberate design or (3) while committing 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 . . . ." Miss. Code Ann. § 97-3-19. A review of the record indicates that no "decided preponderance of the evidence" supports either of those theories.

2. There Was Insufficient Evidence That Bradford Caused Angela's Death.

There was no decided preponderance of evidence that Bradford caused Angela's death. The evidence, in fact, was to the contrary. Dr. Steven Timothy Hayne, a physician and Chief Pathologist for the State of Mississippi, [T 156] testified that, while his autopsy of Angela's body revealed multiple injuries suffered at or about the time of death," [T 164] she did not die from those injuries in general. Rather, Dr. Hayne initially identified the actual cause of death as a closed head injury [T 188] and internal bleeding [T 185] in the neck "suggestive of manual strangulation." T 189. On cross-examination, however, Dr. Hayne admitted that he could not say which occurred first. T 189. More telling, he also said that his autopsy did not discover on Angela's body the signs that accompany a death by strangulation:

> Q. Now what do you call that thing that happens to somebody's eyes when they are manually strangulated? That pinpoint?
>
> Q. It is called Tardieu spots or it's a word coined after the French pathologist of the late 19th

Centry (*sic*), Henry Tardieu, and they are actually just petechiae.

Q. Petechiae, that's right. And you didn't observe that in this case, did you?

Q. I did not see that, Counselor, nor did I see it at other sites where you may see it in strangulation, dura hemorrhages in the brain which is named after Dr. Durae, again as petechiae. Nor did I see them on the surface of the lungs or heart.

T 192-93.

Although Dr. Hayne continued to maintain that there were two causes of death, [T 193] it is plain from his own admissions concerning the absence of "petechiae" that Angela's head injury had to have been the cause of her death.

The only person present when Angela sustained her head injury was Bradford. He told both the 911 operator and Deputy Eubanks that Angela fell and hit her head on the door. T 201, T 255. Dr. Hayne testified that Angela's brain injury could have been caused by a single blow or from a fall. T 194. A streak of blood on the bedroom door established that Angela did in fact come in contact with a door, [T 238] just as Bradford said.

Bradford and Angela may well have engaged in a protracted struggle, as suggested by Deputy Sheriff Eubanks, [T 301] in which Angela received multiple injuries. The proof establishes, though, that those multiple injuries did not kill Angela. A blow to the head caused her death. Bradford accounted for that blow to the

head in his 911 call. On the scene evidence and autopsy evidence agreed with that account. Under the circumstances, it cannot be said that a preponderance of the evidence supports the theory that Bradford caused Angela's death. This case must be reversed. *Brown v. State*, 556 So. 2d 338, 340 (Miss. 1990).

3. There Was Insufficient Evidence of Deliberate Design.

Even if Bradford inflicted the injury or injuries that killed Angela, the state failed to prove "deliberate design" or that Bradford committed 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 . . . ." Miss. Code Ann. § 97-3-19.

"Deliberate design" means the same thing as "premeditated design" and "malice aforethought." *Tran v. State*, 681 So. 2d 514 (Miss. 1996). There was no evidence of any such premeditated intent on the part of Bradford Staten to kill Angela.

At most, there was evidence of a "violent altercation all over the house." T 301. There is no evidence that any "deliberate design," "premeditated design," or "malice aforethought" was involved in such an altercation at all. In fact, the state's own witness, pathologist Dr. Hayne, who performed the autopsy, testified that "multiple injuries" of the type sustained by Angela are "usually associated with extreme emotion," or passion, [T 192] quite the opposite of premeditation or deliberate design.

4. There Was Insufficient Evidence of a "Depraved Heart" on Bradford's Part.

Absent evidence of deliberate design, the state, in order to secure a conviction in this case, was required to prove Bradford killed Angela while committing 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 . . . ." Miss. Code Ann. § 97-3-19. There was no evidence before the jury supporting such a finding.

It is essential to note that the statute requires a finding that the act was "eminently dangerous to others" *and* that it evinces "a depraved heart, regardless of human life." Even assuming that Angela's nonlethal "multiple injuries" [T 164] were all inflicted by Bradford, there is no evidence that Bradford was engaged in a "depraved heart" type act when Angela sustained the injury(ies) that killed her. The evidence from Bradford and the Staten home indicates that Angela fell and hit her head on the door. T 201, T 255, T 238. The State's own expert, Dr. Hayne, gave evidence consistent with that scenario. T 194.

Bradford's actions in calling 911 and his dealings with the emergency response personnel certainly did not evidence a "depraved heart . . . regardless of human life."

In *Tait v. State*, 669 So. 2d 85 (Miss. 1996), the appellant had cocked and pointed a gun at the head of a friend. The gun discharged, killing the friend. The evidence showed that after the shooting, Tait fell to the ground, cried, and said, "I killed him. Oh, my God, I killed him. I shot him." Although Tait failed

to offer any manslaughter instruction, the court gave a heat of passion manslaughter instruction. The jury convicted Tait of depraved heart murder.

On appeal, the Court found that the evidence did not support a conviction for murder "because Tait's conduct of falling to the ground and crying following the shooting could be considered as consistent with an accident." ¶ 19. The Court reversed and remanded the case for sentencing for culpable negligence manslaughter.[2]

Similarly, Bradford's behavior after Angela's injuries indicated no intent to kill. He called 911 and seemed very much concerned that his wife be saved. "Please tell me they are on the way," he pleaded to the 911 operator. T 206. He also called to his wife while talking to the operator. T 205. At the pre-trial sanity hearing, paramedic Alexander testified that Bradford begged him to "Help her. Help her," and to "[p]lease help her." T 44. Those are not the acts of someone who has attempted murder from premeditation or deliberate design. At minimum, this case should be remanded for resentencing as a manslaughter case.

B. TRIAL COURT ERRED IN DENYING THE MOTION FOR PSYCHIATRIC EVALUATION.

Prior to trial defense counsel moved the court to order a psychiatric evaluation for Bradford. CP 24. The court held an evidentiary hearing on that motion on August 22, 2005. T 8. At the conclusion of that hearing, the court denied the motion.

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[2]Even though Tait had not requested such an instruction.

With due respect to the court below, Appellant contends it erred in that regard.

In *Howard v. State*, 701 So. 2d 274 (Miss. 1997), the Supreme Court was confronted with a situation in which a trial court, without benefit of a psychological evaluation, permitted a defendant to waive his right to counsel. A motion for mental examination had been made by counsel but never called for hearing.

In its review, the Supreme Court said that the test of competency to stand trial mandates that a defendant be one

> (1) who is able to perceive and understand the nature of the proceedings; (2) who is able to rationally communicate with his attorney about the case; (3) who is able to recall relevant facts; (4) who is able to testify in his own defense if appropriate; and (5) whose ability to satisfy the foregoing criteria is commensurate with the severity and complexity of the case.

Howard, at 280-81.

The Court also said a defendant's "counsel is in the best position to know whether or not the defendant is mentally capable" of making decisions concerning his defense. *Howard*, at 280-81.

The evidence showed that Bradford did not meet criteria one through three above. Staten's mother (Ada) testified that her son's mental conditioned had deteriorated since his arrest. She said he could not remember names of friends or even his parents' telephone number, a number that had been his parents' number all his life. His expression was blank and he was withdrawn. T 12. Not only did Bradford seem unresponsive, at times he seemed without understanding and incapable of communicating. T 13.

One of Bradford's lawyers filed an affidavit in which he stated that he didn't believe Bradford understood the charges

against him, that he didn't think Bradford could assist in his own defense, and that he believed Bradford was incompetent to stand trial. T 23, CP 43. Bradford's other attorney took the witness stand at the hearing and confirmed much of what his co-counsel and Staten's mother had said. The testifying counsel told the Court Staten was unresponsive to questions, did not seem to be able to relate events in an orderly fashion, and was unfocused and rambling. T 25. Staten even had difficulty providing his counsel with the name of his own father. T 26. Counsel's conclusion was that his client needed evaluating. T 26.

The fact that Bradford did not testify in his own defense suggests that his counsel did not believe Bradford met criterion *Howard* four, either. Since it may well be that such testimony could have supplied the additional evidence the trial court thought necessary to support the "heat of passion" instruction discussed below, it cannot be said that his failure to be mentally evaluated was not prejudicial.

Finally, since this was a murder case, the matter could not have been more serious. Under *Howard* criterion five, the trial court's evaluation of the other factors should be reviewed by this Court with that seriousness in mind.

The testimony of Bradford's mother and the affidavit and testimony of his two lawyers, when objectively considered, should "reasonably have raised a doubt about defendant's competency to stand trial." *Howard v. State*, 701 So. 2d 274, 280-81 (Miss. 1997); *Conner v. State*, 632 So. 2d 1239 (Miss. 1993); Uniform Rules of Circuit and County Court Practice, Rule 9.07 (May 1,

1995). While the trial court correctly ordered a competency hearing, it is hard to understand how that hearing could have been meaningful without the ordering of a mental examination.

Trial counsel, being in the best position to understand Bradford's mental condition, both believed a mental examination was needed. The trial court's failure to order the requested mental evaluation constituted prejudicial, reversible error.

C. THE PHOTOGRAPHIC EVIDENCE ADMITTED WAS CUMULATIVE, INFLAMMATORY, AND UNNECESSARY.

Cumulative photographic evidence was placed before the jury. While some of these photographs may well have had some probative value, the cumulative nature of the photographs could not but have had a prejudicial effect on the jury.

In numerous instances, multiple photographs were admitted that repeatedly depicted essentially the same evidence. For instance, exhibits 16, 19, 21, 22, 23 were all photographs of blood on a door. Exhibits 26 and 28 were merely different angles of bloodstains on a door and pillow. Exhibits 48 and 49 were both photos of the same bedding and bloodstained pillow. The same rubber crutch tip was shown in Exhibits 52, 53, and 54. Exhibits 76 and 82 depicted the same facial injuries. Photographs that are gruesome or inflammatory or that lack an evidentiary purpose are inadmissible as evidence. *McNeal v. State*, 551 So. 2d 151, 159 (Miss. 1989).

Approximately 80 photographs were placed before the jury in an obvious effort to inflame its members and give the appearance of a

mountain of evidence. Most of the photos were not probative of guilt, since they neither connected movant to the scene,[3] nor were they necessary to prove the death of the victims or manner of death. Their prejudicial effect far outweighed their probative value. They served only to inflame the jury against movant. Their admission into evidence deprived movant of his right to a fair and impartial jury. This case should be reversed for that reason alone.

D. TRIAL COURT ERRED IN GIVING INSTRUCTIONS S-2 and S-4.

Over the objection of the Defendant's counsel, the trial court granted State's Instructions S-2 and S-4.

S-2 was a "lesser included offense" instruction advising the jury

> that if you find the State has failed to prove beyond a reasonable doubt and to the exclusion of every reasonable hypothesis consistent with innocence any one of the elements of the crime of Murder, . . . you will then proceed . . . to decide whether the State has proved . . . the *lesser* crime of culpable negligence manslaughter (emphasis added)."

CP 180.

While manslaughter, in comparison with murder, is certainly a "lesser crime," a jury, being composed of persons not trained in law, probably has little understanding of exactly what that means. Since the term "lesser" is not one of the elements of manslaughter, its inclusion in the instruction could not have assisted the jury

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[3]Consider that there was no fingerprint or similar evidence in the huge pile of photos admitted.

in reaching its verdict. Moreover, S-2 could likely have led the jury to believe that manslaughter was not a serious crime, relatively speaking. Consequently, S-2 could well have led the jury to convict of murder when a manslaughter verdict was warranted.

The use of the term "lesser" also amounted to an overemphasis on a particular aspect of the case and was, in effect, a comment on the evidence that should not have been permitted. It amounted to an undue emphasis on the law of the case. *Gandy v. State*, 355 So. 2d 1096 (Miss. 1978).

Moreover, the instruction was far too wordy and confusing. In addition to the language quoted above, it instructed the jury that

> the killing of a human being without deliberate design or without a depraved heart regardless of human life is manslaughter. The Court instructs the jury in this case that if you believe from the evidence in this case beyond a reasonable doubt and to the exclusion of every reasonable hypothesis consistent with innocence that the defendant, Bradford Staten, did cause the death of Angela Fleming Staten without deliberate design, or without a depraved heart regardless of human life by such culpably negligent conduct that exhibited or manifested a wanton or reckless disregard for the safety of human life, or such an indifference to the consequences of his acts under the surrounding circumstances as to render his conduct tantamount to wilfulness in causing the death of Angela Fleming Staten, then you shall find the defendant guilty of Manslaughter by culpable negligence.

The repetition of the elements of the crime of murder in immediate proximity to the elements of manslaughter could only have caused confusion with a jury, particularly given the similarity of the "depraved heart" element of murder and "the wanton or reckless

disregard" element of manslaughter[4]. Consequently, Instruction S-2 was so misleading and confusing that the giving of that instruction constituted reversible error. *Sudduth v. State*, 562 So. 2d 67, 72 (Miss. 1990) (inaccurate and confusing instruction can constitute reversible error); *Scott v. State*, 446 So. 2d 580 (Miss. 1984) (instruction that could be read to mean that every killing is either murder or manslaughter should not be given).

Instruction S-4 only added to the confusion of S-2. It said:

> [t]he Court instructs the jury that only if the State has failed to prove all the elements of murder, should you consider a lesser offense; however, if the evidence warrants it, you may find the defendant guilty of a crime less than murder. Notwithstanding this right, it is your duty to accept the law as given to you by the Court, and if the facts and the law warrant a conviction of the crime of murder, then it is your duty to make such finding uninfluenced by your power to find a lesser offense. This provision is not designed to relieve you from the performance of an unpleasant duty. It is included to prevent a failure of justice if the evidence fails to prove the original charge but does not justify a verdict for the lesser crime of manslaughter.

CP 182.

S-4 repeated the unexplained and misleading term "lesser offense." In addition, by telling the jury the purpose of the "lesser offense" option was not to "relieve" it "of an unpleasant duty," S-4 became clearly and impermissibly argumentative. *See*,

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[4]This similarity also demonstrates the danger in permitting "depraved heart" murder to apply to circumstances where the acts were directed toward a single person. Clearly, the legislature intended reckless acts directed toward a single individual to be manslaughter, not depraved heart murder. Total abolition of that distinction would elevate culpable negligence manslaughter to depraved heart murder in every case.

Stone v. State, 310 Miss. 218, 49 So. 2d 263 (1951). S-4 was abstract and unclear to the jury as to how it related to the case at hand. *Kidd v. State*, 258 So. 2d 423, 428-29 (Miss. 1972); *Wall v. State*, 379 So. 2d 529 (Miss. 1980); *Kitchens v. State*, 300 So. 2d 922 (Miss. 1974).

Finally, S-2 told the jury that, if the state failed to prove the "elements" of murder, then it must consider whether the state proved the "elements" of manslaughter. Yet, the Jury was given no guidance as to exactly what "elements" meant. Even assuming the lay jury understood how that word is used in law [which is quite a leap], the instructions fail to specifically distinguish "elements" as contained in the instructions from other parts of the instructions. How, then, could the jury possibly be assumed to have understood exactly what its duty was as to the distinction between murder and manslaughter, particularly given the confusion caused by the blurring of the distinction between "depraved heart" murder and manslaughter? Consequently, the instructions were confusing to the point of depriving the defendant of a fair trial. *Johnson v. State*, 908 So. 2d 758, 764 (Miss. 2005) (the giving of confusing and conflicting instructions is error).

E. TRIAL COURT ERRED IN DENYING APPELLANT'S PROFFERED INSTRUCTIONS.

In homicide cases the trial court should instruct the jury about defendant's theories of defense, justification, or excuse that are supported by evidence, no matter how meager or unlikely, and the trial court's failure to do so is error requiring reversal of judgment of conviction. *Manuel v. State*, 667 So. 2d 590 (Miss.

1995). Yet, the trial court below repeatedly refused instructions proffered by Bradford's trial counsel.

1. The Trial Court Erred in Denying a Heat of Passion Instruction.

Bradford's counsel proffered two instructions [D-2 and D-12] concerning a heat of passion/manslaughter theory of the case. CP 187, T 412; CP 197, T 417. The trial judge rejected both on the ground that "there is a absolutely no evidence, legally sufficient evidence that would sustain an instruction for heat of passion manslaughter." T 413.

With all due regard to the trial court, Appellant disagrees.

Deputy Adam Eubanks testified that his investigation revealed evidence "indicative of a violent altercation all over the house." T 301. State pathologist Hayne testified that Angela's injuries were of the type associated with passion. T 192. The size 5 panties,[5] introduced into evidence by the state certainly suggested grounds for an altercation that would have supported a heat of passion instruction.

Where there is even a scintilla of evidence supporting a defendant's theory of the case, an instruction on that theory must be granted. Defendant is entitled to it "no matter how meager [the evidence] or unlikely" the theory is. *See Manuel v. State*, 667 So. 2d 590, 593 (Miss. 1995).

In this case there existed at least a scintilla of evidence to support Defendant's theory of the case. The jury was entitled to

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[5]Exhibit S 101. The size was far too small to have belonged to the deceased. T 257.

draw inferences from the circumstantial evidence that the death of Angela Staten resulted from a heat of passion scenario. Accordingly, failure to give the heat of passion instruction requested by the defense was reversible error. *Manuel v. State*, 667 So. 2d 590, 593 (Miss. 1995).

2. The Trial Court Erred in Denying Appellant's Other Instructions.

a. D-7.

The Court also refused defense instruction D-7 as a "comment on the evidence." CP 192, T 414. "You certainly can argue D-7 to the jury . . .," the Court told defense counsel, "but it is not a proper instruction." T 414. That instruction was as follows:

> If you find from the evidence that Angela Fleming died several hours after the fatal blow was struck, and that during that intervening time Brad Staten did make every reasonable attempt to resuscitate Angela Fleming and to obtain medical attention to prevent her death, then the State has not proven beyond a reasonable doubt that Brad Staten did intend to kill Angela Fleming. If you cannot find beyond a reasonable doubt that Brad Staten intended to kill Angela Fleming at the time the fatal blow was struck, then your verdict must be for manslaughter and not murder.

With all due respect, D-7 was not a comment on the evidence. Instructions comment on the evidence when they suggest to a jury how facts should be decided, *see Keith v. State*, 197 So. 2d 480, 483 (Miss. 1967), effectively tell a jury to disregard certain evidence, *see Gandy v. State*, 355 So. 2d 1096, 1099 (Miss. 1978), or assume certain facts to be true. *See Fields v. State*, 272 So. 2d 650 (Miss. 1975). D-7 did none of those things. When an instruction like D-7 does not otherwise misstate the law and uses the introductory words, "[i]f you find from the evidence," it is

not a comment on the evidence. *See Daniels v. State*, 312 So. 2d 706, 708 (Miss. 1975).

The fact that the court said that counsel could argue the point to the jury does not compensate for the court's failure to give proper instructions. *See Bell v. Watkins*, 692 F. 2d 999, 1012, n. 13, *certiorari denied*, 464 U. S. 843, 104 S. Ct 142, 78 L. Ed. 2d 134 (5th Cir. 1982). The instruction was proper. The trial court should be reversed for refusing D-7.

b. D-10A and D-10B.

The trial court likewise erred in denying instructions D-10A[6] [CP 195] and D-10B [CP 196] as "effort[s] to define reasonable doubt . . . ." T 416. Those instructions, however, were no more efforts to define reasonable doubt than was the court's instruction that what lawyers say is not evidence. *See, e.g.* Court's instruction, C-1. CP 175. *See Pittman v. State*, 350 So. 2d 67 (Miss. 1977) (instruction defined reasonable doubt by comparing it to doubts in non-trial situations), for a case illustrating an impermissible attempt to define reasonable doubt. Rather, D-10A and D-10B merely sought to explain to the jurors how they were to exercise their function of determining whether reasonable doubt exists. Both instructions are entirely correct statements of the law and the court should not have refused them.

c. D-13.

Instruction D-13 [CP 199] would have explained to the jury what it must find in order to convict Bradford Staten of "depraved

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[6]The trial judge referred to D-10A and as D-10, but is clear from the record that he was referring to D-10A.

heart" murder. "I think D-13 is covered by the other instructions," the court said. "I'm going to refuse it." With all due respect to the trial court, D-13 was not covered by the other instructions.

Denial of this instruction was especially egregious given the development of the law in this state regarding "depraved heart" murder. As this Court knows, historically, one could not be convicted of "depraved heart" murder unless the homicide was committed by an act done in disregard of the value of human life at large. The classic example is the random firing of a gun into a crowd, a vehicle, or a room or dwelling. *See, e. g., Banks v. State*, 85 Tex. Cr. R. 165, 211 SW 217 (1919) (firing into barroom); *Hill v. Commonwealth*, 239 KY 646, 40 S. W. 2d 261 (1931) (firing into automobile); *Washington v.State*, 60 Al. 10, 15, 31 Am. Rep. 28 (1877) (firing into occupied room).

The Supreme Court of Mississippi, however, has in recent years interpreted our depraved heart murder statute as "encompassing a reckless and eminently dangerous act directed toward a single individual." *See, e. g., Windham v.State*, 602 So. 2d 798, 802 (Miss. 1992). This Court apparently sees little distinction between acts directed toward humanity at large and those directed toward a single individual. Counsel respectfully disagrees with such a view. The attitude of heart, the pure sociopathic meanness, that permits a person, without underlying reason or even emotion, to cooly commit an act almost certain to kill a complete stranger is entirely different from the state of mind of one killing of another in the heat of passion. Psychology and religion both teach

that broken humanity often kills in fits of unbridled rage the one it loves, but that is not depraved heart murder, as least not as it has been traditionally understood.

This Court historically has not been cavalier with the accumulated wisdom of centuries of common law development or with the acts of the legislature.[7] For that reason, Appellant cannot believe this Court intended to abolish entirely the distinction between the traditional understanding of depraved heart murder and other forms of unjustifiable homicide. Without an instruction like D-13, however, that is where the law is left. D-13 was absolutely necessary to the jury's understanding of the difference between depraved heart murder and manslaughter. Without it, the jury had no real basis for distinguishing between manslaughter [whether by heat of passion or by culpable negligence] and depraved heart murder. The Court erred in denying instruction D-13.

d. D-14.

Instruction D-14 (on culpable negligence) was erroneously refused as "already given." CP 200. No substantially similar instruction, however, appears to have been given. In view of the now fine line between manslaughter and depraved heart murder, D-14 should have been given along with D-13.

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[7]Miss. Code Ann. § 97-3-19 (1) (b) still defines depraved heart murder as a killing done "without any premeditated design to effect the death of any particular individual . . . ." Current interpretation of the law almost that subsection to be overlooked.

e. Other Instructions.

The Court also refused other instructions that should have been granted. For example, instruction D-1 stated "Defendant is not to be judged by the cool light of the after-developed facts, but they are to put themselves in his place and find their verdict according to the existing circumstances at the time of the killing . . . ." CP 186, T 412.

Instruction D-3 would have told the jury, "You need not be convinced that the Defendant is innocent before you may return a verdict of not guilty. . . . [I]t is only necessary that you have a reasonable doubt." CP 188, T 413.

Instruction D-6 said that "You cannot, under your oath as a juror, compromise your honest convictions as to the evidence . . . for the purpose of bringing in a verdict. CP 196, T 414. Since S-4, the instruction telling the jury the manslaugher instruction was not designed to relieve it of an unpleasant duty, was given, D-6 certainly should have been given to balance S-4.

Instructions D-12B, a manslaughter instruction, was also refused.

In fairness to the defense, the court should have granted the forgoing instructions. Its failure to do so was an abuse of discretion and requires reversal. *Manuel v. State*, 667 So. 2d 590, 593 (Miss. 1995).

F. THE COURT ERRED IN FAILING TO GIVE AN ACCIDENT INSTRUCTION.

The Court recognized that an accident instruction was warranted under the evidence. T 387. Even though he subsequently

said otherwise, [T 418] nothing had changed evidentially. Plainly, an accident instruction was warranted on the evidence and the court had an obligation to see that one was given. *See, Manuel v. State*, 667 So. 2d 590 (Miss. 1995).

G. THE COURT ERRED IN FAILING TO GRANT A DIRECTED VERDICT AT THE CLOSE OF THE STATE'S CASE AS TO DELIBERATE DESIGN MURDER AND PERMITTING STATE TO PROCEED UNDER A THEORY OF DEPRAVED HEART MURDER.

After the state rested, defense counsel moved

> for a directed verdict or dismissal of the indictment on the basis that the State has proceeded on the indictment with a charge of premeditated murder under Section 97-3-19, and the State has failed to make out a prima facie case on the charge of murder.

T 382.

The prosecution responded by arguing that the definition of murder included depraved heart murder. T 383. The court denied the motion for a directed verdict but did not make clear as to whether it believed that the evidence supported deliberate design murder, depraved heart murder, or both. T 385-86. The Court then gave a depraved heart murder instruction.

In *State v. Berryhill*, 703 So. 2d 250 (Miss. 1997), Berryhill was indicted for capital murder predicated upon an underlying crime of burglary. The indictment charged that Berryhill killed his girlfriend in the commission of a burglary, attempted kidnaping, possession of a firearm by a felon, and as an habitual offender. Berryhill moved to quash the indictment on the ground that it failed to state which underlying offense was part of the burglary

underlying the capital murder. The Court quashed the indictment, and the State appealed.

The Supreme Court affirmed. An indictment, said the Court, "must give notice of the nature and cause of the charges . . . ." *Berryhill* at 255-56.

> To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection[8] which the guaranty of the intervention of a grand jury was designed to secure. *For a defendant could then be convicted on the basis of fact not found by, and perhaps not even presented to, the grand jury which indicted him* (emphasis added).

Berryhill at 256.

The Court explained that its ruling was designed to prevent "trial by ambush," since different prosecutorial theories "would plainly invite different defenses." *Berryhill* at 256.

Defendant Bradford Staten, without notice by indictment that he would be tried for depraved heart murder, was prepared to defend upon an indictment of deliberate design murder. As noted in his counsel's motion for new trial [CP 226], he was understandably unprepared to defend against the charge of depraved heart murder, for which he was not indicted. That is exactly the evil the Court in *Berryhill* sought to prevent. Accordingly, he was effectively prevented from presenting an adequate defense on that charge to the jury. This case must be remanded for retrial.

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[8]As guaranteed by the **fifth and fourteenth amendments to the Constitution of the United States** and by the **Mississippi Constitution of 1890**, Art. 3, § 27.

H. APPELLANT WAS DENIED ADEQUATE ASSISTANT OF COUNSEL.

Under *Strickland v. Washington*, 466 U. S. 668 (1984), a defendant, to prove he has received inadequate and ineffective assistance of counsel, must demonstrate (1) that counsel's performance was deficient, and (2) that the deficiency prejudiced the defendant. *Leatherwood v. State*, 473 So. 2d 964, 968 (Miss. 1985). In order to overcome the presumption that trial representation was legally sufficient, the defendant must show that, but for trial counsel's deficiency, a different result would have occurred. *Id.* at 968. While that is a difficult standard to meet, that standard is satisfied in this case.[9]

Counsel appropriately moved the court to require a mental evaluation, CP 24, but then failed to put on evidence other than Bradford's mother, an affidavit of co-counsel, and his own testimony. The affidavit, the court said, was insufficient in that in failed to give examples of Bradford's inability to assist his defense. T 23, CP 43. Then, when the Court denied the motion, counsel failed to pursue an interlocutory appeal, despite the trial judge's specific invitation to do so. T 58.

When trial time came, Bradford's counsel essentially admitted guilt to the Jury. T 155. Once the trial began, Counsel's objections and failures to object permitted evidence potentially damaging to Bradford to go before the jury, often with undue emphasis. For instance, counsel objected to testimony of Dr. Hayne

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[9]It is not appeals counsel's intention to denigrate trial counsel in any way. Appeals counsel is well-aware of the tremendous work loads carried by most trial counsel and very much appreciates the difficult tasks they perform.

as to matters "other than the cause" of death included a description of the "closed head injury or the manual strangulation." This actually called attention to the inappropriate evidence. T 163.

Trial counsel also failed to impeach Jason Alexander in his serious change of testimony. Alexander testified at the competency hearing that when he arrived at the Staten home, Bradford pleaded with him to help Angela. He "started out [saying] 'Help her. Help her,'" Alexander told the court at the pre-trial hearing. "And then it went to 'Please help her.`" T 44. Yet, at trial, he told the jury Bradford was saying, "Help me; help me." T 221. One version, the first version told by Alexander, paints Bradford as trying to save his wife. The second version, the only one heard by the jury, depicts Bradford more as trying to save himself. Alexander should have been impeached on this very serious change in testimony, but he was not. Certainly that affected the outcome of the trial. *See*, for example, *Tait v. State*, 669 So. 2d 85 (Miss. 1996), discussed, *supra*.

Counsel also engaged in additional ill-advised cross-examination of Deputy Eubanks.

> Q. "[I]t would be fair to say . . . that there was blood splatter evidence over the majority of the house?"
>
> A. Yes, sir. It appeared to be; yes, sir.
>
> Q. And that would be indicative to you of a violent altercation which occurred in several different places within the house?

A. It appeared that there was altercations in several places; yes, sir.

T 298-97.

This line of questioning had the effect of emphasizing the violence and, in all probability, turning the jury against the defendant. It had the additional damaging effect of opening the door for even more emphasis of that violence on redirect. T 301. What is more, when the prosecutor went in that precise direction on redirect, counsel failed to object to blatant repetition and leading of the witness by the prosecutor:

Q. Mr. Eubanks, is that the way you would characterize the scene as you found it as indicative of a violent altercation all over the house?

A. Yes, sir.

T 301.

Counsel also failed to object to the introduction of Bradford's CPR and First Aid Cards, T 258 [Exhibits S 80 and S 81], or to interpose any argument concerning the lack of relevance of the same.

Counsel permitted the prosecutor to lead EMT Scott Alexander [T 242] and failed to object to the admission on his identification of a photograph [S-16] showing blood on a bedroom door. T 242-43.

Additionally, counsel failed to cross-examine DNA analyst Huma Nasir, forensic scientist Lisa Davis [T 349] and state crime lab employee Alexandria Davis. T 354. In the latter case, Davis was permitted to testify as to her crucial role in identifying Angela's blood without even a question concerning her qualifications or

authorization to perform the function she testified she performed. Ms. Davis was also permitted by trial counsel to testify from notes with request to examine the notes without any request by trial counsel to examine the notes. T 351.

Counsel permitted, without objection, another state's witness, Mississippi Bureau of Investigation employee, to give a narrative that took up 13 pages of the record. T 367-340.

Trial counsel permitted numerous photographs to go into evidence without objection. Far more photographs of bloodstains were admitted into evidence than necessary. Exhibits 6, 11-15, 17-24, 26-27, 30-31, 35-36, and 46-51 depicted bloodstains or blood spots. All of those were unnecessary. The same is true of the six pictures [Exs. 38-45] of the broken crutch allegedly used by Bradford to hit Angela. There was also no probative value to the two photos of an unbroken crutch admitted as Exs. 32 and 33. In total, their prejudicial effect of the foregoing photographic exhibits plainly outweighed their probative value, and trial counsel should have objected to them.

At instruction time, counsel also made the state's case a little easier by successfully having the words "and murdered" removed from instruction S-1. T 397, CP 179.

Perhaps the most serious omission was counsel's failure to provide the court with an accident instruction. At the close of the State's case, the trial judge unequivocally said that "the evidence would support an instruction on accident . . . ." T 387. It is plain that such was the case. The state's own evidence included a recorded statement by Bradford Staten that Angela had

fallen and hit her head. T 201. The head injury was the likely cause of death. T 189, T 192.

The trial judge, at the conclusion of his discussion of instructions with counsel, said,

> I want the record to reflect that after, on review, I do not think the facts of this case would have justified an accident instruction. And had it been requested, in light of the 911 tapes and the statements to Mr. Eubanks, I don't think that would--I don't think it would have been an appropriate case for an accident instruction. There again, I don't think that it is before the Court, but since I said it, I wanted to clear that up.

T 418.

Nothing, though, had changed since the court initially said an accident instruction was warranted. Clearly, despite what the judge said, had an accident instruction been proffered, he would have had little choice but to have granted it. *See, Manuel v. State*, 667 So. 2d 590 (Miss. 1995).

After being denied a heat of passion instruction, counsel made an issue of the size 5 panties in his closing, in effect, supplying a motive for the prosecution where none existed before. T 443, T 447.

The only question that remains is this: if counsel had not been deficient in the foregoing respects, would the outcome have been different? *See Leatherwood*, 473 So. 2d at 968. It is not necessary that appellant would have been acquitted. Mightn't the jury, though, have convicted of manslaughter, rather than murder? Certainly there would have been a different outcome in that regard.

Viewing the totality of the circumstances, but for the

inadequate and ineffective representation of trial counsel, there is a reasonable probability that the outcome of the trial would have been different. Consequently, Appellant Bradford Staten was denied his right to adequate and effective assistance of counsel[10] and is entitled to a new trial.

I. CUMULATIVE ERROR REQUIRES REVERSAL.

Even if not reversible error in and of themselves, the foregoing errors, taken together, amount to cumulative, prejudicial error requiring reversal in this case. *Collins v. State*, 408 So. 2d 1376, 1380 (Miss. 1982).

J. THE COURT'S SENTENCE WAS GROSSLY DISPROPORTIONAL AND UNCONSTITUTIONAL AND IMPROPER ON THE EVIDENCE.

Appellant recognizes that the general rule in this state is that a sentence should not be disturbed on appeal so long as it does not exceed the maximum term allowed by statute, *Fleming v. State*, 604 So. 2d 280, 302 (Miss. 1992). This Court, though, has also held that unduly harsh sentences may not meet constitutional muster. *Clowers v. State*, 522 So. 2d 762, 764 (Miss. 1988). Life imprisonment, without the possibility of parole, under the circumstances, is unduly harsh. To the extent the murder statute requires a life sentence without the possibility of parole, it is

[10]As guaranteed by the **fifth and fourteenth amendments to the Constitution of the United States** and by the **Mississippi Constitution of 1890**, Art. 3, § 26.

unconstitutional.[11] Moreover, as noted above, the evidence made out at best, a case for manslaughter. At minimum, the sentence should be reversed and this case remanded for resentencing.

VIII. CONCLUSION.

Appellant Bradford Staten prays that this Court will reverse his conviction and render judgment finding him not guilty. In the alternative, he prays that this Court will reverse his conviction and remand for new trial and/or resentencing.

This the 14th day of February 2007.

Respectfully submitted,

James T. McCafferty
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Box 5092
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601.366.3506
Bar No. 2198

[11]Under the eighth and fourteenth amendments to the Constitution of the United States and the Mississippi Constitution of 1890, Art. 3, § 28.

IX. PROOF OF SERVICE

I, the undersigned counsel of record for the Appellant certify that I have this day caused to be served by United States Mail, postage prepaid, a copy of the foregoing to the following persons:

1. Honorable Doug Evans
   District Attorney
   Circuit Court District Five
   Post Office Box 1262
   Grenada, Mississippi 38902-1262

2. Clyde Hill, Esquire
   Office of the District Attorney
   Circuit Court District Five
   Post Office Box 1262
   Grenada, Mississippi 38902-1262

3. Honorable Clarence E. Morgan III
   Circuit Judge
   Circuit Court District Five
   Post Office Box 721
   Kosciusko, Mississippi 39090

4. Honorable Jim Hood
   Attorney General
   Post Office Box 220
   Jackson, Mississippi 39205

5. J. Stewart Parrish, Esquire
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   Post Office Box 823
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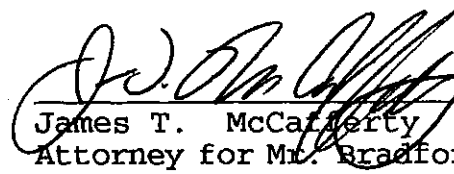
6. Johnnie E. Walls, Jr., Esquire
Trial Counsel for Defendant
Post Office Box 634
Greenville, Mississippi 38702-0634

This the 14th day of February 2007.

Respectfully submitted,



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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2006-KA-01612-COA

BRADFORD STATEN APPELLANT

VS.

STATE OF MISSISSIPPI APPELLEE

X. APPENDIX

CONSTITUTION OF THE UNITED STATES

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VIII - Cruel and Unusual Punishment.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV – Due Process Provision

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF THE STATE OF MISSISSIPPI

Sec. 26. In all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both, to demand the nature and cause of the accusation, to be confronted by the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and, in all prosecutions by indictment or information, a speedy and public trial by an impartial jury of the county where the offense was committed; and he shall not be compelled to give evidence against himself; but in prosecutions for rape, adultery, fornication,sodomy or the crime against nature the court may, in its discretion, exclude from the courtroom all persons except such as are necessary in the conduct of the trial.

Sec. 27. No person shall for any indictable offense, be proceeding against criminally by information, except in cases arising in the land or naval forces, or the military when in actual service, or by leave of the court for misdemeanor in off ice; but the legislature, in cases not punishable by death or by imprisonment in the penitentiary, may dispense with the inquest of the grand jury, and may authorize prosecutions before justices of the peace, or such other inferior court or courts as may be established, and the proceedings in such cases shall be regulated by law.

Sec. 28. Cruel or unusual punishment shall not be inflicted, nor excessive fines imposed.

§ 97-3-19 Homicide; murder defined; capital murder; lesser-included offenses.
(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
(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;
9c) When done without any design to effect death by any person engaged in the commission of any felony other than rape, kidnapping, burglary, arson, robbery, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or felonious abuse and/or battery of a child in violation of subsection (2) of Section 97-5-39, or in any attempt to commit such felonies;

(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;

(c) When done without any design to effect death by any person engaged in the commission of any felony other than rape, kidnapping, burglary, arson, robbery, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or felonious abuse and/or battery of a child in violation of subsection (2) of Section 97-5-39, or in any attempt to commit such felonies;

(d) When done with deliberate design to effect the death of an unborn child

(2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:

(a) Murder which is perpetrated by killing a peace officer or fireman while such officer or fireman is acting in his official capacity or by reason of an act performed in his official capacity, and with knowledge that the victim was a peace officer or fireman. For purposes of this paragraph, the term "peace officer" means any state or federal law enforcement officer, including, but not limited to, a federal park ranger, the sheriff of or police officer of a city or town, a conservation officer, a parole officer, a judge, senior status judge, special judge, district attorney, legal assistant to a district attorney, county prosecuting attorney or any other court official, an agent of the Alcoholic Beverage Control Division of the State Tax Commission, an agent of the Bureau of Narcotics, personnel of the Mississippi Highway Patrol, and the employees of the Department of Corrections who are designated as peace officers by the Commissioner of Corrections

pursuant to Section 47-5-54, and the superintendent and his deputies, guards, officers and other employees of the Mississippi State Penitentiary;

(b) Murder which is perpetrated by a person who is under sentence of life imprisonment;

(c) Murder which is perpetrated by use or detonation of a bomb or explosive device;

(d) Murder which is perpetrated by any person who has been offered or has received anything of value for committing the murder, and all parties to such a murder, are guilty as principals;

(e) When done with or without any design to effect death, by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson, robbery, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or in any attempt to commit such felonies;

(f) When done with or without any design to effect death, by any person engaged in the commission of the crime of felonious abuse and/or battery of a child in violation of subsection (2) of Section 97-5-39, or in any attempt to commit such felony;

(g) Murder which is perpetrated on educational property as defined in Section 97-37-17;

(h) Murder which is perpetrated by the killing of any elected official of a county, municipal, state or federal government with knowledge that the victim was such public official.

(3) An indictment for murder or capital murder shall serve as notice to the defendant that the indictment may include any and all lesser included offenses thereof, including, but not limited to, manslaughter.

UNIFORM RULES OF CIRCUIT AND

COUNTY COURT PRACTICE

Adopted Effective May 1, 1995

Rule 9.07

INSANITY DEFENSE

If a defendant intends to rely upon the defense of insanity at the time of the alleged crime, the defendant shall, within the time provided for filing pretrial motions or at such later time as the court may direct, serve upon the prosecuting attorney and the clerk of the court a written notice of the intention to offer a defense of insanity. If there is a failure to comply with the requirements of this subsection, the court may use such sanctions as it deems proper, including:

1. Granting a continuance, and, in its discretion, assessing costs against the appropriate attorney or party;

2. Limiting further discovery of the party failing to comply;

3. Finding the attorney failing to comply in contempt; or

4. Excluding the testimony of appropriate witnesses.

The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

Within ten days thereafter, but in no event less than ten days before the trial unless the court otherwise directs, the defendant shall serve upon the prosecuting attorney the names and addresses of the witnesses upon whom the defendant intends to rely to establish the defense of insanity.

If a defendant intends to introduce expert testimony relating to a mental disease, defect, or other condition bearing upon the issue of whether the defendant had the mental state required for the offense charged, the defendant shall, within the time provided for the filing of pretrial motions or at such time as the court may direct, serve upon the prosecuting attorney and the clerk of the court notice of such intention, with the names and addresses of such expert witnesses upon whom the defendant intends to rely.

The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

The court may, upon motion of the prosecuting attorney, require the defendant to be examined by a competent psychiatrist selected by the court. No statement made by the accused in the course of any examination provided for by this rule shall be admitted in evidence against the defendant on the issue of guilt in any criminal proceeding.

The prosecuting attorney shall serve notice on the defendant promptly, but in no event less than ten days prior to trial, stating the names and addresses of any witnesses upon whom the state intends to rely relating to the issue of the defendant's mental condition at the time of the alleged offense or the defendant's mental state required for the offense charged.

If, prior to or during trial, either party learns of an additional witness whose identity should have been included in the notice under this rule, the party shall promptly notify the other party of the name and address of such additional witness.

Upon the failure of either party to comply with the requirements of this rule, or failure by the defendant to submit to an examination when ordered under this rule, the court may use such sanctions as it deems proper, including:

1. Granting a continuance, and, in its discretion, assessing costs against the appropriate attorney or party;

2. Limiting further discovery of the party failing to comply;

3. Finding the attorney failing to comply in contempt; or

4. Excluding the testimony of appropriate witnesses.

For good reason shown, the court may grant an exception to the requirements of this rule.