IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

RAYMOND L. PANNELL — APPELLANT

VS.

NO. 2006-KA-1882-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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PROCEDURAL HISTORY:

On October 5, 6, 2006 , Raymond Pannell, "Pannell" was tried for arson before a Prentiss County Circuit court jury, the Honorable Thomas J. Gardner presiding. R. 1. Pannell was found guilty and given a twenty with ten year suspended sentence in the custody of the Mississippi Department of Corrections. R. 100-101. From that conviction, Pannell appealed to the Supreme Court. C.P. 109-110.

ISSUE ON APPEAL

I.

WAS PANNELL'S INCULPATORY STATEMENTS PROPERLY ADMITTED AFTER A SUPPRESSION HEARING?

II.

WAS THERE CREDIBLE, SUBSTANTIAL EVIDENCE IN SUPPORT OF PANNELL'S CONVICTION?

STATEMENT OF THE FACTS

On August 22, 2005, Pannell was indicted for arson. He was charged with burning the house within which his ex-wife, Ms. Teressa Pannell, was preparing to reside, by a Prentiss County Grand jury. C.P. 3.

On September 26, 2006, a hearing was held. on Pannell's "Motion to Suppress." R. 2-57. Pannell was represented by Mr. John Helmert. R. 1. The hearing was heard before Judge Sharion Aycock. R. 2-55. Both Officers Brian Taylor and Jeremy Pace testified that Pannell asked to speak to "the jail administrator." R. 3; 30. Officer Taylor was the administrator as well as an investigator. R. 5. Pannell had been incarcerated since December 4, 2004. His request to speak to the jail administrator came on March 12, 2005.

Officer Taylor testified that Pannell asked to speak to him. R. 6-7. Taylor did not know what Pannell wanted to discuss. Taylor dealt with jail condition complaints. When Pannell mentioned wanting an attorney present when he talked, Taylor testified that he did not question him. R. 6-7. Pannell had not requested an attorney when he was arrested. R. 6.

Taylor showed Pannell the evidence folder related to his case. R. 6. It contained photographs of the burned house as well an admission in the form of a threat he made to his brother, Mr. Herman Pannell. R. 8.

After viewing the evidence, Pannell indicated he wanted to talk. Taylor read Pannell his **Miranda** rights. Pannell signed the **Miranda** waiver. R. 8-9. Pannell indicated he understood his Constitutional rights, including his right to an attorney. R. 9. Pannell's admission of burning the house was written down by Officer Taylor. After the statement was reduced to writing , it was read back to Pannell. R. 10. Pannell signed the inculpatory statement, and initialed it. In addition,

Pannell executed a sworn affidavit before a notary. He stated that his accompanying inculpatory statement was "true and correct." R. 10.

Taylor testified he made no promises to Pannell about release from jail or the arranging of a bail bond. R. 27. Taylor also testified that he had never seen any alleged alibi statement given by Pannell to another officer. R. 28. Taylor believed that Pannell "understood the fact that he was waiving his rights to an attorney." This was prior to his making any inculpatory statements. R. 9-10.

Officer Pace, the jailor, testified that Pannell asked to speak to the "jail administrator." R. 30. Pace testified that Taylor did not question Pannell after he mentioning wanting an attorney when he talked about the fire. R. 31. Pace saw Taylor show Pannell the evidence file against him. Taylor told him he did not have to speak to him. R. 31.

Pace testified to hearing Taylor read Pannell his **Miranda** rights. R.32 . He saw Pannell sign the wavier and initial the inculpatory statement. See State's Exhibit 19. After Pace witnessed the waiver being executed, which he signed as a witness, he heard Pannell admit to burning the house. He said he set fire to the curtains inside the house. R. 33. Pace saw and heard Pannell raise his right hand and swear in an accompanying affidavit that his inculpatory statement was "true and correct." R. 34.

Pace testified that Taylor made no promises, or threats to Pannell. R. 34. Officer Pace believed that Pannell "knowingly, freely and voluntarily" waived his right to counsel. R. 34.

After consulting with his counsel, Pannell chose not to testify at the suppression hearing. R. 41.

After hearing testimony from Officers Taylor and Pace with the Prentiss County Sheriff's office, the trial court found that Pannell's inculpatory statements were "freely, knowingly and voluntarily given." R. 55-57. They were made after the execution of a valid **Miranda** wavier and

an affidavit which had been signed and witnessed . See State's exhibits 18, the **Miranda** waiver of rights form executed by Panell, witnessed and dated; exhibit 19, Pannell's statement of facts, admitting to setting the fire, which he signed as well as initialed; and exhibit 20 a notarized affidavit signed by Pannell, witnessed and dated. In it he stated that the facts in exhibit 20 were "true and correct." All these exhibits are contained in manila envelop marked "Exhibits."

The trial court found there was sufficient evidence for concluding that Pannell "initiated" contact with Officer Brian Taylor, the jail administrator. After being given his **Miranda** rights, and being reminded that he did not have to speak, Pannell decided to speak about "the fire" at his ex-wife's house. He therefore, under this set of facts, knowingly "waived" his right to counsel. R. 55-57.

Ms. Teresa Pannell testified that she was preparing to live in the house she jointly owned with Pannell. When she asked Pannell about picking up some of his belongings, she heard him say: "he would burn the houses before he let me move back into it." R. 165.

Mr. Herman Pannell testified that Pannell was "mad" and "upset bad" with his ex-wife. R-190. He heard him threaten to burn the house rather than let her live there. He testified that he heard Pannell say, "I'm going to kill her and burn the house down. She's not taking my place. I'll burn it down before she does." R. 191. Pannell said this the day of the fire.

Herman also testified that he saw Pannell coming from the direction of the fire with a rifle. This was within minutes of Herman Pannell seeing smoke coming from the direction of the house jointly owned by Pannell and his ex-wife. R.194.

Officer Taylor testified about the conditions under which Pannell's inculpatory statement was given. This was after the execution of a **Miranda** waiver and an affidavit. Pannell's statement, exhibit 20, was read to the jury. This included Pannell stating, "On December 4th, 2004, I set my

house on fire." R. 140.

Officer Jeremy Pace corroborated Taylor's testimony. R. 157-181.

Mr. Jonathan Owens testified to examining the burned house. R. 205-227. In his fire marshal's report, based upon examination of the burned house, he concluded that the fire was the result of human intervention by use of some type of incendiary devise. R. 217.

At the conclusion of the prosecution's case, the trial court denied a motion for a directed verdict. R. 231. This was based upon there allegedly being inadequate evidence without Pannell's inculpatory statement. R. 231-232; 316.

Mr. Pannell testified in his own behalf. R. 268-297. He testified that he did not ask to speak to Officer Taylor. R. 293. Pannell admitted to seeing the evidence folder related to the arson charge. R. 296. Pannell admitted to signing the **Miranda** wavier, as well as making the attached inculpatory statement. R. 294. However, he claimed it "was Brian Taylor's conception of what went down." R. 294. Pannell admitted that he had signed as well as initialed his statement admitting he set fire to the jointly owned house. R. 294. He admitted that he waived his right to an attorney. R. 295. Pannell admitted to signing an affidavit indicating his statement was "true and correct". R. 296. Pannell claimed that he did so out of "duress."

Pannell claimed that he was threatened with a beating with "an axe handle" and told that if he would sign the statement, "he (Officer Taylor) would drop the charges." R. 295-296. He denied having set the fire. R. 297. He also testified to providing an alleged alibi statement to Officer Ron Brewer, exhibit 21. R. 293.

Pannell admitted that he met with his ex wife the day before the fire. R.294. He admitted he was angry with her. R. 289. Pannell claimed more than once that she had "provoked" him. She had done so on that day as well as on other occasions. He admitted to meeting his brother, Herman,

and being near the burned house on the day of the fire. R. 289.

Officers Taylor and Pace testified in rebuttal. R. 299-315. Taylor testified that he did not ask to speak to Pannell. It was Pannell who asked to speak to him. Taylor testified that he did not ask any questions of Pannell until after he signed the **Miranda** waiver. Taylor testified he did not threaten Pannell and did not promise him anything should he give a statement. R.300-301.

Officer Pace testified that Pannell asked to speak to "the jail administrator." R. 309. Pace testified that Taylor did not ask Pannell any questions. This was after Pannell initially mentioned wanting an attorney when he spoke about the fire. R. 303. Pace testified that after this statement, Taylor merely showed Pannell the evidence folder related to the arson charge. R. 303. It was after viewing this evidence without being questioned about it, that Pannell decided to talk. Taylor reminded Pannell that he could not talk to him until after he signed a **Miranda** waiver. R. 315. Pace testified to seeing Pannell raise his right hand and swear the inculpatory statement he had just given was "true and correct." R. 312. Pace testified that Taylor did not threaten or coerce Pannell in any way. R. 312.

Pannell was given jury instruction C-4(a). R. 332-333. It stated that if the jury believed that Pannell's inculpatory statement was made under hope of reward or in violation of his right to have an attorney, this could be considered along with the other evidence in the case. R. 332-333. Pannell was also given an alibi instruction in keeping with his testimony and Exhibit 21. R. 332. R. 291. In that statement he denied having burned the house or ever going to the burned property the day it burned.

Pannell was found guilty and given a twenty with ten year suspended sentence in the custody of the MDOC. R. 100-101;; 109-110

Pannell filed a "Motion for a JNOV". R. 103-104. The grounds for the allegedly

inadmissible inculpatory statement was that it was "involuntarily given because of coercion and inducements." R. 104. The Court denied the motion. R. 108. From that denial of relief, Pannell appealed to this Court. C.P. 109-110.

SUMMARY OF THE ARGUMENT

1. The record reflects that the trial court did not err in denying a motion to suppress. R. 55-56. The record reflects the trial court used the correct legal standard. That decision was fully supported by the evidence. **Sanders v. State** 835 So.2d 45, *50 (Miss. 2003).

Pannell did not "contest" any issue during the suppression hearing. Instead, he chose not to testify. R. 41. Therefore, under the facts of this case, there was a total lack of "any" evidence of any "inducement"or "coercion" involved in his making inculpatory statements. **Agee v. State**, 185 So. 2d 671, 673 (Miss. 1966).

The trial court found that Pannell "initiated" contact with Officer Taylor. R. 55-57. Pannell knowingly "waived" his right to an attorney. He made his inculpatory statements "freely, knowingly and voluntarily." R. 56. The Court found that when Pannell mentioned wanting an attorney when he talked about the fire, he was not questioned. R. 55. He was merely shown the evidence against him. He was only questioned after he had signed a **Miranda** waiver, and knowingly and voluntarily waived his right to have an attorney present.. R. 55-57. Pannell also executed a notarized affidavit indicating his inculpatory statement was "true and correct." See exhibit 18,19 and 20 in manila envelop marked Exhibits.

The showing of the case file to Pannell allowed him to review the evidence against him. He was not badgered or questioned about the fire. There was no evidence of any manipulative or suggestive conversation about the fire occurring at the time he made inculpatory statements..

Therefore, the fully corroborated and "uncontested" testimony of the Prentiss County investigators was sufficient for denying a motion to suppress. There was no evidence that investigators initiated contact with Pannell after he allegedly invoked his right to silence or his right to an attorney. **Mason v. State**, 440 So. 2d 318, 319 (Miss. 1983)

In the instant cause, unlike what occurred under the facts of **Sanders v. State**, 835 So. 2d 45 (Miss. 2003) and **State v. Balfour**, 598 So. 2d 731 (Miss. 1992), relied upon by Pannell, the accused did not testify at his suppression hearing. R. 41. There was therefore no evidence of either "inducement" or "coercion" at the time of the trial court's ruling.

Assuming arguendo, based upon Pannell's testimony before the jury, that he had testified at the suppression hearing, the appellee would submit that the trial court's ruling would still be correct. R. 268-298. Pannell did not testify to being "induced" to testify as a result of seeing the evidence folder. R. 268-297. **Mason v. State, id.** Rather his testimony, which was contradicted by both Officer Taylor and Pace, was that he was coerced by a combination of threats and promises by the physically imposing Officer Taylor. R. 278-280.

Consequently, even if Pannell had contested factual issues at his suppression hearing, the Appellee would submit the trial court's ruling would have correctly been the same. **Hunt v. State** 687 So.2d 1154, *1160 (Miss. 1996).

2. Additionally, although no formally addressed in the appellant's brief, the defense argument before the trial court was that there was insufficient evidence to support Pannell's conviction without his confession.

To the contrary, the record reflects that there was clearly sufficient evidence for affirming Pannell's arson conviction. **McClain v. State**, 625 So. 2d 774, 778 (Miss. 1993). Contrary, to the assumption in Pannell's motions for directed verdicts, his inculpatory statements were admissible for the reasons stated above. In addition to Pannell's admission to burning the house, he admitted to his ex-wife and his brother that he was going to do so. He "threatened" to burn down the house to prevent his ex-wife from living there. He admitted repeatedly before the jury that he was angry and "provoked" by her. R. 165; 191; 286.. See M. R. E. 801(d)(2)," admission against interest."

Pannell was also seen coming from the direction of the fire with a rifle. This was within minutes of smoke being seen coming from the direction of the house by Mr. Herman Pannell. R.194. The fire marshal's report, based upon examination of the burned house, concluded that the fire was the result of "human intervention with an open flame devise." R. 217. This was the "cause of the fire" based upon Mr. Owens elimination of other alternatives. R. 227-228.

The additional issue of insufficiency of the evidence was therefore also lacking in merit. Pannell was given a jury instruction in keeping with his testimony about his statements being false and under duress without a lawyer present. R.332-333 . He was also given an alibi instruction. R. 332.

The jury did not find Pannell's rambling, angry, contradicted self serving testimony credible. This issue of the sufficiency of the evidence was therefore lacking in merit. There was more than enough credible substantial evidence in support of each element of the arson charge.

ARGUMENT

PROPOSITION I

THE MOTION TO SUPPRESS WAS PROPERLY DENIED UNDER THE FACTS OF THIS CASE. THERE WAS NO VIOLATION OF PANNELL'S CONSTITUTIONAL RIGHTS.

Pannell's appeal counsel team argues that Pannell was improperly interrogated. They believe this occurred after he had indicated his desire not to speak to investigators without an attorney being present. They also think that there was sufficient evidence for concluding that investigators initiated contact with Pannell. They purposely did so after Pannell invoked his right to counsel. They also believe officers improperly offered him false hopes for reward should he make incriminating statements. They believed this was a devious way of getting Pannell to admit his involvement in the fire that burned down the house his ex-wife was preparing for occupancy. Appellant's brief page 8-11.

To the contrary, the record reflects that after a suppression hearing , the trial court found that it was Pannell who "initiated" contact with the jail administrator. The record also reflects that Pannell did not "contest" any factual issue at that hearing. R. 41; 55-57. The Appellee would submit that there was credible, fully corroborated record evidence in support of the trial court's finding.

Officer Jeremy Pace , the Prentiss County jailer, testified that Pannell contacted him from his cell. Inmate Pannell wanted to speak to "the jail administrator," which was Officer Taylor.

> Q. And what did you then do in response to his request?
>
> A. I advised Brian Taylor, which was the jail administrator, that inmate Pannell wanted to speak with him. R. 30.

Officer Brian Taylor testified that Officer Pace contacted him. He indicated that inmate Pannell wanted to speak to him. Officer Taylor was not informed about what Pannell wanted to

discuss with him.

> Q. All right. Do you remember how that came about?
>
> A. At the time, Officer Jeremy Pace was working in the jail, and he had contacted me and made me aware that Mr. Pannell would like to speak to me.

After he mentioned wanting an attorney when he chose to talk, Officer Taylor testified that he did not question Pannell Rather, Taylor showed him the evidence against him.

> Q. All right. Do you remember how that came about? (How he happened to speak with inmate Pannell?)
>
> A....He told me it was going to be about the fire, and I–at that point he made reference that, you know, he wanted to talk, but not without his attorney present. And I told him that was fine, that, you know, he had a right to an attorney and that I didn't want to talk to him if that's what he was electing to do. **But I did tell him that I had evidence against him. I did not ask him any further questions.** R. 5-6. (Emphasis by Appellee).

Officer Pace testified that after Pannell mentioned wanting an attorney, Officer Taylor showed him the evidence against him. He did not question him.

> Q. All right. Now, between the time that he asked for his attorney and the time that Brian Taylor put the photographs out, what happened?
>
> A. **The only thing that happened was Brian said, These are the pictures of the house that was burned and here is a statement against you. He didn't–as far as any other conversation, there was none.** R. 38. (Emphasis by Appellee).

Therefore, the record reflects that Officer Taylor was corroborated by Officer Pace. Pannell was not subjected to questions after he mentioned wanting an attorney when he chose to talk about the fire.

Officer Taylor was also corroborated by Officer Pace about Pannell changing his mind. After seeing the evidence folder, Pannell indicated he wanted to talk about the fire. Taylor reminded him that he did not have to talk. However, if he wished to do so, he would need to waive his right to have an attorney present.

Panell decided he did want to talk without an attorney being present

Taylor was also corroborated that after being read his **Miranda** rights, Pannell signed a **Miranda** waiver, did not request an attorney and made incriminating statements of burning the house to Officer Taylor. R. 9-10; 32-33. There was corroborated credible evidence that he "understood" at that time he was consciously "waiving" his right to have an attorney present. R. 9-10; 34.

Officer Taylor testified that he believed, based upon his conversation with Pannell, that "he understood what he was doing." R. 9. He understood that he was waiving his right to have an attorney present when he talked about the fire. This was the first time Taylor had talked since he had been incarcerated.

> Q. At the time that he was read his **Miranda** rights, as well as waived them, did he appear to you to understand what he was doing?
>
> A. Yes, sir. R. 9.
>
> ...
>
> Q. Once he had been read his **Miranda** rights, was there anything that made you think he did not understand the fact that he was waiving his rights to an attorney?
>
> A. No, sir. R. 9.

Officer Pace corroborated Taylor in testifying that Pannell appeared to understand he was waiving his right to counsel.

> Q. **Did he appear to you to knowingly, freely and voluntarily waive those rights?**
>
> A. **Yes, sir**. R. 34. (Emphasis by Appellee)

There was also corroborated evidence that Officer Taylor neither promised Pannell anything nor threatened him in any way. R. 12; 34-35.

There was corroborated evidence that Officer Taylor did not question Pannell after he

mentioned wanting an attorney. R. 8; 16; 26; 38. He did not initiate or carry on a conversation about the fire. He merely allowed Pannell to review the evidence file about the fire. It contained his alleged admissions of threatening to burn the house to his brother as well as numerous photographs of the burned house. R. 8.

> Q. And tell me again what was relayed back to him once he made the statement about wanting an attorney?
>
> A. **He was told that at that point that he was entitled to an attorney and, of course, I couldn't proceed in that respect if he did want his attorney there. And I didn't ask him any further questions.** I just told him that I had some strong evidence against him. I believe I read a statement from his brother and showed him some photographs that was taken at the scene. R. 8. (Emphasis by Appellee).

On cross examination, Officer Taylor testified that he gave the evidence file to Pannell to show him the evidence against him. He did not do so to get any particular "response." R. 18. On redirect, Taylor testified that while Pannell mentioned wanting an attorney, he changed his mind. He did so after seeing the evidence against him. He was not questioned. He was not "hounded" into doing so. He was not promised anything whatsoever for doing so. R. 24-25.

Officer Jeremy Pace corroborated Taylor. He showed him the evidence file and let him review it without questioning him.

> Q. Now, between the time that he asked for his attorney and the time that Brian Taylor put the photographs out, what happened?
>
> A. The only thing that happened was Brian said, These are the pictures of the house that was burned and here is a statement against you. **He didn't–as far as any other conversation, there was none.** R. 38.(Emphasis by Appellee)

The record reflects that after consulting with his attorney, Pannell chose not to testify at the suppression hearing. R. 41; 55-57.

The court's denial of the motion to suppress was based on finding from the testimony that there was sufficient evidence to determine that Pannell's "initiated" contact with the jail

administrator. R. 55. As stated by the trial court at the conclusion of the suppression hearing.

> **I do not believe that the presentation of evidence to the defendant at that stage was interrogation.** R. 56.
>
> **I do find that his statement that he gave that constitutes State's Exhibit no. 3 was freely, knowingly, voluntarily given. It was not given with duress, noting that the defendant did initiate the contact with the jail administrator on March 12, 2005. And even after he did request that he not make a statement without his attorney being present, once he was shown that evidence, he went forward by giving a statement and, prior to giving that statement, explicitly in writing with signatures waiving his right to silence and the right to an attorney.** I do not find that he gave the statement under duress. I find that there were no promises. There has been no credible evidence that there were any threats or promises against the defendant. And there is no evidence that he gave the statement while under the influence of drugs or alcohol. The motion to suppress will be denied. R. 57. (Emphasis by Appellee).

In **Agee v. State**, 185 So. 2d 671, 673 (Miss. 1966), the Court stated that when an officer, knowledgeable about the facts, testifies that a confession was voluntarily made, a prima face case for admission has been made. Voluntarily made means without promises or threats. When the accused contests the voluntariness of a confession, then all the officers present when the statements were made should testify to overcome "this contested issue." However, as shown with cites to the record, in the instant cause, Pannell did not "contest" any fact related to his inculpatory statements. R. 41. As stated in **Agee**:

> The State has the burden of proving the voluntariness of a confession. This burden is met by the testimony of an officer, or other person having knowledge of the facts, that the confession was voluntarily made without any threats, coercion, or offer of reward. This makes out a prima facie case for the State on the question of voluntariness. **Lee v. State**, 236 Miss. 716, 112 So. 2d 254 (1959). When objection is made to the introduction of the confession, the accused is entitled to a preliminary hearing on the question of the admissibility of the confession. This hearing is conducted in the absence of the jury **Lee v. State, supra**, is also authority for the proposition that when, after the State made out a prima facie case as to the voluntariness of the confession, the accused offers testimony that violence, threats of violence, or offers of reward induced the confession, then the State must offer all the officers who were present when the accused was questioned and when the confession was signed, or given an adequate reason for the absence of any such witness. See also **Holmes v. State**, 211 Miss. 436, 51 So. 2d 766 (1951).

The record reflects that the trial court heard from all the officers present. She heard testimony from Officers Brian Taylor and Jeremy Pace. R. 3-55. As shown with cites to the record, they corroborated each other as to Pannell initiating contact with "the jail administrator." While Pannell mentioned wanting an attorney, it was he who initiated contact with them. He had never previously mentioned either wanting or having retained an attorney. R. 6. He was not questioned after mentioning an attorney. R. 8, 16, 26, 38. He was merely shown the evidence against him. Only after the **Miranda** waiver was knowingly signed, and witnessed was Pannell asked any questions.

In addition, Pannell initiated his written inculpatory statement, and executed a notarized statement indicating that his inculpatory statement was "true and correct."

The Appellee would submit that the record reflects the trial court's ruling was fully supported by record evidence. There was no testimony from Pannell as to any inducements, coercion or threats.

Assuming arguendo, based upon the fact that Pannell testified before the jury, that his testimony had been admitted at the suppression hearing, the Appellee would submit that his inculpatory statements would still have been admissible. Pannell admitted that he signed and initialed the beginning and the end of his inculpatory statement. R. 294-295. He admitted that he executed a sworn affidavit indicating that the facts contained in his inculpatory statement was "true and correct." R. 296-297. He admitted "he knew he had a right to an attorney." R. 294. " He testified when he waived his right to silence and to have an attorney present he not only signed the waiver but also wrote under his signature "without attorney present." R-295. He claimed he "voluntarily" signed but he did so under "duress." R. 294-296.

While Pannell testified that he did not ask to speak to Officer Taylor, and that his inculpatory

statement came from Taylor and not himself, Officer Taylor and Pace rebutted his testimony on each of these factual issues. Officer Taylor denied either threatening or promising Pannell anything. R.304-305. He denied having harassed or threatened Pannell at any time that he was incarcerated. R.301. Taylor testified that he "had no contact with Raymond Pannell" until Pannell asked to speak to him. R. 305. He denied having initiated contact with Pannell. R.303. He was fully corroborated by Officer Pace. R. 310-311. .

In **Sanders v. State** 835 So.2d 45, 51 (¶19-20) (Miss. 2003), the Court affirmed the trial court's denial of a motion to suppress. In that case, Sanders testified at his suppression hearing. Although Sanders claimed to have requested an attorney, more than one Warren County police officer disputed his assertions. Sanders admitted that he initiated a conversation after having the capital murder charge explained to him. Although he admitted stating that he wanted an attorney, he also admitted he was not questioned by officers after his invocation of his right to counsel. Id. 49.

> ¶ 19. According to the record, especially Sanders's own testimony at the suppression hearing, Sanders did not request an attorney, if he requested an attorney at all, until after Sheriff Pace asked him if he would like to discuss his arrest. He stated he would rather wait until his attorney was present. His statement then indicates that Sanders re-initiated the conversation with the sheriff and undersheriff by discussing his charges and the possible punishment he could receive. The trial court used the correct standard in finding that Sanders offered to talk to the sheriff after being advised of his constitutional rights, and thus, waived his Sixth Amendment right to counsel.
>
> [3] ¶ 20. Sanders also claims his statement was not voluntary due to the fact he was promised a charge of murder instead of capital murder if he confessed. However, both Sheriff Pace and Undersheriff Riggs testified no promises were made to Sanders to induce him to give a statement. The trial court again used the correct standard in finding Sanders's statement was given freely and voluntarily. He was advised of his rights at least three times, and on one of those occasions was able to recite his rights back to the sheriff. In **Crawford v. State**, 716 So.2d 1028, 1037 (Miss.1998), this Court stated:

> [W]hether a confession is admissible is a finding of fact which is not disturbed unless the trial judge applied an incorrect legal standard, committed manifest error, or made a decision contrary to the overwhelming weight of the evidence. **Balfour v. State**, 598 So. 2d 731, 742 (Miss.1992).

In **Balfour v. State** 598 So.2d 731, *744 (Miss.1992), relied upon by Pannell, the Supreme Court found Balfour's confession was inadmissible. Balfour testified at her suppression hearing. Id. 738. There was record evidence that she invoked her right to counsel on at least two occasions. After invoking her right to counsel, Desoto County officers admitted they initiated contact with her. Although they claimed ignorance of her invocation of her right to counsel at the time of her arrest, the Supreme Court found their contact improper.

> Keeping in mind that the invocation of the right to counsel is to be afforded a broad interpretation, **Michigan v. Jackson**, 475 U.S. 625, 633, 106 S. Ct. 1404, 1409, 89 L.Ed.2d 631, 640 (1986), Balfour, along with a little help from the court, invoked her Sixth Amendment and Art. III, § 26, right at this time. See **Balfour v. State I**, 580 So.2d 1203, 1208 (Miss.1991) (right to counsel invoked at initial appearance). Even if Investigator Radford and Deputy Smith had not been present at the initial appearance and heard the exchange between Balfour and Judge Barbee, knowledge of the invocation would be imputed to them. "One set of state actors (the police) may not claim ignorance of defendants' unequivocal request for counsel to another state actor (the court)." **Michigan v. Jackson**, 475 U.S. 625, 634, 106 S.Ct. 1404, 1410, 89 L.Ed.2d 631, 641 (1986). Within less than four hours, Radford and Smith initiated contact with Balfour. As a result of this contact, Balfour "waived her rights" and made a full confession to the shooting of Lt. Lance. However, the rigid prophylactic rule of **Michigan v. Jackson**, and very recently re-endorsed in **McNeil v. Wisconsin**, absolutely precludes the State from the opportunity to prove a police-initiated valid waiver of that right. See **McNeil v. Wisconsin**, 501 U.S. 171, ----, 111 S .Ct. 2204, 2209, 115 L.Ed.2d 158, 169 (1991) (once right has been invoked, any waiver which is product of police-initiated interrogation is invalid); **Michigan v. Jackson**, 475 U.S. 625, 635-36, 106 S.Ct. 1404, 1410-11, 89 L.Ed.2d 631, 641 (1986) (same). It follows, then, that it was error for the trial court to admit into evidence Balfour's confession statement of October 11, 1988, since such statement was tainted by the constitutional violation of her Sixth Amendment right to counsel and rights secured by Art. III, § 26, of the Mississippi Constitution of 1890.

In **Rhode Island v. Innis** 446 U.S. 291, *302-303, 100 S.Ct. 1682,**1690 (U.S.R.I.,1980), also relied upon by Pannell, the Supreme Court found, under the facts of that case, that there was

no evidence of any "functional equivalent" of questioning. The record reflected that while two officers were talking with each other, Innis unexpectedly made incriminating statements. There was no evidence the officer's conversation was done with the intent to induce a confession in Innis.

> Moreover, it cannot be fairly concluded that the respondent was subjected to the "functional equivalent" of questioning. It cannot be said, in short, that Patrolmen Gleckman and McKenna should have known that their conversation was reasonably likely to elicit an incriminating response from the respondent. There is nothing in the record to suggest that the officers were aware that the respondent was peculiarly susceptible to an appeal to his conscience concerning the safety of handicapped children. Nor is there anything in the *303
> record to suggest that the police knew that the respondent was unusually disoriented or upset at the time of his arrest.FN9

In **Beckum v. State**, 786 So. 2d 1060,1063 (¶11) (Miss. 2001), Beckum testified at his suppression hearing. In addition, the facts of that case indicate that Beckum had counsel present when he was questioned. Whereas, in his testimony before the jury, Mr. Pannell did not testify to having any representation. Officer Taylor testified at the suppression hearing that he was never aware that Pannell had ever retained counsel. R. 20.

The facts in the instant cause, as indicated by cites to the record above, distinguishes the instant cause from **Brewer v. Williams**, 430 U S 387, 97 S Ct 1232, 51 L Ed 2d 424 (1977), relied upon by Pannell's counsel at the suppression hearing. R. 45. In **Brewer**, the U. S. Supreme Court found that Officer Leaming's speech in the presence of Williams "provoked" his making of incriminating admissions. This "Christmas burial speech" case was believed by the court to be tantamount to a surreptitious form of interrogation.

However in the instant cause, the record reflects that Pannell did not "contest" the testimony of Officers Taylor and Pace as to his confession being voluntarily and intelligently entered. R. 41. Additionally, in Pannell's testimony before the jury he did not testify that he was "provoked" or "induced" to confess because of any speech or conversation that occurred when he was shown the

evidence against him. He did not indicate that he confessed because of any conversation that caused him to act on strong emotions.

Rather he testified that he confessed under "duress" because of threats from an allegedly irate "red faced" physically imposing 300 pound jailer. R. 278; 295.

In **Dancer v. State** 721 So.2d 583, *587 (¶18) (Miss.1998), the Supreme Court stated that where on conflicting evidence inculpatory statements are admitted they will generally be affirmed. Consequently, even if Pannell had contested his inculpatory statements before the trial court, the result on appeal would have been the same.

> Where, on conflicting evidence, the lower court admits a statement into evidence this Court generally must affirm. **Morgan**, 681 So.2d at 87; (citing Alexander, 610 So.2d at 326); **McGowan v. State**, 706 So.2d 231, 235 (Miss.1997).

The Appellee would submit that the record cited above indicates the trial court used the correct legal standard. There was uncontested testimony from Officers Taylor and Pace in support of her finding. R. 55-57. There was corroborated evidence that it was Pannell who initiated contact with the jail administrator.

Pannell was not questioned about the fire until after he had signed a **Miranda** waiver of rights and an affidavit. The showing to Pannell of the evidence against him was a legitimate answer to a question about why he was still being incarcerated.

The record , which includes Pannell's own self serving testimony, does not show it was a mere subterfuge to induce or provoke a confession. To the contrary, the record cited supports the trial court's finding that Pannell's confession was voluntarily and knowing waived without threats or promises.

The Appellee would submit that this issue is lacking in merit.

PROPOSITION II

THERE WAS CREDIBLE, SUBSTANTIAL EVIDENCE IN SUPPORT OF PANNELL'S ARSON CONVICTION.

Additionally, although not formally addressed in the appellant's brief, there was clearly sufficient evidence for affirming Pannell's arson conviction. Contrary, to the assumption in Pannell's motions for directed verdicts, his inculpatory statements were admissible for the reasons stated above. R. 231-232; 316.

In addition to Pannell's admission to burning the house, he admitted to his ex-wife and his brother that he was going to do so. He was going to burn it to prevent his ex-wife from living there. R. 165; 191; 286. He admitted repeatedly to being angry and "provoked" by her. See M. R. E. 801(d)(2)," admission against interest." Pannell was also seen coming from the direction of the fire with a rifle within minutes of the smoke being seen coming from that direction. R.194. The fire marshal's report, based upon examination of the burned house, was that the fire was the result of human intervention by use of some type of incendiary devise. R. 217.

In **McClain v. State**, 625 So. 2d 774, 778 (Miss. 1993), the Court stated that when the sufficiency of the evidence is challenged, the prosecution was entitled to have the evidence in support of its case taken as true together with all reasonable inferences. Any issue related to credibility or the weight of the evidence was for the jury to decide, not this court.

The Appellee would submit that when the evidence summarized above was taken as true with reasonable inferences , there was more than sufficient credible corroborated evidence in support of the trial court's denial of all peremptory instructions.

The implied additional issue of insufficiency of the evidence is therefore also lacking in merit. Pannell was given a jury instruction in keeping with his testimony about his statements being

false and under duress without a lawyer present. R.332-333 . He was also given an alibi instruction. R. 332.

The jury did not find Pannell's rambling, angry, contradicted self serving testimony credible, given his testimony. This issue of the sufficiency of the evidence was therefore lacking in merit. There was more than enough credible substantial evidence in support of each element of the arson charge.

In **Groseclose v. State**, 440 So. 2d 297, 301 (Miss. 1983), the Court stated that any conflicts in the evidence created by testimony from defense witnesses was to be resolved by the jury. What the jury believes and who the jury believes, from all the evidence presented to them, is solely for their determination. As stated:

> Jurors are permitted, indeed have the duty, to resolve the conflicts in the testimony they hear. They may believe or disbelieve, accept or reject the utterances of any witness. No formula dictates the manner in which jurors resolve conflicting testimony into finding of fact sufficient to support the verdict. That resolution results from the jurors hearing and observing the witnesses as they testify, augmented by the composite reasoning of twelve individuals sworn to return a true verdict. A reviewing court cannot and need not determine with exactitude which witness or what testimony the jury believed or disbelieved in arriving at its verdict. It is enough that the conflicting evidence presented a factual dispute for jury resolution. **Shannon v. State**, 321 So. 2d 1 (Miss. 1975) 373 So. 2d at 1045.

This issue is also lacking in merit.

CONCLUSION

Pannell's conviction and sentence should be affirmed for the reasons cited in this brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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