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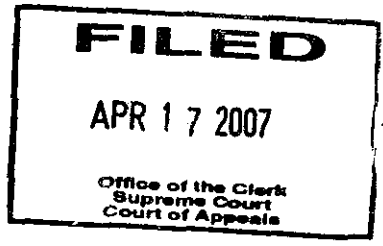
IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2006-KA-02058 COA



MIKIMIE TENILLE BROWN
a/ka/ Mikime Brown a/k/a Mikimie Kim Brown APPELLANT

V.

STATE OF MISSISSIPPI APPELLEE

BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

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

1. State of Mississippi
2. Mikimie Tenille Brown

THIS 17th day of April 2007.

GEORGE T. HOLMES
Mississippi Office of Indigent Appeals
Counsel for Mikimie Tenille Brown

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STATEMENT OF THE CASE

This appeal proceeds from judgments of conviction for the crimes of murder and arson in the fourth degree against Mikimie "Kim" Tenille Brown resulting in a life sentence plus two concurrent years from the Circuit Court of Marion County, Mississippi, following a trial held October 9-11, 2006, Honorable Michael R. Eubanks , Circuit Judge, presiding. Ms. Brown is presently incarcerated with the Mississippi Department of Corrections.

STATEMENT OF THE FACTS

Gerald Dillon did not report to work at B. J. Services Company in Columbia MS on the morning of December 12, 2000. [T. 171-75]. So, two of his co-workers went to Gerald's home on Highway 35 South in Marion County MS to check on him. While looking through his kitchen door window, they saw Gerald's lifeless body laying face down on the kitchen floor with a fatal gunshot through his chest. *Id.* [Ex. 11, 12, 16].

Investigators with the Marion County Sheriff's Department and Mississippi Highway Patrol determined that one of Gerald's girlfriends, Kim Brown, the appellant here, was a suspect in the shooting; and, a search warrant was obtained and executed at the home of Kim's father on whose property she resided in a separate mobile home. [T. 256-57]. A 9 mm Ruger pistol belonging to Kim's father was recovered which was later identified as the weapon from which the fatal round was fired which ended Mr. Dillon's

life. [T. 237-41, 258; Exs. 38, 45].

While investigators were executing the warrant, Kim arrived at her father's house and she was asked to give an interview at the Sheriff's office. [T. 259]. Ms. Brown was purportedly *Mirandized*, and, thereafter gave the investigating officers a written inculpatory statement without counsel. [T. 260-85; Ex. 53]. In this alleged statement, Ms. Brown reported that Gerald Dillon was accidently shot during an argument that got physical. *Id.*

Kim stated she and the victim Gerald were dating and that she went to his house early on the morning of the shooting to talk about their relationship and the fact that she recently miscarried his child. [T. 249-51]. Kim brought a gun with her to Gerald's house because she was afraid, based on past physical abuse by Gerald, that he would hurt her again. [T. 271]. Kim further stated that when she entered Gerald's home, they exchanged words, he grabbed her and the gun discharged. [T. 282-85]. Kim also allegedly admitted that, before she left Gerald's house the morning of the shooting, she attempted to set his pick-up truck on fire by putting a bag in the gas tank and lighting it, but the fire went out. [T. 280].

Another woman, Lateya Watts, was in Gerald's house when the shooting took place. Lateya spent the night with Gerald the night before he was shot. Lateya overheard the discussion between Gerald and Kim before the shooting, which she described in a written statement and on cross examination as "arguing and Gerald put his hand in

[Kim's] face" after which Kim said, "[i]f you put your hand in my face one more time, I swear....".[T.123]. According to Lateya, Kim came to Gerald's home the night before the shooting and attempted to gain entry of the residence but was unsuccessful. [T. 114]. Kim returned early the next morning whereupon Kim and Gerald exchanged words in the living room. [T. 103]. According to Lateya, she heard a gunshot and saw a muzzle flash, but did not see much else until Gerald stumbled into the kitchen and fell to the floor in front of her. [T. 108] Then, according to Lateya, Kim then entered the kitchen and pointed a pistol at her; Lateya pushed the gun away and it fired. [T. 109]. After the gun fired, Lateya fell to the floor and was subsequently able to convince Kim to allow her to get her shoes on and leave. Before Lateya left, Kim threatened that if she told anyone about what had occurred, Kim would come after her. [T. 110-11]. Investigators found two spent projectiles, the one that killed Gerald, and the one that missed Lateya. [T. 223-25].

Donovan Abram testified for the state that accompanied Kim to Gerald's house the morning of the shooting unaware of any expected confrontation. [T. 140-56]. Donovan dropped Kim off and waited; when Kim returned to the car, Donovan said she tossed a pistol on the floorboard and told Donovan on the way home that she shot Gerald and wanted to go back to see about him. *Id.* Donovan refused to go back. He was charged as an accessory after the fact, pled guilty, and was sentenced to one year to serve concurrent with a federal sentence he was serving for attempted bank larceny. [T. 141-42].

The state was allowed, over objection, to introduce evidence that Kim had threatened Gerald before the shooting. [T. 184, 19, 201-204]. The court also allowed the defense to introduce evidence of ongoing abuse of Kim by Gerald. [T. 338-47].

There was a motion to suppress Kim's statement to the officers based on Kim's history of mental problems, coercion and promises of leniency by the officers. [R. 52-54; Supp. Vols. 2 and 3]. The motion to suppress was denied without any specific findings except that the statement was "knowingly [and] intelligently" given. [Supp. Vol. 3, pp 184-85].

The defense also requested to introduce evidence of Kim's mental illness, including post traumatic stress disorder and borderline personality disorder, during its case in chief, but the trial court denied this request. [R. 146, 174; T. 350-52]. Based on the evidence of prior abuse from Gerald, defense counsel argued self-defense and accident in closing. [T. 371-90].

Kim was indicted for murder, aggravated assault, and arson in the fourth degree. [R. 9-10]. She was acquitted in count II of aggravated assault, and found guilty of murder and arson, fourth degree.[R. 354-55; T. 412-13].

SUMMARY OF THE ARGUMENT

Ms. Brown's trial was irreparably flawed and rendered unfair by the admission of an involuntary statement, improper jury instructions, bolstering by the state, introduction of incompetent opinion evidence, improper closing argument and exclusion of defense evidence by the trial court. The verdict of murder was not supported by the evidence.

ARGUMENT

ISSUE NO. 1: WHETHER THE APPELLANT'S STATEMENT TO LAW ENFORCEMENT OFFICERS WAS FREE AND VOLUNTARY?

The defense filed a motion to suppress Kim's purported inculpatory written statement. [R. 52-54]. At the hearing, Dr. Shirley M. Beall, a psychologist with the Forensic Unit of the Mississippi State Hospital at Whitfield testified for the state. [R. 86-88; Supp Vol. 3 p. 108]. Dr. Beall participated in the mental evaluation of Kim pursuant to an order from the circuit court in this case. [*Id.*, and Supp. Vol. 3 at p. 110]. Dr. Beall offered the opinions that even though she was "suffering from a severe personality disorder, borderline personality disorder" [Supp. Vol. 3 p.116], Kim had the "ability" to form the intent to commit the crimes charged in this case, and was not acting under "a diminished capacity at the time of the alleged crimes", and did not and does not suffer from "any definable or recognizable mental condition or disease." Dr. Beall said Kim understood and comprehended the nature of her actions and that she understood the difference between "right and wrong" at the time of the crime, and that she was

competent to stand trial. [Supp. Vol. 3, pp. 114-21].

Dr. Beall described Kim's borderline personality disorder as follows:

> It's a pervasive pattern of instability in inner personal relationships and self image, and a lot of times, usually your cognizance abilities are affected by it, and an increase impulsivity. It's characterized by somebody who suffers an intent fear of being abandoned or rejected by others, and they'll go to all sorts of extremes to try to keep from being abandoned by someone else. They will behave impulsively. Frequently, they make a number of suicide attempts, gestures, threats, behaviors. Again, their self image changes quite frequently, and they'll be high on themselves for a while, and they quit right before they complete a course or something. It's a very unstable self image, also. [Supp. Vol. 3, p. 119].

On cross examination, Dr. Beall reviewed Kim's mental health history going back to 1999 which included hearing voices and suicide attempts; a diagnosis in 2001 was "major depression, ... severe, with psychotic features...". [Supp. Vol. 3. pp. 124-26]. Dr. Beall also felt that Kim was "malingering" symptoms of psychosis. [Supp. Vol. 3, p. 145].

In support of the motion to suppress Kim's statement, the defense presented the testimony of Dr. Jean Hawks, a clinical psychologist in private practice.[1] [Supp. Vol. 3, p.148]. Dr. Hawks examined Kim in April 2001. Dr. Hawks' opined that on the day of the shooting, Kim suffered from "major depression with psychotic features" and "post traumatic stress disorder", a malady which often includes "hyper vigilance" and "exaggerated startle reflex". [Supp. Vol. 3, pp.151-52]. Perhaps more importantly, Dr.

[1] Dr. Jean Hawks' testimony was also proffered under the defendant's Motion To Present Evidence of Diminished Capacity, which is addressed in Issue 3, *infra.* [T. 350-52].

Hawks had the opinion that Kim suffered from diminished capacity at the time of the alleged criminal acts. [Supp. Vol. 3, p. 152].

Dr. Hawks reported that in her interviews, Kim was "quite angry, saying "that she had been told that if she just went ahead and gave a statement, they [the investigating officers] would make sure that she . . . would have a lower bond and be able to go home and be with her children, and ... that they'd make sure that she got in front of ... Judge Prichard. " [Supp. Vol. 3, p. 155].

The motion to suppress was overruled. [Supp. Vol. 3, pp. 184-85] In ruling on Ms. Brown's motion to suppress, the trial court made no detailed findings except, without indicating what burden of proof was used, the following:

> ... I think she knowingly, intelligently gave the statement. Now, whether it was voluntarily by the fact that there was this allegation of lower bond to go home with, and the issue about which Judge it might come before – the only facts I have is just what she told the doctor, but – and so based on that, I would not suppress it ... *Id.*

In *Carley v. State*, 739 So. 2d 1046, 1500 (Miss. App. 1999), the court said,

> [t]he privilege against self-incrimination secured by the Fifth and Fourteenth Amendments to the U.S. Constitution and by Article 3, § 26 of the Mississippi Constitution renders an involuntary confession inadmissible. *Neal v. State*, 451 So. 2d 743, 750 (Miss.1984); *Morgan v. State*, 681 So. 2d 82, 87 (Miss.1996). When the voluntariness of a confession is put in issue, the burden falls on the State to prove the voluntariness of the confession beyond a reasonable doubt. [Cites omitted]. The State meets that burden by offering the testimony of those individuals having knowledge of the facts that the confession was given without threats, coercion, or offer of reward. [Cites omitted].

The *Carley* court reiterated that a trial judge is the "fact finder" in the determination of voluntariness and the trial court's decision is reviewed under a standard of clearly erroneous, but added, "[h]owever, our review of the voluntariness of an accused's confession is less constrained where the trial judge fails to make detailed and specific findings on critical issues." *Id.*

Carley, who was 14 years old, suffered with psychosis and hallucinations. He was diagnosed with post traumatic stress disorder and gave a statement after interrogating officers invoked religious salvation, leniency and hopes of reward. The Supreme Court found his statement involuntary, saying "[w]hile the accused's mental weakness may not be the sole reason to exclude a confession, when coupled with overreaching interrogation tactics, it may become the basis for the exclusion of a confession." 739 So. 2nd 1053.

In *Williamson v. State*, 330 So. 2d 272, 276 (Miss.1976), the court said

> [a] confession will not ordinarily be excluded merely because the person making the confession is mentally weak. Until it is shown that a weak-minded person has been overreached to the end that he has divulged that which he would not have divulged had he not been overreached, his voluntary confession is admissible.

In the present case, similar to *Carley*, *supra*, Kim Brown was diagnosed with a severe personality disorder, and reported hallucinations and psychotic symptoms according to according to both doctors who testified. According to Dr. Hawks, Kim was unstable susceptible to suggestion to do what people wanted her or told her to do. [Supp. Vol. 3, pp 154-55].

According to the *Carley* decision, *supra*, a totality of the circumstances approach mandates that the trial judge perform an "evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warning given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." 739 So. 2d 1053.

As in the present case, the trial judge in *Carley* "failed to make detailed and specific findings" in deciding whether Carley freely and voluntary waived his rights. Therefore, the Court is not now restrained by the usual "clearly erroneous" standard used in its evaluation of the trial court's ruling. *Id* at 154.

Neal v. State, 451 So. 2d 743 (Miss. 1984), is a seminal Mississippi authority on this issue, procedurally and substantively. Neal gave a confession to authorities that he committed capital murder, by kidnaping and killing a young girl. *Id* at 747-49.

During the suppression hearing in *Neal,* evidence was presented that he was mentally retarded, suffered from dementia, and his IQ was measured at 54 placing him at the "low end of the mild mental retardation range." *Id*. p. 752 Expert testimony was offered that Neal could not understand the Miranda warnings "unless they were explained carefully and in extremely simple terms." *Id.*

The state in *Neal* put on expert testimony that the defendant's IQ was 60 and that he had faked the IQ test and that there was no evidence of an organic dementia, and that in the expert's opinion, Neal understood the *Miranda* warnings. *Id*. There was also proof

that Neal was married, had a family, and held several jobs, which went to establishing an ability to live interdependently in society. *Id.* p. 752.

The *Neal* Court stated the following:

> ... the mere giving of the *Miranda* warnings, no matter how meticulous, no matter how often repeated, does not render admissible any inculpatory statement thereafter given by the accused. The rights of which the accused is Miranda-warned must thereafter be waived -- intelligently, knowingly and voluntarily. Whether there has been an intelligent, knowing and voluntary waiver is essentially a factual inquiry to be determined by the trial judge from the totality of the circumstances. *Id* at p. 753.
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> * * *
>
> When an accused makes an in-custody inculpatory statement without the advice or presence of counsel, even though warnings and advise regarding his privilege against self-incrimination have been fully and fairly given, the State shoulders a heavy burden to show a knowing and intelligent waiver. *Id.*

The state carry's the burden to prove voluntariness beyond a reasonable doubt. *Id.*

> In his voluntariness determination, the trial judge must first determine whether the accused, prior to the confession, understood (a) the content and substance of the *Miranda* warnings and (b) the nature of the charges of which he was accused or with respect to which he was under investigation. *Id.* p. 755.

The *Neal* court explained that Neal's waiver was knowing, voluntary and intelligent; because, the confession developed over three days of very careful, low-key interrogation and questioning. 451 So. 2d 756. The *Neal* court found a "credible basis

for a finding that Neal was capable of understanding -- and intelligently relinquishing -- his constitutional privilege against self-incrimination." *Id.* 756-57.

In the present case, as opposed to *Neal*, there was relatively brief questioning of Kim Brown. [T. 36, 45, 87-88] The setting was subtly coercive, during a time when Kim was arguably psychotic and could not have rationally understood her legal rights. Coupled with the alleged promises of reward, it could not be said beyond a reasonable doubt, that Kim's confession was freely and voluntarily, and knowingly given. A new trial is respectfully requested.

In the following cases, the Mississippi Supreme Court has determined that confessions were involuntary due to youth, mental weakness or low intelligence: *Ford v. State*, 21 So. 524 (Miss. 1897), *Hamilton v. State*, 27 So. 606 (1900), *Harvey v. State*, 207 So. 2d 108 (Miss. 1968), *Dover v. State*, 227 So. 2d 296 (Miss. 1969).

ISSUE NO. 2: WHETHER THE TRIAL COURT ERRED BY ALLOWING THE STATE TO INTRODUCE IMPROPER LAY OPINION EVIDENCE ABOUT THE DEFENDANT'S MENTAL STATUS?

During the testimony of Mississippi Highway Patrol Investigator Darrel Perkins, over objection, the trial court allowed the state to introduce a lay opinion that Kim Brown did not appear to be suffering from "any mental disease or illness". [T. 300]. Investigator Perkins was not qualified as an expert in any field.

In *Jackson v. State*, WL 584375, Miss. App., February 27, 2007 (No. 2004-KA-

01460-COA), the court said:

> The decision whether a witness is qualified as an expert in fields of scientific knowledge is one left to the discretion of the circuit court. *Cowart v. State*, 910 So. 2d 726 (¶ 11) (Miss.. App.2005). We will only reverse the circuit court if the decision was clearly erroneous. *Id.* That is, we will not reverse the circuit court's decision unless it is clear that the witness was not qualified. *Id.* Additionally, an expert's testimony is always subject to M.R.E. 702 . To give a M.R.E. 702 opinion, a witness must have "experience or expertise beyond that of an avcragc adult." *Id.*

It is the appellant's position here that the state, was permitted to cross the boundaries established by Miss. R. Evid. Rules 701 and 702; and, a witness not qualified as an expert, was allowed to posit an "expert" opinion disguised as a "lay" opinion.[2] This testimony prejudiced Kim Brown because it was used to suggest that she was not

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RULE 701. OPINION TESTIMONY BY LAY WITNESSES

If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness,(b) helpful to the clear understanding of the testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Comment

The traditional rule regarding lay opinions has been, with some exceptions, to exclude them from evidence. Rule 701 is a departure from the traditional rule. It favors the admission of lay opinions when two considerations are met. The first consideration is the familiar requirement of first-hand knowledge or observation. The second consideration is that the witness's opinion must be helpful in resolving the issues. Rule 701, thus, provides flexibility when a witness has difficulty in expressing the witness's thoughts in language which does not reflect an opinion. Rule 701 is based on the recognition that there is often too thin a line between fact and opinion to determine which is which.

The 2003 amendment of Rule 701 makes it clear that the provision for lay opinion is not an avenue for admission of testimony based on scientific, technical or specialized knowledge which must be admitted only under the strictures of Rule 702.

RULE 702. TESTIMONY BY EXPERTS

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

suffering from any mental problems when the state's own expert was of the opinion the defendant had severe post traumatic stress disorder as expressed in the hearing on the defendant's motion to suppress. [Supp. Vol. 3, pp. 116, 119].

To determine if Kim Brown suffered from any mental problems, the jury would need expert testimony, just as the trial court needed expert testimony in the motion to suppress. If scientific testimony is found to assist the trier of fact under Rule 702, according to the court in *Whittington v. State*, 523 So. 2d 966, 975 (Miss. 1988), [w]here a "record does not reveal . . . any specific scientific or technical training or experience" on the part of the witness "which qualifie[s] him as an expert, [it is] error for the circuit judge to permit [the witness] to express [an] opinion . . . ."

In *Palmer v. Volkswagen of America, Inc.*, 905 So. 2d 564, 588 (Miss. App. 2003), there was objection to a lay opinion about an air bag equipped automobile; the Court of Appeals said in reversing:

> In *Sample v. State*,[643 So. 2d 524, 530 (Miss. 1994)], our supreme court stated that, while there is a very thin line between lay testimony and expert opinion, there is a bright line rule: "[t]hat is, where, in order to express the opinion, the witness must possess some experience or expertise beyond that of the average, randomly selected adult, it is a Rule 702 opinion and not a Rule 701 opinion" *Id.* at 529-30. [The witness'] explanation of how tank testing works, ... certainly required experience or expertise beyond that of the average, randomly selected adult..... It was expert testimony. The trial court abused its discretion by allowing [this] testimony to stray into the realm of scientific, technical and specialized knowledge that only could be admitted as expert testimony after assessment pursuant to Rule 702.

On *certiorari*, in *Palmer v. Volkswagen of America, Inc.*, 904 So. 2d 1077, 1092

(Miss. 2005), the Supreme Court concurred with the Court of Appeals, finding the plaintiff was prejudiced by improper opinion testimony and stating:

> To be clear, the test for expert testimony is not whether it is fact or opinion. The test is whether it requires "scientific, technical, or other specialized knowledge" beyond that of the "randomly selected adult." If so, the testimony is expert in nature, and must be treated in discovery, and at trial, as such.

The Supreme Court on grant of *certiorari* required that prejudice be shown for reversal, which it was. *Id.* Ms. Browns's position here is that psychology and the detection of mental illness are areas requiring expert testimony under Miss. R. Evid. Rule 702; they both concern the processing of scientific and technical information such that a jury of lay persons would need assistance. Here, the lay witness provided damaging opinion testimony representing an untrained, unscientific conclusion and opinion to an untrained jury which evidence the defendant was expressly prohibited from rebutting which is addressed in Issue No. 3. See also, *Cotton v. State*, 675 So. 2d 308, 312 (Miss. 1996).

The case of *Goodson v. State*, 566 So. 2d 1142, 1153 (Miss. 1990), is authority for the proposition here that Kim Brown was prejudiced by the admission of the questionable opinions. The defendant in *Goodson* was charged with rape of a female under the age of fourteen and the trial court allowed testimony about "child sexual abuse profiles", an area which had been determined to be not an area of expertise. *Id.* at 1142-46.

One reason the *Goodson* court reversed was that the physician who testified for the

state did not have expertise to give an opinion with the reliability required by Rule 702. Similarly, in *Edmonds v. State*, 2004-CT-02081-SCT (decided January 4, 2007 not reported yet), pages 4-7, the court, on grant of *certiorari,* found that a two-shooter theory proffered by a pathologist to be inadmissable saying:

> While Dr. Hayne is qualified to proffer expert opinions in forensic pathology, a court should not give such an expert carte blanche to proffer any opinion he chooses. There was no showing that Dr. Hayne's testimony was based, not on opinions or speculation, but rather on scientific methods and procedures. [Cite omitted]. The State made no proffer of any scientific testing performed to support Dr. Hayne's two-shooter theory. Therefore, the testimony pertaining to the two-shooter theory should not have been admitted under our standards. *Id.*

The same fatal shortcomings appear in the case at bar. Here there was no showing that Investigator Perkins' testimony was based on science, as it was clearly based on speculation and lay conjecture. It is also important to note that the decision to reverse in *Edmonds* was reinforced in that Dr. Hayne's improper opinion was the only "evidence" of guilt other than the defendant's confession.

Here, Investigator Perkins was not qualified as an expert in psychology and there was no showing that any prior experience he had dealing with mentally ill persons offered any reliability whatsoever as to the detection of mental or psychological problems in people, nor any showing that Perkins had any knowledge or understanding of vast and various symptoms of mental illness, nor testing, nor scientific methods of any kind. As in *Edmonds, supra,* Investigator Perkin's opinion was the only "mental health" evidence

the jury heard.

In *Goodson, supra*, court stated that "[t]here was a substantial probability that the jury would be mislead by [the doctor's] opinion", and letting [the doctor] testify about profiles denied Goodson the right to a fair trial Rule 103(a) MRE. 566 So. 2d at 1148. Here in Kim Brown's case, as in *Goodson*, the jury would have been influenced and misled by the witness's improper lay opinion.

It would follow that Brown here, as Goodson and Edmonds, did not, therefore, receive a fair trial. Moreover, in the present case, the defense's hands were tied by not being able to respond, making the issue completely one sided.

Even if it was proper to allow, the lay opinion here, or even if there is the argument of harmless error, the prejudicial flaw does not stand alone or go away; because, the jury heard the evidence, and the defendant was proactively prevented from responding with competent evidence, namely, the testimony of Dr. Hawks. A trial court's allowance of an expert on one side, but not allowing a competent expert opinion from the other side is clearly erroneous as was held in *Williams v. State*, 539 So. 2d 1049, 1050-51 (Miss. 1989).

In *Williams*, a psychiatrist who had interviewed a child prosecutrix testified for the defense as to, among other things, the child's propensity for truthfulness. The defense expert was not allowed to testify as to the propensity for truthfulness of victim's brother, whom the expert had also interviewed. Subsequently, a state expert, who had likewise

interviewed both children, was allowed to testify in rebuttal as to her opinion of the brother's propensity for truthfulness. The court said, "[t]his, obviously, was error. The purpose of rebuttal testimony is to explain, repel, counteract or disprove evidence by the adverse party." Citing, *United States v. Delk*, 586 F.2d 513 (5th Cir.1978); *Roney v. State*, 167 Miss. 827, 150 So. 774 (1933); and generally, 23 C.J.S. Criminal Law, § 1050 (1961).

The *Williams* court found that it was reversible error to allow the opinion of the state's expert in rebuttal on the same subject matter that the defendant's expert was silenced. There is no fair reason the court should not grant the same relief to Ms. Brown, which is respectfully requested.

ISSUE NO. 3: DID THE TRIAL COURT ERR BY DISALLOWING EVIDENCE ABOUT THE APPELLANT'S MENTAL CONDITION?

By motion with a proffer, the defense sought to introduce evidence of Kim Brown's mental condition in its case in chief; but, the request was denied by the trial court. [R. 146, 174; T. 350-54; Supp. Vol. 3 pp 148-55; Ex. 57]. In this context, mitigation of culpability resulting from mental defect is treated under the topic of "diminished capacity".

Generally, "diminished capacity is not a recognized defense in Mississippi", as stated in *Cannaday v. State*, 455 So. 2d 713 (Miss. 1984) and elsewhere, See, also,

Garcia v. State, 828 So. 2d 1279, 1284 (MS App.2002), *Stewart v. State*, 790 So. 2d 838, 841 (Miss. App.2000), *Smith v. State*, 880 So. 2d 1094, 1097 (Miss. App. 2004).

However, "diminished capacity" is relevant in determining whether an act, in this case homicide, was committed with or without intent or deliberate design. In *Bieller v. State*, 275 So. 2d 97, 98-99 (Miss. 1973) Bieller was accused of killing his girlfriend with a shotgun. Bieller was so intoxicated he had no memory of the event. Beiller was not mentally ill, but at trial wanted a jury instruction which would have offered a defense of lack of intent due to intoxication. On appeal, in ruling in favor of Bieller and relegating the issue to the jury, the court said:

> The [trial] court refused the instruction as the evidence bearing upon Bieller's condition at or about the time of the homicide did no more than raise a question as to the degree of his voluntary intoxication. In this situation it was for the jury to say whether Bieller was intoxicated to such an extent that he was incapable of forming the malicious intent, or 'malice aforethought' necessary in the crime of murder. The jury gave Bieller the benefit of this and found him guilty of manslaughter only.
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> The applicable rule is stated in 22 C.J.S. Criminal Law § 70 (1961) as follows:
> Temporary insanity resulting from use of intoxicants, however, may be sufficient to deprive accused of the capacity to entertain a specific intent essential to commission of a particular crime, which is just another way of stating the rules, . . . to the effect that drunkenness does not excuse crime but may preclude the existence of a specific mental condition essential to commission of a particular kind or degree of offense.

In *Taylor v. State*, 452 So. 2d 441, (Miss. 1984), the court clearly established that in Mississippi, when there is no insanity defense tendered in a particular case, expert

testimony is generally not admissible to show the mental state of a defendant *prior* to a homicide as evidence of lack of intent or heat of passion; because, in a heat-of-passion-manslaughter versus deliberate-design-murder case, the factual determination to be made by the jury is all based on *objective* evidence, where in an insanity defense case, the jury deliberates the *subjective* intent of the defendant. However, this does not stop the analysis.

Neither *Taylor* nor the usual cases on diminished capacity are controlling herein Kim Brown's case; because, the state's evidence of malice aforethought against Kim Brown, was based, at least in part, on her actions *after* the homicide, rather than *before*.

The controlling authority, rather, under this issue, is *Garrison v. State*, 726 So. 2d 1144, 1151 (Miss. 1998). In *Garrison,* the court said:

> In the case sub judice, ... the State built its case, to some extent, on testimony about Melissa's actions *after* her mother's murder, focusing on statements she made which later were proven to be untrue. The State went so far as to assert in closing arguments that these lies were inferential of her guilt. Rule 702 of the Mississippi Rules of Evidence allows for the admission of expert testimony if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." While much of the proffered testimony addressed Melissa's mental state prior to the murder, it also covered Dr. Tramontana's impressions of her mental state *after* the crime, including post-traumatic shock, depression and anxiety. ***We find that his testimony about her mental state after the murder was admissible as rebuttal to the State's assertions since it would assist the jury in understanding the evidence and determining facts in issue.*** [emphasis added].

In the present case, the state made out its proof with actions of Kim Brown after the homicide with testimony from Donovan Abram and Kim Brown's own statement.

Abram said that Kim admitted freely to shooting Gerald and wanted to go back and help him; and, Kim allegedly, went home after the shooting, packed her children off to school, took a nap and went to a funeral home for visitation. [T. 148-56, 279, 366; Ex. 53]

In the testimony during the motion to suppress, great emphasis was placed by Dr. Shirley Beall on Kim's conduct following the shooting:

> Another part of the reason was – again, her level of functioning that she reported on that day. You know, coming home, getting her children dressed, going to a funeral home and interacting with a number of people. If somebody is very psychotic or being bothered by voices, they're not on the phone talking for four hours to somebody, typically. [Supp. Vol. 3, p 141].

Also during the motion to suppress hearing, Dr. Hawks was asked a number of questions by the prosecutor about the details of what transpired after the shooting as an indicator of mental status before and at the time of the shooting. [Supp. Vol. 3 pp. 170-82].

If follows as a matter of law under *Garrison*, *supra*, that Kim Brown should have been allowed to introduce evidence concerning her mental health. Yet this, once again, does not end the argument; because, Kim Brown's case is even stronger than Garrison's under this issue.

There is also the argument here that, since the court allowed evidence of Kim Brown's prior bad acts under Miss. R. Evid. Rule 404(b) over objection as proof of motive, etc., and lack of accident, which included the threats Kim allegedly made against Gerald and her coming to the Gerald's house prior to the shooting etc., there should have

been some allowance for defense evidence to show that this conduct was just as much influenced by mental illness as any fatal acts. [T. 184, 199-205, 310]. Due process and simple fairness would require Kim Brown to be allowed to answer this evidence.

This is not an abstract assumption. The decision in *Houston v. State*, 531 So. 2d 598, 606-07 (Miss. 1988), stands for the proposition that, if prior bad acts are admissible against a defendant under Rule 404(b), a defendant should be allowed to introduce evidence in response in so-called "mini trials" to rebut "bad character" evidence.

In addressing the complexities of 404(b) evidence and the often episodic characteristics of child abuse cases, and how both sides use and ought to be allowed to use the character evidence, the *Houston* court said, "[t]his, of course, creates the necessity for conducting a whole series of mini-trials within the trial." *Id.* at 606 fn. 7. This necessity was not afforded Kim Brown, so she respectfully requests a new trial.

ISSUE NO. 4: WHETHER JURY INSTRUCTION C-4 REGARDING CULPABLE NEGLIGENCE PROPERLY STATED THE LAW?

Here the trial court gave the following instruction *sue sponte* as C-4, or Jury Instruction No. 10:

> "Culpable Negligence" is conduct which exhibits or manifests a wanton or reckless disregard for the safety of human life, or such indifference to the consequences of the defendant's act under the surrounding circumstances as to render his conduct tantamount to willfulness."[R 273].

It is Ms. Brown's position that the law on culpable negligence was improperly

stated; because, as worded the subject instruction required the jury to deliberate whether the alleged culpably negligent act was "tantamount to willfulness" based on the surrounding circumstances. However, nothing in the applicable statute requires this finding. Under MCA § 97-3-47 (1972):

> Every other killing of a human being by the act, procurement, or culpable negligence of another and without authority of law, not provided for in this title, shall be manslaughter.
>
> The case law does not change the definition. In and *Grinnell v. State*, 230 So. 2d 555, 558 (Miss. 1970) the court held:
> [T]he term culpable negligence should be construed to mean a negligence of a higher degree than that which in civil cases is held to be gross negligence, and must be a negligence of a degree so gross as to be tantamount to a wanton disregard of, or utter indifference to, the safety of human life, and that this shall be so clearly evidenced as to place it beyond every reasonable doubt.

If the jury in this case found under the instructions given that Kim was culpably negligent, her actions were "tantamount to wilfulness". If her actions were tantamount to wilfulness under C-4, then accordingly she acted with deliberate design under S-5 and S-14. [R. 269-71, 278]. It follows, then that C-4 and all of the other instructions in this case taken as a whole and read together resulted in peremptory instructions for deliberate design murder, if the jury found culpable negligence, which was neither correct nor intended.

For the jury here, there was no distinguishable difference between murder and culpable negligence manslaughter resulting from "conduct which exhibits or manifests a wanton or reckless disregard for the safety of human life, or such indifference to the

consequences of the defendant's act under the surrounding circumstances to render his conduct tantamount to willfulness". Kim Brown was convicted by a misinformed jury.

In the case of *Smith v. State*, 463 So. 2d 1028, 1029-30 (Miss. 1985) the Supreme Court had an analogous issue before it pertaining to the confusing and improper instructions on manslaughter and murder. In *Smith* the court found that an instruction, similar in part to S-5 and S-14 here, was peremptory to the issue of murder and was, therefore, improper, unless cured by other instructions. In reviewing the manslaughter instruction which was given in that case, the *Smith* court found that the manslaughter instruction was contradictory to the murder instruction and the jury had to decide which instruction stated the law correctly. *Id.* The Supreme Court found that choosing between jury instructions is a function of the court and not the jury, and reversed the case for a new trial. *Id.*

The same situation arose in *Scott v. State*, 446 So. 2d 580, 583 (Miss. 1984). The *Scott* court said, "when a jury is given instructions which are in hopeless conflict this court is compelled to reverse because it cannot be said that the jury verdict was founded on correct principles of law."

See also *Russell v. State*, 789 So. 2d 779, 780 (Miss. 2001) where the Supreme Court reversed a murder conviction, where a manslaughter instruction was given, but the jury was not adequately instructed as to the definition of malice aforethought.

The state cannot argue that this issue is procedurally barred by a failure to object;

because, proper jury instructions is a fundamental right effecting a defendant's constitutional right to a fair trial. A defendant is entitled to have the jury fully and properly instructed on theories of defense for which there is a factual basis in evidence. *Green v. State*, 884 So. 2d 733, 735-38 (Miss. 2004). It is suggested that the court is obligated to address the merits under the doctrine of plain error. From *Dobbins v. State*, 766 So. 2d 29, 31 (Miss. App. 2000):

> The right of an appellate court to notice plain error is addressed in M.R.E. 103(d). The Mississippi Supreme Court applies the plain error rule only when a defendant's substantive rights are affected. [Cite omitted]. The plain error doctrine has been construed to include anything that seriously affects the fairness, integrity or public reputation of judicial proceedings.' " *United States v. Olano*, 507 U.S. 725, 732, 113 S. Ct. 1770, 123 L.Ed.2d 508 (1993). The plain error doctrine requires that there be an error and that the error must have resulted in a manifest miscarriage of justice. [Cite omitted]. Both error and harm must be found for reversal. [Cites omitted.].

Accordingly, under this claimed error, Kim Brown respectfully requests a new trial.

ISSUE NO. 5: WHETHER THE STATE WAS ALLOWED TO IMPROPERLY BOLSTER ITS CASE WITH IMPROPER REDIRECT EXAMINATION OF STATE WITNESSES?

There were two instances when the trial court here allowed the prosecution an unfair advantage of exceeding the scope of redirect examination, which resulted in an irreparable dilution of Ms. Brown's rights of confrontation and cross-examination, under Sixth and Fourteenth Amendments of the U. S. Constitution and the Art. 3 §14 and 26 of the Mississippi Constitution. First, during the examination of state witness LaTeya Watts, she was asked several questions about a written statement she gave investigating officers about the incident with the written statement itself being introduced into evidence. [T. 120-27; Ex. 30]. On redirect, over objection, the trial court allowed the prosecutor to go, in his own terms, "line by line" through Ms. Watt's statement with her, basically reading the statement to the jury periodically stopping to ask Ms. Watts if what was read was correct. [T. 127-38].

The second event, although minor and probably benign standing alone, in conjunction with other errors, cannot necessarily be labeled harmless. Over objection, during redirect of state witness Deputy Tim Stingley, the state was allowed to explore the second discharge of the 9mm pistol (when Lateya Watts allegedly pushed the gun away), even though defense counsel never raised the matter during cross-examination. [T. 289-90].

In *Caston v. State*, 823 So. 2d 473, 489 (Miss. 2002), a similar issue was raised

concerning the admission of "prior consistent" statements of two state witnesses where the state read a statement into the record claiming "slight discrepancies" between the statement and the testimony. The *Caston* court analyzed the issue under Mississippi Rules of Evidence 801(d)(1) which states the following:

> (d) Statements Which Are Not Hearsay. A statement is not hearsay if:
>
> (1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him ...
>
> The *Caston* court ruled stating:
>
> Therefore, M.R.E. 801(d)(1)(B) normally applies in rebuttal situations. [A]dmission of a prior consistent statement of a witness where the veracity of the witness has been attacked is proper but should be received by the court with great caution and only for the purpose of rebuttal so as to enable the jury to make a correct appraisal of the credibility of the witness. [cites omitted].

Caston, thus, stands for the position that the state should have been limited to use of the prior consistent statement for pure rebuttal only, not as a second bite at the proverbial apple. The *Caston* court found error, although not reversible, because, there was no objection and the incident was isolated. Here, in Kim Brown's case, there were timely and repeated objections, and the first instance of improper redirect, laced with leading questions, went on during the redirect of

Lateya Watts for, more or less, ten pages of the trial transcript. [T. 127-138] As can be seen the trial court did not handle the testimony with "great caution" as required.

Repeated leading questions on material issues has been held to be reversible error. In *McDavid v. State*, 594 So. 2d 12, 16-17 (Miss. 1992), the court said:

> We stated the rule to be applied when reviewing a trial court's decisions regarding leading questions in *Whitlock v. State*, 419 So. 2d 200, 203 (Miss.1982):
>
> A leading question is one that suggests to the witness the specific answer desired by the examining attorney. [citations omitted]. Trial courts are given great discretion in permitting the use of such questions, and unless there has been a manifest abuse of discretion resulting in injury to the complaining party, we will not reverse the decision. [citations omitted]. This is because the harm caused is usually inconsiderable and speculative, and only the trial court was able to observe the demeanor of the witness to determine the harm. [citation omitted].
>
> The harm caused by the leading questions in this case was not inconsiderable and speculative. One of the leading questions dealt with Detective Harris's identification of McDavid and other leading questions dealt with Detective Clowers's identification of McDavid's voice. These improper questions caused significant harm to McDavid since they dealt with the most crucial issue in the case, the identification of McDavid as a participant in the drug transaction.

Improper redirect in this context, is actually bolstering. As stated in *Henry v. State*, 209 So. 2d 614, 617 (Miss. 1968):

> As a general rule, corroborating testimony to strengthen and bolster the testimony of a party's own witness is not admissible. This rule is pointed out

in 98 C.J.S. Witnesses § 472 (1957), wherein it is said:
'Where a witness has not been impeached, it is not in general permissible to support his testimony by other evidence, corroborative in its nature, which bears on the credibility of the witness rather than on the issues in the cause ... However, considerable latitude must be allowed in the admission of corroborative evidence of a witness not directly impeached, and under certain circumstances corroborative evidence is admissible to support the testimony of such a witness.'

Here in Ms. Brown's case, she was irreparably prejudiced because the repeated leading questions concerned the only eye witness to the events leading to the death of the victim. So, as in *McDavid, supra*, the harm here was neither slight nor speculative. The leading questions and improper redirect were obviously clear violations of the rules and common procedural law and the defendant was harmed. Therefore, Ms. Brown looks to this court for the appropriate relief, respectfully requesting a new trial.

ISSUE NO. 6: WHETHER THE APPELLANT WAS PREJUDICED BY IMPROPER CLOSING ARGUMENT OUTSIDE THE EVIDENCE?

Recall that Donovan Abram testified for the state that he rode with Kim Brown the morning of the shooting unaware of any expected confrontation, and that Kim came back from Gerald's house and threw the gun down and told Donovan that she shot Gerald. [T. 140-56] Donovan was *subsequently* convicted of a federal offense of "attempted bank larceny". [T. 141-42].

During closing argument in the present case, the prosecutor misrepresented to the jury that Donovan was a convicted of the federal offense *at the time of the incident*,

arguing that this was proof of Kim's criminal animus in that she sought out a convicted felon to assist her in a "planned" murder, hoping the jury would be swayed too by the logical fallacy of guilt by association. [T. 393, 398, 409].

The defendant objected, and the trial court offered to let counsel make further closing argument; but, not wanting to draw more attention to the matter, counsel declined the offer from the court. Then the court asked counsel if he wanted the court to address the topic; again counsel declined not wanting to draw more attention to the matter. Counsel requested a mistrial, which, ostensibly, was denied. *Id.*

From the record, since the trial court was willing to allow corrective measures, the objection appears to have been sustained. The jury never knew this, however, because the issues were all addressed at a bench conference. *Id.*

Kim Brown's position is that the state exited the boundaries of fair comment during the closing, and the court should have sustained the objection and advised the jury to disregard matters argued outside the record. In *Clemens v. State*, 320 So. 2d 368 (Miss. 1975), the Court stated:

> So long as counsel in his address to the jury keeps fairly within the evidence and the issues involved, wide latitude of discussion is allowed; but, when he departs entirely from the evidence in his argument, or makes statements intended solely to excite the passions or prejudices of the jury, or makes inflammatory and damaging statements of fact not found in the evidence, the trial judge should intervene to prevent an unfair argument. Moreover, this Court will not withhold a reversal where such statements are so inflammatory [in the judgment of this Court]. as to influence the verdict of the jury, and thus prevent a fair trial.
> [Emphasis added]. [*Id.* at 371-72].

In the case of *Johnson v. State*, 596 So. 2d 865, 868 (Miss. 1992), the prosecutor made comments, which were not supported by the evidence, that the defendant had been given an opportunity to, but did not, offer an explanation as to how he obtained certain property. The Supreme Court found that the prosecutor's remarks "were not supported by the record" *Id.* The *Johnson* court reminded prosecutors about "the dangers of reversal in going outside the record in their arguments.":

> The test to determine if an improper argument by a prosecutor requires reversal is whether the natural and probable effect of the prosecuting attorney's improper argument create an unjust prejudice against the accused resulting in a decision influenced by prejudice. [cite omitted].

The *Johnson* court concluded that the references to the defendant's silence without evidentiary support were "improper and highly prejudicial to him" requiring reversal because of the "probable effect of unfairly influencing the jury's decision making." *Id.* at 869.

As pointed out in *Flowers v. State*, 842 So. 2d 531, 553-54 (Miss. 2003), in reversing a capital murder conviction:

> ... the purpose of closing argument is to fairly sum up the evidence, ... [c]ounsel 'cannot however state facts which are not in evidence, and which the court does not judicially know . . . neither can he appeal to the prejudices not contained in some source of evidence.

No doubt, the prosecution has wide latitude in closing argument, with clear

boundaries being comments such as a defendant not testifying.

> The right to argument contemplates liberal freedom of speech and range of discussion confined only to bounds of logic and reason; and if counsel's argument is within limits of proper debate, it is immaterial whether it is sound or unsound or whether he employs wit, invective, and illustration therein. Moreover, figurative speech is legitimate if there is evidence on which it may be founded. *Exaggerated statements and hasty observations are often made in the heat of the day, which, although not legitimate, are generally disregarded by the court, because in its opinion, they are harmless. There are, however, certain well established limits beyond which counsel is forbidden to go. He must confine himself to the facts introduced in evidence and to the fair and reasonable deduction and conclusions to be drawn therefrom and to the application of the law, as given by the court, to the facts.* (Emphasis added).

Under the present set of facts, the prosecutor exited the bounds of the testimony and quite clearly misrepresented facts not in evidence with the natural and probable detrimental effect of creating an unjust prejudice against the accused resulting in a jury verdict influenced by prejudice. Kim Brown, therefore, requests a new trial.

ISSUE NO.7: WHETHER A VERDICT OF MANSLAUGHTER INSTEAD OF MURDER WAS APPROPRIATE?

Kim Brown's motion for directed verdict should have been granted based on the theory of "imperfect self-defense" as set out in *Wade v. State*, 748 So. 2d 771, 773-76 (Miss.1999). In *Wade*, the defendant was charged with killing her boyfriend with whom she was in business as co-owners of a bar. There was testimony, as there was here in Kim Brown's case, that Wade's boyfriend was physically abusive. *Id.*

On the day of the killing, the boyfriend was abusive, banging Wade's head against one of their pool tables, Wade went and retrieved a gun and said, "You ain't gonna hit me no more", the boyfriend moved toward Wade and she shot him.

In the present case, Kim Brown, who had been physically abused by Gerald on prior occasions, said, "[i]f you put your hand in my face one more time, I swear....". Then the witness Lateya Watts, heard a shot and saw the muzzle flash. [T.123]. In *Wade,* the Supreme Court referencing the Court of Appeals stated:

> While Wade was undoubtedly mad, it is also clear that her ill will was engendered by the earlier unlawful acts of Simpson and what appeared to be a renewed attack. This clearly was a killing in the heat of passion and arguably a case of imperfect self defense, and as such, manslaughter was the appropriate verdict. 748 So. 2d at 773.

The important conclusion of the court in *Wade* was that there was insufficient evidence of "malicious intent"; and, the same can be said of Kim Brown's situation, as her "ill will" if any, was engendered by past physical abuse, her feelings of abandonment, and what was a new attack by Gerald putting his hand in her face. *Id.* at 774.

The Supreme Court described the theory of "imperfect self-defense" reducing murder to manslaughter as "an intentional killing ... done without malice but under a bona fide (but unfounded) belief that it was necessary to prevent great bodily harm." *Id.* at 775. See also *Lanier v. State*, 684 So. 2d 93, 97 (Miss.1996).

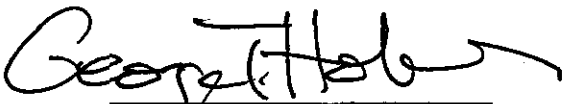
Under this issue, the Court is asked in the alternative to a new trial, to reduce Kim Brown's conviction under Count 1 of the indictment to manslaughter.

CONCLUSION

Kim Brown is entitled to have the murder and arson convictions reversed and remanded back to the Circuit Court for a new trial, or at a minimum, to have the court render a conviction of manslaughter under count one of the indictment and remand for resentencing.

Respectfully submitted,

MIKIMIE TENILLE BROWN

BY: 

GEORGE T. HOLMES,
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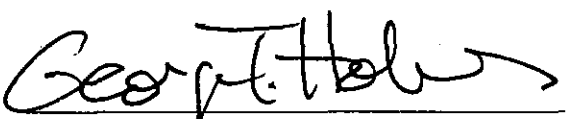
CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 17 day of April, 2007, mailed a true and correct copy of the above and foregoing Brief Of Appellant to Hon. Michael R. Eubanks, Circuit Judge, P. O. Box 488, Columbia MS 39475, and to Hon. Doug Miller, Dist. Atty , 500 Courthouse Sq., Ste. 3, Columbia MS 39429, and to Hon. Charles Maris, Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid.



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