IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2006-KA-2063-COA

TOWANDER DENISE BROADHEAD
a/k/a Towander Denise Garner, a/k/a Tawana
Denise Broadhead — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
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V.

STATE OF MISSISSIPPI — APPELLEE

CERTIFICATE OF INTERESTED PERSONS

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

1. State of Mississippi
2. Towander Denise Broadhead

THIS 22nd day of June 2007.

George T. Holmes

GEORGE T. HOLMES
Mississippi Office of Indigent Appeals
Counsel for Towander Broadhead

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ISSUE NO. 2: **WHETHER THE STATE ESTABLISHED A SUFFICIENT EVIDENTIARY FOUNDATION FOR THE ADMISSION OF RECORDING OF A PURPORTED TELEPHONE CONVERSATION OF THE APPELLANT ?**

STATEMENT OF THE CASE

This appeal proceeds from a judgment of conviction for capital murder against Towander Denise Broadhead and resulting life sentence without parole from the Circuit Court of Jackson County, Mississippi, following a trial held November 14-15, 2006, Honorable Kathy King Jackson, Circuit Judge, presiding. Ms. Broadhead is presently incarcerated with the Mississippi Department of Corrections.

FACTS

Five year old Kenderick Broadhead lived in the Escatawpa community just north of Moss Point in Jackson County with his mother, sister, and step-father. [T. 266-8, 277]. In early 2004, they had moved to Mississippi from Mobile, Alabama. [T. 403].

During the afternoon and evening of Sunday February 29, 2004, Kenderick was having trouble counting to twenty. [T. 279]. When he kept skipping the number sixteen,

his mother Towander Broadhead, the appellant here, hit him several times. [T. 279-284, 406-11, 419-20, 426]. Kenderick died from subdural and subarachnoid hemorrhaging and the brain herniation which followed. [T.387]. His body was found on the side of a road in Harrison County near Gulfport. [T.239-30, 373].

Kenderick's then ten year old sister, Royteshia, Towander's other child living in the home, told investigating officers and the jury that, when Kenderick kept skipping the number sixteen, Towander hit Kenderick repeatedly with a broom stick, a belt, a book, a rod from window blinds and her hand and that Kenderick was picked up and dropped on the floor several times as well. [T. 279-284]. Royteshia said that Kenderick fell asleep and did not wake up. [T. 284-85].

Towander testified that she never intended on hurting Kenderick, just discipline him so he would grow up to be somebody. [T. 408-09, 416]. Towander described how she was mistreated as a child. [T. 401-02]. The jury convicted Towander of capital murder, but could not agree on the death penalty. So, she is serving a sentence of life imprisonment without parole. [T. 544; R. 533].

SUMMARY OF THE ARGUMENT

The trial court erred by allowing the introduction of gruesome autopsy photographs and by allowing a recording of a telephone conversation into evidence without the proper evidentiary foundation.

ARGUMENT

ISSUE NO. 1: WHETHER THE TRIAL COURT ERRED BY ALLOWING INTRODUCTION OF GRUESOME AUTOPSY PHOTOGRAPHS OF THE FIVE YEAR OLD VICTIM'S DISSECTED CHEST AND SKULL WHICH WERE MORE PREJUDICIAL THAN PROBATIVE?

Exhibit 40 introduced during the trial is an autopsy photograph of Kenderick's dissected chest. Exhibit 41, also in evidence, is an autopsy photograph of Kenderick's dissected skull. Both were introduced over objection as being gruesome and more prejudicial than probative. [T. 249-50, 381].[1] In *McFee v. State*, 511 So.2d 130, 135 (Miss.1987), the court reiterated that "photographs which are gruesome or inflammatory and lack an evidentiary purpose are always inadmissible."

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M. R. E. 401-403 provide the guidelines for determining admissibility of photographs:
Rule 401. DEFINITION OF "RELEVANT EVIDENCE"
"Relevant Evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
Rule 402. RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE
All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Mississippi, or by these rules. Evidence which is not relevant is not admissible.
Rule 403. EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME
Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Prior to testimony in the case, Defense counsel informed the court of a motion *in limine* concerning the gruesome photographs and the court advised that the photographs would be taken up when and if offered. *Id.* When an objection was made to Exhibits 40 and 41 during the trial, it was overruled. *Id.*

In *Welch v. State*, 566 So.2d 680, 681 (Miss. 1990), Welch, partly under duress, and two of his buddies beat Joe Ray Heath to death over a gambling argument and dumped Heath's body on the side of a road. Welch's two buddies pled guilty, Welch took his chances at trial and was convicted of murder. *Id.* at 682.

The *Welch* court found several reversible errors, one of which was the introduction of autopsy photographs which were more gruesome and prejudicial than probative. The *Welch* court found fault with photographs of the victim's "dissected cadaver", one of which is almost identical to Exhibit 40 here, described as showing "the cadaver cut open ... with the rib-cage refracted back over the face of the victim". *Id.* at 685.

The *Welch* court reiterated that the admissibility of photographs is at the trial court's discretion and there is no remedy on appeal without an abuse of that discretion. *Id.* One way a trial court abuses the discretion is to allow "[g]ruesome photos which have no evidentiary purpose or probative value except to inflame and arouse the emotion of the jury." *Id.*

The *Welch* court said the cadaver photographs had no probative value; because, they did not show "circumstances surrounding the death, the cruelty of the crime, the

place of the wounds, or the extent of force or violence used, [and], were extremely unpleasant and used in such a way as to be overly prejudicial and inflammatory." *Id.*

In *Hewlett v. State,* 607 So.2d 1097, 1102 (Miss.1992) the court said, "Photographs of a victim should not ordinarily be admitted into evidence where the killing is neither contradicted nor denied, and the *corpus delicti* and the identity of the deceased have been established." In the present case, the *corpus delicti* of the charges and identity of the deceased were clearly established and unchallenged. This is why it is obvious that the state's motive here was to merely inflame the jury.

In *McNeal v. State*, 551 So.2d 151, 159 (Miss.1989), trial judges were

> instructed to carefully consider the circumstances surrounding the admission of photographs. The trial judge must specifically consider: (1) whether the proof is absolute or in doubt as to the identity of the guilty party, as well as, (2) whether the photographs are necessary evidence or simply a ploy on the part of the prosecutor to arouse the passion and prejudice of the jury.

When the state argued in *McNeal* that the gruesome photographs were needed to prove the *corpus delicti* of the crime, the court said "we believe that the state could have shown the angle and entry of the bullet wound without the full-color, close-up view of the decomposed, maggot-infested skull." *Id.* The for photographs to have "evidentiary value", they must:

> '(1) aid in describing the circumstances of the killing; (2) describe the location of the body and the cause of death; (3) supplement or [clarify] witness testimony.' *Jones v. State*, 938 So.2d 312, 316-17 (Miss. App. 2006)

In the present case, the gruesome testimony about the victim's bruising and fatal injuries from the pathologist was more than sufficient to establish everything the state needed to prove in this case. In other words, there was not a legitimate reason here to display the child's bloody splayed open chest and skull. [T. 377-88]. This case was not complicated, the details of the internal injuries were not crucial to the prosecution.

Exhibits 40 and 41 served no probative purpose. There is no way for the jury to differentiate any subdural bleeding from bleeding caused by the autopsy incision. There is no way from Exhibit 41, the photo of the skull, for the jury to discern the nature or cause of the injuries or any other probative matter, such as the volume of blood associated with the injury versus the autopsy, nor the number or ferocity of any blows, there is nothing in the photographs which indicate the size or use of any weapon.

The sole purpose of Exhibits 40 and 41 was to arouse the inherent human emotions of viewing the body of an innocent child undergoing an autopsy. The viewing of these photos is clinical to seasoned members of the Court and criminal bar; but, is highly traumatic to lay jurors. This juror trauma was what the prosecution wanted and obtained. The natural response of a juror is to remain in an emotional state where the only satiation is to convict the person accused of placing the child on the cold stainless-steel autopsy table. The verdict is thus a product of passion and emotion rather that reason and due process of law.

The appellant respectfully requests that the Court here find that the trial court

should not have admitted Exhibits 40 and 41. Accordingly, a new trial is requested as well.

ISSUE NO. 2: WHETHER THE STATE ESTABLISHED A SUFFICIENT EVIDENTIARY FOUNDATION FOR THE ADMISSION OF RECORDING OF A PURPORTED TELEPHONE CONVERSATION OF THE APPELLANT ?

Towander Broadhead spent her pre-trial detention as the Jackson County Adult Detention Center where all telephone calls from the jail cell area are automatically recorded to a computer and then to a cassette tape. [T. 101, 308]. The state was allowed to introduce Exhibit 26, a compact disk recording, and Exhibit 27, a transcript, which were of a purported telephone conversation between the appellant Towander and someone named Cliff made March 3, 2004, three days after Kenderick died. [T. 307-13].

In this alleged conversation, there are prejudicial references to Towander having a "juvenile record", and more damaging, however, Towander reportedly states in response to a question from Cliff, "[b]ecause I murdered my child ". There are other irreparably prejudicial and incrimination remarks as well.

There was a pretrial motion *in limine* hearing regarding the purported telephone conversation. [T. 100-13]. The court took the issue under advisement with no ruling prior to trial. Then, at trial, there was an objection to the admission of the recording and transcript into evidence before the jury. [T. 307-16]. However, the court allowed both the

recording and transcript into evidence. *Id.*

One of the main flaws in the evidentiary foundation for these particular items is that, at the time the alleged conversation was made, there was no one at the Jackson County Adult Detention Center who actually monitored the machinery which made the recording who could testify that all was in proper working order nor listening to the conversation to say that it was accurately recorded and transcribed. [T. 309-10]. Moreover, the phone system was not the same as the present system. [T. 308]. The sponsor of the exhibit was not the custodian of records and was not even employed at the jail when the tape was made. [T. 310]. Nothing is in the record before the court that the compact disk recording admitted into evidence and the associated transcript are what they purport to be. [2]

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[2] The applicable rule is M. R. E. 901 which states in relevant parts:

> (a) General Provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
> (b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:
>
> (1) *Testimony of Witness With Knowledge.* Testimony occurrence a matter is what it is claimed to be.
> ...
> (5) *Voice Identification.* Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.
>
> (6) *Telephone Conversations.* Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances,

When a recording is offered into evidence, the authentication of the sponsoring witness must include testimony that the content of the recording accurately reveals the events or transactions as they actually occurred at the time of occurrence. *Seals v. State*, 869 So.2d 429, 433 (Miss. App. 2004) (citing *Wells v. State*, 604 So.2d 271, 277 (Miss.1992)). A person with first hand knowledge is one way to authenticate a recording. *Von Brock v. State*, 795 So.2d 566, 568 (Miss. App. 2001). Here, no one was monitoring the conversation at issue. Mere voice identification of Towander, does not satisfy the requirement that the recording is accurate.

In *Conway v. State*, 915 So.2d 521, 526 (Miss. App. 2005), even though the court did not reverse, it did find that it was error to admit a videotape without a proper foundation . As here, the sponsor in *Conway* was not present when the recorded event took place nor was he the person who made the tape. Ultimately in *Conway*, the court found that the sponsoring witness did not have sufficient knowledge to confirm the tape accurately depicted the events on the day in question. *Id.* The same should be concluded in the present case.

Subpart (9) of Rule 901 pertaining to a process or system controls here. Recorded

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including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

...

(9) *Process or System.* Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

results from machinery, whether operated by a person or automatically, should be authenticated by proof that the mechanical "process or system" rendered an accurate result as to the item of evidence at issue. An analogous situation would a radar device or intoxilyzer. See, *e. g.*, *Stidham v. State*, 750 So.2d 1238, 1241 (Miss. 1999)

In *McIlwain v. State*, 700 So.2d 586, 590-91(Miss.1997), the defendant asserted that the State failed to lay the proper predicate for the admission of an intoxilyzer test result. The *McIlwain* court found that a condition precedent to admissibility of the intoxilyzer was proof that the machine was accurate in it processes. *Id.* Therefore, if there is no testimony from someone with first-hand knowledge that a recording is accurate or the result of a reliable mechanical process, then no evidentiary foundation of authenticity is established under M. R. E. 901.

Defense counsel also challenged the accuracy of the transcript Exhibit 27 entered into evidence over objection. [T. 313]. It is pertinent to note that there is one approach that any transcript of a recording admitted into evidence must be agreed upon as being accurate before it can be presented to the jury as seen in *U.S. v. Onori*, 535 F.2d 938, 948-49 (5th Cir. 1976). There is also the wise practice of giving a cautionary instruction to the jury that the tape recording is the actual evidence, and the transcript is only an aid as done in *Monk v. State*, 532 So.2d 592, 599 (Miss.1988), where prior to having an audio tape played for the jury, the trial judge instructed the jury that the recording was the actual evidence and the recording was an aid t and give "whatever value you deem it to

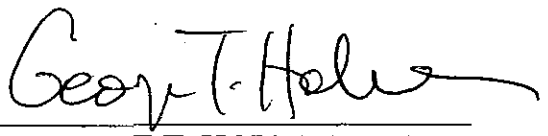
have."

Without these safety procedures, the prejudice suffered by Towander Broadhead by the admission of the alleged telephone recorded is highlighted all the more. Ms. Broadhead looks to this Court for a remedy, respectfully asking for new trial.

CONCLUSION

Towander Broadhead is entitled to a new trial.

Respectfully submitted,
TOWANDER DENISE BROADHEAD

BY: 

GEORGE T. HOLMES,
Mississippi Office of Indigent Appeals

CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 22nd day of June, 2007, mailed a true and correct copy of the above and foregoing Brief Of Appellant to Hon. Kathy King Jackson, Circuit Judge, P. O. Box 998, Pascagoula MS 39568, and to Hon. Anthony N. Lawrence, III, Dist. Atty. , P. O. Box 1756, Pascagoula MS 39568, 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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