IN THE SUPREME COURT OF MISSISSIPPI

FRED BEALE — APPELLANT

VS. — CAUSE NO. 2007-TS-00190

STATE OF MISSISSIPPI — APPELLEE

APPEAL FROM THE CIRCUIT COURT OF THE
FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

BRIEF FOR THE APPELLANT
FRED BEALE

ORAL ARGUMENT REQUESTED

MICHAEL J. MALOUF, ESQ.
[redacted]
MICHAEL J. MALOUF, JR., ESQ.
[redacted]
MALOUF & MALOUF
501 East Capitol Street
Jackson, Mississippi 39201
(601) 948-4320

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 the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualifications or recusal:

1. Fred Beale - (Appellant herein)

2. Michael J. Malouf, Esq. - (Counsel for Appellant)
   Michael J. Malouf, Jr., Esq.
   501 E. Capitol Street
   Jackson, Mississippi 39201

3. Greg Miles, Esq. - (Counsel for Appellee)
   P.O. Box 22747
   Jackson, Mississippi 39225-2747

4. Attorney General Jim Hood
   P. O. Box 220
   Jackson, MS 39205-0220

RESPECTFULLY SUBMITTED

BY: _____
Michael J. Malouf,
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF CASES:

TABLE OF AUTHORITIES:

REQUEST FOR ORAL ARGUMENT

Fred respectfully submits that oral argument will be of valuable assistance to this Court. Oral argument will ensure a thorough and effective presentation of this appeal to help bring a final conclusion to this matter.

STATEMENT OF THE ISSUES

I. THE TRIAL COURT ERRED IN PEREMPTORILY FINDING FRED GUILTY OF BURGLARY.

II. THE TRIAL COURT ERRED IN NOT ALLOWING FRED TO ARGUE SELF-DEFENSE.

III. THE TRIAL COURT ERRED IN REFUSING TO ALLOW FRED TO ARGUE SELF-DEFENSE PURSUANT TO THE STATE'S OWN INSTRUCTION.

IV. THE COURT ERRED IN REFUSING FRED'S MANSLAUGHTER INSTRUCTIONS.

V. THE TRIAL COURT ERRED IN SHOWING BIAS AGAINST FRED.

STATEMENT OF THE CASE

Appellant, Fred Henry Beale, was indicted for capital murder pursuant to §97-3-19 (2)(e), Miss. Code Ann. (1972), alleging that he killed and murdered Leon Thomas, Jr. while engaged in the commission of the crime of burglary in violation of §97-17-23, Miss. Code Ann. (1972), by breaking and entering into the dwelling house of Ulander Taylor with intent to commit the crime of assault. (RE 11; R 3) This matter was tried on September 25 through 27, 2006 with Hinds Circuit Judge W. Swan Yerger presiding. Having been prohibited by the trial judge from arguing self defense or the lesser included offense of manslaughter, Fred was found guilty of capital murder. Fred has perfected his appeal of such conviction.

STATEMENT OF FACTS

Fred and his longtime girlfriend, Ulander Taylor, were romantically involved for more than fifteen (15) years and had a child together, who was age eleven (11) at the time of the alleged incident. (T.195) On the evening of March 22, 2005, Fred called Ulander to tell her that he was coming by her apartment at 4850 Watkins Drive, Jackson, to visit her. Ulander told Fred not to come by because she was getting ready to leave. Fred replied that he was almost there and would just come on anyway. Ulander did not respond, but just hung up the phone. (T. 318) When Fred arrived at the apartment, he knocked on the door several times, and when no one answered, he became angry and kicked the door, jarring it open. (T. 319) As Fred was entering the apartment, Ulander was approaching him on her way to open the door. Words were briefly exchanged and in anger, Fred struck Ulander with a pistol that he had in his hand. (T. 320) Ulander and Fred both testified that Fred usually kept his gun in his vehicle, but when he visited Ulander, he took it into her apartment since his car had been burglarized at her apartment. (T. 213, 321) Ulander was knocked unconscious by Fred's blow and had no recollection of events until Fred was leaving her apartment. (T. 200)

Fred testified that after his encounter with Ulander, he heard some noise and saw a shadow in the bedroom. (T. 321) As he approached the bedroom and looked into it, a man in the bedroom pointed a gun at Fred. *Id.* Fred instinctively filed a warning shot in the direction of the stranger. *Id.* Moments later, Fred peeped into the bedroom and saw the man lying on the floor with the weapon laying on the bed. (T. 322) Fred entered the bedroom, picked up the weapon, and left the apartment. (T. 323) On his way out of the apartment, Fred told Ulander that he had shot the man and she should call the ambulance. (T. 323)

Fred, being frightened and confused and not knowing what to do, drove around the city

for several minutes. During this time, Fred realized that the gun he had seized was actually a .22 pistol that he had given Ulander some months earlier for her protection. (T. 323, 324) While traveling on I-220 in the city of Jackson, Fred threw the gun out his car window. Ulander testified that she usually kept the .22 pistol in her closet, but had placed it on her dresser in the bedroom since she was moving. She further testified that she never saw it again, and had assumed the police had taken it. (T. 214)

While driving in his vehicle, Fred, being extremely nervous and upset about the incident that had occurred at Ulander's apartment, soiled his pants. (T. 324) He then called his uncle, Melvin Beale, to ask if he could come by and visit. *Id.* Fred then drove to Melvin's residence in Jackson where he took a shower and cleaned himself up. (T. 325) While he was there he received a phone call on his cell phone from the Jackson Police concerning the shooting. *Id.* Fred immediately ask about the condition of the other gentleman and was told by the policeman that he was going to be just fine. *Id.* Fred agreed to turn himself in at the Clinton Fire Department after he cleaned himself up. (T. 325-326)

At trial, Fred testified that he and Ulander had a long lasting romantic relationship, and that he had been to her apartment on numerous occasions. He and Ulander both testified that Fred had a key to her apartment, but some months earlier had given it to their son so that he could enter the apartment after school. (T. 216, 316) Fred also testified that he was at Ulander's apartment the day before the incident working on her automobile, and that on the night of the incident, he wanted to go by Ulander's to talk to her, and had no idea that another man was there. (T. 320) Fred testified that Ulander did not tell him that Leon was there. Ulander agreed that she did not tell Fred that Leon was there. (T. 214) Ulander also testified that she was on the way to open the door to let Fred in when he kicked the door, knocking it open. She further testified that

he didn't have to break in because she was going to let him in voluntarily. (T. 212)

At the conclusion of the evidence, the trial court granted the State's proposed instruction, S-1 (also referred to as S-1A) (RE 5)

During the discussion of instruction S-1, the state recognized that whether or not Fred was guilty of the underlying crime of burglary was a question of fact for the jury, and further agreed that Fred's intent was a question for the jury. (T. 347) The trial court at that time agreed that Fred's intent was a "jury issue", and that "not in necessary self-defense" had to be proven as well and would be left to the jury. (T. 349) In spite of such statements, the trial court refused numerous instructions offered by Fred regarding self-defense, or the lesser included offense of manslaughter.

In closing argument, the court sustained the state's objection to Fred's counsel arguing self defense. (T. 405-407) The court also prohibited defense counsel from mentioning the gun used by the decedent (T. 405) even though the state first introduced evidence about the gun. (T. 205) Fred and Ulander both testified about the gun, and the prosecutor argued in his closing argument that "there was never a pistol there". (T. 402)

The issue as to whether or not the decedent had a gun was particularly critical to Fred's defense since the assistant district attorney asked Fred on cross-examination:

> BY MR. ARTHUR: In fact, you picked up the only piece of evidence that would show you were **innocent.** (T.336) (emphasis added)

> BY MR. ARTHUR: And somewhere along the way you threw out the only piece of evidence that would **exculpate you?** (T. 337) (emphasis added)

Even though the prosecutor was allowed to question Fred about the gun, stating in the presence of the jury that such gun would prove Fred's innocence, Fred was barred from

mentioning the gun in his closing argument. (T. 402)

Although the prosecutor and the trial court recognized and agreed that before Fred could be convicted of capital murder, the jury must find beyond a reasonable doubt that Fred was guilty of the underlying crime of burglary, the trial court made a de facto finding that Fred was guilty of burglary, and therefore not entitled to argue self-defense or even mention the decedent's weapon.

In addition to the trial court's making a judicial finding that Fred was guilty of burglary, thereby barring his claim of self-defense, the trial court in every phase of the trial from voir dire through closing argument and while in the presence of the jury, showed his bias against Fred.

In voir dire, defense counsel was prohibited from explaining to the jury the difference between a civil and a criminal case. (T. 67) He was also prohibited from discussing reasonable doubt. (T. 68) The trial court also during voir dire sustained an objection to defense counsel's stating that he was looking for twelve (12) people that had the courage and conviction to try this case. (T. 70) The trial court further sustained an objection to defense counsel mentioning in voir dire that this was a case of a lovers' triangle. (T. 81) The court further sustained the state's objection to defense counsel's asking Ulander on cross-examination about her conversation with Fred, which she testified about on direct. (T. 225) The court further sustained an objection to defense counsel's asking Ulander on cross-examination whether or not Fred broke in to commit a crime, even though Ulander was allegedly the victim of the crime. (T. 227) The trial court also objected to defense counsel asking Ulander what crime Fred had committed. (T. 228)

The trial court further prohibited defense counsel from asking Melvin Beale on cross-examination about Fred's condition when he came to his home shortly after the shooting, and sustained the prosecution's objections when Melvin was asked on cross-examination his observation of Fred's being distraught, wanting to pray, and wanting to kill himself. (T. 265,

267-269)

During Fred's direct examination, the trial court prohibited Fred from testifying that he had three (3) grown children or that he financially contributed to the child he has with Ulander. (T. 313-314) The trial court further prohibited Fred from testifying that he had no intent to commit a crime. (T. 319) Even though Fred was charged with the crime of capital murder, the trial court prohibited him from giving any background information, including where he grew up, what his employment was, or where he graduated from high school. (T. 328) The trial court also sustained an objection to Fred's testifying that he had been to Ulander's apartment over one hundred (100) times, even though that was the apartment he was accused of burglarizing. (T. 329)

While some of the aforementioned objections might seem minor, the cumulative affect of the trial judge continually sustaining objections to Fred's proof clearly sent a message to the jury that Fred's counsel lacked credibility, and that Fred had no defense to the charge of capital murder. The trial court's constant rulings against Fred clearly conveyed to the jury that the "fair and impartial" trial judge wanted a conviction.

SUMMARY OF THE ARGUMENT

Appellant, Fred Beale, respectfully submits that his conviction of capital murder was the direct result of his not receiving a fair trial. Fred would show that the trial court wrongfully assumed that Fred was guilty of burglary, and made a de facto ruling of such, barring Fred from arguing self-defense, even though the decedent was armed with a deadly weapon. Fred would further show that in closing argument defense counsel was prohibited from asserting self-defense, even though state instruction S-1 (S-1A) clearly stated that before Fred could be found guilty of the crime of capital murder, the jury had to find it was "not in necessary self-defense".

Fred would further show that even though there was sufficient evidence for the trial court to submit to the jury the lesser included offense of manslaughter in the heat of passion or alternatively, manslaughter as a result of imperfect self-defense, the trial court refused to allow the jury to consider either.

Fred would further assert that his conviction was the result of the trial court's bias in continually sustaining objections to Fred's evidence and closing argument, thereby tainting the jury.

Fred respectfully submits that his conviction of capital murder should be reversed and remanded for a fair trial, consistent with this Court's ruling.

ARGUMENT

I. The Trial Court Erred in Peremptorily Finding Fred Guilty of Burglary.

The trial court ruled that Fred could not claim self-defense since he was guilty of burglary, and therefore denied Fred's instructions on self-defense. (T. 352-362) While Fred acknowledges that the general rule in Mississippi is that a person **guilty of burglary** cannot claim self-defense, the trial court failed to comprehend that whether or not Fred was in fact guilty of burglary was a question of fact for the jury. Mississippi law is well settled that the state must prove beyond a reasonable doubt each element of the charged crime. *Hooker v. State*, 716 So.2d 1104, 1117 (Miss. 1998) Fred presented credible evidence that he did not unlawfully break and enter Ulander's apartment with the intent to commit a crime. Specifically, Fred testified that he and Ulander had a romantic relationship of more than fifteen (15) years, that they had an eleven (11) year old child together, that Ulander had lived at the apartment approximately four (4) years, that he had been there as many as two or three times a day, that he was there the day earlier working on her car, that he called her before he went to the apartment, and that he had no intent to commit a crime when he entered her apartment the night of the alleged incident. (T. 195-196, 216, 314-319). Specifically, Fred testified:

> BY MR. MALOUF: Okay. Now, why did you want to go into the apartment?
>
> BY FRED: So I could talk to her. (T. 319)

When Fred attempted to explain to the jury that he had no intent to commit a crime, the trial court refused such testimony:

> BY MR. MALOUF: Did you have any intent to commit any crime?
>
> BY FRED: Oh, no.

BY MR. ARTHUR: Objection.

BY FRED: Oh, no, I did not.

BY THE COURT: Just a minute.

BY FRED: I did not.

BY THE COURT: Sustained. The jury will disregard the last question and answer. (T. 319)

In addition to Fred's testimony, Ulander, the state's first witness, testified that Fred didn't have to break into her apartment, and that she was in the process of voluntarily opening the door to let him in:

BY MR. MALOUF: Okay. But a few minutes after that he was there knocking on the door.

BY MS. ULANDER TAYLOR: He did that.

Q. And he knocked several times?

A. He knocked.

Q. And then after you didn't come to the door, he did lose his temper and he kicked the door?

A. True.

Q. And after he kicked it one time the door flew open, didn't it?

A. True. And by the time when the door flew open, I was almost at the door.

Q. To open it?

A. To open it. I mean to open the door because he was kicking on the door.

Q. Were you going to open the door?

A. Yes, I was going to open. I mean after he was beating

on the door, and he started kicking on the door, so therefore, I go to the door, and by the time I put my hand on the door the door came open.

Q. So you were going to let him in voluntarily?

A. I was going to let him in. I mean I had nothing to hide, so why not.

Q. Sure. And so he didn't have to break in? You were going to let him in willingly?

A. He actually didn't have to. He didn't have to do any of that. (T. 212)

The trial judge sustained an objection when Ulander, the alleged victim, was asked on cross-examination if Fred had committed a crime:

BY MR. MALOUF: I just have one last question, Ms. Taylor, please, ma'am. That night on March the 26th of 2005, Saturday night, about 8:00 Fred Beale didn't break into your apartment to commit a crime, did he?

BY MR. ARTHUR: Objection.

BY THE COURT: Sustained. It's up to the jury, not her.

BY MR. MALOUF: Do you know of any crime that you observed or know of that Fred committed when he broke into your apartment?

BY MR. ARTHUR: Same objection.

BY THE COURT: Sustained. It's improper. (T. 227-228)

Even if the trial court was not persuaded by Fred's or Ulander's testimony, said issues were questions of fact for the jury. Claims of self-defense could only be barred if the **jury** found Fred was guilty of the crime of burglary. However, the Court took these questions of fact from the jury and peremptorily found Fred guilty of the underlying crime of burglary when he refused to grant Fred's jury instructions 14 and 15 (RE 9), as well as Fred's self-defense instructions D-1,

D-2, D-3, D-4, D-8, and D-12. (RE 7; T. 352-362)

Although the trial court refused to grant Fred an instruction on self-defense, the trial judge and assistant district attorney both recognized that whether or not Fred was guilty of burglary was a question of fact for the jury. While arguing the state's proposed instruction S1, the assistant district attorney stated:

> BY MR. ARTHUR: **Your Honor, as to the evidence, that's a question for the jury**. What the testimony, the unrefuted testimony, is he did not have authority to enter the house. He kicked the door open.
>
> **As to what his intent was, that's a question for the jury,** Your Honor, ... (T. 346-347) (emphasis added)
>
> BY THE COURT: ... **And the intent is determined not by what he says but by what he does, and that's, of course, a jury issue. And, of course, not in necessary self-defense. That has to be proved as well, and that is up to the jury.** (T. 349) (emphasis added)

While it is clear that the trial court and state both recognized that whether or not Fred was guilty of the underlying crime of burglary, or acted in self-defense, were jury issues, the court made a de facto ruling that Fred was guilty of burglary, and therefore not entitled to a self-defense instruction. This very issue was decided by the Supreme Court in *Harveston v. State*, 493 So.2d 365, 372 (Miss. 1986) wherein the supreme court ruled that an instruction on the lesser included offense should have been given where there was an evidentiary basis upon which the jury may have found no robbery occurred, and the killing was either accidental or justifiable.

II. The Trial Court Erred in Not Allowing Fred to Argue Self-Defense.

Throughout the trial of this matter, Fred consistently maintained that he acted only in necessary self-defense when he shot Leon. Fred testified that prior to entering Ulander's

apartment, he was unaware that another man was there. There was no testimony that he entered the apartment with the intent of committing any crime. Specifically, Fred testified:

> BY MR. MALOUF: Did you at the time have any idea anyone else was there?
>
> BY FRED: No idea whatsoever. I didn't.
>
> Q. Did she when you talked on the phone tell you that someone was there?
>
> A. No. She didn't mention nothing about that. (T. 319-320)

Fred further testified:

> A. . . . I heard a movement in the bedroom. And I was fixing to walk in there and see what was in there, and by that time I seen - - I seen a pistol. And I just - - in a man's hand. I just overreacted. I just shot. It happened so fast. I just shot. I seen a gun in a man's hand coming towards me.
>
> Q. Where was the gun pointing?
>
> A. Towards me.
>
> Q. And why was it that you shot in the direction of the man?
>
> A. Because I seen a gun coming toward me, and that was my reaction to shoot. That was a reflection (sic). I just shot before I know it. (T. 321, 322)

Fred also testified that he did not intend to kill Leon, but that he only fired a single warning shot:

> BY MR. MALOUF: So after you shot - - how many times did you shoot?
>
> BY FRED: Just one. A warning shot letting him know I had a gun, too.
>
> Q. Okay. And after you shot - - could you see where you were shooting?
>
> A. I didn't. I just shot. (T 322)

Fred's reaction in firing a single warning shot at a stranger coming at him with a gun can only be classified as an accident or self defense. Yet the trial court refused to let the jury consider either, and further refused jury instructions D-7 and D-8. (RE 8, 9).

There is no question that there was sufficient evidence to support an instruction on self-defense. Ulander testified that the .22 pistol that Fred had given her some months earlier was on the dresser in the bedroom where Leon was shot. She further testified that she never saw the gun after the shooting, and assumed the police had taken it. Ulander also testified that when she talked to Fred some weeks after the shooting, that he explained that he was scared and shot in self-defense because Leon had a gun. (T. 207) Fred, on direct examination, testified that he was scared when he saw Leon pointing a pistol at him and shot a warning shot to let Leon know that he also had a gun. (T. 321) He also testified that he picked the gun up off the bed, and later realized it was the pistol he had given Ulander, and threw it out his car window. (T. 323, 324)

The state's own expert witness, Dr. Steven Hayne, a forensic pathologist, refuted the state's theory that Leon was sitting in a chair when he was shot in cold blood by Fred. On cross-examination, Dr. Hayne admitted that Leon's entrance and exit bullet wounds were inconsistent with Leon and Fred directly facing each other. Dr. Hayne further testified that Leon's injuries were consistent with the trajectory entering his left side under his arm and exiting the right side, as if Leon were turned sideways, with his left hand raised. (T. 288-290)

During Fred's closing arguments, and in the presence of the jury, the court prohibited Fred from arguing the shooting was in self-defense. In the presence of the jury, the trial court continually admonished Fred's attorney, and specifically instructed the jury to disregard Leon's gun:

BY MR. MALOUF: In fact, the best way to present it and the very best question asked all day long was by their own assistant district attorney, and when he asked Fred Beale up there - -Fred Beale who didn't have to testify and was given an opportunity not to testify and wanted to testify..he asked him Fred, you picked up the only piece of evidence that showed you were innocent. Yes. Why did you pick up the one piece of evidence that would prove you innocence? They know and let them explain if the gun has no bearing why - -

BY MR. ARTHUR: - - objection, You Honor. The gun does not have bearing. The Court has ruled that the defendant is not entitled to an instruction on self-defense in this case.

BY MR. MALOUF: I object to his arguing the case. The Court has given instructions.

BY MR. MALOUF: This is what he stated. This is what he asked Fred Beale on the stand. How can you prove your innocence with the gun, and they don't want you to - -

BY THE COURT: - - just a minute. Just a minute. Just so the jury is clear on this, the Court has already ruled that **the defendant is not entitled to a defense of self-defense**. It's already been ruled upon. So sustain the objection. (emphasis added)

BY MR. MALOUF: It's got to be willfully, unlawfully and feloniously. And if he's got that gun, then they know they can't prove their case, and that's why they're concerned. And that's why they keep saying he didn't have a gun there. He was sitting there.

Well, let's use common sense. If Fred Beale wanted to kill him, wouldn't he approach him - - if the man didn't have a gun, couldn't he just walk right up to him and say, what are doing with my woman? Why are you here - -

BY MR. ARTHUR: - - Your Honor, I'm going to object. He keeps on talking about the gun, and I hate to do this to the Court. The Court has ruled it doesn't matter if Leon Thomas had a gun. It doesn't matter. He's not entitled to an instruction on self-defense as a matter of law.

BY THE COURT: The Court has instructed again - sustain that objection - - that **the defendant is not entitled to a defense of self-defense.** That's already been ruled on. (emphasis added)

BY MR. MALOUF: Your Honor, there's no instruction to that effect with all due reference. There's no instruction to that effect.

BY THE COURT: But an instruction was requested by the defendant to that effect which was denied, so that defense is not available. (T 406)

When Fred's counsel made mention of Leon's gun, the state again objected:

BY MR. MALOUF: But there was a gun in his hand, and they knew it - -

BY MR. ARTHUR: - - Your Honor, I'm very sorry, but he's arguing something that is completely irrelevant.

BY MR. MALOUF: It goes, Your Honor, to willful, unlawful and feloniously as the Court has instructed. That means willful. It's not an accident. It means you want to kill somebody.

BY MR. ARTHUR: Mr. Malouf, could he rule on the objection?

BY THE COURT: That's still self-defense to bring up the gun in the victim's possession as a reason for him shooting him, so that's self-defense, so under the law that's not proper. **So the court again instructs the jury and is going to continue to instruct them if you continue to argue that that this is not a case that the defendant can claim self-defense**. (T 407) (emphasis added)

Ironically, the objections by the state regarding the relevance of Leon's gun is completely contrary to the state's own questioning. During cross-examination of Fred, the assistant district attorney questioned Fred as to why he threw Leon's gun out the window. On two different occasions he questioned Fred about Leon's gun proving his innocence:

BY MR. ARTHUR: In fact, you picked up the only piece of evidence that you claim would show you were **innocent**? (T 366) (emphasis added)

BY MR. ARTHUR: And somewhere along the way you threw out the only piece of **evidence that would exculpate you**? (T 337) (emphasis added)

Even though the prosecution recognized that Leon's weapon might exculpate Fred, and so

stated in the presence of the jury, the trial court barred Fred from arguing the very matter the state argued. Fred respectfully submits that it was extremely prejudicial for the trial court to state, in the presence of the jury, that Leon's gun was irrelevant, particularly since the state argued in closing argument that no such gun ever existed:

> BY MR. MILES: And then Fred says, I drove out to County Line Road, and then I rode over to my uncle's house, and then I realized that's the gun I gave to Ulander. Common sense folks. **There was never a pistol there.** (T. 402) (emphasis added)

Fred respectfully submits that the trial court erred in dismissing the relevance of Leon's gun. Fred further submits that it was reversible error for the trial court to sustain the state's objections and make such statements to the jury, which in effect gave additional instructions to the jury during closing arguments. Such instructions by the court during closing arguments were not only improper, but were tantamount to a peremptory instruction of guilt.

Such rulings by the trial court compounded the situation since he failed to grant Fred's instructions D-1, D-2, D-3, D-4, D-8, and D-12. on self-defense. (RE 7) The Supreme Court of Mississippi has addressed this issue on numerous occasions:

> In fact, our case law favors lesser-included offense instructions to the jury. *Agnew,* 783 So.2d at 703. In *Agnew*, we noted that "the jury should be given the option of a lesser-included offense when there is *any* evidentiary basis[for it] (emphasis not added) *Woodham v. State*, 800 So.2d 1148, 1157 (Miss. 2001)

In *Adams v. State*, 772 So.2d 1010, 1016 (Miss. 2000), the Supreme Court ruled:

> Even though based on meager evidence and highly unlikely, a defendant is entitled to have every legal defense he asserts to be submitted as a factual issue for determination by the jury under proper instruction by the court. Where a defendant's proffered instruction **has an evidentiary basis,** properly states the law, and is the only instruction

presenting his theory of the case, refusal to grant it constitutes reversible error. (emphasis not added)

III. The Court Erred in Refusing to Allow Fred to Argue Self-Defense Pursuant to the State's Own Instruction.

The law is well established that the state must prove every element of the charged crime beyond a reasonable doubt. *Hooker v. State*, 716 So.2d 1104, 1117 (Miss. 1998) The trial court therefore granted the state's jury instruction S-1A which instructed the jury it could convict Fred of capital murder if it found that Fred shot and killed Leon while committing house burglary....."**not in necessary self-defense.**" (RE 5) Although self-defense was included in the state's instruction, the court prohibited Fred from arguing self-defense in closing argument. Such inconsistency was misleading and confusing to the jury, and during deliberations the jury wrote the judge asking for clarification:

In #4(d) (Instruction S-1A) **what is the legal definition of intent?**

In #4- is a-e defining house burglary? (RE 5, R. 38)

It is apparent from the jury's questions that the court's rulings left the jury extremely confused. Both of these questions were legitimate concerns of the jury and vital to its rendering a fair verdict, yet the trial court declined to respond. As a result of the trial court's inconsistent rulings, the jury deliberated for more than six (6) hours (T. 421, 431), on what appeared to be a relatively simple issue since the court had stripped Fred of any defense. Such inconsistent rulings by the court denied Fred a fair trial.

IV. The Court Erred in Refusing Fred's Manslaughter Instructions.

In *Ellis v. State*, 778 So.2d 114 (Miss. 2000) this Court held:

> Instructions are not given unless supported by the evidence; however, if any evidence in the record can reasonably be inferred to support a lesser offense, then the trial court should give the lesser-related offense instruction.

In *Lanier v. State*, 684 So.2d 93, 97 (Miss 1996), this Court reversed a murder conviction wherein the trial court refused to give an instruction which would have allowed the jury to reject a self-defense theory, yet still find the defendant guilt of manslaughter. Likewise, in the present case, the jury was not allowed to consider the lesser-included offense of manslaughter. (See refused jury instructions D-16, D-17, and D-18. (RE 10; R 35, 36, 37)

Based upon the evidence presented, Fred offered manslaughter instructions on two (2) different theories. Jury instruction D-17 was based on the state's evidence that Fred was upset and in a state of rage when he entered Ulander's apartment. In closing argument, the state's argument to the jury clearly was one of manslaughter:

> BY MR. ARTHUR: ...because the defendant was **angry**. He was **angry** because someone hung the phone up. He was **angry** because a woman that wasn't good enough to marry, wasn't good enough to move to his house off Norrell Road, wasn't good enough to take his child out of wedlock out of this dangerous neighborhood, refused to open a door for him. (T 419) (emphasis added)

Under the very scenario presented by the state, Fred was clearly entitled to argue the lesser-included offense of manslaughter in the heat of passion. *Wade v. State*, 748 So.2d 771 (Miss. 2000).

As an alternate manslaughter theory, based upon the evidence presented, Fred offered jury instruction D-18 on the concept of "**imperfect self defense.**" (RE 10; R 37) Such instruction would have allowed the jury to find Fred guilty of manslaughter if it found that he acted on a bona fide belief of self-defense, even if there was no reasoned basis for it.

In *Nelson v. State*, 850 So.2d 201, (Miss 2003) this Court held:

> Mississippi case law recognized this concept (imperfect self-defense) when the person purposely causing the death of another is found to have acted on a *bona fide* belief, though there is no reasoned basis for the belief, that his actions were necessary to prevent his own death or great bodily harm.

The testimony of both Fred and Ulander was unequivocal that Fred believed he was acting in self-defense when he shot Leon. If the jury found that Fred had a bona fide belief that he was in danger, though there was no reasoned basis for it, it could have found Fred guilty of the lesser included offense of manslaughter. The trial court however erroneously refused to let the jury consider such "imperfect self-defense", or the lesser crime of manslaughter.

V. The Trial Court Erred in Showing Bias Against Fred.

The trial court in every phase of the trial from voir dire through closing argument, and while in the presence of the jury, showed his bias against Fred.

During voir dire:

(1) Defense counsel was prohibited from explaining to the jury the difference between a civil and a criminal case:

> BY MR. MALOUF: As you know or as maybe you've learned and it may have been some years ago, the distinction between a civil case and a criminal case is a civil case you've got two individuals arguing over money. One person is suing another person for money, and you're asking or fighting over money.
>
> In a criminal case you're seeking the death penalty or life imprisonment - -
>
> BY MR. MILES: - - objection, Your Honor. We've already covered this in pretrial motions.
>
> By MR. MALOUF: No, not in this case. In a criminal case.

BY THE COURT: Sustain that. The jury will disregard the last question. (T. 67)

(2) Defense counsel was prohibited from explaining why the burden of proof is greater in a criminal case:

BY MR. MALOUF: In other words, in a criminal case you're asking to deprive someone of his freedom and for that reason - -

BY MR. ARTHUR: - - same objection.

BY MR. MILES: We object again, Your Honor.

BY THE COURT: Sustained. It's improper. Move on. The jury will disregard the last question. (T. 68)

(3) Defense counsel was prohibited from discussing reasonable doubt:

BY MR. MALOUF: In other words, if you visualize the scales of justice, all you have to do is tilt the scales of justice in a civil case, and you find for party A or party B or however the scales of justice may tip. 51 percent to 49 percent.

In a criminal case it's got to be overwhelming, beyond every reasonable - -

BY MR. ARTHUR: - - objection, Your Honor - -

BY MR. MILES: - - objection. He's defining reasonable doubt, Your Honor. He knows better that to do that.

BY MR. ARTHUR: **And it's not beyond any reasonable doubt.** (emphasis added)

BY THE COURT: Sustained. Let's just stick to what the relevant law is. (T. 68, 69)

(4) The trial court sustained an objection to defense counsel, stating that he was looking for twelve (12) people that would have the courage and conviction to fairly try this case:

BY MR. MALOUF: When I say I'm actually looking for twelve jurors to be fair, what I'm really looking for is twelve soldiers, twelve people that will have the courage and conviction - -

BY MR. MILES: - - objection - -

Q. - - to hold true to their convictions - -

BY MR. MILES: - - objection, Your Honor.

BY THE COURT: Sustain that last objection. The jury will disregard that last question. (T. 70)

(5) The trial court sustained an objection to defense counsel's mentioning in voir dire that this was a case of a lovers' triangle:

BY MR. MALOUF: Now, as the Court has told you, this is a murder case, and we won't go into the details at this time, but as you'll find out during the testimony, this is what was probably known as a lovers' triangle.

BY MR. MILES: Objection. It's the same situation we objected to a while ago.

BY THE COURT: Sustained. The jurors will disregard the last statement. It's not opening statement. (T. 81)

During cross-examination of Ulander Taylor:

(6) The court sustained the state's objection to defense counsel's asking Ulander on cross about her direct testimony of her conversation with Fred. (T. 207, 216, 225)

(7) The court sustained an objection to defense counsel's asking her whether or not Fred could tell if there was a clip in the gun that Leon was holding:

BY MR. MALOUF: And so if Fred looked around the corner and saw somebody pointing the gun at him, he couldn't tell - -

BY MR. ARTHUR: - - objection.

BY THE COURT: Sustained. You can't tell what somebody else would or wouldn't have done. (T. 227)

(8) The court sustained an objection to defense counsel's asking her whether or not Fred broke in to commit a crime, even though Ulander was allegedly the victim of the crime:

BY MALOUF: I just have one last question, Ms. Taylor, please, ma'am. That night on March the 26th of 2005, Saturday night, about 8:00 Fred Beale didn't break into your apartment to commit a crime, did he?

BY MR. ARTHUR: Objection.

BY THE COURT: Sustained. It's up to the jury, not her. (T. 227)

(9) The trial court sustained an objection to defense counsel's asking Ulander what crime Fred had committed:

BY MR. MALOUF: Do you know of any crime that you observed or know of that Fred committed when he broke into your apartment?

BY MR. ARTHUR: Same objection.

BY THE COURT: Sustained. It's improper. (T. 228)

During cross-examination of Delois Allen:

(10) The trial court sustained an objection to Fred' counsel asking Delois whether Ulander was keeping her relationship with Leon a secret from Fred. (T. 241)

During cross-examination of Melvin Beale:

(11) The trial court sustained an objection as to what Melvin observed Fred doing:

BY MR. MALOUF: And so what did he do at your house?

BY MELVIN BEALE: Cleaned his clothes up the best he could and borrowed some underclothes from me, and then was talking on the phone to - -

BY MR. MILES: - - objection.

BY THE COURT: Sustained.

BY MR. MALOUF: He has not said anything.

BY THE COURT: Sustained. That's hearsay. (T. 267)

(12) The trial court sustained an objection to defense counsel's asking Melvin on **cross-examination** a **leading** question:

> BY MR. MALOUF: Now, without saying what he said, after he cleaned himself up did you see him praying?
>
> BY MELVIN: Yes.
>
> BY MR. MILES: Objection as to relevance.
>
> BY THE COURT: Sustained. Not relevant.
>
> BY MR. MILES: And we would ask the jury to disregard. We've already covered this.
>
> BY THE COURT: Not relevant. It's a **leading** question, but in any event, it's not relevant. The jury will disregard the last question and answer.
>
> BY MR. MALOUF: I'm sorry, Your Honor?
>
> BY THE COURT: The jury will disregard the last question and answer. Sustain the objection as to relevance. (T 267, 268)

(13) The trial court sustained an objection to defense counsel asking Melvin on cross-examination whether he gave a statement to police officer:

> BY MR. MALOUF: And the police officer asked you everything -- to tell them everything you knew about the case and what all Fred said; is that right?
>
> BY MELVIN: Yes, sir.
>
> BY MR. MILES: Objection to that, Your Honor. That's what Fred said. It's still hearsay.
>
> BY THE COURT: Sustained.
>
> BY MR. MALOUF: I'm not asking what he said.
>
> BY THE COURT: It's hearsay. Sustained. Move on. (T. 268)

(14) The trial court sustained an objection to defense counsel's asking Melvin what he observed

with regard to Fred's state of mind:

> BY MR. MALOUF: And he laid down, and he tried to pray, and then he couldn't control his emotions and kept getting up; isn't that right?
>
> BY MELVIN: That's right.
>
> BY MR. MALOUF: He asked you to pray with him, too, didn't he?
>
> BY MR. MILES: Objection, Your Honor.
>
> BY THE COURT: Sustained. Mr. Malouf. I sustained that. I instruct you not to go into that again. I ruled it's not relevant. The jury will disregard it. Don't ask it again.
>
> BY MR. MALOUF: He was very distraught, was he not?
>
> BY MELVIN: Yes, sir.
>
> Q. He acted like he wanted to kill himself?
>
> A. Well - -
>
> BY MR. MILES: Objection, Your Honor.
>
> BY THE COURT: Sustained. Not relevant. Move on. (T. 269)

(15) The trial court sustained an objection to defense counsel's asking Melvin what he observed Fred do:

> BY MR. MALOUF: Now, he asked you to hold the gun, did he not?
>
> BY MELVIN: He left it laying on the table.
>
> Q. Okay. And he said the police would be calling for it later?
>
> A. Police - - was talking on the telephone to the police, and he left - -
>
> BY MR. MILES: - - objection as to what he said.

BY THE COURT: Sustained, sir. You can't said what he said.

BY MR. MALOUF: But you heard him talking - - don't say what he said, but you heard him talking to the police, right?

BY MR. MILES: Objection. He doesn't know who he was talking to.

BY MELVIN: He was talking on the cellular phone.

BY MR. MALOUF: And he said he was going to turn himself in?

BY MR. MILES: Objection, Your Honor.

BY THE COURT: Mr. Malouf, stop asking questions that are directly hearsay. I don't know how many times I have to tell you that. Move on. Sustain the objection. It's all hearsay. (T. 270)

During Fred's direct-examination:

(16) The trial court prohibited Fred from testifying that he had three (3) grown children or that he financially contributed to his child that lived at the apartment with Ulander. (T. 313-314)

(17) The trial court prohibited Fred from testifying that he had no intent to commit a crime. (T. 319)

(18) The trial court prohibited Fred from giving any background testimony, including where he grew up, what his employment was, or where he graduated from high school, even though Fred was charged with the crime of capital murder:

BY MR. MALOUF: Now, I think you said where - - did you grow up in Jackson or in the Jackson area?

BY MR. ARTHUR: Objection as to relevance.

BY MR. MALOUF: May it please the Court.

BY THE COURT: Sustained. It's not relevant. Move on.

BY MR. MALOUF: What type of employment do you have?

BY MR. ARTHUR: Objection as to relevance.

BY THE COURT: Sustained. Not relevant.

BY MR. MALOUF: And did you graduate from high school?

BY MR. ARTHUR: Objection as to relevance.

BY THE COURT: Sustained. (T. 328)

(19) The trial court prohibited Fred from testifying that he had been to Ulander's apartment over one hundred (100) times, even though that was the apartment he was accused of burglarizing:

> BY MR. MALOUF: And tell the jury how many times you've been over to that apartment.
>
> BY. FRED: I can't count the times I've been there. Two and three times a day, you know, just - -
>
> BY MR. ARTHUR: - - objection, Your Honor. He's answered the question.
>
> BY MR. MALOUF: Give us the best guess.
>
> BY THE COURT: Just a minute.
>
> BY MR. MALOUF: More than a hundred? Less than a hundred?
>
> BY. FRED: Over a hundred.
>
> BY MR. MILES: We have an objection.
>
> BY THE COURT: All right. The Court will overrule the objection to the first question but sustain the objection to the last one. So the jury will disregard that last questions about his guess. He had already answered the question to some extent earlier. (T. 329)

During Fred's closing argument:

(20) The trial court sustained an objection to defense counsel stating that Fred had to act with malice aforethought:

BY MR. MALOUF: But it's not like the State wants to present it.

> They've got to prove that he willfully, unlawfully, and feloniously killed that man with malice aforethought, that he intended to do it, and that's where the evidence falls short.
>
> BY MR. MILES: We object to that, Your Honor. That's not in the instructions, malice aforethought.
>
> BY THE COURT: All right. Sustain that objection to malice aforethought. (T. 403, 404)

(21) The trial court sustained objections to defense counsel arguing self-defense or mentioning Leon's gun. (T. 405, 406).

While Fred is mindful that such evidentiary rulings are within the sound discretion of the trial judge, the cumulative effect of his continually sustaining objections to Fred's proof sent a clear message to the jury that not only did Fred's counsel lack credibility, but that Fred had no defense to the charge of capital murder. The trial court's rulings conveyed to the jury that the "fair and impartial" trial judge wanted a conviction. As stated in *Thompson v. State*, 468 So.2d 852, 854 (Miss. 1985):

> It is a matter of common knowledge that jurors...are very susceptible to the influence of the judge...jurors watch his conduct, and give attention to his language, that they may, if possible, ascertain his leaning to one side or the other, which, if known, often largely influences their verdict. He cannot be too careful and guarded in language and conduct in the presence of the jury, to avoid prejudice to either party.

In *West v. State*, 519 So.2d 418 (Miss. 1988), the Court further held:

> It is a tribute to our judicial system that the words and actions of trial judges have great weight with trial juries. They observe closely the judge's actions and weigh carefully his words, and are greatly influenced by what they think are his reactions. It is impossible to ascertain the weight and influence of the testimony of the trial judge with the jurors. The jurors are subordinate to the judge. He has large control over them...It is the supreme duty of the trial judge, in so far as it is humanly possible, to hold the scales of justice evenly balanced between the litigants. As a witness,

> regardless how careful and conscientious he may be, he necessarily takes on the appearance of a partisan, endeavoring to uphold by his testimony one side against the other, and to some extent at least detracts from the dignity and impartiality of his office.

VI. Cumulative Effect of Errors Warrants Reversal.

Plaintiffs respectfully submits that the cumulative effect of the above stated errors denied Fred his constitutional right to a fair trial. Defendant respectfully submits that he is entitled to a new trial as a result of the accumulation of errors at trial. *King v. State*, 960 So. 2d 413, 447 (Miss. 2007) citing *Jenkins v. State*, 607 So.2d 1171, 1183-84 (Miss. 1982).

CONCLUSION

For the above and foregoing reasons, Fred Beale respectfully requests that the judgment of the lower court be reversed.

RESPECTFULLY SUBMITTED this the 13 day of October, 2007.

FRED BEALE, Appellant

BY: _____
Michael J. Malouf

MICHAEL J. MALOUF, ESQ.
[redacted]
MICHAEL J. MALOUF, JR., ESQ.
[redacted]
Malouf & Malouf
501 E. Capitol Street
Jackson, MS 39201
(601) 948-4320

CERTIFICATE OF SERVICE

I, Michael J. Malouf, Attorney for Appellant, do hereby certify that I have this day mailed, by U. S. Mail, first-class postage prepaid, a true and correct copy of the above and foregoing **Brief of Appellant Fred Beale** to the following:

Honorable W. Swan Yerger
Hinds County Circuit Court Judge
P. O. Box 327
Jackson, MS 39205-0327

Greg Miles, Esq.
P.O. Box 22747
Jackson, Mississippi 39225-2747

Attorney General Jim Hood
P. O. Box 220
Jackson, MS 39205-0220

DATED this the 5th day of October, 2007.

FRED BEALE, Appellant

BY: _____
Michael J. Malouf