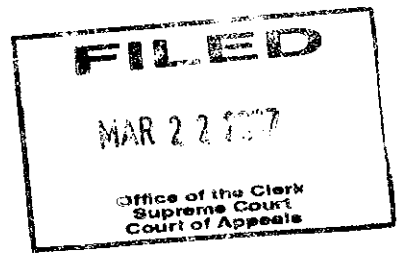
IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI]
NO. 2007-KA-0009-COA

MARY COOPER — 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. Mary Cooper

THIS 22nd day of March 2007.

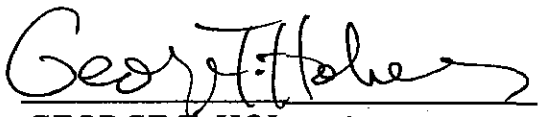

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES

OTHER AUTHORITIES

STATEMENT OF THE ISSUES

ISSUE NO. 1: **WHETHER THE COURT ERRED BY DENYING A REQUESTED HEAT OF PASSION MANSLAUGHTER INSTRUCTION?**

ISSUE NO. 2: **WHETHER THE JURY INSTRUCTIONS REGARDING CULPABLE NEGLIGENCE MANSLAUGHTER AND DEPRAVED HEART MURDER WERE CONFUSING TO THE JURY OR IMPROPERLY STATED THE LAW?**

ISSUE NO. 3: **WHETHER THE VERDICT OF GUILTY OF MURDER, AS OPPOSED TO MANSLAUGHTER, IS SUPPORTED BY THE EVIDENCE?**

ISSUE NO. 4: **WHETHER THE COURT ALLOWED IMPROPER OPINION EVIDENCE?**

STATEMENT OF THE CASE

This appeal proceeds a judgment of conviction for the crime of murder against Mary Cooper and the resulting life sentence out of the Circuit Court of Winston County, Mississippi, following a trial held October 24-25, 2006, Honorable C. E. Morgan, III, Circuit Judge, presiding. Mary Cooper is presently incarcerated with the Mississippi Department of Corrections.

FACTS

When Derrick Edwards, a/k/a "Smoke D", was shot and killed in the early afternoon of September 5, 2004 at 613 Selma Avenue in Louisville MS, the large caliber

projectile split the top of his skull wide open. [T. 110, 193; R. Ex. 34]. The trial testimony revealed three different versions of what transpired to precipitate the tragedy.

According to Vincent Hudson, Vincent and Mary Cooper had an ongoing romantic relationship.[T. 116] According to Vincent, on the morning of the shooting, he and Derrick and Joe Mack Speights went to Mary's house trailer. [T. 116-18] Derrick was driving and stayed outside in Vincent's sister's Ford Explorer, while Vincent and Joe Mack went inside. Id. Vincent and Mary argued; and, Vincent pushed Mary and then choked her. [T. 130-31] Vincent and Joe Mack then went to leave; as Vincent got in the front passenger side of the Explorer, there were six gunshots and Derrick, who was sitting in the driver's seat, was hit with one round. [T. 119-20] Vincent said he never saw who was doing the shooting. [T. 132]

Lee Hardy, Mary's niece, testified that she was visiting her aunt Mary, who she called "Aunt Cat", over the Labor Day weekend. [T. 146-50] Lee remembered Vincent and Joe Mack came over to Mary's house while Derrick stayed outside in the Explorer; Joe Mack and Vincent were drinking and doing drugs. [Id. and T. 156] There was an argument between Vincent and Mary and they tussled. [T. 149-50] Contrary to what Vincent said, however, according to Lee, as Vincent was leaving, Vincent shot at Mary, and Mary returned fire, hitting Derrick. [T. 150-52].

Joe Mack Speights also testified that he saw Mary shooting from the porch. [T. 70] However, Joe Mack said it was apparent to him that Mary did not intend to hurt

anyone. Id.

According to Mary, who testified at trial, there was no argument; Vincent, Joe Mack & Derrick came to her house drunk, the three shot intravenous drugs; and, Mary concluded that Vincent and Joe Mack killed Derrick, because, Derrick had been gambling and won a substantial amount of money. [T. 203-10]

Mary put on evidence from their mutual friend Ethyl Jackson that Derrick, Vincent and Joe Mack had been gambling extensively the day prior to the shooting and that Derrick had won a considerable amount of money. [T. 192-94] Ethyl said she overheard Vincent and Joe Mack saying they wanted to rob Derrick of his gambling profits. Id.

There was even testimony that Mary gave the gun to Lee, who gave it to her mother who was blind who threw it in the yard. [T. 157] The weapon was retrieved by Lonnie Ingram, Lee's father, at the insistence of Joe Mack. [T. 165] Lonnie buried the weapon; but, later showed officers where it was. [T. 163, 168] It was suggested that Vincent had tried to run Lonnie off when Lonnie was taking investigating officers to where the gun was buried.. [T. 166. 171-72]

Investigator Greg Clark with the Louisville Police Department who was not qualified as an expert, testified that he took measurements and used a laser beam and colored dowels to conclude that the shooter was standing on the porch of Mary's trailer. [T.95-100 R. Ex 8, 9, 11, 12] The jury was shown photographs of the Explorer with colored dowels indicating what Clark said were the paths of the projectiles. Id

Both Mary and Vincent were tested for gun shot residue about seven (7) hours after the shooting. [T. 133, 139-46]. Mary was negative; but, Vincent was positive for gun-shot residue on his left hand, which suggested at least that he was in the environment of a fired weapon within 2-3 feet. Id.

SUMMARY OF THE ARGUMENT

The jury heard improper opinion evidence. The jury instructions improperly stated the law and were confusing and the jury should have been instructed on heat of passion manslaughter. At worst, Mary Cooper's conviction should have been for manslaughter, not murder.

ARGUMENT

ISSUE NO. 1: WHETHER THE COURT ERRED BY DENYING A REQUESTED HEAT OF PASSION MANSLAUGHTER INSTRUCTION?

Mary's trial counsel asked for a heat of passion manslaughter instruction under MCA §97-3-35 (1972), in the record as refused instructions D-5 and D-6. [T. 231-32; R. 155-56; R.E. 18-19] Even though all of the state witnesses agreed that there was an argument between Vincent and Mary [T. 68, 84, 117, 149-50], and even though Vincent admitted hitting and choking Mary [T. 130-31], and even though Lee testified that there was tussling during the argument and that Vincent ultimately shot at Mary, which was arguably confirmed by the gun-shot residue tests, [T. 150-52] and that Mary was crying

[T. 152], the trial court concluded that there was insufficient provocation *from Derrick the ultimate victim* to justify a heat of passion manslaughter instruction. [T. 231-32]

The trial court concluded that the doctrine of "transferred intent" applied in this case. See Dykes v. State, 232 Miss. 379, 99 So.2d 602, 605 (MS 1957). Nevertheless, as will be shown below, the appellant's position is that it was error for the trial court to conclude that the doctrine of "transferred intent" did not apply to "heat of passion" manslaughter in this case since any provocation did not come from the resulting victim.

This Court has defined "heat of passion" as:

> ... a state of violent and uncontrollable rage engendered by a blow or certain other provocation given, which will reduce a homicide from the grade of murder to that of manslaughter. Passion or anger suddenly aroused at the time by some immediate and reasonable provocation, by words or acts of one at the time. The term includes an emotional state of mind characterized by anger, rage, hatred, furious resentment or terror. Mullins v. State, 493 So. 2d 971, 974 (MS 1986).

In this case, it is reasonable to conclude that, but for Vincent's conduct provoking Mary to shoot, Derrick would not have been killed. Stated another way, there is a direct proximate causal connection between Vincent's provocation of Mary and the death of Derrick. The jury in this case, however, never had the opportunity to deliberate whether this provocation reduced the offense from murder to manslaughter.

> A person may form an intent to kill from a sudden passion induced by insult, provocation or injury from another. In that moment of passion,

> while still enraged, if he slays the other person , the homicide may be manslaughter, even though it is not in necessary self-defense, depending upon the insult, provocation or injury causing the anger. Ordinarily, whether such a slaying is indeed murder or manslaughter is a question for the jury. Windham v. State, 520 So. 2d 123, 127 (MS 1988).

Morever, "if there is any evidence which would support a conviction of manslaughter, an instruction on manslaughter should be given." Graham v. State, 582 So.2d 1014, 1018 (MS 1991). In Roberts v. State, 458 So.2d 719, 720 (Miss.1984), the Court said that the defendant's statement "I didn't mean to do it baby, my baby" was a sufficient basis for a heat of passion manslaughter instruction. The law of what is manslaughter in Mississippi has been consistently characterized as "liberal" and the courts have made "considerable allowance for the frailties of human passion." Windham v. State, supra, 520 So.2d at p. 127.

It should not be overlooked that "it is possible for a deliberate design to exist and the slaying nevertheless be no greater than manslaughter." Williams v. State, 729 So. 2d 1181,1186 (MS 1998). In Williams v State where the defendant had joined with several other defendants in the beating death of the victim for no apparent reason and Williams was convicted of murder, the Supreme Court reversed on grant of certiorari because the trial court failed when requested to instruct the jury on differentiating between malice aforethought and deliberate design, and because Williams' murder conviction resulted in a miscarriage of justice. Id.

The Williams court pointed out that a heat of passion manslaughter instruction was

required there because the record, as here, contained sufficient evidence from which "the jury could infer that Williams acted on impulse or in the heat of the moment." See also Wells v. State, 305 So. 2d 333 (MS 1975) and Clemens v. State, 473 So. 2d 943 (MS 1985).

The test to determine whether a lesser included instruction is required has been stated as follows:

> [A] lesser included offense instruction should be granted unless the trial judge -- and ultimately this Court -- can say, taking the evidence in the light most favorable to the accused, and considering all reasonable favorable inferences which may be drawn in favor of the accused from the evidence, that no reasonable jury could find the defendant guilty of the lesser included offense (and conversely not guilty of at least one essential element of the principal charge). Graham v. State, 582 So. 2d 1014, 1017 (MS 1991) citing Gates v. State, 484 So. 2d 1002, 1004 (MS 1986).

According to the authorities outlined above, there was a jury question here as to whether the homicide in this case was premeditated or committed by depraved heart, culpable negligence or in the heat of passion. Applying the above law to the testimony and evidence in this case, Mary Cooper was indeed entitled to a heat of passion manslaughter instruction as a matter of law, and failure to do so was reversible error. Windham 520 So. 2d at 127.

By no stretch of the imagination, even the state would probably stipulate that if the victim in this case was Vincent, then Mary would clearly have been entitled to a "heat of passion" manslaughter instruction. Does the law then preclude the same conclusion as to

the unintended victim in this case, Derrick?

Mississippi does not have a reported case which the undersigned counsel could located exactly on this key issue. According to 40 C. J. S. Homicide §41 Transferred Intent, "[t]he grade of the crime in cases of transferred intent will be the same as though the accused had killed the person whom he or she had intended to kill."

From 2 Wharton's Criminal Law § 146 (15th ed.) Charles E. Torcia, Part II. Offenses Against the Person Chapter 8. Murder:

> § 146. Transferred intent
> Under the common-law doctrine of transferred intent, a defendant, who intends to kill one person but instead kills a bystander, is deemed the author of whatever kind of homicide would have been committed had he killed the intended victim.
>
> If, as to the intended victim, the homicide would have constituted murder, the defendant is guilty of murder as to the bystander who was the actual victim. **Similarly, if the homicide would have constituted voluntary manslaughter as to the intended victim, the defendant is guilty of voluntary manslaughter as to the bystander who was the actual victim**; and if the homicide, as to the intended victim, would have been justifiable, as in self-defense, the defendant is deemed the author of a justifiable homicide as to the bystander, at least in the absence of criminal negligence. [emphasis added]

In State v. Moffitt ,431 P. 2d 879, 895 (KS 1967) overruled on other grounds State v. Underwood, 228 Kan. 294, 615 P.2d 153 (1980) where the defendant shot at one person and hit an innocent bystander, the court said:

> The fact that the homicidal act was directed against one other than the person killed does not relieve the slayer of criminal responsibility. **It is generally held that such a homicide partakes of the quality of the**

> **original act, so that the guilt of the perpetrator of the crime is exactly what it would have been had the assault followed upon the intended victim instead of another.** (1 Wharton's Criminal Law and Procedure, Homicide, s 193, p. 438), [emphasis added].

This approach is widely accepted. "If a person, shooting at another, kills a third person, his guilt is the same as if he had killed the person for whom the shot was intended." [cite omitted], Harris v. State, 239 So.2d 331 (AL 1970). Morever, the doctrine has been an accepted rule for considerable time. In State v. Dalton, 101 S. E. 548, 549 (NC 1919), the court said:

> In cases of this character, it is the generally accepted principle that, where one man, engaged in an affray or difficulty with another unintentionally kills a bystander, his act shall be interpreted in reference to his intent and conduct towards his adversary, and criminal liability for the homicide or otherwise and the degree of it must be thereby determined. A very correct statement of the general principle is given in 13 R. C. L. tit. Homicide, § 50, pp. 745, 746, as follows:
>
> > The fact that the homicidal act was intended to compass the death of another person does not in any measure relieve the slayer of criminal responsibility. He is guilty or innocent exactly as though the fatal act had caused the death of the person intended to be killed. The intent is transferred to the person whose death has been caused. The result is that the slayer has been held guilty of murder or manslaughter or excusable homicide, according to the attendant circumstances. If the killing of the person intended to be hit would, under all the circumstances, have been excusable or justifiable on the theory of self-defense, then the unintended killing of a bystander by a random shot fired in the proper and prudent exercise of such self-defense is also excusable or justifiable. And if the killing of the intended victim would have been reduced by the circumstances to murder in the second or third

> degree, or to manslaughter in any of the degrees, then the unintended and accidental killing of the bystander resulting from any act designed to take effect upon the intended victim would be likewise reduced to the same grade of offense as would have followed the death of the victim intended to be killed.

Citing State v. Moffitt, supra, the court in State v. Walker, 20 P.3d 1269, 1276 (Kan. App. 2001) said:

> In State v. Stringfield, 4 Kan. App.2d 559, 561, 608 P.2d 1041, rev. denied 228 Kan. 807 (1980), the court applied the transferred intent doctrine to aggravated battery. The court held that while a specific intent to injure was a necessary element of aggravated battery, under the doctrine of transferred intent, the intent to injure could be transferred to the harm to a bystander who was unintentionally injured. The Stringfield court noted:
>
> " 'Under this rule, the fact that the bystander was killed instead of the victim becomes immaterial, and the only question at issue is what would have been the degree of guilt if the result intended had been accomplished. The intent is transferred to the person whose death has been caused, or as sometimes expressed, the malice or intent follows the bullet.' 40 Am. Jur.2d, Homicide § 11, pp. 302-303" 4 Kan. App.2d at 561, 608 P.2d 1041.
>
> In State v. Garza, 259 Kan. 826, 916 P.2d 9 (1996), the court addressed the transferred intent doctrine in a shootout situation where another shooter's bullet, not the defendant's bullet, caused a bystander's death. The court held the defendant's act caused no injury and the doctrine did not apply, but the court later discussed the defendant's liability as an aider and abettor. 259 Kan. at 828-30, 916 P.2d 9. In discussing transferred intent, the court stated:
>
> "Under the doctrine of transferred intent, the fact that a reckless act was directed against one other than the person injured does not relieve the actor of criminal responsibility. It is generally held that such an act partakes of the quality of the original act, so that the guilt of the perpetrator of the crime is exactly what it would have been had the act been directed at the intended victim instead of another." 259 Kan. at 829, 916 P.2d 9.

The Missouri Supreme Court said in State v. Mannon, 663 S.W.2d 780, 782(Mo. App.,1983):

> The fact that Mannon intended to shoot someone else and shot Ricky Brooks instead, thinking he was some other person, is of no legal comfort to the defendant here. Mannon's guilt in killing Brooks is measured, and the degree of homicide determined, by what defendant's crime would have been had he shot and killed his intended victim. In cases like this, the intention follows the bullet. State v. Eiland, 534 S.W.2d 814, 817 (Mo. App.1976).

Not only does the degree of the crime remain intact through the "transfer", all defenses travel the same route:

> For some purposes, where a bystander is an unintended victim of an assault directed at another, the actual victim is deemed to stand in the shoes of the intended victim. The defendant's intent toward the target is transferred to the bystander for the purpose of fixing the grade of the offense.[cites omitted]. If the assault upon the bystander was committed in self-defense against an attack by the intended victim, self-defense furnishes a defense against a charge of assault upon the bystander. [cites omitted]
>
> State v. Arellano, 736 S.W.2d 432, 434(Mo. App.1987).

The Florida Supreme Court said in Brown v. State, 84 Fla. 660, 94 So. 874, 874 (1922):

> [i]f the killing of the party intended to be killed would, under all the circumstances, have been excusable or justifiable homicide upon the theory of self-defense, then the unintended killing of a bystander, by a random shot fired in the proper and prudent exercise of such self-defense, is also excusable or justifiable."

See also Nelson v. State, 853 So.2d 563,565 (Fla. App. 2003), Foreman v. State, 47

So.2d 308 (Fla.1950); V. M. v. State, 766 So.2d 280 (Fla. 4th DCA 2000)

There is no sound reasoning to suggest that Mississippi should treat the doctrine of transferred intent any differently. Namely, the crime that would have been charged if the intended victim should be applied to the actual victim. That being the legally sound conclusion, it follows, necessarily that Mary Cooper should have been allowed a heat of passion manslaughter instruction, and failure to do so was reversible error. Accordingly, a new trial is respectfully requested.

Alternatively, and under the same authority the argument could be made that jury instruction S-4 was incomplete because it did not explain transferred intent was applicable to culpable negligence manslaughter.

ISSUE NO. 2: WHETHER THE JURY INSTRUCTIONS REGARDING CULPABLE NEGLIGENCE MANSLAUGHTER AND DEPRAVED HEART MURDER WERE CONFUSING TO THE JURY OR IMPROPERLY STATED THE LAW?

The jury in this case was instructed on culpable negligence manslaughter (MCA § 97-3-47 (1972)), deliberate design murder and depraved heart murder (MCA § 97-3-19(1)(a)&(b) (1972)). [T. 226-30; R. 146-49][1]. However, the several instructions given

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1

S-1 The Court instructs the jury that murder is the killing of a human being, not in necessary self-defense, and without the authority of law, by any means or by any manner, when done with the premeditated and deliberate design to effect the death of the person killed OR when done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual.

The Court further instruct you that if you believe from the evidence in this case, beyond a reasonable doubt, that Mary Cooper, on or about September 5, 2004, in Winston County, Mississippi, killed Derrick Edwards, a human being, without authority of law, not in necessary self defense, AND

did not properly state the law; they conflicted and were ultimately confusing to the jury; because, none of the instructions explained the differences between the three prosecutorial theories, or degrees of culpability. The end result was that the jury verdict which convicted Mary Cooper of murder was not the product of fundamental due process of law guaranteed by the 5th, 6th and 14th Amendments to the U. S. Constitution and Art. 3 §14 of the Constitution of the State of Mississippi.

From the instructions in this case, there is no distinguishable difference between

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(1) With the deliberate design to effect the death of Derrick Edwards, OR

(2) while engaged in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of the value of human life, although without any premeditated design to effect the death of Derrick Edwards, then the defendant Mary Cooper, is guilty of murder, and it is your sworn duty to so find.

If the State has failed to prove any one or more of the above elements beyond a reasonable doubt, then you shall find the defendant not guilty of murder. [R. 146; RE 14]

S-2 The Court instruct the jury that the deliberate design as mentioned in these instructs does not have to exist in the mind of the slayer for any given length of time; and if only moments before the act of violence, if any, the defendant, Mary Cooper, acted with deliberate design to take the life of Derrick Edwards, then it was truly malice and the act was as truly murder as if the deliberate design had existed in the mind of the defendant for minutes, hours, days, weeks or even years. [R. 147; RE 15]

S-3 The Court instructs the Jury that if you find the State has failed to prove beyond a reasonable doubt any one of the elements of the crime of Murder, you must find the defendant Mary Cooper, not guilty of Murder, and you will then proceed with your deliberations to decide whether the State has proved the elements of the lesser crime of Manslaughter.

The Court instructs the jury that the killing of a human being by culpable negligence and without authority of law is manslaughter. If you find from the evidence in this case beyond a reasonable doubt:

1. On or about the 5th day of September, 2004, in Winston County, Mississippi Derrick Edwards was a living person, and

2. The defendant, Mary Cooper, did knowingly and willfully discharge a pistol at or in the direction of Derrick Edwards, and

3. The defendant's conduct as above described, was culpable negligence in that said conduct exhibited a wanton or reckless disregard for the safety of human life, or such an indifference to the consequences of her conduct under the surrounding circumstances as to render his conduct tantamount to wilfulness, then you shall find the defendant, Mary Cooper, guilty of manslaughter by culpable negligence.

If the State has failed to prove beyond a reasonable court any one or more the elements, then you shall find the defendant, Mary Cooper, not guilty of manslaughter by culpable negligence. [R. 148; RE _16]

S-4 The Court instructs the Jury that where there is express intent to kill one person and another is killed unintentionally by the act, it is Murder since law transfers express intent to kill from the intended victim to the person actually slain. Therefore, if you believe from the evidence in this case, beyond a reasonable doubt, that the defendant Mary Cooper had the express intent to kill Vincent Hudson, but unintentionally killed Derrick Edwards, then you shall find the defendant guilty of Murder. [R. 149; R. E. 17]

depraved heart murder resulting from "an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design" 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."

In the case of Smith v. State, 463 So. 2d 1028, 1029-30 (MS 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-1 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 (MS 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."

In Williams v. State, 729 So. 2d 1181,1182 (MS 1998), the defendant requested an

instruction which gave the jury some guidance on the difference between malice aforethought and heat of passion, the court said, "we hold that such an instruction is proper in such a case as this, and error in this case to refuse a proper instruction . . . thereon."

Mary Cooper's conviction was not founded on correct principles of law. The application of Williams and Scott, supra, requires reversal. See also Russell v. State, 789 So. 2d 779, 780 (MS 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.

Here it was crucial for the jury to distinguish between killing in the heat of passion and/or culpable negligence and a killing that was done as the product of a depraved heart also without any intent to effect the death of the victim, or whether the killing was from a deliberate design. With the instructions given, the jury was not able to do their job.

Not only was the jury confused, but the law on culpable negligence was improperly stated in S-3 because the jury was instructed to deliberate whether the alleged negligent act was "tantamount to willfulness" based on the surrounding circumstances. [R. 148] 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 Grinnell v. State, 230 So. 2d 555, 558 (MS 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.

However, contrary to the law, if the jury in this case found under the instructions given that Mary Cooper was culpably negligent, her actions were "tantamount to wilfulness." If the jury followed the instructions as they are presumed to have done, then if they found Ms. Cooper culpably negligent, it would be the same as finding her actions wilful. If Ms. Cooper's actions were tantamount to wilfulness under S-3, then they were wilful according to S-1 and she acted with deliberation. The instructions incorrectly equate culpable negligence and deliberate design. The instructions, read together and taken as a whole, resulted in peremptory instructions for deliberate design murder under S-1, which was neither correct nor intended.

Under this claimed error, Mary Cooper respectfully requests a new trial.

ISSUE NO. 3: WHETHER THE VERDICT OF GUILTY OF MURDER, AS OPPOSED TO MANSLAUGHTER, IS SUPPORTED BY THE EVIDENCE?

One version of the facts of this case can generically be stated as follows: boyfriend hits girlfriend and chokes her, and perhaps even has a gun and shoots at her. Girlfriend, immediately gets a pistol and shoots at boyfriend, missing boyfriend and hitting boyfriend's gambling buddy. Is this really deliberate-design or depraved heart murder? Taking the state's case in its best light, the only conviction which could arguably said to be supported by the evidence is one for manslaughter, not murder.

Heat of passion manslaughter is defined in MCA § 97-3-35 (1972)

> The killing of a human being, without malice, in the heat of passion, but in a cruel or unusual manner, or by the use of a dangerous weapon, without authority of law, and not in necessary self-defense, shall be manslaughter.

Murder requires premeditation or deliberate design. MCA § 97-3-19(1) (1972):

> Although our law has never prescribed any particular *ex ante* time requirement, the essence of the required intent is that the accused must have had some appreciable time for reflection and consideration before pulling the trigger. Blanks v. State, 542 So. 2d 222, 226-227 (MS 1989).

This Court has defined "heat of passion" as:

> ... a state of violent and uncontrollable rage engendered by a blow or certain other provocation given, which will reduce a homicide from the grade of murder to that of manslaughter.

> Passion or anger suddenly aroused at the time by some immediate and reasonable provocation, by words or acts of one at the time. The term includes an emotional state of mind characterized by anger, rage, hatred, furious resentment or terror. Mullins v. State, 493 So. 2d 971, 974 (MS 1986).

In this case, all of the evidence shows that Mary Cooper acted on impulse without any premeditation whatsoever. It should be remembered that under Lee Hardy's version, Mary had to go get the pistol.

"Ordinarily, whether such a slaying is indeed murder or manslaughter is a question for the jury." Windham v. State, 520 So. 2d 123, 127 (MS 1988). However, the Supreme Court has reversed jury verdicts of murder on more than one occasion remanding for sentencing only for manslaughter, including " Williams v. State, 729 So. 2d 1181,1186 (MS 1998).

In Dedeaux v. State, 630 So. 2d 30, 31-33, (MS 1993) the court reviewed the facts of a barroom shooting where the Defendant was charged and convicted of murder for shooting his girlfriend's husband. Similar to this case, there was ongoing animosity. Id. The defendant Dedeaux shot the victim three times, twice while the victim was moving toward him, and a third time as the victim lay on the ground. Id.

Even though the defense did not request a manslaughter instruction in the Dedeaux case, the Supreme Court found that the facts only supported a conviction for manslaughter because "this clearly was a killing in the heat of passion" even though a "greater amount

of force than necessary under the circumstances" was used. Id. The Dedeaux court reversed the murder conviction and remanded the case for re-sentencing for the crime of manslaughter. 630 So. 2d 31-33.

In Clemons v. State, 473 So. 2d 943 (MS 1985), the court pointed out that there was "such contradictory testimony that it is virtually impossible to reconstruct what actually happened". 473 So. 2d at 944. The Clemons case involved a barroom stabbing. The Clemons court pointed out "there is more than enough conflicting evidence to cast at least a reasonable doubt as to murder", then, reversed the murder conviction and remanded for sentencing for manslaughter. Id. at 945. Could the same not be said in Mary Cooper's case?

In the case at bar, we see a similar factual scenario as in Dedeaux and Clemons. Namely, an argument with provocation, here hitting and choking by the intended victim and a reaction by the accused involving more than reasonable force, resulting in the unfortunate and unnecessary death of the victim.

In Tait v. State, 669 So. 2d 85, 86-88 (MS 1996), the defendant was indicted for depraved heart murder and convicted. He appealed on weight and sufficiency and that the conviction should have been manslaughter by culpable negligence. Several young men were joking and horesplaying with a gun. The defendant put the gun to the victim's head and it went off. The Supreme Court ruled that the only proper verdict supported by the evidence was for manslaughter by culpable negligence. *Id.* at p 90. The Tait facts are

analogous here in that there was no evidence of premeditation. In Tait there was horseplay, here there was drunkenness, argument, and physical violence.

Mary Cooper respectfully asks this court to review the facts of this case with the guidance of the Dedeaux, Clemons, Tait and Williams decisions, and to reverse the murder conviction and remand the case for a new trial or sentencing for manslaughter.

ISSUE NO. 4: WHETHER THE COURT ALLOWED IMPROPER OPINION EVIDENCE?

Investigator Greg Clark with the Louisville Police Department who was not qualified as an expert, testified that he took measurements and used a laser beam and colored dowels to conclude that the shooter was standing on the porch of Mary's trailer. [T.95-100 R. Ex 8, 9, 11, 12]. The jury was shown photographs of the Explorer with colored dowels indicating what Clark said were the paths of the projectiles. Id

Trial counsel did not originally object, but, when the witness explained that he was no expert in the area of crime scene reconstruction, an objection was lodged, and the trial court ruled that the objection was not timely. [T. 105-06].

In Jackson v. State, No. 2004-KA-01460-COA (not reported yet, decided February 27, 2007), 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) (MS. 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 average adult." Id.

Who better to know if they are an expert or not than the witness? In this case Mr. Clark was asked if he was an expert, and he denied it. [T. 105-06] There was no attempt to qualify Mr. Clark as an expert by the state. According to the court in Whittington v. State, 523 So.2d 966, 975 (MS 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 . . . ."

Even though there was no contemporaneous objection in this case, the testimony of Clark was so prejudicial along the photographs he sponsored, that it interfered with the substantive due process rights of Mary Cooper.

It is the appellants position here that Mr. Clark, crossed the boundaries established by Miss. R. Evid. Rules 701 and 702; and, what transpired during his testimony was exactly what Miss. R. Evid. Rules 701 and 702 were designed to prevent, namely, a witness not qualified as an expert positing "expert" opinions disguised as "lay" opinions.[2]

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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.

No one knows whether Mr. Clark had any training or on the job experience regarding crime scene reconstruction in general nor, specifically, in the area of calculating bullet trajectories. This testimony prejudiced Mary Cooper because it was used to suggest that she shot from the porch where she was reportedly standing.

In Palmer v. Volkswagen of America, Inc., 905 So.2d 564, 588 (MS 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 (MS 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, and his calculation of the Jetta's peak pressure and rise rate from the tank test curves certainly required experience or expertise beyond that of the average, randomly selected adult. His testimony regarding the

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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

1. 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.

> tank test curves was extremely technical. 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 (MS 2005), the Supreme Court concurred with the Court of Appeals, finding the plaintiff was prejudiced by improper opinion testimony and stating:

> The testimony provided by [the witness], a highly-skilled, specially educated engineer, very definitely required scientific, technical knowledge beyond that of the randomly selected adult. Such testimony therefore constituted expert testimony. [cites omitted]
>
> * * *
>
> 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.
>
> This Court has held that it "will not reverse the admission or exclusion of evidence unless the error adversely affects a substantial right of a party." [cites omitted] "[F]or a case to be reversed on the admission or exclusion of evidence, it must result in prejudice and harm or adversely affect a substantial right of a party." [cites omitted]
>
> * * *
>
> The trial court abused it discretion by allowing [Volkswagen's expert] 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.

Ms. Cooper's position here is that "crime scene reconstruction" or "firearm trajectory analysis", 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.[3] Here, the lay witness provided extremely damaging opinion testimony and graphic visual aids representing untrained, unscientific conclusions and opinions to an untrained jury information neither could decipher within a degree of reliability.

In Cotton v. State, 675 So. 2d 308, 312 (MS 1996), the court said

> [i]f the witness is not testifying as an expert, his 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 and (b) helpful to the clear understanding of his testimony or the determination of a fact in issue.
>
> * * *
>
> Lay opinion testimony must meet a two prong test; the witness must have observed the fact or had first hand knowledge, and the opinion must be helpful to the determination of the issues. Comment, M.R.E. 701.
>
> * * *
>
> **[W]here, 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 M.R.E. 702 opinion and not a Rule 701 opinion."** Citing Sample v. State, 643 So.2d 524, 530 (MS 1994).

In Cotton, the case turned on whether a weapon fired accidently or not. The witness at issue testified that certain safety characteristics of a semi-automatic pistol used in that case would only allow the gun to fire in certain circumstances. The Cotton court ruled that

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See, Walter F. Rowe, "Uncertainties in Bullet Trajectories Reconstructed by the Trigonometric Method", International Journal of Forensic Identification Vol.57, Jan/Feb 2007, pp 19-31,which concerns errors and uncertainties in horizontal and vertical angles of bullet paths based on the location of bullet holes. An abstract of the article is available through National Criminal Justice Service website: http://www.ncjrs.gov/App/Publications/abstract.aspx?ID=238739

such evidence required the witness to testify from particularly specialized knowledge of the weapon which would "constituted expert opinion"; and, since the witness was never qualified as an expert, it was reversible error. Id. See also, Sample v. State, 643 So.2d 524, 530 (Miss.1994).

Here, the witness was not testifying merely as to what he observed; he told the jury what he *concluded* based on his observations. These *conclusions* were founded on untrained unscientific methods. The untrained opinions concerned a topic in which the jury needed expert help, not off the cuff, arm-chair pseudo-expert ratiocinations.

The case of Goodson v. State, 566 So. 2d 1142, 1153 (MS 1990), is authority for the proposition here that Cooper 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.

There were two reasons the Goodson court reversed. First, the physician who testified for the state did not have expertise to give an opinion with the reliability required by Rule 702; and, secondly, the state did not establish proof that behavioral science has developed to the point where even the most knowledgeable experts in the field may give opinion that sexual abuse has occurred or not with the required level of reliability. Id. at 1147.

The Goodson 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 Id. at 1148.

Here in Coopers's case, as in Goodson, the jury would have been influenced by the witnesses improper lay opinions. It would follow that Cooper, as Goodson, did not, therefore, receive a fair trial.

Recently this court handed down a decision reversing a capital murder conviction in Edmonds v. State, 2004-CT-02081-SCT (decided January 4, 2007 not reported yet), Pages 4-7. The Edmonds 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. *See, e.g.*, Moss v. Batesville Casket Co., 935 So. 2d 393, 404 (Miss. 2006). 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 [Mr. Clark's] testimony was based, not on opinions or speculation, but rather on scientific methods and procedures." It is also important to note that the decision to reverse in Edmonds was reinforced because Dr. Hayne's improper opinion was the only

"evidence" of guilt other than the defendant's confession.

Here in Ms. Cooper's case, the lack of proper opinion was extremely treacherous because there was evidence of more than one weapon being fired and that the vehicle had at least one bullet hole from a previous shooting incident. [T.125, 150]

According to the Edmonds opinion, the introduction of Dr. Haynes' improper opinion violated a fundamental "substantial right" of the defendant. [Op. 4-7] Therefore, the state's expected position that the issue here in Ms. Cooper's case may be procedurally barred would not be persuasive; because, even if there is an question of the issue being procedurally barred, which is not conceded, this court is nevertheless obligated to address the merits under the doctrine of plain error. From Dobbins v. State, 766 So.2d 29, 31 (MS 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. Grubb v. State, 584 So.2d 786, 789 (Miss.1991). 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. Gray v. State, 549 So.2d 1316, 1321 (Miss.1989). Both error and harm must be found for reversal. Riggs v. State, 744 So.2d 365, 372 (MS App.1999)(citing Frierson v. Sheppard Bldg. Supply Co., 247 Miss. 157, 171, 154 So.2d 151, 156 (1963).

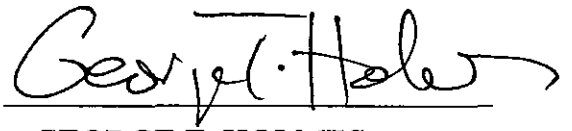
The resulting prejudice from this error would entitle Mary Cooper to a new trial which is respectfully requested.

CONCLUSION

Mary Cooper is entitled to have her conviction reversed and rendered, or to have the case remanded for a new trial, or for resentencing for manslaughter.

Respectfully submitted,

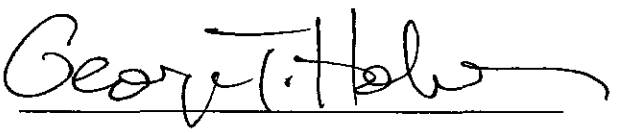
MARY COOPER

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 March, 2007, mailed a true and correct copy of the above and foregoing Brief Of Appellant to Hon. C. E. Morgan, III, Circuit Judge, P. O. Box 721, Kosciusko MS 39090, and to Hon. Michael Howie, Asst. D. A. , P. O. Box 1262, Grenada MS 38902, 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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