

IN THE MISSISSIPPI COURT OF APPEALS

No. 2007-KA-00381 -COA

**COPY**

ANTHONY SNEED a/k/a TRIGGER;  
ANTHONY SMITH a/k/a STICKY;  
THOMAS GERMAN a/k/a TOMMY C.;  
JAMARIO BRADY a/k/a MARIO  
a/k/a TURTLE and JOHNNY BICKHAM

APPELLANTS

**FILED**

**AUG 26 2008**

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SUPREME COURT  
COURT OF APPEALS

vs.

STATE OF MISSISSIPPI

APPELLEE

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**BRIEF OF APPELLANT THOMAS GERMAN**

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Appeal from the Circuit Court of Coahoma County, Mississippi

**Jane E. Tucker** ( [REDACTED] )  
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Jackson, MS 39206  
(601) 291-2047

## 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.

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The State of Mississippi  
*Appellee*

Honorable Charles E. Webster  
*Circuit Court Judge, Coahoma County, Mississippi.*

SO CERTIFIED, this the 26th day of August, 2008.

  
Jane E. Tucker

## TABLE OF CONTENTS

Certificate of Interested Persons .....	i
Table of Authorities.....	v
Statement of Issues.....	vii
Statement of the Case.....	I
Statement of the Facts .....	1
Summary of Argument.....	7
Law and Argument.....	7
1.    The trial court erred in failing to grant Thomas German a severance.....	7
2.    Instruction C-12 did not allow the jury to assess each individual's guilt independently. Pursuant to the instruction, either all were guilty of murder or not.....	11
3.    The instructions never made it clear that each defendant had to have the intent to kill Herman Fair.....	17
4.    The evidence was insufficient to support a verdict of murder. Alternatively, the verdict was against the weight of the evidence.....	22
5.    The errors taken together are cause for a new trial.....	26

Conclusion.....	26
Certificate of Service.....	27

## TABLE OF AUTHORITIES

### *Cases:*

<i>Bailey v. State</i> , 176 Miss. 579, 169 So. 765 (1936) . . . . .	15, 16
<i>Barnes v. State</i> , 118 Miss. 621, 79 So. 815 (1918) . . . . .	15
<i>Bruton v. United States</i> , 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). . . . .	10
<i>Bush v. State</i> , 895 So.2d 836, 844 (Miss. 2005). . . . .	24
<i>Byrd v. Wainwright</i> , 428 F.2d 1017 (5th Cir. 1970) . . . . .	8
<i>Carr v. State</i> , 208 So.2d 886 (Miss.1968) . . . . .	23
<i>Chambers v. Mississippi</i> , 410 U.S. 284, 93 S.Ct. 1038 (1973). . . . .	26
<i>Clark v. Procunier</i> , 755 F.2d 394 (5 <sup>th</sup> Cir. 1985) . . . . .	23
<i>Clemons v. State</i> , 482 So.2d 1102 (Miss. 1985) . . . . .	20
<i>Cooley v. State</i> , 346 So.2d 912 (Miss. 1977) . . . . .	15
<i>Dilworth v. State</i> , 909 So.2d 731 (Miss. 2005). . . . .	24
<i>Duckworth v. State</i> , 477 So.2d 935 (Miss.1985). . . . .	8
<i>Dudley v. State</i> , 719 So.2d 180 (Miss. 1998) . . . . .	24
<i>Francis v. Franklin</i> , 471 U.S. 307, 105 S.Ct. 1965 (1985). . . . .	15
<i>Gray v. State</i> , 926 So.2d 961 (Miss.App. 2006). . . . .	24
<i>Griffin v. State</i> , 607 So.2d 1197 (Miss. 1992) . . . . .	24

<i>Harper v. State</i> , 83 Miss. 402, 35 So. 572 (1904) . . . . .	15, 16
<i>Hickson v. State</i> , 472 So.2d 379 (Miss. 1985) . . . . .	26
<i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) . . . . .	23
<i>Johnson v. State</i> , 512 So.2d 1246 (Miss.1987) . . . . .	8
<i>Murphy v. State</i> , 89 Miss. 827, 42 So. 877 (1907) . . . . .	15
<i>Notaro v. United States</i> , 363 F.2d 169 (9th Cir. 1966). . . . .	15
<i>Pharr v. State</i> , 465 So.2d 294 (Miss.1984) . . . . .	4
<i>Pittman v. State</i> , 297 So.2d 888 (Miss. 1974) . . . . .	15, 16
<i>Scott v. State</i> , 446 So.2d 580, 583 (Miss. 1984) . . . . .	15
<i>State v. Coble</i> , 527 S.E2d 45 (N.C. 2000) . . . . .	21
<i>Stringer v. State</i> , 500 So.2d 928 (Miss. 1986) . . . . .	26
<i>Thomas v. State</i> , 129 Miss. 332, 92 So. 225 (1922). . . . .	24
<i>Tifford v. Washington</i> , 588 F.2d 954 (5 <sup>th</sup> Cir. 1979). . . . .	10
<i>United States v. Kelly</i> , 349 F.2d 720 (2d Cir. 1965) . . . . .	13
<i>United States v. Onick</i> , 889 F.2d 1425 (5 <sup>th</sup> Cir. 1989). . . . .	23
<i>United States v. Sacerio</i> , 952 F.2d 860 (5 <sup>th</sup> Cir. 1992) . . . . .	23
<i>Zafiro v. United States</i> , 506 U.S. 534, 113 S. Ct. 933, 122 L. Ed. 2d 317 (1993). . . . .	11, 14

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Wayne R. LaFave & Austin W. Scott Jr., <i>Substantive Criminal Law</i> (1986). . . . .	20
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## **STATEMENT OF ISSUES**

- 1. The trial court erred in failing to grant Thomas German a severance.**
- 2. Instruction C-12 did not allow the jury to assess each individual's guilt independently. Pursuant to the instruction, either all were guilty of murder or not.**
- 3. The instructions never made it clear that each defendant had to have the intent to kill Herman Fair.**
- 4. The evidence was insufficient to support a verdict of murder. Alternatively, the verdict was against the weight of the evidence.**
- 5. The errors taken together are cause for a new trial.**



## **STATEMENT OF THE CASE**

In an indictment filed November 28, 2006, Thomas German, along with codefendants Jamario Brady, Anthony Smith, Anthony Sneed, and Johnny Bickham, were charged with murdering forty-two-year-old Herman Fair on August 11, 2006. CP. 8; RE. 19. Defendants Sneed, Smith and German moved to sever their trial from those of the other defendants. CP. 16, 19, 22; T. 459. After a hearing on the motions (T. 48), the trial court denied a severance. CP. 22A. The defendants renewed their motions at the close of the evidence. T. 538. The trial court denied all severance requests. T. 499, 539.

The trial of all five defendants began on February 20, 2007. T. 73. At the end of a four-day trial, the jury found all five guilty of murder (CP. 92-96) including Thomas German. CP. 95; RE. 20. German was sentenced to life imprisonment. CP. 31; RE. 21.

## **STATEMENT OF FACTS**

The prosecution alleged that the five defendants set out to murder Herman Fair after Fair got into an argument with Anthony Smith's mother. T. 281. When Anthony found out about the argument, he gathered the other four defendants and they set out for Fair's apartment with a golf club. T. 281. When Fair left his apartment, the prosecution alleged, Anthony Smith knocked Fair down and all of the defendants proceeded to kick and beat him to the point where he died from

internal blood loss. T. 282. The prosecution's evidence, however, demonstrated that Smith and three of the defendants, including Thomas German, merely wanted to hurt Fair and left the scene when it turned out that codefendant Jamario Brady, was out of control and wouldn't stop beating Fair. Indeed, later, Brady even bragged about killing Fair. Nonetheless, the jury, which was given an instruction whereby they had to find all of the defendants guilty of murder or none of them, convicted all five defendants of murder.

There was one eyewitness to the beating, eighteen-year-old Rotandria Foster, who testified that she was ordering something to eat (T. 307) when she saw Herman Fair "get into it" with Leanna Smith outside of a club. T. 307. Leanna was choking him. T. 325. This continued for about 15 to 20 minutes. T. 307. Once it was over, Rotandria called Leanna Smith's son, Anthony Smith, and told him what she had seen. T. 307. After that, she walked to the projects and met up with Terinesia Burton as well as Smith, Jamario Brady, Anthony Smith, Johnny Bickham and Thomas German.<sup>1</sup> T. 308-10; 313. Smith was saying that he wanted to talk to Herman Fair. T. 311. His mother, however, told him "to leave it alone." T. 327.

No one knocked on Fair's door (T. 331) but he came downstairs and asked, twice, "where that bitch ass 'Baddy'<sup>2</sup> at?". T. 311. At that point, Anthony Smith hit Fair with his fist and Fair fell onto his back. T. 311; 331. Foster testified that

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<sup>1</sup> Rotandria used the defendant's nicknames when identifying them. T. 308-310.

<sup>2</sup> Leanna Smith's nickname is Baddy.

she was there for the entire incident and she saw Jamario Brady, Johny Bickham, Thomas German, Anthony Smith and Anthony Sneed each kick Herman once. T. 332-33. The kicks were more of a type designed to get Herman Fair to get up and fight rather than as if they were kicking a football. T. 340. Jamario Brady started hitting Fair in the face with a golf club. T. 312. Rotandria did not know how many times Jamario hit Fair with the golf club but thought maybe it was only twice. T. 333; 336. But he swung the club over his head like a golf swing rather than just using the club to poke Fair. T. 341. Anthony Smith stopped Brady and told him that they weren't trying to kill Fair, they just wanted to hurt him. T. 312; 336. Fair was still moving on the ground after he was kicked but he stopped moving once Brady started beating him with the golf club. T. 350; 355. When it appeared that Brady was out of control, Rotandria and everyone but Brady ran from the scene. T. 348.

Rotandria testified that she left the scene and went to Kendedria Hampton's. T. 314. Already there were Anthony Smith, Anthony Sneed, and Jamario Brady. T. 314. Jamario was saying "Yeah, I killed the bitch. I tried to kill him. My name is 'Turtle Squirtle.'" T. 315. About that time, the police showed up. The guys ran and the police took Rotandria and Kededria to City Hall. T. 315.

Rotandria testified that the entire assault was over in five or ten minutes. T. 317. When the police questioned her that night, she didn't tell them everything.

T. 317. The police then took her to the jail in Clarksdale and “then I went ahead and told them what happened.”

On cross-examination Rotandria testified that she attends Agricultural High School and that she has been in a special program for three years. T. 320. When asked how many seconds are in a minute, she replied “Say one second in a minute.” T. 320. In her first statement to police, she told them that Jamario said his name was “Turtle Squirtle” and he “didn’t care about killing nobody.” T. 323. At the time Rotandria heard Jamario say this, she did not know that Herman Fair was dead. T. 323.

Coahoma County Sheriff’s Investigator Mario Magsby recovered the golf club in a soybean field on the Monday following the Friday on which Fair died. T. 380; 420. Jamario Brady showed him the location of the club. T. 381. The golf club was sent to the crime lab to be examined for fingerprints and blood but the results were negative for both. T. 420; 423.

Magsby interviewed all five defendants. Jamario Brady told Magsby that he kicked Herman Fair. T. 386. In a later statement, Brady stated that he not only kicked Mr. Fair but that he also used a golf club to hit Fair on the leg. T. 387. He also said that he had drunk some beer prior to the altercation. T. 415.

Anthony Smith waived his Miranda rights and told Magsby that he received a call from his cousin Rotandria Foster and Foster told him that Herman Fair had assaulted his mother. T. 388-89. He then left to find his mother who told him not to go over to Fair’s apartment. T. 389. When Fair came out of his apartment and

walked down the stairs, Smith hit the tip of his chin and Fair fell down. T. 389. During his interview, Smith indicated he was drunk. T. 415. Smith's shoes were sent to the crime lab but no blood was detected on the shoes. T. 428.

Anthony Sneed also waived his Miranda rights and told Magsby that he went to the Yates Street Apartments to jump Fair and that he kicked Fair in the right side. T. 390. Sneed's shoes were taken by police and submitted to the crime lab but no blood was found on the shoes. T. 423.

Bickham, too, waived his rights and said that he kicked Herman Fair once in the right side. T. 391. Thomas German, after waiving his rights, said the same thing, i.e. that he kicked Herman Fair once in the right side. T. 392. He also told Magsby that when he saw Fair being hit, he ran. T. 434.

Pathologist Steven Hayne testified regarding the cause of Herman Fair's death. An external examination of the body revealed tears to Fair's head, namely a two-inch laceration to the right back of the head, a half-inch tear to the right ear, another two-inch tear on the back of the head, a two-inch tear to the left ear and a half-inch cut located over the bridge of the nose. T. 460. Fair's chest was bruised. There was an approximately six-and-a-half-inch bruise located mostly on the left side of the chest wall. There was a scratch located on the far right chest wall as well as another scratch on the back of the right shoulder. T. 460.

Autopsy revealed a broken rib and a large collection of blood in both the right and left chest cavities. T. 471. There was extensive bruising over the surface of the lungs as well as tears in both lungs. T. 471-72. The cause of death was

blunt force trauma to the chest. T. 473. It was Hayne's opinion that to produce the tearing found in Fair's lungs, "one would have to compress the chest wall significantly." T. 474. In other words, the injuries were more consistent with stomping than mere kicking. T. 483. Hayne opined that Fair's death was not caused by kicks to his side. T. 486. While Fair suffered a broken rib, the rib did not puncture a lung. "If lethal injuries had been inflicted to the location on the left or right flank of the body, I would expect to see fractures of the ribs," Hayne stated. T. 486.

After Dr. Hayne's testimony, the prosecution rested. Defendant Anthony Sneed called to the stand Sheila Croom who testified that Herman Fair occasionally stayed in her apartment and that she was with Fair all day at a barbecue. T. 518. While they were at the barbecue, a man named Dennis Thompson rode up on his bike and got into an altercation with Fair. T. 519, 525. That night Sheila Croom called Loretta Smith, who lived in the apartment next door, to let her know that Herman and "Baddy" had been in a fight. T. 520. She knew that Fair was at Smith's apartment because someone had called and told her this. And while she was on the phone with Ms. Smith, she could hear Fair's voice in Smith's apartment. T. 520. Croom was sitting on her bed talking on the phone when she heard a loud bump. A few minutes later, she looked out her bedroom window and saw Fair laying on the ground and Dennis Thompson was going through Fair's pockets. T. 521, 523. By the time Croom made it to the door, Thompson was gone. T. 521. She went down the stairs to where Herman was

laying on the ground; 911 was called. T. 521. By the time Officer Davis pulled up, Thompson was coming around the apartment building. Croom testified that Thompson stood by Fair's body and said "He didn't have nothing to do with it." T. 522.

### **SUMMARY OF THE ARGUMENT**

There were a multitude of errors in this case that individually and collectively deprived Thomas German of due process and a fair trial. First of all, the trial court erred in not severing the trials of the defendants. While there was a large amount of evidence that Jamario Brady was guilty of murder - he not only beat Fair repeatedly he later bragged about killing him - the evidence against the others, including Thomas German, was that they merely wanted to hurt Fair. Combining the trials of all the defendants was prejudicial to Brady's codefendants given that the evidence against him was much greater. The error is refusing to order a severance was compounded by the court's error in instructing the jury that it must find all of the defendants guilty of murder or acquit them all of murder.

The instructions on aiding and abetting were either abstract or wrong and included instructions on the elements of the lesser included offense of aiding and abetting non-specific intent manslaughter which is a crime impossible to commit.

Finally, the evidence was insufficient to support the conviction of murder. Alternatively, the conviction was against the overwhelming weight of the

evidence. The prosecution's own evidence in this case demonstrated that German, and all the defendants other than Brady, merely intended to hurt Fair.

## **LAW AND ARGUMENT**

### **1. The trial court erred in failing to grant Thomas German a severance.**

Rule 9.03 of the Uniform Circuit and County Court Rules states, "[t]he granting or refusing of severance of defendants in cases not involving the death penalty shall be in the discretion of the trial judge." The Mississippi Supreme Court set forth the criteria for determining whether a severance was warranted in *Duckworth v. State*, 477 So.2d 935, 937 (Miss.1985). These criteria are whether or not the testimony of one co-defendant tends to exculpate that defendant at the expense of the other defendant and whether the balance of the evidence introduced at trial tends to go more to the guilt of one defendant rather than the other. Absent a showing of prejudice, there are no grounds to hold that the trial court abused its discretion. *Duckworth*, 477 So.2d at 937. When the evidence at trial goes equally to the guilt of both defendants, and not to one more than the other, it is not error to try the defendants jointly. *Johnson v. State*, 512 So.2d 1246, 1254 (Miss.1987). However, the failure to grant a severance is error and violates due process if a joint trial makes the trial fundamentally unfair to the defendant. *Byrd v. Wainwright*, 428 F.2d 1017, 1021 (5th Cir. 1970).



In this case, there was a huge disparity in the evidence against one of the defendants, Jamario Brady, as opposed to the evidence against the rest of the defendants including German. The only eyewitness to testify in this case, Rotandria Foster, told the jury that she saw each of the defendants kick Fair in the side as though to prompt him to get up. At that point, Jamario Brady started beating Fair with a golf club at which point Smith asked him to stop because they only wanted to hurt him. When Brady refused to quit, Smith and the others, including German, ran from the scene. This disparity is one reason the trial court should have granted a severance. Clearly there was a potential for the jury convicting all five based in the evidence of Brady's conduct. This might have been solved by appropriate instructions. Unfortunately, the instruction that outlined the elements of murder also told the jury to convict all of the defendants or none. That issue is briefed below.

A severance was also warranted because the joint trial meant that German was not allowed to introduce exculpatory evidence that could have been introduced if German had been tried separately. German told investigator Mario Magsby that, just as Rotandria testified, that he kicked Fair but then Brady started beating on Fair with a golf club and German and the other defendants ran. T. 431. The trial court disallowed this questioning on the grounds that German's statements implicated a co-defendant - Brady - and this would violate Brady's right to confront the witnesses against him. T. 432.

Eventually, the trial court allowed German to adduce from Magsby the fact that German stated he ran after he saw Fair being hit with golf club. T. 434. There was no mention, though, that it was Brady's beating of Fair that prompted German to run. The jury, then, was not allowed to hear all of German's statement even though that statement would have corroborated what the one eyewitness testified.

One way a defendant might be prejudiced in a joint trial is if the court allows the jury to hear statements made by non-testifying codefendants which inculcate the defendant but where the defendant cannot cross-examine the codefendant. This, of course, violates the defendant's right to confront the witnesses against him. *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). The trial court in this case was careful to see to it that this error did not occur by limiting each defendant's statement to an account of only that defendant's participation. However, what did occur as a result of the need to avoid a confrontation error was that German was prejudiced by being unable to elicit essential exculpatory evidence that would have been available to German if he had not been tried with Brady. This, too, was error. *Tifford v. Washington*, 588 F.2d 954, 956 (5<sup>th</sup> Cir. 1979).

The failure of the trial court to sever German's case from the others, or, at least, from Brady's trial, meant that the jury heard evidence about Brady's

behavior that they may have used to convict German, especially in light of the instructions in this case. It also meant that German was not allowed to introduce important exculpatory evidence. The denial of a severance violated German's right to a fair trial.

**2. Instruction C-12 did not allow the jury to assess each individual's guilt independently. Pursuant to the instruction, either all were guilty of murder or not.**

As outlined above, the trial court refused to sever German's trial from that of his codefendants. Oftentimes limiting instructions are sufficient to remedy any prejudice that may arise due to a joinder of defendants. *Zafiro v. United States*, 506 U.S. 534, 113 S. Ct. 933, 122 L. Ed. 2d 317 (1993). In this case, though, not only did the instructions fail to remedy any prejudice that might have resulted because the five defendants were being tried together, one instruction exacerbated the problem. It required the jury to convict all or none of the defendants.

There were five defendants in this case. The instruction containing the elements of the crime with which the defendants were charged, Jury Instruction No. C-12, did not allow the jury to assess the evidence against each defendant individually. Instead, it told the jury that if it found any of them guilty of the crime, then it should find all of the guilty.

JURY INSTRUCTION NO. C-12

The defendants, JAMARIO BRADY A/K/A MARIO A/K/A TURTLE; ANTHONY SNEED A/K/A TRIGGER; ANTHONY SMITH A/K/A STICKY; THOMAS GERMAN A/K/A TOMMY C. and JOHNNY BICKHAM have been charged by indictment with the crime of Murder.

If you find from the evidence in this case beyond a reasonable doubt that:

- (1) On or about August 11, 2007, Herman Fair, was a living being, and
- (2) the defendants JAMARIO BRADY A/K/A MARIO A/K/A TURTLE; ANTHONY SNEED A/K/A TRIGGER; ANTHONY SMITH A/K/A STICKY; THOMAS GERMAN A/K/A TOMMY C. and JOHNNY BICKHAM, individually or while aiding and abetting and/or acting in concert with each other, did unlawfully, willfully and feloniously and without authority of law and with deliberate design to effect death, kill and murder Herman Fair,
- (3) by beating and/or kicking him to death,
- (4) while the said JAMARIO BRADY A/K/A MARIO A/K/A TURTLE; ANTHONY SNEED A/K/A TRIGGER; ANTHONY SMITH A/K/A STICKY; THOMAS GERMAN A/K/A TOMMY C. and JOHNNY BICKHAM were not acting in self-defense or in defense of others,

Then you shall find the defendants JAMARIO BRADY A/K/A MARIO A/K/A TURTLE; ANTHONY SNEED A/K/A TRIGGER; ANTHONY SMITH A/K/A STICKY; THOMAS GERMAN A/K/A TOMMY C. and JOHNNY BICKHAM, guilty of murder.

If the State has failed to prove any one or more of these elements beyond a reasonable doubt then you shall find the defendants JAMARIO BRADY A/K/A MARIO A/K/A TURTLE; ANTHONY SNEED A/K/A TRIGGER; ANTHONY SMITH A/K/A STICKY; THOMAS GERMAN

A/K/A TOMMY C. and JOHNNY BICKHAM not guilty of murder.

Instruction C-12; CP. 109; RE. 26.

The problem with this instruction is that it required the jury to find all of the defendants were guilty of murder or all were not guilty. It did make it clear that the jury was authorized to convict one, or some, of the defendants and acquit others.

In *United States v. Kelly*, 349 F.2d 720 (2d Cir. 1965), the defendant Shuck was charged with along with two others in a conspiracy to defraud the public by selling grossly overvalued stocks. The proof against Shuck was much less than that against his codefendants and such that a reasonable jury could have convicted the two codefendants of having participated in a conspiracy but acquitted Shuck. However, the trial judge gave the jury an instruction that "If you find separate conspiracies and that some of the defendants belonged to one and not to the other, then there would be no proof of the single conspiracy charged in the indictment; and in that case you must return a verdict of not guilty as to all of the defendants on the conspiracy count." *Kelly*, 349 F.2d at 757. "This was the equivalent of an instruction that the jury could not acquit Shuck on the conspiracy count without also acquitting Kelly and Hagen." *Id.* This "lumping together" of all of the defendants was error requiring reversal of Shuck's conviction. *Id.*

In this case, the prosecution's own evidence was that the defendants, except Jamario Brady, merely desired to hurt Fair. In fact, the prosecution admitted as much during the argument on the motion to sever. "That at the very minimum," stated Assistant District Attorney Mickey Mallette, "[the defendants] were there for the common purpose **of dealing with and/or assaulting Mr. Fair** and that it was during the course of that **assault** . . . that he succumbed to the beating . . . ." T. 52 (emphasis added). During closing argument, Mallette stated, "I don't think the golf club is the murder weapon. **The golf club is important because it shows the intent of at least one of those five men.**" T. 639 (emphasis added). Even the prosecution appears to concede that a reasonable jury could have convicted Brady of murder and found that the others had committed only an assault. Unfortunately, the court's principal instruction did not allow the jury this option. It was either all the defendants or none.

Whenever several defendants are tried together, there is the potential for the jury to be confused as to how to allocate the evidence. A fair trial requires that the court give limiting instructions that militate against this potential. *Zafiro v. United States*, 506 U.S. 534, 113 S. Ct. 933, 122 L. Ed. 2d 317 (1993). And while the Court gave several instructions regarding the elements necessary to convict of aiding and abetting, those instructions were even more confusing (see Issue 2, *infra*) and, moreover, general instructions cannot cure the error in

specific instructions. *Francis v. Franklin*, 471 U.S. 307, 320, 105 S.Ct. 1965, 1974 (1985).

As one court has said, “[w]hen a party has the burden of proof as to a factual issue, it cannot be proper that instructions pertaining to the issue are so vague or ambiguous as to permit of misinterpretation by the jury of the standard which is to be applied.” *Notaro v. United States*, 363 F.2d 169 (9th Cir. 1966). The Mississippi Supreme Court has repeatedly held that an erroneous instruction which omits certain essential elements and undertakes to tell the jury to find the defendant guilty if it finds a certain set of facts (a concrete instruction) cannot be cured by an either an abstract or concrete instruction which correctly states the law. *Scott v. State*, 446 So.2d 580, 583 (Miss. 1984); *Cooley v. State*, 346 So.2d 912 (Miss. 1977); *Pittman v. State*, 297 So.2d 888 (Miss. 1974); *Bailey v. State*, 176 Miss. 579, 169 So. 765 (1936); *Barnes v. State*, 118 Miss. 621, 79 So. 815 (1918); *Murphy v. State*, 89 Miss. 827, 42 So. 877, 878 (1907); *Harper v. State*, 83 Miss. 402, 35 So. 572 (1904).

On the question of when erroneous jury instructions may be cured by other instructions, the Court has repeatedly held:

Where an abstract proposition of law is incorrectly announced by an instruction, and the same or similar propositions of law are thereafter correctly set forth in other instructions in the cause, then if, taking the instructions on both sides as a whole, the court can safely affirm that no harm has been done to either side, and that the right result has been

reached, the verdict of the jury will not, in such cases, be disturbed. *Skates v. State*, 64 Miss. 644, 1 South. 843, 60 Am. Rep. 70. But where, as in the instant case, the court undertakes to collate certain facts, and, making a concrete application of the law to such facts, instructs the jury to bring in a stated verdict if they believe in their existence, and the facts therein stated will not legally sustain the verdict directed, such error cannot be cured by other instructions; the reason for the difference being that in the first instance it is simply an erroneous statement of a legal principle, which may or may not mislead the jury, according to the varying circumstances of causes, but in the latter instance, where a verdict is directed to be based upon the facts stated in the instruction, other instructions embodying other and different statements of facts and authorizing verdicts to be predicated thereon, do not modify the erroneous instruction, but simply conflict therewith. If, by an erroneous instruction, a jury be charged to convict if they believe certain facts to exist, and by another instruction the jury be told that they should acquit unless they believe that certain other facts also exist, these instructions do not modify, but contradict, each other. The one is not explanatory of the other, but in conflict therewith. In such a state of case the jury is left without any sure or certain guide to conduct them to the proper conclusion. *Hawthorne v. State*, 58 Miss. 778; *Collins v. State*, 71 Miss. 691, 15 South. 42; *Josephine v. State*, 39 Miss. 647; *Owens v. State*, 80 Miss. 499, 32 South. 152 [emphasis added].

*Bailey v. State*, 169 So. at 767.

Put another way, an incomplete or erroneous concrete instruction may not be cured by other instructions even though they may correctly state the law. The reason being that the appellate court cannot tell which of the two instructions the jury actually followed in reaching a verdict. Such an error requires reversal in every case. *Harper v. State*, supra.



In this case, none of the instructions clearly told the jury what they had to find in order to determine the guilt or innocence of each individual defendant. And the one instruction containing all of the elements of murder required the jury to convict all or none of the defendants. German's resulting conviction must be reversed.

**3. The instructions never made it clear that each defendant had to have the intent to kill Herman Fair.**

In addition to Instruction C-12, the jury was given three instructions on the theory of aiding and abetting and the intent necessary to convict of aiding and abetting. An examination of these three instructions shows that the jury was never instructed that it had to find that each individual defendant had the necessary *mens rea* before it could convict any individual defendant of murder. First of all, two of these instructions are abstract instruction. The third instruction actually gets around to discussing the offenses at issue in the case but it discusses specific intent with regard to both murder and manslaughter. In this case, the manslaughter was essentially killing without intent to commit murder and, thus, an instruction discussing specific intent as applied to both murder and manslaughter hopelessly confused the issue of specific intent as applied to the circumstances here.

Instruction C-10 states as follows: "The Court instructs the Jury that if two or more persons are engaged in the commission of a felony, then the acts of each in

the commission of such felony are binding upon all and all are equally responsible for the acts of each in the commission of such felony.” C.P. 106; RE. 24.

C-11 is longer. It states:

The guilt of a defendant in a criminal case may be established without proof that the defendant personally did every act constituting the offense alleged. The law recognizes that, ordinarily, anything a person can do for himself may also be accomplished by that person acting in concert with, or aiding and abetting, another person or persons in a joint effort or enterprise.

If a defendant is acting in concert with or aiding and abetting another person and performs acts with the intent to commit a crime, then the law holds the defendant responsible for the acts and conduct of such persons just as though the defendant had committed the acts or engaged in such conduct.

Before any defendant may be held criminally responsible for the acts of others it is necessary that the defendant deliberately associate himself in some way with the crime and participate with the intent to bring about the crime.

Of course, mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish that a defendant either acted in concert or aided and abetted the crime unless you find beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator.

In other words, you may not find any defendant guilty unless you find beyond a reasonable doubt that every element of the offense as defined in these instruction [sic] was committed by some person or persons, and that a defendant voluntarily participated in its commission with the intent to violate the law.

Instruction C-11; CP. 107; RE. 25.

The problem with this instruction is that it allows a defendant to be found guilty as an aider and abettor regardless of whether he shared the intent of the person committing the actual crime. The last paragraph of the instruction merely

requires the defendant to participate in the crime with the intent to violate "the law." Thus, someone like German who participated by kicking Fair once with the intent to commit an assault can be found guilty of aiding and abetting a murder under Instruction C-11.

Instruction C-16 is more specific in that it actually names the offenses, i.e. murder and manslaughter, for which the jury must find specific intent. The problem with C-16, however, is that it consistently refers to "murder or manslaughter" and murder is a specific intent crime while the manslaughter with which the defendants are charged (killing without the deliberate design to effect death) is essentially murder without specific intent. The instruction, then, only confused the issue even more.

C-16 is as follows:

The court instructs the jury that each person present at the time, and consenting to and encouraging the commission of a crime, and knowingly, willfully and feloniously doing any act which is an element of the crime, and knowingly, willfully and feloniously doing any act which is an element of the crime or immediately connected with it, or leading to its commission, is as much a principal as if he had with his own hand committed the whole offense. In this case the State has charged that these defendants aided and abetted one another in the commission of the crime charged. Aiding and abetting requires some participation in the criminal act and may be evidenced by word, overt act or deed. In order to be found guilty as aiders and abettors must possess the same intent as the person principally committing the crime charged. If you believe from the evidence, beyond a reasonable doubt, that the defendants, Jamarío Brady, Anthony Sneed, Anthony Smith, Thomas German and Johnny Bickham, or any one of them, did willfully, knowingly, unlawfully and feloniously do any act which is an element of the crime of murder or manslaughter as

you so find. immediately connected with such crime, or leading to its commission, and that such defendant or defendants shared the same intent as the person principally committing the crime, then and that event you should find such defendant or defendants guilty of murder or manslaughter, as you so find.

Instruction C-16; CP. 113; RE. 28.

To be found guilty of murder as an aider and abettor, German would have had to have the intent to kill Fair. *Clemons v. State*, 482 So.2d 1102, 1106 (Miss. 1985) (a defendant is not guilty of being an aider and abettor unless he had the intent to make the crime succeed). However, the underlying offense of manslaughter on which the jury was instructed was not a specific intent crime but rather a killing done without deliberate design. Instruction C-16.

One who is being tried as an accomplice or an aider and abettor may only be convicted “only for those crimes as to which he personally has the requisite mental state” 2 Wayne R. LaFave & Austin W. Scott Jr., *Substantive Criminal Law* § 6.7(c) at 143-45 (1986).

This notion . . . is applicable in a variety of circumstances. It means, for example, that one may not be held as an accomplice to the crime of assault with intent to kill if that intent was not shared by the accomplice. But this limitation has proved most significant in the homicide area, where the precise state of mind of the defendant has great significance in determining the degree of the offense. To determine the kind of homicide of which the accomplice is guilty, it is necessary to look to his state of mind; it may have been different from the state of mind of the principal and they thus may be guilty of different offenses. Thus, because first degree murder requires a deliberate and premeditated killing, an accomplice is not guilty of this degree of murder unless he acted with premeditation and deliberation. And, because a killing in a heat

of passion is manslaughter and not murder, an accomplice who aids while in such a state is guilty only of manslaughter even though the killer is himself guilty of murder. Likewise, it is equally possible that the killer is guilty only of manslaughter because of his heat of passion but that the accomplice, aiding in a state of cool blood, is guilty of murder.

*Id.* at 144-45 (footnotes omitted).

It mattered not, then, that German shared the intent of the others. The question is whether German himself had the requisite intent to kill Fair. The aiding and abetting instructions never made this clear. Indeed, because the manslaughter instruction was for a non-specific intent crime, i.e., it was a killing without the design to effect death, it is arguably impossible for German to be convicted as an aider and abettor of non deliberate-design manslaughter since it would be impossible for him to have the same intent as the person committing the crime not requiring any specific intent.<sup>3</sup> Thus, the inclusion of manslaughter in the only specific instruction on the intent necessary to convict of aiding and abetting just hopelessly complicated an already-complicated instruction.

The prosecution's closing argument also misstated the proof needed for aiding and abetting liability by leaving out the requirement of intent. The exact wording of your instruction will say that each person present at the time, consenting to, encouraging the commission of a crime, and

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<sup>3</sup> The South Carolina Supreme Court held that it was impossible to commit attempted second degree murder for much the same reason. *State v. Coble*, 527 S.E.2d 45, 48-49 (S.C. 2000). Second degree murder in South Carolina is a non-specific intent murder, just as is non-deliberate design manslaughter in Mississippi. Since an attempt requires the intent to commit the substantive offense, and second-degree murder has no specific intent, it is impossible to attempt to commit second degree murder. *Id.* Because one who aids and abets must have the specific intent of the substantive offense, and non-deliberate design has no specific intent, it is impossible to aid and abet non-deliberate design manslaughter.

doing any act which is an element of that crime or immediately connected with it or leading to its commission is just as much a principal as if he had with his own hand committed with it or leading to its commission is just as much a principal as if he had with his own hand committed the whole offense. So what I ask you to do is look at the evidence and make your separate determination. Did every one of those men come and be present and participate, encourage, and do an act? Every one of them told you that they did, and I submit that makes them guilty.

T. 577.

The jury in this case had to be hopelessly confused. The instructions given the jury were either so abstract as to be useless or flat-out erroneous. The failure of the trial court to instruct the jury correctly on aiding and abetting requires reversal of German's conviction.

**4. The evidence was insufficient to support a verdict of murder. Alternatively, the verdict was against the weight of the evidence.**

At the conclusion of the state's case, counsel for German requested a directed verdict on behalf of German on the grounds that the prosecution failed to prove that German committed any act which caused or contributed to Fair's death.

T. 502. This was denied.

In the case sub judice, no reasonable, fair-minded, and properly instructed juror could find Thomas German guilty of murder. The evidence presented by the State was insufficient as a matter of law to support a conviction and the jury's verdict was not supported by the overwhelming weight of the evidence.

Where the evidence is insufficient, the court must vacate the conviction.

Where the verdict is against the overwhelming weight of the evidence, the conviction must be reversed and the case remanded for a new trial.

Evidence is insufficient where the evidence “viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged. then a reasonable jury must necessarily entertain a reasonable doubt.” *Clark v. Procunier*, 755 F.2d 394, 396 (5<sup>th</sup> Cir. 1985); *United States v. Sacerio*, 952 F.2d 860, 865-66 (5<sup>th</sup> Cir. 1992) (a “plausible, rational, innocent explanation for almost every action, thus [lends] reasonable doubt to an inference of guilt”). If a reasonable jury would doubt whether the evidence proves an essential count, reversal is required. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *United States v. Onick*, 889 F.2d 1425 (5<sup>th</sup> Cir. 1989).

In *Carr v. State*, 208 So.2d 886 (Miss.1968), the Mississippi Supreme Court stated that in considering whether the evidence is sufficient to sustain a conviction in the face of a motion for directed verdict or for judgment notwithstanding the verdict, the critical inquiry is whether the evidence shows “beyond a reasonable doubt that accused committed the act charged, and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction.” *Carr*, 208 So.2d at 889.

The Mississippi Supreme Court has stated on numerous occasions that when determining whether a verdict should be overturned that the “Court must

accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial.” *Dudley v. State*, 719 So.2d 180, 182 (Miss. 1998). Under this standard, the prosecution is given “the benefit of all favorable inferences that may reasonably be drawn from the evidence.” *Griffin v. State*, 607 So.2d 1197, 1201 (Miss. 1992). When making this review, the Court will reverse only if the jury’s verdict is “so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice.” *Dilworth v. State*, 909 So.2d 731, 737 (Miss. 2005). The evidence is weighed “in the light most favorable to the verdict.” *Bush v. State*, 895 So.2d 836, 844 (Miss. 2005).

A challenge to the weight of the evidence requires the State to have a greater quantum of evidence than does a challenge to the sufficiency of the evidence. *Pharr v. State*, 465 So.2d 294, 302 (Miss. 1984). The jury’s verdict should be overturned when “from the whole circumstances, the testimony is contradictory and unreasonable, and so highly improbable that the truth of it becomes so extremely doubtful that it is repulsive to the reasoning of the ordinary mind.” *Thomas v. State*, 129 Miss. 332, 92 So. 225, 226 (1922).

When reviewing the sufficiency of evidence in a case, the Court must determine “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Gray v. State*, 926 So.2d 961, 968 (Miss.App. 2006).



The prosecution's own evidence proved there was no intent to kill Fair on the part of any of the defendants other than Jamario Brady. Eyewitness Rotandria Foster testified that she saw each defendant kick Fair one time but that Jamario Brady was also hitting Fair with a golf club by swinging the golf club over his head. T. 312, T. 341. At that point, Smith stopped Brady and told Brady that they weren't trying to kill Herman, they just wanted to hurt him. T. 312; 336. When it became clear that Brady was out of control and could not be stopped, all of the other defendants, including German, ran from the scene. T. 348.

During the hearing on the motion to sever, the Assistant District Attorney described the evidence as showing "That at the very minimum [the defendants] were there for the common purpose of dealing with and/or assaulting Mr. Fair and that it was during the course of that assault . . . that he succumbed to the beating . . . ." T. 52.

The prosecution's proof was that German kicked Fair one time. There was no evidence that German intended to kill or cause deadly harm to Fair. Indeed, the evidence was to the contrary: the prosecution put on testimony to the effect that German, as well as all the defendants except Brady, intended merely to hurt Fair. Given the evidence, the only way that a reasonable jury could convict German of murder was if wrongly instructed thereon, which is exactly what happened here. German's conviction for murder should be reversed and rendered.

**5. The errors taken together are cause for a new trial.**

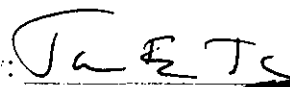

The Mississippi Supreme Court has recognized that several errors not individually sufficient to warrant a new trial may, when taken together, require reversal. *Stringer v. State*, 500 So.2d 928, 946 (Miss. 1986); *Hickson v. State*, 472 So.2d 379, 385-86 (Miss. 1985). In this case, the court made several errors in its rulings that, cumulatively, had the effect of denying Thomas German a fair trial. *Chambers v. Mississippi*, 410 U.S. 284, 298, 93 S.Ct. 1038, 1047 (1973) (reversing based on various evidentiary errors resulting in a denial of due process). If this Court finds that no single error in this case calls out for reversal of the convictions and /or sentences, it should nonetheless consider a new trial based on the plethora of errors that prevented Thomas German from obtaining due process.

**Conclusion**

For the above and foregoing reasons, Thomas German's conviction and sentence must be vacated or reversed and remanded for a new trial.

Respectfully submitted.

THOMAS GERMAN

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## CERTIFICATE OF SERVICE

I, Jane E. Tucker, hereby certify that I have this day mailed by first-class mail, postage prepaid, a true and correct copy of the foregoing Brief of Appellant to the following:

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This, the 26th day of August, 2008.

A handwritten signature in black ink, appearing to read 'Jane E. Tucker', written over a horizontal line.

Jane E. Tucker