IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

2007-KA-00108-COA

ROBERT L. GRANT — APPELLANT

v.

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

ON APPEAL FROM THE CIRCUIT COURT OF PEARL RIVER COUNTY

ORAL ARGUMENT IS NOT REQUESTED

EARL LINDSAY CARTER, JR.
ATTORNEY AT LAW
404 HEMPHILL STREET
HATTIESBURG, MS 39401
(601) 545-8142, MSB #[redacted]

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies pursuant to Mississippi Supreme Court Rule 28(a)(1) that the following persons have an interest in the outcome of the case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

Robert L. Grant
MDOC
Defendant/Appellant

Earl Lindsay Carter, Jr.
Appeal Counsel for Robert L. Grant
Hattiesburg, MS 39401

James L. Gray, Esq.
Trial Counsel for Robert L. Grant
Picayune, MS 39466

Hon. Hal Kittrell
Hon. Manya Creel
Hon. Doug Miller
District Attorney
Assistant District Attorneys
500 Courthouse Square, Suite 3
Columbia, MS 39429

Hon. Jim Hood
Attorney General
P.O. Box 220
Jackson, MS 39205-0220
Appellant Counsel for the State

Hon. Michael E. Eubanks
Circuit Judge
P.O. Box 488
Purvis, MS 39475
Trial Judge

SO CERTIFIED, this the 16th day of October, 2007.

Earl Lindsay Carter Jr.

EARL LINDSAY CARTER, JR.
ATTORNEY

TABLE OF CONTENTS

Certificate of Interested Persons.....ii

Table of Authorities.....iv

Statement of Issues.....1

Statement of the Case.....2

Statement of the Facts.....3

Summary of the Argument.....5

Argument.....6

I. The Mississippi capital murder (felony murder) statute is not applicable in the case of a death of a co-conspirator.....6

II. The jury was not properly instructed on capital murder by the trial court granting instruction S-13.....11

III. The trial court erred in not allowing Robert Grant's expert to give his opinion as to his first two conclusions.....12

IV. The court erred in allowing inadmissible hearsay testimony of Chris Thomas....14

V. The Court erred in sentencing the defendant as an habitual as the evidence was not properly authenticated.....15

VI. The verdict of guilty was against the overwhelming weight of the evidence.....16

Conclusion.....18

Certificate of Service.....19

TABLE OF AUTHORITIES

CASES

Bush v. State, 895 So. 2d 836 (Miss. 2005).....16

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).....13

Drake v. State, 800 So. 2d 508 (Miss. 2001).....6

Edwards v. State, 615 So. 2d 590 (Miss. 1993).....15

Enmund v. Florida, 458 U.S. 782, 73 L.Ed.2d 1140, 102 S.Ct. 3368 (1982).....10

Fairchild v. State, 459 So. 2d 793.....6

Gray v. State, 351 So. 2d 1342 (Miss. 1977).....6

Gray v. Lucas, 677 F.2d 1086 (5th Cir. 1982).....7, 8

Grayson v. Mississippi, 806 So. 2d 241 (Miss. 2001).....10

Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d. 859 (1976).....6

Haggerty v. Foster, 838 So. 2d 948 (Miss. 2002).....12

Holland v. State, 705 So. 2d 307 (Miss. 1997).....6, 7, 8

King v. State, 527 So. 2d 641 (Miss. 1988).....16

McGowen v. State, 859 So. 2d 320 (Miss. 2003).....12

Miss. Transp. Comm'n v. McLemore, 863 So. 2d 31 (Miss. 2003).....12

People v. Ferlin, 203 Cal. 587, 265 P. 230 (1928).....10

Reed v. State, 91 So. 2d 269 (Miss. 1956).....15

Russell v. State, 670 So. 2d 816 (Miss. 1996).....16

Tison v. Arizona, 481 U.S. 137, 95 L.Ed.2d 127, 107 S.Ct. 1676 (1987).....10

Underwood v. State, 708 So. 2d 18 (Miss. 1998).....6

United States v. Schwanke, 598 F.2d 575 (10th Cir. 1979).....9, 10

OTHER AUTHORITIES

Miss. Code Ann. § 97-3-19(1)(a-c).....12

Miss. Code Ann. § 97-3-19(2)(a-h).....9

Miss. Code Ann. § 99-19-101(7)(a-d).....7

Miss. R. Evid. 702 (2007).....12

Miss. R. Evid. 801(d)(2)(a).....14

Miss. R. Evid. 902(1)(2)(4).....15

STATEMENT OF THE ISSUES

I. THE MISSISSIPPI CAPITAL MURDER (FELONY MURDER) STATUTE IS NOT APPLICABLE IN THE CASE OF A DEATH OF A CO-CONSPIRATOR.

II. THE JURY WAS NOT PROPERLY INSTRUCTED ON CAPITAL MURDER BY THE TRIAL COURT GRANTING INSTRUCTION S-13.

III. THE TRIAL COURT ERRED IN NOT ALLOWING ROBERT GRANT'S EXPERT TO GIVE HIS OPINION AS TO HIS FIRST TWO CONCLUSIONS.

IV. THE COURT ERRED IN ALLOWING INADMISSABLE HEARSAY TESTIMONY OF CHRIS THOMAS.

V. THE COURT ERRED IN SENTENCING THE DEFENDANT AS AN HABITUAL AS THE EVIDENCE WAS NOT PROPERLY AUTHENTICATED.

VI. THE VERDICT OF GUILTY WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

STATEMENT OF THE CASE

Procedural facts are as follows. Robert Grant was indicted on September 30, 2004 by a Pearl River County Grand Jury on a one count indictment charging that on or about July 17, 2004, he committed the crime of Capital Murder. C.P. 6.

Robert Grant's trial began on August 28, 2006 in the Circuit Court of Pearl River County. The jury found him guilty of Murder, and sentenced him as a habitual to serve a sentence of life without the possibility of parole. C.P. 273.

It is from this conviction and sentence that Robert Grant brings the present appeal.

STATEMENT OF THE FACTS

The statement of the facts as they pertain to the issues on appeal are as follows. On July 16, 2004 around midnight, Deputy Adam Naquin was dispatched to a home invasion. T. 13. The home was a trailer which was occupied by Terry Wayne Adams, Skipper Bowens, Jerome Williams, and Roderick Shanks. T. 17. After investigating the crime, a barking dog alerted the officer to the woodline. T. 26. One of the trailer occupants also stated to the officer that he thought he saw someone running. T. 26. Deputy Naquin and Detective Kramer walked over to the woods and discovered a body. T. 26. This body was located almost two and one half hours after Officer Naquin first arrived on the scene. T. 34. No one claimed to know that anyone was shot until the body was found. T. 34.

The law enforcement officers investigated the crime and determined that the body was that of Arthur Joshua, and they then determined that he was shot in the living room. T. 68. They also determined that the body had been drug into the woods. T. 76. After interviewing the occupants of the trailer, it was determined that two men entered the trailer fired some shots and stole some stuff out of the safe. T. 82.

Shannon Landry and Terry Wayne Adams were the only two witnesses that placed Robert Grant at the trailer the night that Arthur Joshua was killed. Shannon Landry was dating Arthur Joshua at the time of his death. T. 195. Shannon had previously dated Terry Wayne Adams. T. 170. Shannon testified that she still visited Terry Wayne Adams, and that Arthur Joshua would not have liked this. T. 220. Shannon Landry also gave three inconsistent statements to law enforcement. T. 208. Terry Wayne Adams testified that he moved two pounds of marijuana into the woods before law enforcement arrived. T. 176. Terry Wayne Adams was also the only person that tested positive for gunshot residue, which was on his left

palm. T. 395. Both Terry Wayne Adams and Shannon Landry plead to lesser charges in exchange for their testimony. T. 194, 222.

Robert Grant request that the verdict of the jury and the sentences imposed upon him by the Trial Court be reversed and a new trial granted.

SUMMARY OF THE ARGUMENT

Robert Grant raises six issues for review by this Court. The first involves the trial court's error in allowing Robert Grant to be tried for capital murder for the death of a co-conspirator.

Second, the jury was not properly instructed on capital murder, but falsely instructed to return a verdict of murder.

Third, the trial court erred in not allowing Robert Grant's expert to testify as to his first two conclusions. As such, many of the prosecution's expert's opinions went unquestioned.

Fourth, the trial court allowed inadmissible hearsay testimony of Chris Thomas.

Fifth, the trial court erred in sentencing Robert Grant as a habitual. The prosecution attempted to enter into evidence "pen packs", which were not properly authenticated.

Finally, the facts of the trial prove that the verdict was against the overwhelming weight of the evidence. Only two witnesses placed Robert Grant at the scene of the crime. Both witnesses were entangled, and received lesser charges as a result of their testimony.

ARGUMENT

STANDARD OF REVIEW

On appeal, the standard of review typically requires that the evidence be viewed in the light most favorable to the Appellee. However, in capital cases, the standard is different. The Court must review the evidence in "the light most favorable to the defendant (Appellant) and [consider] all the reasonable inferences which may be drawn in favor of the defendant (Appellant) from the evidence." *Drake v. State*, 800 So. 2d 508 (Miss. 2001), citing *Underwood v. State*, 708 So. 2d 18, 36 (Miss. 1998) and *Fairchild v. State*, 459 So. 2d 793, 801. In *Drake*, the State did not seek the death penalty and the defendant was sentenced to life imprisonment. Despite the fact that the death penalty was not a possible sentence, this Court still applied the alternate standard and evaluated the evidence in the light most favorable to the Appellant.

I. THE MISSISSIPPI CAPITAL MURDER (FELONY MURDER) STATUTE IS NOT APPLICABLE IN THE CASE OF A DEATH OF A CO-CONSPIRATOR.

Many prior cases discuss the issue of whether or not the Mississippi capital murder statute is unconstitutional. The main issue seems to revolve around the finding of specific intent. The Mississippi Supreme Court thoroughly analyzed the constitutionality of Mississippi's capital murder statute in *Holland v. State*, 705 So. 2d 307 (Miss. 1997). Therein, the Court readdressed its prior decision in *Gray v. State*, 351 So. 2d 1342, 1344 (Miss. 1977), *cert. denied*, 446 U.S. 988, 100 S.Ct. 2975, 64 L.Ed.2d 847 (1980), *reh'g denied*, 448 U.S. 912, 101 S.Ct. 30, 65 L.Ed.2d 1174 (1980). The Court held as follows:

> Gray's Eighth Amendment claim addressed the imposition of the death penalty. Under *Gregg v. Georgia*, 428 U.S. 153, 187-88, 96 S.Ct. 2909, 2931-32, 49 L.Ed.2d 859 (1976), *reh'g denied*, 429 U.S. 875, 97 S.Ct. 197, 50 L.Ed.2d 158 (1976), a death sentence must not be excessive in relation to the crime for which it is imposed, and death sentences must be imposed with reasonable consistency. Holland contends that Mississippi's capital murder scheme imposing death on an unpremeditated murder, but not a premeditated murder committed in an atrocious manner, implicates the Eighth Amendment concerning fair trial guarantees.

Holland, 705 So. 2d at 320.

The Court subsequently found that Holland's argument overlooks the fact that our statute restricts, limits and narrows capital murder to certain classes of cases. One class consists of those cases in which two crimes have been committed, i.e., murder and another specified type felony. *Id.* at 320.

The Court further held that Miss. Code Ann. § 99-19-101(7)(a-d) further restricts capital murder in those classes to those persons the sentencing jury finds (1) actually killed; (2) attempted to kill; (3) intended to kill; or (4) contemplated lethal force be used. *Id.* at 320.

The Constitutional challenge asserted here does not offend the Eighth Amendment of the United States Constitution, and this conclusion has been long ago held by the United States Court of Appeals for the Fifth Circuit in *Gray v. Lucas*, 677 F.2d 1086 (5th Cir. 1982), *reh'g denied*, 685 F.2d 139 (5th Cir. 1982), *cert. denied*, 461 U.S. 910, 103 S.Ct. 1886, 76 L.Ed.2d 815, *reh'g denied*, 462 U.S. 1124, 103 S.Ct. 3099, 77 L.Ed.2d 1357 (1983).

Gray also addressed the due process or equal protection challenge of the Fourteenth Amendment and upheld Mississippi's legislative classifications of criminal activity therein stating:

> The basis of Gray's claim under both equal protection and due process is that there is no rational basis for imposing the death penalty on people who commit murder during the course of a felony but not imposing it on people who commit especially atrocious simple murder. However, Mississippi could have rationally decided that felony murders pose a problem different from atrocious simple murders and could have sought to cure the felony murder problem first. Alternatively, the legislature could have decided that the death penalty would be more effective in deterring felony murders since an experienced felon is more likely to assess the consequences of his acts. Conversely, it could have rationally determined that the death penalty might not effectively deter atrocious simple murders since such people are likely as a group to act on passion or impulse and thus be unmindful of the consequences of their crime. In short, the legislature could have rationally decided that the one class of murders either presented a different problem from the other or that the death penalty would be more effective deterrent [sic] to felony murders than atrocious simple murders.

Holland, 705 So. 2d at 320, *citing Gray*, 677 F.2d at 1104.

The Mississippi Supreme Court previously held that its capital murder statute is not in violation of the Eighth and Fourteenth Amendments to the United States Constitution, with regard to the challenge that the statute permits a capital murder conviction for certain felony murders without a finding of intent to kill, but does not include premeditated murder.

While it is obvious from the above cases that Mississippi's capital murder statute is constitutional, the facts in this case present a different issue. This issue is whether or not the legislature intended that Miss. Code Ann. § 97-3-19(2)(e), which is the felony murder portion of the capital murder statute, is intended to apply in the scenario of a co-conspirator dying during the commission of another listed crime. Mississippi defines capital murder as follows:

> (2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:
>
> (a) Murder which is perpetrated by killing a peace officer or fireman while such officer or fireman is acting in his official capacity or by reason of an act performed in his official capacity, and with knowledge that the victim was a peace officer or fireman. For purposes of this paragraph, the term "peace officer" means any state or federal law enforcement officer including but not limited to a federal park ranger, the sheriff of or police officer of a city or town, a conservation officer, a parole officer, a judge, prosecuting attorney or any other court official, an agent of the Alcoholic Beverage Control Division of the State Tax Commission, an agent of the Bureau of Narcotics, personnel of the Mississippi Highway Patrol, and the employees of the Department of Corrections who are designated as peace officers by the Commissioner of Corrections pursuant to Section 47-5-54, and the superintendent and his deputies, guards, officers and other employees of the Mississippi State Penitentiary;
>
> (b) Murder which is perpetrated by a person who is under sentence of life imprisonment;
>
> (c) Murder which is perpetrated by use or detonation of a bomb or explosive device;
>
> (d) Murder which is perpetrated by any person who has been offered or has received anything of value for committing the murder, and all parties to such a murder, are guilty as principals;

(e) When done with or without any design to effect death, by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson, robbery, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or in any attempt to commit such felonies;

(f) When done with or without any design to effect death, by any person engaged in the commission of the crime of felonious abuse and/or battery of a child in violation of subsection (2) of Section 97-5-39, or in any attempt to commit such felony;

(g) Murder which is perpetrated on educational property as defined in Section 97-37-17;

(h) Murder which is perpetrated by the killing of any elected official of a county, municipal, state or federal government with knowledge that the victim was such public official.

Miss. Code Ann. § 97-3-19(2)(a-h).

The above statute does not have any controlling language concerning this issue. Remarkably there are very few cases which discuss this particular issue. In *United States v. Schwanke*, 598 F.2d 575, 579 (10th Cir. 1979), the Appellant contends that Congress did not contemplate enhancing the penalty under the statute for the unlawful misuse of explosives where the only party injured is the indicted defendant standing trial. The *Schwanke* court also suggested in dicta that even an injury suffered by a co-conspirator would not trigger application of the sentence enhancement provision. *Id.* at 579. This case went on to compare this statute with the felony murder cases, because of the close analogy. Drawing upon state court precedent from the felony murder context, the court reasoned:

> It would not be seriously contended that one accidentally killing himself while engaged in the commission of a felony was guilty of murder. If the defendant is guilty of murder because of the accidental killing of his co-conspirator, then it must follow that [the deceased co-conspirator] was also guilty of murder, and, if he had recovered from his burns, that he would have been guilty of an attempt to commit murder.

Id. (quoting *People v. Ferlin*, 203 Cal. 587, 596-97, 265 P. 230, 234-35 (1928)). The court therefore announced that it was "not inclined to attribute to Congress an enhancement of the penalty where the only injury is to the criminal himself, or to his co-conspirator." *Id.* at 579.

In *Grayson v. Mississippi*, 806 So. 2d 241, 252 (Miss. 2001), the Mississippi Supreme Court stated as follows:

> In a felony murder, the felon is considered "at risk" while committing the felony so that if a homicide results, it is considered murder, or, as in Mississippi, capital murder if associated with the felonies, designated by the legislature. The legislature's intent is to protect the citizenry from the evil of the lesser felony by imposing a greater penalty upon a homicide occurring during its commission.

Of importance is the Court's statement "The legislature's intent is to protect the citizenry..." Robert Grant would contend that it is the intent of the legislature to protect the citizenry or the innocent victims. There is no rational reasoning that the legislature drafted this legislation to protect the conspirator or co-conspirator from the harm that could come to them in committing one of the listed felonies. However, if this were the intent, it is conceivable that one could receive the death penalty for the death of a co-conspirator when one has minimum culpability, and certainly no intent to cause the death of the co-conspirator. The lack of intent could be in conflict with prior rulings such as *Enmund v. Florida*, 458 U.S. 782, 73 L.Ed.2d 1140, 102 S.Ct. 3368 (1982) and *Tison v. Arizona*, 481 U.S. 137, 95 L.Ed.2d 127, 107 S.Ct. 1676 (1987).

In *Enmund*, the Court held that the Eighth Amendment was violated by imposition of the death penalty on a person who aided and abetted a felony murder by driving the getaway car in a robbery, but who did not himself kill or intend to kill. 458 U.S. at 796-97. In *Tison*, the Court held that the culpability requirement imposed by Enmund could be satisfied by "major participation in the felony committed, combined with reckless indifference to human life." 481 U.S. at 137.

Turning to the facts of the instant case, five people were in the trailer during the robbery, but only Terry Adams claimed to see Robert Grant. T. 154-55. Terry Adams is a convicted felon who admitted to moving two pounds of marijuana before calling law enforcement. T. 176. Terry Adams was also the only person who tested positive for gunshot residue, which was on his left hand. T. 395. No one testified as to who shot Arthur Joshua. Jerome Williams testified that he knew for a fact that no one was shot in the home. T. 126. These facts indicate that no one saw Robert Grant shoot Arthur Joshua. Even though the jury did believe that Robert Grant was involved in the robbery, this at most was nothing more than an accidental death of a co-conspirator. As previously stated, Robert Grant respectfully contends that the legislature did not intend that the felony murder statute protect conspirators and co-conspirators. Therefore, the Robert Grant requests that the decision of the trial court be reversed.

II. THE JURY WAS NOT PROPERLY INSTRUCTED ON CAPITAL MURDER BY THE TRIAL COURT GRANTING INSTRUCTION S-13.

The trial court allowed the jury to receive an improper jury instruction on capital murder. Instruction S-13 states as follows:

> The court instructs the jury that if you find from the evidence in this case, beyond a reasonable doubt, that: on or about the 17th day of July 2004 in Pearl River County Mississippi, the deceased, Arthur Joshua, was a living human being; and was killed, without authority of law; while the defendant, Robert L. Grant, was engaged in the commission of a robbery, when the mortal or fatal shot was fired, whether or not the defendant had any intention of actually killing Arthur Joshua then you shall find the defendant Robert L. Grant guilty of murder.

C.P. 239. The last word of this instruction is simply murder. Robert L. Grant was charged in his indictment with capital murder under Miss. Code § 97-3-19(2)(e). While attempting to instruct the jury on capital murder under the felony murder portion of the statute, this instruction incorrectly instructs the jury on a completely different charge of murder. Mississippi defines murder as follows:

(1) The killing of a human being without the authority of law by any means or in any manner shall be murder in the following cases:

(a) When done with deliberate design to effect the death of the person killed, or of any human being;

(b) 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;

(c) When done without any design to effect death by any person engaged in the commission of any felony other than rape, kidnapping, burglary, arson, robbery, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or felonious abuse and/or battery of a child in violation of subsection (2) of Section 97-5-39, or in any attempt to commit such felonies.

Miss. Code Ann. § 97-3-19(1)(a-c).

Simple murder under the above cited section requires some form of intent, while capital murder under felony murder only requires that an unlawful killing occur during the commission of one of the listed felonies. Each crime requires completely different elements in order to prove. Appellant would therefore ask that this Court reverse the trial court's decision and remand for a new trial.

III. THE TRIAL COURT ERRED IN NOT ALLOWING ROBERT GRANT'S EXPERT TO GIVE HIS OPINION AS TO HIS FIRST TWO CONCLUSIONS.

The standard of review for reviewing the trial court's admissibility of evidence, including expert testimony, is abuse of discretion. *Miss. Transp. Comm'n v. McLemore*, 863 So. 2d 31, 34 (Miss. 2003); *McGowen v. State*, 859 So. 2d 320, 328 (Miss. 2003); *Haggerty v. Foster*, 838 So. 2d 948, 958 (Miss. 2002).

Miss. R. Evid. 702 states:

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 fact 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.

The Mississippi Supreme Court amended this rule in 2003 in an effort to address the United States Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). In adopting *Daubert*, the Mississippi Supreme Court stated in *McLemore* that our state trial courts perform a critical gatekeeping role in addressing the admissibility of expert testimony, but that this role does not replace the adversary system. 863 So. 2d at 39. There is a two-pronged test which the court must perform in making a determination whether expert testimony is admissible, in that the trial court must first determine if the testimony is relevant, and if relevant, then is the testimony reliable. *Id.* at 38.

The record in the case at hand does reflect that the trial court did have a Daubert hearing. However, Robert Grant feels that the trial court erred in determining that the expert's opinions were not relevant. Brent Turvey is an expert in the field of Forensic Science. T. 403. Mr. Turvey prepared a report which contained four conclusions. T. 405. The trial court did not allow Mr. Turvey to testify about his first conclusion of how law enforcement did not perform and meet the standards accepted by the State of Mississippi for crime scene investigations. T. 409. The court also did not allow Mr. Turvey to testify as to his second conclusion that because of the failure to meet the minimum crime scene practice standards, many key items of potentially exculpatory physical evidence were not documented. T. 411. The court stated that this evidence was not relevant. In discussing his ruling, the Judge stated "No, what if they- -what if they didn't do right? What's the point?" T. 413. The Judge also stated "We're not trying the Sheriff's Office." T. 413.

Robert Grant would contend that the above two conclusions are extremely relevant. Law enforcement did not try to seize any physical evidence or use the process of Luminol to detect

blood from the red Geo, which Shannon Landry testified was used to transport Robert Grant from the crime scene. T. 283. Robert Grant was supposedly wearing bloody coveralls in the car, and could therefore have possibly transferred blood into the car. T. 201. Also at issue was a two by four which was allegedly used during the robbery. T. 420. Jerome Williams testified that he was struck with this two by four in the head. T. 420. However, law enforcement did not take the two by four into evidence to examine it for trace evidence. T. 420. These were just a couple of the more important issues Brent Turvey intended to testify to in reference to his first two conclusions.

As previously stated, this evidence did seem extremely relevant and reliable. The trial court appeared to be more concerned with not allowing the defendant to put on evidence of how law enforcement's questionable actions were not up to customary standards. The prosecution put forth many experts in an effort to prove their case. Because of the trial court's ruling, many of the expert's conclusions went without any form of contradiction. The trial judge abused his discretion in not allowing the defendant's expert to testify as to his first two conclusions, and the defendant therefore requests that the decision of the trial court be reversed.

IV. THE COURT ERRED IN ALLOWING INADMISSABLE HEARSAY TESTIMONY OF CHRIS THOMAS.

Hearsay is defined as "a statement, other than one made by the defendant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Miss. R. Evid. 801(c).

Chris Thomas testified that Robert Grant stated "He just let me know that Arthur had got shot. That's what he was letting me know they - - after he got shot, they was running through the woods, and they separated." T. 234. The trial court allowed this out of court statement as an admission by a party-opponent under Miss. R. Evid. 801(d)(2)(a). An admission is "a statement by the accused, ... of facts pertinent to the issue and tending, in connection with other facts, to

prove his guilt. *Edwards v. State*, 615 So. 2d 590, 597 (Miss. 1993) (quoting *Reed v. State*, 229 Miss. 440, 446, 91 So. 2d 269, 272 (1956)). Robert Grant contends that this statement is not an admission, but only a hearsay statement. In this statement, Robert did not admit to any crime, but only allegedly stated that Arthur got shot and they were running through the woods. Because defendant believes this statement is not an admission, he respectfully requests that the decision of the trial court be reversed.

V. THE COURT ERRED IN SENTENCING THE DEFENDANT AS AN HABITUAL AS THE EVIDENCE WAS NOT PROPERLY AUTHENTICATED.

The prosecution attempted to enter into evidence three pen packs which were prepared by the Mississippi Department of Corrections. T. 561. The defendant contends that the documents from the Department of Corrections were not properly authenticated under Miss. R. Evid. 902. The applicable portion of the rule states as follows:

> Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:
>
> (1) Domestic Public Documents Under Seal. A document bearing a seal purporting to be that of the United States, or of any State ... and a signature purporting to be an attestation or execution.
>
> (2) Domestic Public Documents Not Under Seal. A document purporting to bear the signature in his official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine...
>
> (4) Certified Copies of Public Records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

Miss. R. Evid. 902(1)(2)(4).

Mississippi courts have consistently ruled that certified copies of commitment papers may be used as a substitute for the original judgment in order to prove prior convictions. *King v. State*, 527 So. 2d 641, 646 (Miss. 1988). Documents contained in "pen packs" have also been admitted as competent evidence of prior crimes to enhance sentencing. *Russell v. State*, 670 So. 2d 816, 832 (Miss. 1996). However, in the present case, Robert Grant's trial counsel stated "Rule 902 provides that an official who has a seal, in the State of Mississippi, must sign this, and it's signed by the Custodian of Records for the Department of Corrections. The Custodian of Records is an employee of the Department of Records, and some official, someone who has taken an oath in the State of Mississippi, must certify that that person is who they purport him to be..." T. 561-62. The trial court subsequently admitted this evidence through hearsay testimony. T. 580.

This evidence was hearsay, and was not properly authenticated. Therefore, the defendant requests that the decision of the trial court be reversed.

VI. THE VERDICT OF GUILTY WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

A challenge to the weight of the evidence succeeds only if a verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. *Bush v. State*, 895 So. 2d 836, 844 (Miss. 2005).

Shaquita Grant testified that Robert Grant was playing cards with her until dark, at which time he left going to Piggy's home. T. 381. Nicole White, also known as Piggy, testified that Robert Grant was with her on the evening of the death of Arthur Joshua, and remained with her the entire night. T. 375.

Only one man claimed to see Robert Minor at the trailer. Jerome Williams testified that he only saw one man that night, and that he did not know if Robert Grant was even there. T. 117. He also testified that he knew for a fact that no one was shot in the home. T. 126.

Roderick Shanks also testified that he only saw one man that night in the trailer. T. 133. Tishma Peralti testified that she only saw one man in the trailer the night of the incident. T. 143.

Shannon Landry and Terry Wayne Adams were the only two witnesses that placed Robert Grant at the trailer the night that Arthur Joshua was killed. Shannon Landry was dating Arthur Joshua at the time of his death. T. 195. Shannon had previously dated Terry Wayne Adams. T. 170. Shannon testified that she still visited Terry Wayne Adams, and that Arthur Joshua would not have liked this. T. 220. Shannon gave three statements to law enforcement. T. 208. Shannon's first statement was that she had nothing to do with it. T. 210. Shannon's second statement was that Arthur Joshua was going to Terry's to get money that Terry had owed him. T. 212. However, once charged with a crime, Shannon gave a third statement which implicated Robert Grant. T. 208. Both Terry Wayne Adams and Shannon Landry plead to lesser charges in exchange for their testimony. T. 194, 222. Terry Wayne Adams was the only person who actually claimed to have seen Robert Grant in the trailer. T. 154-155. Terry also testified to staging the crime scene by moving two pounds of marijuana into the woods. T. 176. Terry Wayne Adams was the only person that tested positive for gunshot residue, which was on his left palm. T. 395.

From the above stated facts, Robert Grant would submit that the verdict was against the overwhelming weight of the evidence. Because of this, Robert Grant submits that the Judgment of Conviction should be reversed and remanded for a new trial.

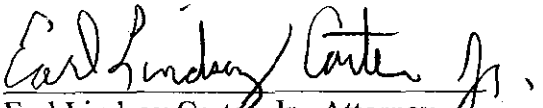
CONCLUSION

The felony murder subpart of the capital murder statute was passed to protect the innocent victim from the danger of the underlying felony. Robert Grant does not believe the legislature passed this law to protect the actual conspirator. Capital murder should be submitted to the jury as capital murder and not simply murder.

Robert Grant's expert should have been allowed to give his opinion so that he could properly defend against the charges against him. The trial court should have excluded the inadmissible hearsay testimony of Chris Thomas. The trial court also admitted inadmissible hearsay evidence to sentence Robert Grant as a habitual offender.

Finally, the verdict was against the overwhelming weight of the evidence. For these reasons, and any other reason this Court may find on the record, Robert Grant's conviction and sentence should be reversed and remanded for a new trial.

Respectfully submitted,



Earl Lindsay Carter, Jr., Attorney

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Appellants Brief was this date mailed via United States Mail, postage prepaid to the following:

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

Hon. Hal Kittrell
District Attorney
500 Courthouse Square
Columbia, MS 39429

Robert Grant
MDOC

Hon. Prentiss Harrell
Circuit Judge
P.O. Box 488
Purvis, MS 39475

Ms. Betty Sephton
Supreme Court Clerk
P.O. Box 117
Jackson, MS 39205

This the 16th day of October, 2007.

Earl Lindsay Carter Jr.

Earl Lindsay Carter, Jr., MSB[redacted]
Attorney at Law
404 Hemphill Street
Hattiesburg, MS 39401
(601) 545-8142