IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JAMES ARTHUR FANNING, JR. — APPELLANT

VS. — NO. 2007-KA-0112

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

Procedural History

James Arthur Fannings, Jr., was convicted in the Circuit Court of the Second Judicial District of Bolivar County on a charge of murder and was sentenced to life imprisonment. (C.P.67-69) Aggrieved by the judgment rendered against him, Fannings has perfected an appeal to this Court.

Substantive Facts

Natalie Hazelton, a resident of Lancaster, Pennsylvania, testified that she and her husband Bruce had a daughter named Stacey who would have been 23 years old at the time of trial. When Stacey was about 20, she became involved with a man named James Fannings, and the couple had a rather rocky relationship for the next two or so years. Stacey was living with her parents in April 2004 when she told them that she was going to Mississippi. Her parents tried to discourage her, but she agreed to stay in contact with

them. During the next few weeks, Stacey talked to her mother by mobile phone at least one daily, usually more often. She told her mother that she liked living in Mississippi. (T.182-88)

In late April 2004, Stacey returned to Lancaster to retrieve some personal belongings: clothes, a television set, a stereo, her bicycle, a sewing machine and a 1video game console. She and her parents packed these items into her Chevrolet F-10 Blazer. (T.189, 200) Mrs. Hazelton described what happened next as follows:

> She waited a while and she just sat there. It was getting dark. And we asked her what was the matter. It was like she didn't want to go. I mean, she was upset, said she didn't have any money. We gave her $500 so she'd have money for food and gas. We made sure that's what she wanted to do, you know, because we told her you can stay home; you don't have to go. And then shortly after that, she did go. And we gave her a hug and we told her we loved her. And that's the last time we got to talk to her.
>
> (T.193)

Stacey informed her mother by telephone that she had ended her journey in Alligator, Mississippi. On May 21, she called her mother, crying, and said that she wanted to go home. Her parents sent $400 to the Wal-Mart store in Cleveland so that she could have her Blazer repaired and return to Pennsylvania. The Hazeltons never spoke with Stacey after that date. They did not see the Blazer again until October 2005, when they observed it in an impound lot in Pennsylvania. (T.194-96)

Meanwhile, the Hazeltons notified the state police shortly after they ceased hearing from their daughter. They also communicated with some of her friends who claimed to have seen Stacey. In January 2005, having not heard from their daughter over the

holidays, the Hazeltons filed a missing persons report with Pennsylvania State Trooper Corporal Patrick Quigley. (T.197-98)

Frank Grubb of Lucille, Pennsylvania, testified that in June 2004, James Fannings, Jr., and Anthony Lane stopped by his house, purportedly to make a friendly visit.[1] Fannings was driving the Blazer previously identified as belonging to Stacey. Fannings asked Mr. Grubb to take him on a motorcycle ride. Mr. Grubb went upstairs to get his helmet; when he returned, Fannings was driving away on Mr. Grubb's motorcycle and motioning for Lane "to go on in the vehicle." Fannings and Lane thus departed the premises. (T.203-07)

Mr. Grubb reported the theft of his motorcycle to the authorities. About three months later, in September 2004, he "had to go up to Lancaster County to pick it up" at an impoundment lot. The motorcycle "was all wrecked up and everything." (T.207-08)

Corporal Quigley testified that his extensive investigation revealed that "the last contact anyone had" with Stacey "was on or about May of 2004." In September 2005, he located Stacey's Blazer, which was located in an impound lot in Chester or Lancaster County, Pennsylvania. The vehicle had been towed into this lot on June 9, 2004. (T.213-16)

Corporal Quigley continued to question Stacey's friends, family and acquaintances. (T.217-18) Information obtained from these interviews led him to question Fannings, who gave a statement summarized as follows:

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[1]Mr. Grubb was living in Coatsville at the time. (T.204) He had known Fannings for several years. (T.207)

> He told us at the time that he had met her [Stacey] while she was working at a gas station in Lancaster County. And that he asked her to put a good word in for him for employment. And then two weeks after he began working there, they started hanging out and dating. They struck up a relationship and dated for six or seven months. And then he told us that Stacey became pregnant; and when they told Stacey's parents, the parents flipped out. So, based on that, they drove down to Mississippi to live.
>
> And they drove down in Stacey's Blazer to live in Mississippi with Chavon Mack as well. And they came down to Duncan, Mississippi, and lived with a woman by the name of "Big Mama" in Duncan, Mississippi. And stayed there for approximately three to four weeks, and, at that point, for some reason, Stacey went back to Pennsylvania. And when she left to go back to Pennsylvania, the last he saw of her was when she was driving in that green Blazer, the Blazer that's registered to her, to Pennsylvania, with Chavon Mack.
>
> I asked him, did he ever see the teal Blazer or green Blazer again, or did he ever see Stacey again, and he said, no.
>
> (T.218-19)

After he interviewed Frank Grubb, Corporal Quigley recognized a conflict: Mr. Grubb's statement placed Fannings in the Blazer in Pennsylvania in June 2004, although Fannings had stated that the last time he saw the Blazer was when it left Mississippi in May 2004. Corporal Quigley also determined that the Blazer had been stopped by the police on June 8, 2004, in Lancaster. It was towed the next day by West Stafford Township. (T.219-20)

On January 18, 2006, having recovered the Blazer, Corporal Quigley questioned Fannings again. Having waived his rights, Fannings stated that he last saw Stacey when

he "put her on a bus from Mississippi."[2] He also stated that he had met Stacey in Reading, Pennsylvania, in the summer of 2004. Corporal Quigley investigated this report but was unable to find anyone in Reading who had seen her. Fannings also stated that he and Stacey had pawned some items in Clarksdale. Corporal Quigley determined that Chavon Mack had pawned a Play Station 2 and two rings at the Crosstown Pawn Shop in Clarksdale on May 24, 2004. On October 27, 2005, Corporal Quigley obtained information from Mack which led to the arrest of Fannings. (T.224-32)

Information received during the investigation led Corporal Quigley to the Birchfield Apartments in Alligator, Mississippi, and to a trailer in Duncan, Mississippi. Upon interviewing Anna Rochelle "Big Mama" Williams and her daughter, Telisia Williams, he determined that these two women had "at one point lived in Lancaster City and resided within proximity of James Arthur Fannings, Jr." "Big Mama" gave Corporal Quigley a sewing machine which he later "handed over" to Stacey's mother. (T.233-35)

Investigator Charles Griffin of the Bolivar County Sheriff's Department testified Fannings had been arrested in Pennsylvania and brought back to Mississippi. At Fannings' preliminary hearing, Mack appeared as a witness. At one point, Mack took Investigator Griffin and other officers to Alligator Place, Apartment 3, in Alligator, where the alleged murder had occurred. He also took them "to a location where the body, the remains possibly could be ... out west of Duncan up on the Sandy Ridge Road..." This

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[2]Fannings stated first that Stacey had taken a train from Mississippi. "Later he changed that..." and said that she had left on a bus. (T.229)

effort and further attempts to find the body were unsuccessful.[3] Some bones were recovered, but testing revealed that they were animal bones. (T.300-08)

On October 8, 2006, Investigator Griffin was notified that DeWayne Hollingsworth, who was incarcerated at the correction facility in Cleveland, wanted to speak with him about this case. Hollingsworth gave information which was used in the investigation. He was then moved to a different facility "because of a threat" from Fannings. (T.309-10)

In late April or early May of 2004, Investigator Griffin conducted a "welfare check" of Stacey at the request of her mother. He found her living in an apartment in Alligator. He never saw Stacey again. (T.315-16)

Chavon Pierre Mack, also known as "P," testified that he had known Fannings since they attended junior high school together. In 2004, Mack, Stacey and Fannings traveled from Pennsylvania to Mississippi in the Blazer to "start over."[4] The three of them moved into the apartment rented by "Big Mama" in Alligator and lived there for two to three weeks before they moved to a trailer in Duncan. At one point they went to Clarksdale to pawn some items to obtain money to pay for repairs to the truck. Among the items pawned were

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[3]Investigator Griffin later explained that the areas in which the officers had been searching for the body were populated by bobcats, opossums, raccoons, and coyotes. A body buried in a shallow grave in this area was likely to have been dug up and scattered by such animals. (T.311-12)

[4]At this time, Fannings had "[m]ore than five" girlfriends. He tended to be "real manipulative" of women. (T.352)

"Stacey's rings, some jewelry," video games and the Play Station 2.[5] Although some of these items had belonged to him, Mack never saw any of the proceeds of the transactions. (T.351-60)

Mack went on to testify that Stacey and Fannings fought verbally nearly every day and that Fannings hit her "a couple of times," causing bruises. On two occasions he locked her in a room at "Big Mama's" apartment; Stacey would "sit in the room and cry." After one argument in Duncan, Fannings threw her clothes out of the trailer. Mack never saw the clothes again. During this period Fannings flirted with another woman and "thought it was funny" when Stacey caught him. (T.360-63)

The last time Mack saw Stacey alive, the three of them were in the apartment in Alligator. Fannings and Stacey were "arguing about how she used to get mad about how he always used to be talking to 'chicks' all the time." Fannings was "playing around with a gun, ... pointing it at himself and then pointing it at her and talking to her." (T.364-65) Mack described what happened next as follows:

> [H]e was talking about how that he wanted to have more than one chick and that, she said she wasn't, she wasn't for it and she wanted to leave. And after that he said, well, if I can't have anybody else, I might as well kill myself. And she said, no, kill me. And at that time, before she said that, I turned around and he shot her. And she fell face down.
>
> (T.365)

Mack clarified that Fannings had "[p]ut it [the gun] right up next to her head" before he shot her. He then threatened to kill Mack if he did not "help him get rid of the body." (T.366)

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[5]Mack claimed the Play Station 2 belonged to him. (T.360)

Fannings wrapped Stacey's body up in sheets and washed the floor with detergent. He and Mack put the body into a large tote bag. Fannings backed the truck up to the window, and he and Mack put the body through the window into the back of the Blazer. They drove around intermittently for two days with Stacey's body in the truck. At one point, they were stopped by Investigator Griffin. They "drove back to Duncan and ... just stayed in the house." (T.366-73)

Two days after Stacey's murder, Fannings and Mack drove to a farm, where they put the body into a metal barrel. Fannings poured gasoline on the body and burned it. They waited by the fire for hours, until "the morning light came up," until there was nothing left of the body except "parts." Fannings told Mack to put the remains in a bag and put the bag in the truck; Mack complied. They went back to Duncan to get a shovel, which they took back to the farm. They dug a hole, put the remains in it, covered it, and left. (T.373-78)

Fannings and Mack returned to the apartment in Alligator. Fannings told Mack that if anyone asked about Stacey's whereabouts, he was to say that she had left and that Fannings had "sent her bags on a little train back home." Thereafter, they left for Pennsylvania with Telisia Williams accompanying them. (T.378)

During the trip, while Mack was driving, Telisia and Fannings began "wrestling and tussling," playfully or flirtatiously at first, but the encounter escalated when Telisia threatened to "cut" Fannings. Fannings threatened to retaliate. Mack then heard him say, "Ow, bitch." Mack "stopped and pulled over," and Fannings told Telisia to get out. She exited the truck and walked away. Fannings took over the wheel and they traveled to Lancaster. Fannings again threatened to kill Mack, as well as his father and his son, if he

told anyone about the murder. (T.381-83)

DeWayne Hollingsworth testified that in October 2006, he had been incarcerated on a burglary charge in the corrections facility in Cleveland. He met Fannings, who was also an inmate there, at a Jumah or Muslim service. During this time, Hollingsworth was housed with inmates who were involved in the search for Stacey's remains. Fannings had seen reports of the search on news broadcasts and asked Hollingsworth whether he knew any of these inmates. Hollingsworth replied that he did. On ensuing occasions, Fannings would "make sly remarks." He proceeded to inquire "what type of body parts might they have found." Hollingsworth replied, "I think they may have found a finger bone down there." Fannings answered, "No, that couldn't be ... we burned her fingers up too good for 'em to find any finger bones or anything like that." (T.449-51)

Fannings went on to tell Hollingsworth that he had shot his girlfriend in the head, and that he and a friend had burned the body and buried the remains. Having followed the story of the search by watching news broadcasts, he acknowledged that the searchers were "right on top" of the burial site. Hollingsworth stated that he felt "[s]ickened" by these revelations. Fannings showed "no remorse for what he had done." Hollingsworth testified finally that no one had promised him anything in exchange for his testimony. (T.452-59)

Telisia Williams testified that she had seen Fannings hit Stacey, choke her, grab her hair and twist her arm during arguments or after he had found her talking to another man. On one occasion, he shot bottles out of her hand. (T.472-76)

Shannon Robinson testified that while he and Fannings were housed together in "Lancaster Prison," Fannings asked him "to make a phone call for him." (T.506) Fannings told Robinson that he (Fannings) had "killed" a "female" in Mississippi. Because Fannings

was "locked down," he asked Robinson to make a phone call to assist him at "get[ting] at Pierre [Mack]" because, in Fannings' words, "Pierre was a snitch, ... he snitched on me about the murder." Fannings went on to tell Robinson that he "was going to beat the case because they ain't got nothing but bloody sheets and they ain't got no weapon. All they got is Pierre ... I got to get after him." Robinson testified finally that no one had promised him anything in exchange for his testimony. (T.522-25)

Casey Smith LeGier,[6] a resident of Pennsylvania, testified that "[u]fortunately," she had "dated" Fannings, beginning in early 2004. Mrs. LeGier remembered that Fannings traveled to Mississippi in the spring, April or May, 2004. After he returned to Pennsylvania, Fannings drove a teal Blazer to Mrs. LeGier's house. Mrs. LeGier recognized the vehicle as the one belonging to Stacey. When Mrs. LeGier asked Fannings why he was driving the Blazer, they got "into an argument about it," and Fannings told her that Stacey "was letting him drive it because she owed him and that she would be in Italy for a school trip so he could use the vehicle while she was gone." Later, [t]owards the middle of the summer," Fannings asked Mrs. LeGier to try to get Stacey's vehicle "out of an impound." In her words, "He wanted me to call and pretend to be her. I could go down there and have her ID." When she was asked, "How do you know he had her ID?" Mrs. LeGier answered, "He showed it to me." (T.535-41)

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[6]"LeGier" is the married name of the witness. She was married approximately 18 months before this trial.

SUMMARY OF THE ARGUMENT

The verdict is based on legally sufficient evidence. The state presented ample proof of the *corpus delicti.* Whether this homicide was murder or manslaughter was properly resolved by the jury. The prosecution introduced sufficient proof to establish that the defendant deliberately put a gun to Stacey Hazelton's head and shot her.

The trial court advised the defendant of his right to testify or not to testify.

Fannings has not shown that his trial counsel rendered ineffective assistance.

The trial court did not err in sentencing Fannings to imprisonment for life without possibility of parole.

Fannings' invocation of the cumulative error doctrine is procedurally barred and substantively without merit.

PROPOSITION ONE:

THE VERDICT IS BASED ON LEGALLY SUFFICIENT PROOF

Under his Propositions I. and II, Fannings challenges the legal sufficiency of the evidence undergirding the verdict. To prevail, he must satisfy the formidable standard of review set out below:

> When on appeal one convicted of a criminal offense challenges the legal sufficiency of the evidence, our authority to interfere with the jury's verdict is quite limited. We proceed by considering all of the evidence--not just that supporting the case for the prosecution--in the light most consistent with the verdict. We give [the] prosecution the benefit of all favorable inferences that may reasonably be drawn from the evidence. If the facts and inferences so considered point in favor of the accused with sufficient force that reasonable men could not have found beyond a reasonable doubt that he was guilty, reversal and discharge are required. On the other hand, if there is in the record substantial evidence of such quality and weight that, having in mind the beyond a reasonable doubt burden of proof standard, reasonable and fair-minded jurors in

> the exercise of impartial judgment might have reached different conclusions, the verdict of guilty is thus placed beyond our authority to disturb.
>
> *Manning v. State*, 735 So.2d 323, 333 (Miss.1999), quoting *McFee v. State*, 511 So.2d 130, 133-34 (Miss.1987).

Furthermore,

> The jury is charged with the responsibility of weighing and considering conflicting evidence, evaluating the credibility of witnesses, and determining whose testimony should be believed. [citation omitted] The jury has the duty to determine the impeachment value of inconsistencies or contradictions as well as testimonial defects of perception, memory, and sincerity. *Noe v. State*, 616 So.2d 298, 302 (Miss.1993) (citations omitted). **"It is not for this Court to pass upon the credibility of witnesses and where evidence justifies the verdict it must be accepted as having been found worthy of belief."** *Williams v. State*, 427 So.2d 100, 104 (Miss.1983).
>
> (emphasis added) *Ford v. State*, 737 So.2d 424, 425 (Miss. App.1999).

See also *Jackson v. State*, 580 So.2d 1217, 1219 (Miss.1991) (on appellate review the state "is entitled to the benefit of all favorable inferences that may reasonably be drawn from the evidence"), and *Noe*, 616 So.2d at 302 (evidence favorable to the defendant should be disregarded). Accord, *Harris v. State*, 532 So.2d 602, 603 (Miss.1988) (appellate court "should not and cannot usurp the power of the fact-finder/ jury"). "When a defendant challenges the sufficiency of the evidence to support a conviction, the evidence which supports the verdict is accepted as true by the reviewing court, and the State is given the benefit of all reasonable inferences flowing from the evidence." *Dumas v. State*, 806 So.2d 1009, 1011 (Miss. 2000).

The state incorporates by reference its statement of Substantive Facts in contending the proof amply supports a finding that Fannings committed a cold-blooded murder by

deliberately putting a gun to Stacey's head and pulling the trigger.[7] While the Stacey's remains were not recovered, the testimony of the eyewitness, Chavon Mack, provided proof of the corpus delicti. *King v. State*, 251 Miss. 161, 168 So.2d 637, 642-43 (1964). See also *Boddie v. State*, 850 So.2d 1205, 1208 (Miss. App. 2002). Mack's testimony was corroborated by that of Hollingsworth and Robinson, who provided details that could have been revealed only by Fannings.[8]

In response to Fannings' argument that the evidence at best supports a conviction of the lesser crime of manslaughter, the state submits that "[w]hether homicide is classified as a murder or manslaughter is ordinarily an inquiry to be made by the jury." *Hodge v. State*, 823 So.2d 1162, 1166 (Miss.2002). We adopt by reference the District Attorney's argument in opposition to the granting of a manslaughter instruction: ""He's [the defendant's] not testified so we have no evidence that shows any heat of passion. We show a cold-blooded murder just from the evidence if it's believed by the jury. So it will not

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[7]If it is possible to exacerbate a cold-blooded murder, Fannings did so by his treatment of Stacey's body and his cavalier references to what he had done.

[8]In making this point, the state incorporates by reference the portion of the assistant district attorney's argument transcribed at T.615-17.

be any manslaughter."[9] T.586) Nonetheless, the court allowed the jury the option of finding the defendant guilty of manslaughter; yet it returned a verdict of guilty of murder. The court properly allowed the jury to decide this issue and correctly refused to disturb its verdict.

The state respectfully submits that Fannings' challenge to the sufficiency of the evidence presented is essentially an improper attempt to relitigate factual issues, including credibility of the witnesses, properly resolved by the jury. Facts, the state asserts the trial court did not abuse its discretion in submitting this case to the jury and refusing to overturn its verdict. The evidence is not such that reasonable jurors could have returned no verdict other than not guilty. Taken in the light most favorable to the verdict, the proof and the reasonable inferences therefrom support the conclusion that Fannings committed committed a cold-blooded murder. Fannings' Propositions I. and II. should be denied.

PROPOSITION TWO:

THE TRIAL COURT ADVISED THE DEFENDANT OF HIS RIGHT TO TESTIFY OR NOT TO TESTIFY

Fannings contends additionally that the trial court erred in failing to advise him of his right to testify or not to testify. This argument is patently refuted by the following excerpt from the record, which was taken after the court denied the motion for directed verdict:

> [BY THE COURT:] Now, Mr. Perkins, let us move to the next juncture. Have you had an opportunity to confer with your client?

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[9]The district attorney went on to argue, "And then he was very cool when he turned around there and shot her. ... [T]his is called a cool, collected and knowing murder." (T.587-88)

BY MR. PERKINS: I have, Your Honor.

BY THE COURT: Has he made a decision as to whether or not he's going to testify?

BY MR. PERKINS: He has indicated to me that he chooses not to testify. If I may be so bold as to ask him if that's his own decision.

BY THE COURT: Well, if you don't mind, I will.

BY MR. PERKINS: Oh, yes, sir.

BY THE COURT: Mr. Fannings, this case is between you and the State of Mississippi. **You have a right to testify, you have a right not to testify.** Should you choose to testify, you will be examined by your attorney or one of them and cross-examined by one of the State's prosecutors. You will be questioned just like other witnesses have been questioned in the case.

Now, if you choose not to testify, the State cannot comment upon your not testifying. They can't say, for example, that you must be guilty because you didn't say anything to defend yourself. The law does not allow the prosecutors to say that.

Now, if you find it necessary to go out and talk with your attorneys again, you may. If you wish to remain steadfast in your decision not to testify, you may tell me that now.

BY MR. Fannings: It's my understanding, Your Honor, that this case is based on the facts and the evidence and the law so I do not wish to testify.

BY THE COURT: Very well. That decision on your part will be accepted by the Court and will be respected by the attorneys.

(emphasis added) (T.571-72)

A trial court is not required to advise a defendant of his right to testify on his own behalf. *Scott v. State*, 965 So.2d 758, 763 (Miss. App. 2007), citing *Shelton v. State*, 445 So.2d 844, 847 (Miss.1984), and *Culberson v. State*, 412 So.2d 1184, 1187 (Miss.1982).

Nonetheless, the trial court in this case unequivocally advised the defendant on the record that he had the right to testify or not to testify. Fannings' third proposition is belied by the record and plainly has no merit.

PROPOSITION THREE:

FANNINGS HAS NOT SHOWN THAT HIS TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE

Fannings' fourth issue is "whether appellant received ineffective assistance of counsel inasmuch as the jury only took 16 minutes to reach a guilty verdict after three days of testimony. He appears to labor under the assumption that a short interval of deliberation is *res ipsa loquitur* that trial counsel was ineffective. That simply is not the benchmark.[10] To the contrary, Fannings must satisfy the following standard in order to prevail:

> The Mississippi Supreme Court has adopted the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) in determining whether a claim of ineffective assistance of counsel should prevail. . . . *Rankin v. State*, 636 So.2d 652, 656 (Miss.1994) enunciates the application of *Strickland:*
>
> > The *Strickland* test requires a showing that counsel's performance was sufficiently deficient to constitute prejudice to the defense. . . . **The defendant has the burden of proof on both prongs. A strong but rebuttable presumption, that counsel's performance falls within the wide range of reasonable professional assistance, exists. . . . The defendant must show that but for his**

[10]For the record, the state points out that "there is no formula to determine how long a jury should deliberate." *Smith v. State*, 569 So.2d 1203, 1205 (Miss. 1990).

> **attorney's errors, there is a reasonable probability that he would have received a different result in the trial court. . . .**
>
> Viewed from the totality of the circumstances, this Court must determine whether counsel's performance was both deficient and prejudicial. . . . Scrutiny of counsel's performance by this Court must be deferential. . . . If the defendant raises questions of fact regarding either deficiency of counsel's conduct or prejudice to the defense, he is entitled to an evidentiary hearing. . . . Where this Court determines defendant's counsel was constitutionally ineffective, the appropriate remedy is to reverse and remand for a new trial.
>
> **In short, a convicted defendant's claim that counsel's assistance was so defective as to require reversal has two components to comply with *Strickland*. First, he must show that counsel's performance was deficient, that he made errors so serious that he was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that counsel's errors deprived him of a fair trial with reliable results.**
>
> (emphasis added) *Colenburg v. State*, 735 So.2d 1099, 1102-03 (Miss. App.1999).

Because this point is raised for the first time on direct appeal, Fannings encounters an additional obstacle: the pertinent question

> **is not whether trial counsel was or was not ineffective but whether the trial judge, as a matter of law, had a duty to declare a mistrial or to order a new trial, sua sponte on the basis of trial counsel's performance.** "Inadequacy of counsel" refers to representation that is so lacking in competence that the trial judge has the duty to correct it so as to prevent a mockery of justice. *Parham v. State*, 229 So.2d 582, 583 (Miss.1969). **To reason otherwise would be to cast the appellate court in the role of a finder of fact; it does not sit to resolve factual inquiries.** *Malone v. State*, 486 So.2d 367, 369 n. 2 (Miss.1986). *Read [v. State*, 430

> So.2d 832 (Miss.1983)] clearly articulates that the method that the issue of a trial counsel's effectiveness can be susceptible to review by an appellate court requires that **the counsel's effectiveness, or lack thereof, be discernable from the four corners of the trial record. This is to say that if this Court can determine from the record that counsel was ineffective, then it should have been apparent to the presiding judge, who had the duty, under *Parham*, to declare a mistrial or order a new trial sua sponte.**
>
> (emphasis added) *Colenburg*, 735 So.2d at 1102.

Accord, *Madison v.* State, 923 So.2d 252 (Miss. App. 2006); *Jenkins v. State*, 912 So.2d 165, 173 (Miss. App. 2005); *Walker v. State*, 823 So.2d 557, 563 (Miss. App. 2002); *Estes v. State*, 782 So.2d 1244, 1248-49 (Miss. App. 2000).

Fannings has not begun to show counsel's performance was so deplorable as to require the court to declare a mistrial on its own motion. The fact that the jury deliberated for 16 minutes is simply a *non sequitur.* His fourth proposition plainly lacks merit.

PROPOSITION FOUR:

THE TRIAL COURT DID NOT ERR IN SENTENCING FANNINGS TO IMPRISONMENT FOR LIFE WITHOUT POSSIBILITY OF PAROLE

Under his fifth proposition, Fannings asserts that the trial court erred in sentencing him to life imprisonment without possibility of parole.[11] (C.P.67-69) Fannings argues that this sentence is contrary to law. The following language demonstrates the error of this argument:

> A defendant convicted of murder is to be sentenced to life imprisonment. Miss. Code Ann. § 97-3-21 (Rev.2000). This

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[11]The sentence was ordered to be served consecutively to sentences previously imposed. (C.P.68)

> provision must be read in conjunction with others that detail which classes of crimes permit the possibility of parole following conviction. Other than first-time offenders convicted of nonviolent crimes, persons convicted after June 30, 1995, are ineligible for parole. Miss. Code Ann. § 47-7-3(1)(g) (Rev.2000). This applies to Booker.
>
> *Booker v. Bailey*, 839 So.2d 611, 612 (Miss. App. 2003).

The same analysis applies to Fannings, who is not a first-time offender. The trial court did not err in sentencing Fannings. His fifth proposition should be denied.

PROPOSITION FIVE:

FANNINGS' INVOCATION OF THE CUMULATIVE ERROR DOCTRINE IS PROCEDURALLY BARRED AND SUBSTANTIVELY MERITLESS

Fannings finally contends that the cumulative errors of the trial court mandates reversal of the judgment rendered against him. He did not present this argument at any time in the trial court and may not raise it for the first time on appeal. *Maldonado v. State*, 796 So.2d 247, 260-61 (Miss.2001); *Gibson v. State*, 731 So.2d 1087, 1098 (Miss.1998). His sixth proposition is procedurally barred.

In the alternative, the state incorporates its arguments under Propositions One through Four in asserting that the lack of merit in Fannings' other arguments demonstrates the futility of his final proposition. *Gibson*, 731 So.2d at 1098; *Doss v.* State, 709 So.2d 369, 400 (Miss.1997); *Chase v. State*, 645 So.2d 829, 861 (Miss.1994). See also *Brown v. State*, 682 So.2d 340, 356 (Miss.1996) ("twenty times zero equals zero"). Fannings' invocation of the cumulative error doctrine lacks substantive merit as well.

CONCLUSION

The state respectfully submits that the arguments presented by Fannings have no merit. Accordingly, the judgment entered below should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL
STATE OF MISSISSIPPI

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SPECIAL ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I, Deirdre McCrory, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 18th day of March, 2008.

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