

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2007-KA-00112-COA

JAMES ARTHUR FANNINGS, JR.

APPELLANT

VS.

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF APPELLANT

AN APPEAL OF THE CONVICTION FOR MURDER IN VIOLATION
OF MISSISSIPPI ANNOTATED CODE SECTION 97-3-19 AND
A SENTENCE TO A TERM OF LIFE WITHIN THE CUSTODY AND
CONTROL OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS

APPELLANT IS CURRENTLY INCARCERATED

(ORAL ARGUMENT REQUESTED)

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CERTIFICATE OF INTERESTED PERSONS

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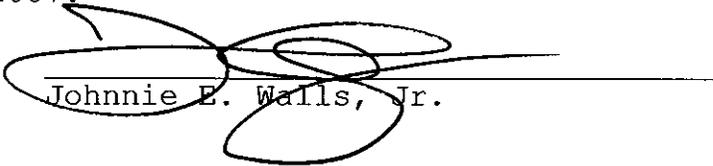

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STATEMENT OF THE ISSUES

I. THE TRIAL COURT ERRONEOUSLY FAILED TO GRANT A JUDGMENT NOTWITHSTANDING THE JURY VERDICT OF GUILTY OF MURDER ALTHOUGH THE VERDICT WAS CONTRARY TO THE FACTS AND THE LAW IN THAT THE EVIDENCE PRESENTED WAS INSUFFICIENT TO SUPPORT A GUILTY VERDICT ON THE CHARGE OF MURDER.

II. THE EVIDENCE ONLY SUPPORTED A VERDICT OF MANSLAUGHTER AND THE TRIAL COURT ERRONEOUSLY FAILED TO GRANT A JUDGMENT NOTWITHSTANDING THE JURY VERDICT OF GUILTY OF MURDER ALTHOUGH THE VERDICT OF MURDER WAS CONTRARY TO THE FACTS AND THE LAW IN THAT THE EVIDENCE PRESENTED WAS INSUFFICIENT TO SUPPORT A GUILTY VERDICT ON THE CHARGE OF MURDER BUT SUPPORTED A VERDICT OF GUILTY OF MANSLAUGHTER.

III. WHETHER THE FAILURE OF THE COURT TO ADVISE THE APPELLANT OF HIS RIGHT TO TESTIFY OR NOT TO TESTIFY ON THE RECORD, DEPRIVED HIM OF THE CULBERSON WARNINGS IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS IN VIOLATION OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION, THE MISSISSIPPI STATE CONSTITUTION ARTICLE 3 SECTION 26 WARRANTING REVERSIBLE ERROR?

IV. 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?

V. WHETHER THE TRIAL COURT VIOLATED THE MURDER STATUTE IN SENTENCING THE APPELLANT TO LIFE WITHOUT THE POSSIBILITY OF PAROLE.

VI. WHETHER THE CUMULATIVE EFFECT OF ERRORS WARRANT REVERSAL OF CONVICTION AND SENTENCE?

STATEMENT OF THE CASE

The Appellant, James Arthur Fannings, Jr., was indicted on or about September 19, 2006 by the grand jury prior to the November, 2006 Term in the Second Judicial District of Bolivar County, Mississippi for the charge of murder in violation of Section 97-3-19 of the Mississippi Code Annotated of 1972, as amended. The Appellant was served with a *capias* and the indictment on the 20th day of September, 2006, and thereafter filed motions for discovery and received discovery from the State of Mississippi, filed a notice of demand for a speedy trial on September 29, 2006.

An order setting docket and trial was entered on October 2, 2006. A Revised State Docket Trial Calendar was entered on October 24, 2006. Appellant filed, *pro se*, a motion for a dismissal on October 24, 2006. An order was entered continuing the case during the term on October 25, 2006. Additional counsel, Stan Perkins, entered his appearance in the case for the Appellant on November 3, 2006 and filed a motion for a continuance on November 16, 2006 whereupon an order denying the motion for a continuance was entered on November 17, 2006.

The case proceeded to trial on November 28, 2006. The State presented its case by calling nine (9) witnesses which included the mother of the alleged deceased, an acquaintance of Appellant from Pennsylvania, an investigating officer with the Pennsylvania State Police, a Bolivar County Deputy Sheriff, an admitted accomplice, two

"jail house informants," a resident of Alligator and an acquaintance of Appellant, and an alleged girlfriend of Appellant from Pennsylvania. The Appellant chose to neither testify in his defense nor call any witnesses on his behalf, and rested after the State rested. The State was unable to present and had no rebuttal proof to present and therefore finally rested.

The court considered and granted Instructions D-9 and D10, which allowed the jury to consider a lesser included offense of manslaughter over the objection of the State/Appellee finding that there had been testimony offered of "heat of passion." The jury was directed to deliberate and to consider three (3) possible verdicts, "Not Guilty," "Guilty of Murder," and "Guilty of Manslaughter." (RE.) (Tr. 588)

The jury thereafter retired to deliberate on November 30, 2006 and on November 30, 2006 after a relatively short period of deliberation, the jury returned a verdict of "We the jury find the defendant guilty of murder." (RE.7) (R.66) The trial judge entered a judgment on December 1, 2006 sentencing the Appellant to a term of life imprisonment which "shall not be reduced or suspended, nor shall the defendant be eligible for parole or probation during the said sentence." The Appellant timely filed a Motion For A New Trial on December 8, 2006. The Court thereafter on December 15, 2006 entered its "Order Denying Motion For New Trial."

Present counsel of record, the undersigned herein, entered his appearance on behalf of the Appellant on January 12, 2007. The

Appellant via counsel timely filed his notice of appeal on January 12, 2007.

STATEMENT OF FACTS

Stacey Hazelton, a twenty-one year old young woman, who grew up in Lancaster County, Pennsylvania ended up in and around Alligator and Duncan, Bolivar County, Mississippi with her boy friend, James Arthur Fannings, Jr., appellant herein. According to Natalie Hazelton, her mother, Stacy was a hard worker and while in Pennsylvania, worked two jobs, at a restaurant and at a gas station. She met James Arthur Fannings, Jr. on the job some two years earlier and began dating. They dated for more than two years, and in the early spring of 2004, she announced to her mother and family, that she was going to Mississippi. She owned a 1996 teal green, four-door Chevy F-10 Blazer automobile, which her father bought for her, in which she would make the trip to Mississippi. (RE-28 - 34) (Tr. 184-190) (See: Exhibit S-2 and Exhibit S-3, E-19 and E-20)

The Appellant, Stacy Hazelton, and Chavon Pierre Mack, a friend of Appellant, drove to Alligator, Mississippi. Upon arriving in Alligator, they went to the home of Rochelle Williams, "Big Mama" which was located in an Apartment complex, "Alligator Place" on Birchfield Street in Alligator, Mississippi. "Big Mama" lived in Apartment No. 3, a three (3) bedroom apartment with her daughter, "Teetee", and one of her close friends, Jennifer and her boyfriend, Gary. [(RE-139)(TR.298)] Appellant, Stacy, and Chavon lived in the apartment with "Big Mama for approximately two and -a-half weeks. The three of them then moved to a trailer in Duncan, Mississippi.

They remained there together for approximately a week and-a-half. Appellant and Stacy were a couple and Chavon Mack slept on the couch. (RE-186) (Tr.358)

According to Natalie Hazelton, Stacy returned home in April and wanted her clothes and her television and stereo. She wanted a lot of "stuff" including her bike. Her family help her pack her Blazer and her father gave her \$500.00 before she left so she would have money for food and gas. They did not see her anymore after that. They were in communication by cell phone two or three time per day. Later the phone calls ceased and they became worried, so they contacted the Bolivar County Sheriff's Department.

Natalie Hazelton recalls talking with Stacy last on May 21, 2004 after calling the Bolivar County Sheriff's Department. Stacy was going to come home but needed her Blazer fixed, so she sent Stacy \$400.00 to the Walmart in Cleveland, Mississippi to get it fixed. She recalls that Stacy was crying and wanted to come home. She did not talk with Stacy again. Stacy loved Christmas, but she did not call around Christmas of 2004.

In May, 2004 Bolivar County Deputy Charles Griffin, who later became involved in the missing persons investigation in August, 2005, located and talked with Stacy following her mother's call to the Bolivar County Sheriff's Department. He responded to a 911 operator call to make a "welfare check" "to see how she's [Stacy] doing and if she was still there," at the request of Natalie Hazelton. (RE. 140-

141, TR. 299-300) He determined that she was still there "living in the Apartment in Alligator.

In January, 2005 Natalie Hazelton and her husband filed a missing person report. She talked with Corporal Patrick Quigley of the Pennsylvania State Police in June of 2005. She later in October, 2005 saw Stacy's vehicle "in an impound out at M & P Garage in Pennsylvania. (RE. 40, TR. 196)

According to Chavon Mack, who had accompanied Stacy and James Fannings to Alligator, Mississippi, after he, Stacy and James had left Big Mama's Apartment and were living in Duncan in a trailer, they took some items, including some rings, other things, and a Play Station that belonged to him, to Clarksdale to a Pawn Shop to get money because they needed to get the truck fixed. He was the one who signed the receipt to pawn the items because he had an ID. James Fannings kept all of the money. According to him Stacy never at this time went back to Pennsylvania. (RE. 185-188, TR.357-360)

Further according to Mack, Stacy and James Fannings argued a lot, she cried a lot and they fought most days. James hit her a couple of times, but it was "pretty much fighting the whole time." She did not leave the house much, but James always left. When they were still at Big Mama's house, James locked Stacy in a room at least twice and she would sit in the room and cry. When James would leave she would come out and use the bathroom and go back into the room, but would remain in the room all day. (RE. 189, TR. 361) On one occasion when

they were in the trailer in Duncan, he told her to leave and threw her clothes out and he left. After James left he did not see the clothes again-James must have taken them. After that she worn the same clothes "for like five days." (RE. 190, TR.362)

Officer Quigley indicated that James Fannings in a later interview, said that he took Stacy to Clarksdale, Mississippi and put her on a bus. That was corroborated by Teetee.

Mack claimed that James and Stacy were in the room arguing, "he was talking about how he wanted to have more than one chick and that she said the she wasn't for it and she wanted to leave." After that he [James] said "well, if I can't have anybody else, then 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." Mack further claimed that James Fannings told him "If I [Mack] don't help him get rid of the body, he's going to kill me."

Mack testified that James Fannings told him to find something to put her in, so he went into Big Mama's room and found a big "tote" in her closet. The "tote" was green and could have been a 50 gallon "tote"- it was long and it stood up at least to his knee caps. He got all of Big Mama's clothes out of the "tote" and went back into the room where she was, and James "already had her wrapped in the sheets off the bed." Nobody was there in the house at that time but Stacy, Mack and James. This incident took place in the back bedroom, "Big Mama's son's bedroom. (RE. 193-196, TR. 365-368)

Mack further claimed that James went into the bathroom, grabbed some detergent, and cleaned up the blood that was on the floor. James helped him push the tote into Big Mama's room, then went outside and backed the truck up to the window, climbed in the window, and they lifted the tote up and put her in the back of the truck -- Stacy's truck. There was not much blood. After that they drove back to the "house." After that they [Mack and James] rode around with her in the truck for two days. Mack claimed James wanted to get rid of her, but did not know where to put her. At one point he claims they were stopped by Deputy Sheriff Charles Griffin. Another officer approached the vehicle and told Mack to get out, James had the gun in his lap, the officers questioned them why they were there, and ran a check on Mack, since he had given them his name. Although it was daylight, the officers told them that they did not want to see them around there and to make sure they get home and allowed them to leave. Mack claims he did not say anything to the officers about the body being in the Truck because he was scared. That night Mack further claims that James took him somewhere around Duncan on a farm and discovered a metal barrel and they put her body in the barrel and burned her. James, Mack claimed, put gasoline on her from a little quart bottle and burned her. He added paper to the flames as it burned. It took close to seven hours to burn--the fire went until morning. No one came by during the burning. They did not leave during the burning. After the burning, Mack claims James kicked over the barrel and told him to

get her remains and put her in a bag. She was in parts-just body parts. He could see "like a shoulder, like he could see meat off the bones. He put her in a brown bag which was already in the truck. Mack had put the bag in the truck earlier because James told him to do so. They then drove back to Duncan and went to a shed near their trailer and got a shovel and put it in the truck. They then drove back to almost the same spot where they burned her and went inside the woods and James told him to dig. Mack dug a hole almost to the depth of his knees, put her in the hole, and covered her. They then drove back to Big Mama House. Mack claims James told him "[I]f anybody asked where she was, tell them that she left and he sent her bags on a little train back home." They stayed at Big Mama's for "a good four or five days, they then picked up Big Mama's daughter, Teetee, to take her back home to Pennsylvania. They drove Stacy's car. None of Stacy's belongings were put in the truck, and he did not see any of her belongings.

When the conversation was had about taking Teetee back to Pennsylvania, none of the other people present knew about what had happened to Stacy. Nothing was ever said to Teetee and Big Mama about Stacy and they never asked anything. When they got to some place in Tennessee, after Teetee and James were in the back see playing or wrestling, he heard James say "you cut me bitch, you cut me." She got out and he did not see her again until later in Lancaster, Pennsylvania. She would not talk to him.

Later during the investigation, Mack took officers to the area where he claimed the body was burned and later buried, but neither Mack nor the officers ever located any traces of a body that could be identified as that of Stacy Hazelton. There were bones found, but were determined to be the bones of animals not human. Officers also searched and conducted an investigation of Big Mama's Apartment and found nothing which could be evidence of the events that Mack claimed occurred that apartment. There were traces of blood found in Big Mama's Apartment, but was determined to be from someone else other than Stacy Hazelton. (Note the testimony of Charles Griffin. RE. 137-177, TR. 296-336)

Officers of the Pennsylvania State Police, as part of their Missing Person's investigation examined and search the vehicle identified as belonging to Stacy Hazelton, failed to reveal any evidence which supported the allegations of Chavon Mack. [See the testimony of Patrick Quigley, a Missing Persons Investigator with the Pennsylvania State Police. RE.55-136, TR.211-292]

SUMMARY OF THE ARGUMENT

Appellant contends that the trial court abused its discretion in denying Appellant's motion for a New Trial and request for a judgment notwithstanding the jury verdict when the jury returned a verdict finding the Appellant guilty of murder, i.e, there was insufficient credible evidence presented to sustain a verdict of guilty of murder

but could possibly support a verdict of manslaughter as was considered by the jury as a lesser included offense of murder.

Since the victim was neither found nor proven beyond a reasonable doubt to be dead and the Appellee/State of Mississippi's case against the Appellant rested upon the testimony of an admitted accomplice, alleged admissions of the Appellant to "jailhouse informants or snitches," and alleged inconsistencies or conflicts in statements made by Appellant to investigators on collateral issues, the verdict of guilty should not stand.

Appellant also argues that he was not advised of or given Culberson warnings regarding his testimony, if any, so deprived of his constitutional rights. He neither testified nor presented any witnesses at the trial on his behalf without being advised by the Court of the advantages and disadvantages of testifying or not testifying.

Appellant was also denied effective assistance of counsel by the trial court's failure to grant him a continuance and the jury's minimal time for deliberation before rendering a verdict of guilty of murder thereby making it clear that his defense was ineffective.

Appellant further submits that he was unlawfully sentenced by the Court in violation of the murder statute.

Appellant finally argues that the cumulative affect of the errors warrant this Court reversing his conviction of murder.

ARGUMENT

I. THE TRIAL COURT ERRONEOUSLY FAILED TO GRANT A JUDGMENT NOTWITHSTANDING THE JURY VERDICT OF GUILTY OF MURDER ALTHOUGH THE VERDICT WAS CONTRARY TO THE FACTS AND THE LAW IN THAT THE EVIDENCE PRESENTED WAS INSUFFICIENT TO SUPPORT A GUILTY VERDICT ON THE CHARGE OF MURDER.

The Appellant contends and asserts here, as in his Motion For A New Trial which included a request for a judgement notwithstanding the jury verdict, that the verdict of "guilty" on the charge made in the indictment was contrary to the credible evidence presented as a matter of law. As set forth herein, supra, the pivotal issue in this case was whether there was a murder committed, i.e., whether Stacy Hazelton was actually killed. Obviously the next and probably most important issue in this criminal case, as in all other criminal prosecutions for the death of a person, is whether it could be proven beyond a reasonable doubt that the accused committed the killing unlawfully.

The trial court, in considering motions challenging the sufficiency of the State's proof, must view the evidence in the light most favorable to the State giving the prosecution the benefit of all reasonable inferences which may be drawn from the evidence. **McClain v. State**, 625 So.2d 774, 778 (Miss. 1993) The Court is obligated to reverse a conviction and render a judgment of acquittal when it determines that, viewed in that light, the State's evidence as to one or more of the critical elements of the crime - in this case, more particularly, that the Defendant was not guilty of murder - is so lacking that reasonable jurors could not have found Appellant guilty

of murder. *Id.* If the trial court denies the motion, that denial is raised as an issue on appeal, the Court is charged to review the evidence by the same standard to determine whether the trial court erred in it's ruling. ***Id at 781.***

It has long been settled in this State that the Supreme Court will reverse a conviction or remand the case for a new trial even though the question of guilt was an issue for the jury, where the verdict was against the weight of the credible evidence. In ***Heflin v. State***, 178 So 594 (Miss. 1938), the Honorable Court held:

"Although the question of guilt was not one for a directed verdict for Appellant, but the issue for the jury, still, we are of the opinion that the verdict was against the weight of the evidence. For that reason alone we reverse the judgment for a new trial."

On appeal from a judgment of conviction, the question before the Supreme Court is not whether the Defendant, is in fact guilty, or probably guilty, but whether the State has made out, beyond a reasonable doubt, a case sufficient to withstand the weight of testimony consistent with innocense. ***Miller v. State***, 198 Miss 277, 22 So. 2d 164 (1945)

Where it is manifest that no reasonable person engaged in a search for truth, uninfluenced by improper motives or consideration, could safely accept or act on the sufficiency of the evidence produced, taking it as a whole, the defendant should be discharged. ***Bennett v. State***, 374 So. 2d 803, 806n.1 (Miss. 1979).

Where the evidence is insufficient to show the commission of the offense charge, the judgment will be reversed. **Hunt v. State**, 108 Miss. 588, 67 So. 57 (1915). A verdict cannot be permitted to stand where the verdict is not supported by evidence on an essential point. The Court opined in **Turner v. State**, 168 Miss. 452, 151 So. 721 (1934),

"Where a conviction is had on record showing evidence for prosecution in that of the Defendant cogent and consistent, the Supreme Court must examine the transcript in minutest detail to ascertain whether something not according to the law of the land turned upon attenuated testimony."

The quality and credibility of the evidence presented by the Appellee in this case should have left the jury in a serious quandary during deliberations. What was the evidence? There was a missing person investigation which changed to a murder investigation more than a year after the disappearance of the alleged victim. That particular change or turn of events occurred solely because the man who claims to have been a witness to the alleged shooting of the alleged victim admittedly helped to conceal, burn, and bury the alleged victim and withheld his alleged knowledge of that information for more than a year, if he is to be believed.

The alleged witness, Chavon Pierre Mack, is at best untrustworthy and his testimony should have been viewed with great, care, caution and suspicion by the jury because he is an admitted accomplice to killing and alleged cover-up of the alleged killing, who was never arrested and charged, even with accessory after the fact. Appellant

asserts that he is unreliable and no conviction should be based upon his testimony.

There was corroboration of Mack's assertions, since no physical and/or forensic evidence which could be used by the Appellee to prove that a killing actually occurred was ever found. There was no body or any traces of a human body found that remotely matched with Stacy Hazelton. One of the essential elements of a murder charge is for the State to prove beyond a reasonable doubt that the killing actually occurred, i.e., the **corpus delicti** must be established. [See: **Turner v. State**, 168 Miss. 452, 151 So. 721 (1934), supra.] There is no physical evidence that proves it occurred. In fact the experienced Missing Persons investigator from the Pennsylvania State Police admitted on cross examination that there exists a possibility that Stacy Hazelton is still alive.

The verdict was overwhelmingly against the weight of the evidence for these reasons and a **suspicion** of guilt is insufficient to support the conviction of murder.

The state absolutely failed to present any credible evidence, certainly sufficient evidence, on the issue of murder. The jury was left to speculate as to whether Appellant had "**unlawfully, wilfully, and feloniously, without the authority of law, and with the deliberate design to effect death, kill and murder a human being, to-wit: Stacy Hazelton.**" Based upon the evidence presented and not presented in this case, Appellant's conviction should be reversed.

The only alleged eyewitness to the alleged murder, Chavon Mack, certainly did not provide any testimony or evidence that prior to the killing demonstrated or explained that the Appellant acted with "the deliberate design to effect the death of Stacy Hazelton."

Chavon Mack offered the following testimony:

Q. All right. I want you to tell us then if he and she had some communication about this going out while, while you were in "Big Mama's house up there in Alligator?

A. Well, she was -

Q. And let me ask you this, is this the last time you saw here alive?

A. Yes.

Q. All right. I want you to tell the jury what happened?

A. All right. Well, we was, we was in Big Mama's house, and they was arguing about how she used to be talking to "chicks" all the time. And I was at the window, at the point in the time being, and *he was playing* around with a gun. And he said that ---- [RE. 193, TR. 365]

Q. Now, when you say he was playing around with the

gun, what was he doing?

A. Just pointing it at himself and then pointing it at her and talking to her.

Q. Okay. And go ahead.

A. **So they was in the room arguing**, and he was talking about how that he wanted to have more than one chick and that, she said that 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, **then I might as well kill myself**. And she said, no, kill me. And at that time, before she said that, I turned around and she shot her. And she fell face down. [RE.193-194, TR.365-366] [Emphasis added.]

There was no prior signals or notice that indicated Appellant's intention or deliberate design to shoot her or to kill her at that time. They were arguing about their relationship and he even said he would kill himself. The shooting from the description given by Mack appeared to be like a reflex action, and it is unclear from the testimony whether Mack was actually watching them when the shot was fired. He said, **"And at that time, before she said that, I turned around and he shot her."**

When questioned further about the shooting Mack expressed surprise that the shooting occurred . His testimony on that point is

as follows:

Q. Did you have any idea that was going on?

A. No. I went outside -

Q. And what did you do when he shot her?

A. I just looked at her.

[RE. 194, TR. 366]

The Appellee thereafter spent a considerable amount of time during Mack's testimony in showing what occurred after the shooting --- the frantic actions to hide or discard the body and Appellant's alleged threats against Mack. None of that testimony sheds any light on the Appellant's prior intent or deliberate design to murder Stacy. The Appellee also spent time developing the fact that Appellant had a gun. Merely having a gun, however, does not in and of itself indicate a propensity to commit murder. It certainly appears from the testimony of Mack that Appellant actually "played" with the gun more than anything else. There was no testimony of Appellant's using the gun to make threats prior to the shooting. There is nothing else in the record that suggests murder. Consequently the proof presented certainly is not enough to show murder beyond a reasonable doubt. If anything the facts come much closer to showing or justifying a verdict of manslaughter if the jurors sincerely and conscientiously analyzed and considered only the evidence presented to them.

The only other evidence presented by the Appellee on the issue of the killing of Stacy Hazelton was the testimony of the alleged admissions of guilt by the Appellant to the "jailhouse informants." Witness DeWayne Hollingsworth said that Appellant "[He] told me that he shot her in the head." [RE. 270, TR. 452] Although that is an admission that Appellant killed Stacy, if you believe it, but certainly does not shed any light on whether it was done with the deliberate design to effect the death of Stacy Hazelton or done in the heat of passion.

The testimony of Shannon Robinson offered no more on the issue of murder or manslaughter. He testified that Appellant said of his friend Pierre, Chavon Mack, "[He snitched, he snitched on me about the murder." "He said it was a murder and he said ----Said that he shot -- The female." Robinson gave no details which would show under what circumstances the shooting occurred, if he is to be believed. He further went on to testify that Appellant said he was going to beat the case because there was no evidence other than Pierre. [RE. 294-295, TR. 524-525]

II. THE EVIDENCE ONLY SUPPORTED A VERDICT OF MANSLAUGHTER AND THE TRIAL COURT ERRONEOUSLY FAILED TO GRANT A JUDGMENT NOTWITHSTANDING THE JURY VERDICT OF GUILTY OF MURDER ALTHOUGH THE VERDICT OF MURDER WAS CONTRARY TO THE FACTS AND THE LAW IN THAT THE EVIDENCE PRESENTED WAS INSUFFICIENT TO SUPPORT A GUILTY VERDICT ON THE CHARGE OF MURDER BUT SUPPORTED A VERDICT OF GUILTY OF MANSLAUGHTER.

The court realized that the evidence presented suggested a basis

for the jury to consider the lesser included offense of manslaughter and decided to give a lesser included offense instruction and a manslaughter instruction. Accordingly the Court instructed the jury that "manslaughter is defined as the killing of a human being without malice in the heat of passion but in a cruel and unusual manner or by the use of a dangerous weapon without authority of law and not in necessary self defense." The simple facts is that the alleged killing from the testimony of Chavon Mack, the only source of any evidence on the issue of the killing, certainly is insufficient to support a verdict of murder, but supports a verdict of manslaughter.

At the close of all evidence, the Appellant made a motion for a directed verdict and submitted a peremptory instruction for the Court's consideration. The Court was faced with all of the evidence at the close of the presentation of all evidence and it was clear then that the evidence failed to sustain a verdict of murder but supported a verdict of manslaughter. Consequently the Court erred in failing to grant the Appellant's motion for a directed verdict on murder and thereafter allow the matter to proceed to the jury on the lesser included offense of manslaughter with instructions.

Appellant contends that the trial court's failure in that regard has resulted in an unjust verdict of murder that is unsupported by and contrary to the credible evidence, is based on insufficient evidence, and should be reversed or reversed and remanded.

III. WHETHER THE FAILURE OF THE COURT TO ADVISE THE APPELLANT OF HIS RIGHT TO TESTIFY OR NOT TO TESTIFY ON THE RECORD, DEPRIVED HIM OF THE CULBERSON WARNINGS IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS IN VIOLATION OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION, THE MISSISSIPPI STATE CONSTITUTION ARTICLE 3 SECTION 26 WARRANTING REVERSIBLE ERROR?

Culberson v. State, 412 So. 2d 1184 (Miss. 1982) addresses a defendant's right against self-incrimination as adopted from the 5th Amendment of the United States Constitution and applied in Article 3, Section 26 of the Mississippi Constitution of 1890. It states that in all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both, to demand the nature and cause of the accusation, to be confronted by the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and, in all prosecutions by indictment or information, a speedy and public trial by an impartial jury of the county where the offense was committed; **and he shall not be compelled to give evidence against himself;...Id.** at 1186. (Emphasis added)

The court goes on to say that, "if he (defendant) wants to testify he should be permitted to do so. A record should be made of this so that no question about defendant's waiver of his right to testify should ever arise in the future." Id.

At the close of the presentation of evidence by the State, defense counsel revealed to the Court that the Appellant would not take the stand and testify on his own behalf and no other witnesses would be called on his behalf. The Appellant then rested his case. The

record is at completely devoid of any mention of advising Appellant of the **Culberson** warnings. On the record the Appellant had no warnings of the possible ill effects of his testimony or lack of testimony. The Appellant should have been advised on the record and had his position clearly stated on same. This adversely affected his right to a fair trial and should warrant reversal.

IV. 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?

Strickland v. Washington, 466 U.S. 668 (1984) sets out the standard of ineffective assistance of counsel claims. In order to prevail, the appellant must show that counsel's performance was deficient and that this deficiency prejudiced his defense. **McQuarter v. State**, 574 So. 2d 685, 687. **Hiter v. State**, 660 So. 2d 961, 965 (Miss. 1995) and **Swington v. State**, 743 So. 2d 1106, 1114 (Miss. 1999) further make it clear that the burden of proof on the defendant is judged by a totality of circumstances test to determine whether the defense counsel was deficient and whether this deficiency deprived the defendant of a fair trial. The defense counsel's actions by not insisting on the Court giving the Appellant the Culberson warnings severely prejudiced the Appellant's rights to a fair trial.

The Appellant was indicted on September 19, 2006. His retained trial counsel entered his appearance on November 3, 2006. The matter

was set for trial on November 28, 2006 and tried for three (3) days commencing on November 28, 2006. On November 16, 2006 counsel for Appellant filed a motion for a continuance which was denied by order on November 17, 2007. The Appellant was indicted and tried in less than three months. The fact that the jury only deliberated for approximately sixteen (16) minutes involving a murder charge demonstrates ineffective assistance of counsel, especially when counsel had sought a continuance.

Using the totality of circumstances test of **Strickland** and its progeny, the attorney of appellant was deficient and this deprived the appellant of a fair trial.

V. WHETHER THE TRIAL COURT VIOLATED THE MURDER STATUTE IN SENTENCING THE APPELLANT TO LIFE WITHOUT THE POSSIBILITY OF PAROLE?

The Appellant was indicted pursuant to Mississippi Annotated Code Section 97-3-19 for the crime of murder. Upon being found guilty of murder as charged he was sentenced by the trial court to serve a term of life imprisonment which sentence shall not be reduced or suspended nor shall the defendant be eligible for parole or probation during the term of said sentence.

Appellant asserts that his sentence is contrary to the law and should be reversed and/or vacated.

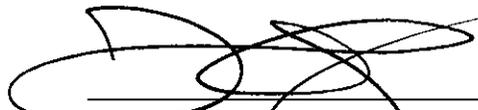
VI. WHETHER THE CUMULATIVE EFFECT OF ERRORS WARRANT REVERSAL OF CONVICTION AND SENTENCE?

Genry v. State, 735 So. 2d 186 (Miss. 1999) states that the Court may reverse a conviction and sentence based upon the cumulative effect of errors that independently would not require reversal. It also stipulates that where there is no reversible error in part, there is none to the whole. **Id.** at 201. In the case at bar, the inconsistencies and overall failure of counsel to develop testimony of the witness to the point of the jury being able to form a reasonable opinion of the facts together with defense counsel ineffectiveness as argued herein, support Appellant's cumulative effect claim.

CONCLUSION

For the above stated reasons James Arthur Fannings, Jr., Appellant herein, respectfully requests that this Honorable Court reverse his conviction herein, and/or remand his case to the trial court for further appropriate proceedings.

Respectfully submitted,



Johnnie E. Walls, Jr.

CERTIFICATE OF SERVICE

I, Johnnie E. Walls, Jr., attorney of record for Appellant, hereby certify that I have this day caused to be mailed by first-class mail, postage prepaid, a true and correct copy of the foregoing Brief of Appellant to:

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This the 19th day of December, 2007.



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