IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2007-KA-00154-COA

JEFFREY J. JACKSON — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Jeffrey J. Jackson

THIS 24th day of September, 2008.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Jeffrey J. Jackson

By: George T. Holmes
George T. Holmes, Staff Attorney

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STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of the Second Judicial District of Bolivar County, Mississippi where Jeffrey J. Jackson was convicted of three counts of aggravated assault and one count of murder in a jury trial conducted November 19-20, 2003, Honorable Kenneth L. Thomas, Circuit Judge, presiding. Jackson was sentenced for the aggravated assault convictions as follows: Count 1- fifteen years, Count 2 - fifteen years and Count 3- twenty years. [R. 49-52]. Under Count 4, the murder charge, the sentence was life imprisonment. *Id.* Counts 1 and 2 are to run concurrently with Count 3. *Id.* The net result, life plus twenty years which Mr. Jackson is presently serving in the Mississippi Department of Corrections.

FACTS

According to the testimony, between 1:30 and 2:00 a. m., February 21, 2003, a fight started in Roy's Ventura Lounge located on Peeler Avenue in Shaw, Mississippi, involving multiple participants. [T.18-19, 36, 45, 49, 87, 113]. The altercation spilled out onto the sidewalk and street. *Id.* Shots were fired outside of the lounge and four people were struck by projectiles. [T. 18, 36, 38, 41, 46, 49, 52, 61-62, 90, 113-14].

Eric Mack, who was fighting, was struck by two bullets and died. [T. 53, 88-89, 102, 142-46, 151]. Tangrea Smith, a bystander, was permanently injured. [T. 52-54]. Jennifer Diggins and Carmencita Davis, also bystanders, were only grazed and fortunate to have escaped serious injury. [T.38, 45-46].

State witnesses identified the appellant Jeffrey J. Jackson as participating in some of the fighting and also identified him as the sole shooter in the case. [T. 49, 51, 65-70, 89, 91]. One witness described the assailant as wearing a light colored jacket, another witness said the jacket was "black" and another witness said "gray". [T. 59, 91, 96, 114-16, 121]. When Jeffrey Jackson was arrested immediately after the shooting, he had on a blue jacket. [T. 115, 121]. All of the witnesses said the shooter had braided hair, which Jackson was allegedly sporting in his mug shot which was shown to the jury. [T. 23, 59, 70-72, 114-16; Ex. S-3].

Just after the shooting, a responding police car was almost hit by a vehicle being driven off from the scene in which the shooter was a passenger with two other occupants,

Dennis Coleman and Carl Hollingsworth. [T. 19-20, 91]. When officers stopped this vehicle, Jackson and two others were arrested. [T.20-24]. No weapon was recovered from the car, but some marijuana which had been thrown out was found nearby. [T.22, 24]. The occupants of the car were quoted by arresting officers as stating, "they was shooting at us, they was shooting at us." [T. 21].

Approximately ten spent shell casing were found at the scene of the shooting, all 9 millimeter. [T. 26]. No weapon was ever located. [T. 24, 73]. There were no finger prints lifted and no gun shot residue on Jackson's hands. [T.74, 76].

SUMMARY OF THE ARGUMENT

Jackson was irreparably prejudiced by an unjustified flight instruction. The verdicts were not supported by the evidence and trial counsel was ineffective for failing to object to damaging hearsay evidence.

ARGUMENT

ISSUE NO. 1: DID THE TRIAL COURT ERR BY GRANTING A FLIGHT INSTRUCTION?

Jury Instruction S-2 was a flight instruction, which was given over objection. [T. 164-66].[1] The trial court was slightly concerned that the instruction would prejudice the

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[1] Jury Instruction S-2: Flight is a circumstance from which guilty knowledge and fear

jury's deliberation against Jackson, but gave the instruction nonetheless. *Id.* This was a reversible misstep on the part of the learned trial court judge. The facts of the case did not justify a flight instruction.

Plus, since Jackson was *in absentia* on day two of the trial, instruction S-2 created an ambiguity from which the jury could wrongfully infer guilt from Jackson's choosing not to participate in his trial. [T. 132-33]. In effect the instruction told the jury that, because the defendant was not present on the second day of the trial, the jury could presume that he was guilty. S-2 infringed on Jackson's due process rights and right to a fair trial and arguably constituted a comment on Jackson choosing to remain silent.

"Our supreme court has consistently held that probative unexplained "flight is admissible as evidence of consciousness of guilt." *Fuselier v. State*, 702 So.2d 388, 390(¶ 4) (Miss.1997) (citing *Williams v. State*, 667 So.2d 15, 23 (Miss.1996)). Contrarily, "evidence of flight is inadmissable where there is an independent reason for the flight." *Id.* at 390-91(¶ 7).

The case of *Pannell v. State*, 455 So. 2d 785, 787-89 (Miss. 1984), controls. Pannell was charged with aggravated assault in a case where his son-in-law was shot. The facts were in dispute as to whether the shooting was self-defense. After the incident,

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may be inferred. If you believe from the evidence in this case beyond a reasonable doubt that the defendant, Jeffrey J. Jackson, did flee or go into hiding, such flight or hiding is to be considered in connection with all other evidence in this case. You will determine from all the facts, whether such flight or hiding was from a conscious sense of guilt or whether it was caused by other things, and give it such weight as you think it is entitled to in determining the guilt or innocence of the defendant. [R. 36].

Pannell went home. *Id.* Pannell's trial judge gave a standard flight instruction as here in Jackson's case. *Id.* The *Pannell* court expounded that only *unexplained* flight justifies a flight instruction and since Pannell's leaving the scene and going home was both uncontradicted and explained, the instruction was not justified, thus requiring reversal. *Id.*

In the present case, there are at least three reasons Jackson was "fleeing" the scene of the shooting: first, there was the claim that Jackson and the other two had been shot at. [T. 21]. Jackson had received an injury to his neck. [T. 75]. Secondly, there was marijuana in the car, which had been thrown out. [T. 22]. Since the three who drove off knew a shooting had happened and that police would be coming, it is likely they did not want their car searched. Thirdly, there is fear of retaliation for being in a fight.

Applying *Pannell* here, Jackson's "flight" had explanation, no flight instruction should have been given. See also *Austin v. State*, 784 So.2d 186, 194 (Miss. 2001). Appellant respectfully requests a reversal.

In *Tran v. State*, 681 So.2d 514, 519 (Miss.1996) the Supreme Court found that the defendant and the co-defendant fled the scene of a murder "to avoid retribution from the friends of [the victim]." *Id.* The *Tran* court held that in such instances, "a flight instruction should be automatically ruled out," because resulting prejudice far outweighs any probative value. *Id.* Fleeing to avoid retribution "seems logical and necessary." *Id.* In reversing, the *Tran* court found that the flight instruction there became a comment on

the evidence that the trial court did not accept the explanation of the defendant and called "undue attention to Tran's flight." *Id.* See also, *Austin v. State*, 784 So.2d 186, 194(¶ 24) (Miss.2001).

In *U.S. v. Myers*, 550 F.2d 1036, 1049, (5th Cir. 1977), the court reversed a bank robbery conviction for improperly giving a flight instruction without a sufficient evidentiary foundation. The *Myers* court explained that flight evidence becomes "admission by conduct." Flight can be probative, but, is never more than circumstantial evidence of guilt. For flight to be probative, all four of the following inferences must be drawn: (1) that the defendant's behavior is flight; (2) that the flight arises from consciousness of guilt; (3) that the consciousness of guilt specifically concerns the crime charged; and (4) that the consciousness of guilt for the specific crime charged is conclusive as to actual guilt of the crime charged. "Because of the inherent unreliability of evidence of flight, and the danger of prejudice its use may entail, a flight instruction is improper unless the evidence is sufficient to furnish reasonable support for all four of the necessary inferences." [Citations omitted]. One reason the *Myers* court reversed is because Myers had committed another crime which could have been the reason for any flight.

There is yet another reason in the present case that S-2 should not have been given in this case due to the fact that Jackson had absented himself from day two of his trial. [T. 132-33]. The instruction was abstract and did not explain that being absent from trial was

not evidence of guilt.

In *U. S. v. Sanchez*, 790 F.2d 245, 251-53 (2nd Cir. 1986), the defendant absconded during his trial and the court found that the usual flight instruction was improper. Without evidence in the record that Sanchez was indeed a fugitive, and not choosing to simply not participate in his trial, there was no evidence of "consciousness of guilt." "It was error to instruct the jury that it could equate [Sanchez's] nonappearance with 'flight.'" *Id.* Giving the instruction ended up being "a heavy sanction on what may constitute the mere waiver of a constitutional right to attend trial." *Id.*

Also, in *People v. Morales,* 84 A.D.2d 522, 441 N.Y.S.2d 686 (N.Y.A.D.,1981), the giving of a flight instruction when a defendant was tried *in absentia,* was found to be reversible error." In *Morales*, the instruction, in part, was that the jury had "the right to infer" the defendant's unexplained absence from the proceedings as "evidence of consciousness of guilt." This is what happened here in Jackson's case, perhaps not as extreme at Morales' but with the same prejudicial effect.

The following language from *Morales* is applicable here

> Defendant correctly asserts that the trial judge's highlighting of his absence during trial shifted the focus of the jury's attention from the issue of guilt or innocence to a question of whether defendant's absence should be taken as an indication of guilt. Such emphasis on defendant's absence denied defendant a fair trial.

To protect against such infringement on a fair trial, some jurisdictions require that a jury be instructed in cases where a defendant absences himself during trial, that his

absence cannot be considered as evidence of guilt. See *McFadden v. State*, 539 S. E. 2d 391, 394-95 (S.C. 2000). *McFadden* is a good authority that the flight to which a flight instruction refers should be flight from the crime scene and not flight from trial. In the present case, since the instruction was in the abstract, the jury could not discern which flight S-2 referred. Other courts require an instruction that the jury should not speculate as to why the defendant is not present during trial. *People v. Alexander*, 164 A.D. 2d 892 (N. Y. A. D. 1990).

Jackson respectfully requests a new trial.

ISSUE NO. 2: WHETHER THE WEIGHT OF THE EVIDENCE SUPPORTS A GUILTY VERDICT AS TO ALL COUNTS?

Evidence of the shooter's attire in this case varied widely. One witness described the assailant as wearing a light colored jacket, another witness said the jacket was "black" and another witness said "gray". [T. 59, 91, 96, 114-16, 121]. When Jeffrey Jackson was arrested, immediately after the shooting, he had on a blue jacket. [T. 115, 121].

Roy's Ventura Lounge had a metal detector and all patrons were patted down upon entry. [T. 33, 98, 119]. There was no way Jackson had a gun in the club. Jackson was in the fight which spilled out just before the shooting, and was seen coming directly out of the club just before the shooting. [T. 33, 53, 61]. There was no chance for Jackson to retrieve a gun. No gun was found in the car when Jackson was arrested. [T. 73]. Gunshot

residue tests were negative. [T. 74]. The preponderance of the evidence is, therefore, that the shooter was outside before the shooting and could not be Jeffrey Jackson. At best, the evidence appears inconclusive. One witness even appears to be making assumptions. When asked how he knew who shot Eric Mack, the witness replied, " [i]f it was only one person shooting ... that's the only person could have shot him." (Sic). [T. 99].

In *Clemons v. State*, 473 So.2d 943, 945 (Miss. 1985), a murder victim died as a result of being stabbed in a barroom brawl. The court was confounded by conflicting inconclusive testimony and said:

> This Court has difficulty understanding how the jury was able to extrapolate enough competent facts from the many versions of the story to sufficiently support the finding of murder. From the record there is more than enough conflicting evidence to cast at least a reasonable doubt, as to murder.

Citing to a similar decision, *Wells v. State*, 305 So.2d 333 (Miss.1974), the *Clemons* court reversed and remanded the case for a manslaughter sentence. 473 So.2d 945. Jackson respectfully requests that the Court enter a judgement of acquittal on all charges.

Normally, conflicting testimony is relegated to the jury for resolution. This is as it should be, in most cases where different witnesses tell different versions of events or where a victim might not remember all of the minutia of details. However, there is a dividing line, as in the present case, when what the court is faced with evidence so

unreliable that it does not soundly support a criminal conviction.

It is the appellant's position that the convictions in this case are not supported by the unreliable and conflicting evidence as in *Clemons*. See also *Lyle v. State*, 8 So. 2d 459, 460 (Miss. 1942). A verdict of guilty which is not supported by reliable evidence should be reversed, even viewing the state's evidence in the best possible light. *Edwards v. State*, 736 So. 2d 475, 477-79 (Miss. Ct. App.1999). *Sheffield v. State*, 749 So.2d 123, 127 (¶15) (Miss.1999).

In *Bush v. State*, 895 So.2d 836, 844 (¶18) (Miss. 2005), the court said that in reviewing a denial of a motion for new trial the court will only reverse if the trial court verdict "is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." [citing *Herring v. State*, 691 So.2d 948, 957 (Miss.1997)].

ISSUE NO. 3: DOES THE EVIDENCE SUPPORT A MURDER CONVICTION IN COUNT IV RATHER THAN MANSLAUGHTER?

Alternatively, as for Count IV, this is a manslaughter case, not murder. The victim Eric Mack had been involved in the fighting, which ended up outside Ray's Lounge with at least ten people fighting. [T. 42, 102]. Neither side requested a manslaughter instruction. [T. 160-62]. Taking the State's case in its best light, the only conviction which could arguably said to be supported by the evidence is one for manslaughter, not

murder; because, the shooting was impulsive, not planned, and not deliberated. It was an unfortunate impulsive act. If Jackson shot Mack, it was during the fighting and not after any deliberation or premeditation.

Manslaughter is defined in MCA § 97-3-35 (1972)

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

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

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

Heat of passion has been defined as:

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

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

1181,1186 (Miss. 1998) referenced in previous issues.

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

Also, similar to the present case, Dedeaux did not request a manslaughter instruction. *Id.* Nevertheless, the *Dedeaux* court found that the facts only supported a conviction for manslaughter because, "this clearly was a killing in the heat of passion" even though a "greater amount of force than necessary under the circumstances" was used. *Id.* The *Dedeaux* court reversed the murder conviction and remanded the case for re-sentencing for the crime of manslaughter. 630 So. 2d 31-33

In *Clemons v. State*, 473 So. 2d 943, 944 (Miss. 1985), the court reversed a murder from a barroom stabbing and remanded for sentencing for manslaughter. *Id.* at 945.

Here in Jackson's case, there is a lack of evidence as well as conflicting evidence and, and a factual scenario as in *Dedeaux* and *Clemons*. Namely, there is some sort of argument and fighting with the victim participating and a reaction by the accused involving more than reasonable force, resulting in the unfortunate and unnecessary death of the victim. The requested approach is applicable in depraved heart murder cases too. *Tait v. State*, 669 So. 2d 85, 86-88 (Miss. 1996).

So, as an alternative to acquittal on Count IV, Jackson respectfully requests a rendering of a manslaughter conviction with remand for resentencing.

ISSUE NO. 4: WHETHER THE INTRODUCTION OF PREJUDICIAL HEARSAY WAS PLAIN ERROR OR THE RESULT OF INEFFECTIVE TRIAL COUNSEL?

Without any objection from trial counsel, the state proceeded to introduce evidence of a questionable photo line-up identification of Jeffrey Jackson *via* a sheriff's office investigator's version of what a non-testifying witness had told him. [T. 70-72]. Murray Rourk with the Bolivar county Sheriff's Department testified he spoke with several people about the identification of the shooter. *Id.* He was asked, "[d]id you use any kind of lineup or anything of that nature?" Rourk responded that he had "some booking information", and photographs of Coleman, Hollingsworth and Jackson, and that he showed an unidentified witness these photographs and asked this unnamed unsworn person if one of the three was the shooter. *Id.* Rourk was then asked by the prosecutor, "...did that person identify anyone from the booking report you showed them?" Answer: "Yes, they did". Question: "Do you recall who that person identified?" Answer: "Jeffrey Jackson." *Id.* The prosecutor then introduced the three photographs, including Exhibit S-3 which is of Jackson. *Id.* Trial counsel was asked if he had any objection, "No objection" was the reply. *Id.*

There should have been two objections. First, that the photographic lineup was not

properly conducted so as to avoid a likelihood of misidentification. *Wilson v. State*, 574 So.2d 1324, 1327 (Miss.1990). Secondly, there should have been an objection to the hearsay resulting in Jackson's inability to cross-examine this unknown person who made the alleged identification. U. S. Constitution 5th and 14th Amendments, Article 3 §26 of the Mississippi Constitution of 1890, Miss. R. Evid. Rule 801.

Hearsay is defined as, "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." M. R E. 801. Hearsay is inadmissible, except under certain exceptions, and when improperly admitted constitutes reversible error. *Murphy v. State*, 453 So. 2d 1290, 1294 (Miss. 1984) Miss. R. Evid. Rules 802, 803 and 804.

Testimony of police officers and investigators about the results of investigations based on what they were told is inadmissible hearsay, which if admitted, is reversible error. *Bridgeforth v. State*, 498 So.2d 796, 800 (Miss.1986). However, if the hearsay is "merely cumulative" a reversal might not be warranted. *Jones v. State,* 606 So.2d 1051, 1057 (Miss.1992).

In the present case the evidence conflicted and was not cumulative. No photographs of the defendant had previously been introduced. The identification of the shooter conflicted. Was he wearing a gray, black or light jacket? Or was it blue.

The reliability, quality and cumulativeness of the unnamed identification witness' identification are not known. Issues of witness identification through photographic

lineup are reviewed under the guidelines of *Neil v. Biggers*, 409 U.S. 188, 199, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), and whether under the "totality of the circumstances" five factors suggest a "likelihood of misidentification" which include "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." See also, *Outerbridge v. State*, 947 So.2d 279, 282(¶ 9) (Miss.2006). None of these matters were explored here, so the reliability of the unknown hearsay declarant is a total mystery.

The present case does not involve the same type of hearsay identification evidence as in *Livingston v. State*, 519 So. 2d 1218, 1221 (Miss. 1988). In *Livingston,* the alleged victim testified in addition to police officers repeating that the victim identified the defendant at a line-up. Here, the investigator was allowed by trial counsel to tell the jury that the unnamed witness identified Jackson without the unknown person ever being available for cross-examination as in they were *Livingston*. Jackson's rights of cross examination under the 6th And 14th Amendments to the U. S. Constitution and Article 3 § 26 of the Mississippi Constitution were thrown out the window.

As to ineffectiveness of counsel, in *Madison v. State* , 932 So.2d 252, 255 (Miss. App. 2006) the court reiterated:

> [the Supreme] Court applies the two-part test from *Strickland v. Washington*, 466 U.S. 668 (1984), to claims of ineffective assistance of

> counsel. *McQuarter v. State,* 574 So.2d 685, 687 (Miss. 1990). Under *Strickland*, the defendant bears the burden of proof to show that (1) counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense. *Id.* There is a strong but rebuttable presumption that counsel's performance fell within the wide range of reasonable professional assistance. *Id.* This presumption may be rebutted with a showing that, but for counsel's deficient performance, a different result would have occurred. *Leatherwood v. State*, 473 So.2d 964, 968 (Miss. 1985). This Court examines the totality of the circumstances in determining whether counsel was effective. *Id.*

If the issue of ineffective assistance of counsel is raised, as is here, on direct appeal the court will look to whether:

> (a) . . . the record affirmatively shows ineffectiveness of constitutional dimensions, or (b) the parties stipulate that the record is adequate and the Court determines that findings of fact by a trial judge able to consider the demeanor of witnesses, etc. are not needed. *Id.*

The appellant hereby stipulates through present counsel that the record is adequate for this court to determine this issue and that a finding of fact by the trial judge is not needed.

The prejudice to Jackson under the *Strickland* test was that, in addition to not getting to cross examine his accusers as stated aforesaid, the lack of an objection allowed the state to wrongfully bolster its case with improper hearsay evidence. In reversing an aggravated assault conviction in *Anderson v. State*, 156 So. 645, 646-47 (Miss. 1934), based on the admission of a witness' hearsay statement wrongfully admitted, it was pointed out that:

> [t]his court has consistently condemned the practice of undertaking to bolster up the testimony of a witness on the stand, and to strengthen his credibility by proof of his declarations to the same effect as sworn to by him out of court. [recently omitted]

In *Anderson*, after the victim had identified the defendant at trial, investigating officers were allowed to testify that they took the defendant to the victim who was in bed recouping from being shot and that the victim identified the defendant. The *Anderson* court reversed the conviction stating "[t]he testimony of [the officers] under the circumstances should not have been admitted." *Id.* If bolstering hearsay testimony was inadmissible and reversible error in *Anderson*, it is inadmissible and reversible error here.

More recently in *Walker v. State*, 878 So.2d 913, 915-16, (Miss.2004), the Court reversed because of the admission of unauthenticated evidence which tended to corroborate the sexual assault victim's testimony, the court found that the admission of a towel with semen on it, but not necessarily connected to the defendant "fails the unfair prejudice standard set forth in M.R.E. 403, infringed upon Walker's right to a fair trial, and served only to bolster the testimony of the prosecution's witnesses.

On the topic of confrontation rights, the Appellant would ask the court to direct its attention to *Crawford v. Washington*, 124 S. Ct 1354, 1356-59, 541 U.S. 36, 158 L. Ed. 2d 177 (2004). Crawford was charged with and convicted of assault with a deadly weapon for stabbing a man who allegedly tried to rape his wife. 124 S. Ct. at 1356-58. The defendant's wife gave a recorded statement to investigating officers which was introduced at trial against Crawford. *Id.* Crawford was never given the opportunity to cross examine the wife's statement. *Id.* Crawford gave a statement/confession claiming self defense which was consistent with the wife's version. *Id.*

Crawford's wife was "unavailable" and did not testify because of the marital privilege applicable in Washington state which did not extend to the spouse's out of court statements. *Id.* The *Crawford* court ruled that admission of wife's statement violated the Confrontation Clause. *Id.* at 1359. There is no evidence as to whether the phantom witness here in Jackson's case was unavailable or not.

> The Sixth Amendment's Confrontation Clause provides that '[i]n all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him.'
>
> * * *
>
> The text of the Confrontation Clause . . . applies to 'witnesses' against the accused – in other words those who 'bear testimony'. Testimony in turn is typically a solemn declaration or affirmation made for the purpose of establishing or proving some fact.
>
> * * *
>
> An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes casual remark to an acquaintance does not." *Id.* at 1364.

The *Crawford* Court explained that statements given to police officers sworn to or not are clearly testimonial, "the Sixth Amendment is not solely concerned with testimonial hearsay. . ." it would also be concerned with "testimonial statements of a witness who did not appear at trial unless he was unavailable to testify and the defendant had a prior opportunity for cross-examination." *Id.* at1364-65.

The end result of the *Crawford* decision is that, if testimonial hearsay is offered because a witness is unavailable, there must have been a prior opportunity for cross-examination by the accused for the declaration to be admissible. *Id.*

In the Mississippi Supreme Court's decision in *Clark v. State* , 891 So.2d 136, 139-41, (Miss. 2005), the Court applied *Crawford*, and found error in the fact that a police officer was allowed to restate to the jury what witnesses had told him. The *Clark* court did not overrule because the erroneous evidence was cumulative of other "overwhelming" evidence. *Id.* Here in Jackson's case the evidence was not overwhelming. See also, *Hobgood v. State*, 926 So.2d 847, 852(¶ 12) (Miss.2006)["[A] statement is testimonial when it is given to the police or individuals working in connection with the police for the purpose of prosecuting the accused."

So, the allowance of the hearsay evidence against Jackson due to no objection resulted in irreparable prejudice to Jackson including the loss of cross-examination rights and bolstering of the state's case with improper hearsay.

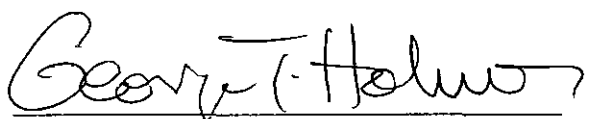
The court is also asked to look at this issue as plain error. *Moore v. State*, 986 So.2d 959, 961(¶8) (Miss. App. 2007), *Bevill v. State*, 669 So.2d 14, 17 (Miss.1996). The fair result would be a new trial. *Havard v. State*, 928 So.2d 771, 789-90 (Miss. 2006).

CONCLUSION

Jeffrey J. Jackson is entitled to have his convictions reversed and rendered or reversed with remand for a new trial, or with remand for resentencing under Count IV for manslaughter.

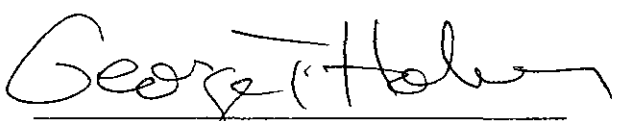
Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Jeffrey J. Jackson, Appellant

By: 
George T. Holmes, Staff Attorney

CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 24th day of September, 2008, mailed a true and correct copy of the above and foregoing Brief Of Appellant to Hon. Kenneth L. Thomas, Circuit Judge, P. O. Box 548, Cleveland MS 38732, and to Hon. Brenda Mitchell , Asst. Dist. Atty., P. O. Box 848, Cleveland MS 38732, and to Hon. Charles Maris, Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid.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