

**COPY**

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**ANTONIO PAGE**

**APPELLANT**

**FILED**

**JUN 11 2007**

**V.**

**NO. 2007-KA-0334-COA**

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STATE OF MISSISSIPPI  
COURT OF APPEALS

**STATE OF MISSISSIPPI**

**APPELLEE**

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**BRIEF OF THE APPELLANT**

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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. Antonio Page, Appellant
3. Honorable Jon Mark Weathers, District Attorney
4. Honorable Robert Helfrich, Circuit Court Judge

This the 11th day of June, 2007.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:

  
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**STATEMENT OF THE CASE**

On October 14, 2005, a Forrest County grand jury indicted Antonio Lavon Page under Section 97-3-19 (1)(A) Mississippi Code Annotated of 1972 as Amended, alleging that he did willfully, feloniously and without the authority of law kill and murder Cynthia Page, with deliberate design to effect the death of Cynthia Page, a human being. He was also indicted as an habitual offender under Section 99-19-83 Mississippi Code Annotated of 1972 as Amended. After a jury trial, Antonio Lavon Page was found guilty of murder and sentenced to life in prison without the benefit or possibility of parole.

**STATEMENT OF THE FACTS**

On August 30, 2005, one day after hurricane Katrina hit, Youlanda Page and her husband Antonio Page (Tony) drove around between 8:00 and 9:00 a.m. to see the damage caused by this hurricane. They went to Tony's grandmother's house, Capatoria Page because the storm left them homeless. They brought beer and liquor to his grandmother's house and Tony drank all that day. T.

111. Later that afternoon, Fred Burns called and told Cynthia Page to tell everyone to get their coolers together so that he could go get ice. Fred and Cynthia lived together for a number of years and had an eleven year old daughter together named Jasmine. Fred came by and picked up the coolers and went looking for ice. T. 111-112. Approximately two or three hours later, Fred came back without any ice. An argument between Fred and Tony began when Tony became aware that Fred came back without any ice. Tony began the argument by accusing Fred of not being trustworthy to bring back ice, because Fred did not take care of his own children. Youlanda believed that Tony started the argument because he was drunk. Tony's grandmother calmed Tony down. Fred decided to leave and as he was leaving, he invited Tony to come down on his end and "start that shit." This is when the argument escalated again. Tony turned around and threw a beer bottle that busted the driver's car window of Fred's car.

Fred Burns testified that Tony was doing a lot of cursing and using vulgar language, referring to his kids as motherfuckers and that when Tony busted out his window, the glass went all over his children and could have hurt his children. He saw the expression on his children's faces along with their screaming and hollering and decided to kill Tony. Fred admits that he drove his truck home and got his pistol. When he arrived back at Tony's grandmother's house, he had the pistol pointed at Tony. When Tony saw the gun he charged at Fred and Fred hit Tony in the head with the pistol causing the gun to fire. Fred hit Tony in the head a second time with the pistol and afterwards Tony ran away. Fred further testified that after Tony ran, because he could not get to Tony, he decided to puncture two of the tires on Tony's van. Afterwards, Fred went over to some of his friends house where he stayed until later in the night and then he went back home. He also testified, that prior to that day he and Tony never had a conflict. T. 99-101.

You land also testified that after Fred hit Tony in the forehead with the gun, Tony "fell out."

He was bleeding and his head was swollen and cut pretty bad. T. 115 and 125. The police came and wanted to have Tony checked out by the ambulance or perhaps the hospital. However, Tony refused. T. 129. After he was arrested, Tony was placed on suicide watch at the jail. T.128

Lucy Page, the mother of Tony and Cynthia Page, testified that when Fred hit her son in the head, Tony began bleeding out of his mouth and nose and it made him not himself. She said that it was after Fred hit Tony in the head that Tony came back and walked up to Cynthia and they both looked at each other and neither said anything, and Tony shot Cynthia in the head. Mrs. Page said that it wasn't her son, just his body walking down the street, but he wasn't himself. T. 140-142.

Vickie Page also testified that right before her brother shot her sister he did not appear to be fully aware of what he was doing based on her observations. T. 135.

Tasha Anderson testified that she and her sister Brittany were walking to her grandmother's friend's house to get some charcoal when they saw Tony standing beside a van talking to Melvin. She says Melvin handed Tony something that looked like a gun and Tony hurried and put it under his shirt. T. 174 Tasha went back home and saw Tony coming up McSwain and turn on East Laurel. She said she lives on McSwain and Mrs. Page lives on East Laurel Street. She also said that she was standing on her porch and she could see a gun in the front of his shirt. After she went back into the house, she heard the gun go off. When she looked around, she saw Tony coming up the street and cut between two houses. He had the gun with him when he went in between the two houses and when he came from in between the houses she did not see the gun. T. 177.

The State also called Brittany Anderson whose testimony was substantially the same as her sister, Tasha. They both were together when they saw Melvin hand Tony a gun. TE. 162. She saw Tony come up the street going to his grandmother's house and the next thing she heard was a gunshot. She then saw Tony come walking back down the street and he had the gun in his hand.

Tony walked through the pathway and when he came out she did not see the gun. She says he was walking, not running and acting as if nothing happen. T. 164-167.

The last witness the State called was Bill Sherrer. Mr. Sherrer testified that he was going to check on a plant he worked at after hurricane Katrina hit. When he stopped at the stop sign, he saw a gentleman come from the left-hand side of this girl, pull out a gun at a very short range and shoot her. T. 181.

## **SUMMARY OF THE ARGUMENT**

### **I. INEFFECTIVE ASSISTANCE OF COUNSEL**

Tony Page contends that he was denied his Sixth Amendment right to the effective assistance of counsel during his murder trial. He asserts that his counsel had a duty to explore and investigate the circumstances leading to his killing of his sister and to prepare a competent defense for him. Tony Page received at least two blows to his head and briefly lost consciousness before killing his sister, thereby placing a duty on his counsel to investigate any medical reason that could have been raised that would have placed reasonable doubt of Tony Page's being found guilty of deliberate design or depraved heart murder. At the very least, counsel had a duty to seek a mental evaluation in order to determine Tony Page's mental state at the time of the crime. Tony Page asserts that, "*a blow to the head can cause brain injuries. The damage produced by brain injuries varies widely. Symptoms may be headache, confusion, and loss of memory or consciousness. Loss of consciousness following a head injury requires immediate medical attention. Other symptoms may include speech difficulties, bleeding from the ears or nose, paralysis, and coma. If one suffers a concussion because of a head injury the symptoms may include short-term loss of consciousness; vomiting; memory loss; behavioral changes; dizziness; nausea; headache. If the brain injury is a traumatic injury some symptoms can include loss of consciousness; drowsiness;*



*confusion; disorientation and doctors look for changes in neurologic examination, particularly impaired mental status and orientation to time, place or identity; differing responses of the pupils to light; damaged areas of the brain as shown by CT scan.”<sup>1</sup>*

The touchstone for testing a claim of ineffective assistance of counsel must be “whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Irby v. State, 893 So.2d 1042, 1048 (Miss. 2004) (citing Strickland v. Washington, 466 U.S. 668, (1984)). The standard of review for a claim of ineffective assistance involves a two-prong inquiry: (1) The defendant must demonstrate that his counsel’s performance was deficient and (2) the deficiency prejudiced the defense of the case. Irby v. State, 893 So.2d at 1042 (citing Carr v. State, 873 So. 2d 991, 1003 (Miss. 2004); Walker v. State, 863 So.2d 1, 12 (Miss. 2003) (citing Strickland, 466 U.S. at 687, 2064 (1984)). Although it need not be outcome determinative in the strict sense, Ferguson v. State, 507 So. 2d 94 (Miss. 1987) (citing Strickland, 466 U.S. at 687 (1984)), it must be grave enough to “undermine confidence” in the reliability of the whole proceeding. 466 U.S. at 694. This requires that the defendant show that his attorney’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” Walker, 863 So.2d at 12 (citing Strickland, 466 U.S. at 687).

To establish deficient performance, a defendant must show that his attorney’s representation fell below an objective standard of reasonableness. Ross v. State, 954 So.2d 968, 1003 (Miss. 2007) (citing Davis v. State, 897 So.2d 960, 967 (Miss. 2004) (citing Williams v. Taylor, 529 U.S. 362 (2000)). To establish prejudice, a defendant must show that there is a reasonable probability that, but

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<sup>1</sup> America’s #1 Medical Authority. Johns Hopkins Family Health Book 479-481 ( Michael J. Klag, et al. eds., Harper Collins 1999).

for counsel's unprofessional errors, the result of the trial would have been different. See Ross, 954 So.2d at 1003. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. at 1004.

From the testimony offered in court the head injury Tony Page received appeared to be extremely serious. The following testimony was offered pertaining to Tony Page's head injury.

**Fred Burns testimony on Pages 99-100.**

A. At that point – at that point I decided I was going to kill Tony, so I drove my truck home, and I went in and I got my pistol, and I went back over to his grandmother's house, and I got out and he was standing out in the yard. When I got out of my truck, and I pointed my pistol at him and my daughter hollered. She said, Don't shoot him, Daddy. Don't shoot him. And I hesitated. And when I hesitated, he charged at me. And when he charged at me, before he got to me I took the gun and I hit him in the head with it and gun went off.

Q. Did the bullet strike him or did the gun strike him?

A. The gun struck him not the bullet because he backed up and he said, I'm not shot and I'm not dead, and he charged at me again. And I hit him in the head with the gun the second time. He ran around the van.

**Youlanda Page testimony on Pages 115-116.**

Q. Describe what you saw between Fred and Antonio.

A. When he was running, he had the gun. Obviously, he must have had it up because it grazed him instead of shooting him, and **Tony fell out.**

Q. He struck Tony with the pistol?

A. Right.

Q. Did the gun go off when that happened?

A. Yes.

Q. **Did Tony jump up and say anything?**

A. **No.**

Q. Okay. We have him struck with a pistol one time. What, if anything, happens after that?

A. Sir?

Q. After Tony is struck with the pistol one time, what happens next?

A. Fred took the gun, the pistol, and started hitting my van with it.

Q. I see. Did it go off again?

A. Yes.

Q. Was there a point in time that Tony exited the area?

A. **When the gun went off the second time, Tony got up off the ground and took off running behind the house, and Fred ran behind him and shot at him again.**

#### **Pages 124-125**

Q. Fred went down and got a gun; didn't he?

A. Yes.

Q. Came back down to the house?

A. Yes.

Q. He hit Tony in the head twice with it?

A. Once or twice.

Q. The gun went off twice?

A. Yeah. The gun went off three times.

Q. Then he chased Tony in the yard and tried to shoot him and kill him; didn't he?

A. Right.

Q. Now, Tony retreated to what was left of your home, right?

A. Uh-huh (affirmative response).

- Q. Did the police come?
- A. Yes.
- Q. Okay. You go around there to y'all's house, correct?
- A. Right.
- Q. Was Tony bleeding?
- A. Yes.
- Q. Was his head cut pretty bad?
- A. Yes.
- Q. Was it swollen?
- A. Yeah.
- Q. Specially, where was he hit at?
- A. Right here. (Indicating)
- Q. On the forehead. And it was obvious he was injured.
- A. Right.

**Skip to page 126.**

- Q. Before he shot Cynthia, based on your observations of him, do you believe he was aware of what he was doing?
- A. No.
- Q. Was this out of the ordinary for Tony?
- A. Right.
- Q. Do you think he planned to shoot his sister?
- A. No.

**Skip to page 129.**

Q. Ma'am, you told us that Tony had been drinking all day?

A. Right.

Q. And I believe when counsel asked you about the police, the police actually wanted to have him checked out by the ambulance or, perhaps, the hospital; is that correct?

A. With the wound.

Q. Yeah, with the wound?

A. Uh-huh (affirmative response).

**Lucy Page testimony on Page 140.**

Q. Did anybody say a word to him?

A. Huh-uh (negative response).

Q. Did anything happen to your daughter Cynthia?

A. He shot her.

Q. When you say he shot her, who did you see shoot her?

A. My son.

Q. Had you seen her say anything bad to him before that?

A. Huh-uh (negative response). He didn't say nothing. She didn't say nothing. She just looked at him. He looked at her.

Mr. Saucier: Thank you, ma'am.

The Witness: Can I say something else?

Mr. Saucier: I'm sorry. Did I cut you off? Go ahead.

The Witness: Yeah. But it wasn't my son. It was my son's body walking down the street, but he wasn't at himself. That's what it seemed to me.

**Skip to page 141.**

Q. Ms. Page, on the day this happened, you testified on direct that it was your son's body but it wasn't your son. What did you mean by that?

A. He just wasn't himself.

Q. Wasn't himself? Was he acting out of the ordinary?

A. When he got hit in the head – when Fred hit him in the head with the gun, he took off running beside my momma's house where all them trees done fell down at. When Fred hit him aside the head, the gun went off. The children was out there. My daughter running behind, don't shoot my brother. That's all I know.

**Skip to page 142**

### **REDIRECT EXAMINATION**

Q. When you say he wasn't acting normal, you actually didn't see Tony after he got hit in the head did you?

A. When he got hit in the head he was bleeding out of the mouth and the nose. And after that he took off and I don't know nothing else.

**Vicki Page testimony on page 135.**

Q. You do remember, though, your brother's conduct on that day. It was out of the normal; was it not?

A. Yes.

Q. Do you remember right before your sister got shot, did you observe your brother?

A. Yes.

Q. Did he appear to be fully aware of what he was doing based on your observations?

A. No.

In the present case, there is no evidence in the record of any efforts to present any type of defense for Tony Page. T. 187. However, the evidence in the record clearly raises a question as to Tony Page's medical/mental/psychological condition at the time he shot Cynthia. The testimony of

Youlanda Page was that her husband temporarily lost consciousness when he was struck in the head with the pistol. She clearly said that he “fell out” after being stuck with the pistol. She said that Fred then took the gun and started hitting her van, and only after the gun was fired a second time did Tony get up off the ground and run. T. 115-116. She further said that his head was cut pretty bad, and that he was bleeding from the head and his head was swollen. T.125. Fred testified that he hit Tony twice in the head. Mrs. Page says once her son was hit in the head he was bleeding from his head, nose and his mouth. After his head injury, he shot Cynthia. However, she says it wasn’t her son. It was her son’s body walking down the street, but he wasn’t himself. T. 141-142. Vicki Page stated that her brother did not appear to be fully aware of what he was doing when he shot their sister. T. 135. Finally, the police must have believed that the injury to Tony’s head was extremely serious because once they arrived they offered to give him medical assistance either by calling an ambulance or taking him to a hospital. T. 129.

Here, the record establishes, along with the information obtained from John Hopkins Family Health Book, that there was a strong possibility of an intervening medical/mental/psychological cause, other than voluntary intoxication, for Tony Page killing his sister. The jury was instructed that voluntary intoxication was not a defense to Murder nor Manslaughter. *See Jury Instruction S-3*. However, there was not any evidence presented at trial concerning Tony Page’s medical/mental/psychological condition, due to the blow to his forehead, that would have required the jury to be instructed if they found he suffered mental illness, or some other defect from the blow to his head temporarily causing him to be unable to appreciate the criminality of his conduct or conform his conduct to the requirements of the law they should find him not guilty. Tony Page argues his attorney was ineffective for failing to investigate and retain an expert to testify on his behalf during his trial.

In Ross v. State, 954 So.2d 968 (Miss. 2007), the Court found that given the severity of the charge against Ross, defense counsel's failure to investigate Ross' psychological problems and his disciplinary record in prison substantially undermined the Court's faith in Ross' sentence, and therefore constituted ineffective assistance of counsel for the sentencing phase of the trial. Id., (citing Davis v. State, 897 So.2d 960, 967 (Miss. 2004), (State v. Tokman, 564 So.2d at 1339, 1343 (Miss. 1990)).

In Williams v. Taylor, 529 U.S. 362, (2000), the United States Supreme Court held that Petitioner was denied his constitutionally guaranteed right to effective assistance of counsel when counsel failed to investigate and present substantial mitigating evidence during sentencing phase of capital murder trial. Counsel failed to prepare for sentencing until a week beforehand. Counsel failed to uncover extensive records graphically describing Williams' nightmarish childhood, to introduce available evidence that Williams was "borderline mentally retarded" and did not advance beyond sixth grade, to seek prison records recording Williams' commendation for helping people to crack a prison drug ring and for returning a guard's missing wallet, and to discover the testimony of prison officials who described Williams as among the inmates least likely to act violently, dangerously, or provocatively, and of a prison minister that Williams seemed to thrive in a more regimented environment. The Court stated that the failure to introduce the comparatively voluminous amount of favorable evidence was not justified by a tactical decision and clearly demonstrates that counsel did not fulfill their ethical obligation to conduct a thorough investigation of Williams' background. Moreover, the Court found that counsel's unprofessional service prejudiced Williams within Strickland's meaning.

While courts must defer to lawyers' judgments and strategies, "at a minimum, counsel has a duty to interview potential witnesses and to make independent investigation of the facts and



circumstances of the case.” See Ross, 954 So.2d at 1005, (citing Ferguson v. State, 507 So.2d 94, 96, Miss. 1987). Under this standard, counsel may be deemed ineffective for relying almost exclusively on material furnished by the State during discovery and conducting no independent investigation. See Ferguson, 507 So.2d at 96. While counsel is not required to exhaust every conceivable avenue of investigation, he or she must at least conduct sufficient investigation to make an informed evaluation about potential defenses. See Ross, 954 So.2d at 1005, (citing State v. Tokman, 564 So. 2d at 1343 Miss. 1990). Under Strickland, counsel has a duty “to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” See Ross, 954 So.2d at 1005, (citing Strickland, 466 U.S. at 691).

Defense counsel’s failure to investigate and retain an expert witness cannot be considered reasonable given the testimony of the witnesses during trial. There was no evidence of a dispute between Tony and Cynthia. Furthermore, based on family members’ testimony, Tony suffered short-term loss of consciousness, bled from the nose and mouth, behaved abnormally, all of which could have possibly indicated an impaired mental status.

## CONCLUSION

Defense counsel's failure to investigate and retain an expert cannot be considered reasonable given the testimony of the witnesses concerning the blows Tony Page received to his head and the description of his behavior and injuries afterwards. This failure falls below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's failure to obtain the assistance of an expert the results of the trial would have been different. The failure of defense counsel to investigate the mental/medical/psychological problems Tony Page suffered undermines the reliability of his having had a fair trial, and therefore constitutes ineffective assistance of counsel.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

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## CERTIFICATE OF SERVICE

I, Brenda Jackson Patterson, Counsel for Antonio Page, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

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Honorable Jon Mark Weathers  
District Attorney, District 12  
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This the 11th day of June, 2007.

  
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