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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CHRISTOPHER O'NEIL MCCUNE — APPELLANT

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SUPREME COURT
COURT OF APPEALS

VS. — NO. 2007-KA-0923-SCT

STATE OF MISSISSIPPI — APPELLEE

# BRIEF FOR THE APPELLEE

## APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**CHRISTOPHER O'NEIL MCCUNE** **APPELLANT**

**VS.** **NO. 2007-KA-0923-SCT**

**STATE OF MISSISSIPPI** **APPELLEE**

# BRIEF FOR THE APPELLEE

## STATEMENT OF THE CASE

This is an appeal against a judgment of the Circuit Court of Newton County, Mississippi, in which the Appellant, Christopher O'Neil McCune, was convicted by a jury and sentenced for the felony crimes of **MURDER**, Miss. Code Ann. § 97-3-19(1)(a) (1972), and **AGGRAVATED ASSAULT**, Miss. Code Ann. § 97-3-7(2)(b) (1972).

## STATEMENT OF FACTS

On or about the 13th day of August, 2006, the Appellant, Christopher O'Neil McCune (McCune), did willfully, feloniously, without authority of law and with deliberate design to effect the death of the person killed, or of any human being, did kill and **MURDER** one James Antwan Boulton (J. J.), a human being, contrary to and in violation of Miss. Code Ann. § 97-3-19(1)(a) (1972). ( R. E. 3)

On or about the 13th day of August, 2006, Appellant McCune, did willfully, feloniously, purposely and knowingly attempt to cause bodily injury to Cathy Hardy, a human being, with a deadly

weapon, to-wit: a firearm, by firing said firearm at Cathy Hardy, and said firearm being means likely to produce death or serious bodily harm, contrary to and in violation of Miss. Code Ann. § 97-3-7(2)(b) (1972), **AGGRAVATED ASSAULT**. ( R. E. 3).

The direct eye witness testimony of the **AGGRAVATED ASSAULT** victim, Cathy Hardy, is complete with the facts as they were that night. Below is the testimony of victim Cathy Hardy.

A. Christopher McCune was standing on the driver's side and Kafien was on the passenger's side.
A. J.J. rolled the window down and Chris asked him, why the F did he stop the MF truck. And J.J. told him, "Man, I was just trying to see what was up."
Q. You used the words "F" and "MF." Did he say the real words?
A. Yes, sir.
Q. And J.J. replied, Just trying to see what was going on.
A. Yes, sir.
Q. What happened after that or what was said?
A. J.J. told him, "Man, I was just trying to see what was up." And Chris asked him again why did he stop the F'ing truck. And J.J. told him, "Man, I was just trying to see what was up."
And Chris replied, "You done caused enough shit on these streets."
Q. Let me stop you right there, Cathy. Before this day, do you know whether or not they knew each other, J.J. and Chris?
A. We all went to school together, so I know they knew each other.
Q. When he said that about J.J. causing stuff on the streets in Newton, do you know what he meant by that?
A. No, sir.
Q. What happened after he said that?
A. J.J. replied to him, "Man, I wouldn't do you like that," and he replied to Kafien, "And, man, you know I wouldn't do you like that."
Q. Chris McCune had a gun.
A. Yes, sir.
Q. And then what happened?
A. After J.J. told Kafien, "And, man, you know I wouldn't do you like that," the gun just started going off.
Q. How many times?
A. I don't know.
Q. More than once?
A. Yes, sir.
Q. Several times?
A. More than three, four, five.
Q. A lot of shots?
A. Uh-huh.

Q. Did J.J. have a gun?
A. No, sir.
Q. Did you get hit by any of them?
A. No, sir.
Q. At some point during all of this, did you see that gun again?
A. Yes, sir.
Q. Tell us about that.
A. After the shots had stopped firing, I noticed J.J. had took his left hand and took his shirt and brushed his shirt. That's when I noticed he had a bullet hole in his shirt. I leaned back up. I leaned up, you know, to look, and I seen Chris with the gun in the window.
Q. Where was it pointing?
A. At my head, aimed toward it like this.
Q. Did the gun go off again?
A. Yes, sir.
Q. Tell us about that.
A. When I seen the gun, I just leaned back real fast. And the gun fired and something just told me to get out and run and I just ran.
Q. When the gun fired that time, did you feel anything?
A. My face was burning real bad.
Q. Where did the bullet go?
A. I don't know.
Q. But you leaned back and the gun went off?
A. Yes, sir.
Q. When it went off, was it still pointed where it was when you said it was pointed at your head?
A. I didn't even look. I just started -- I just opened the door and started running.
Q. When you got out of the car, did you look around?
A. Yes, sir. When I was running, I turned back to look.
Q. Who did you see?
A. I seen Chris getting back in the truck, him and Kafien.
Q. As you were running, did you hear anybody say anything?
A. Yes, sir.
Q. Who was it that you heard?
A. I heard Chris, "Bitch, you better run or I'll kill you, too." (Tr. 112 - 130).

For the felony crime of **MURDER**, Miss. Code Ann. § 97-3-19(1)(a) (1972), Appellant McCune was sentenced to serve LIFE imprisonment with the Mississippi Department of Corrections.

For the felony crime of **AGGRAVATED ASSAULT**, Miss. Code Ann. § 97-3-7(2)(b) (1972), Appellant McCune was sentenced to serve Twenty - Five (25) years imprisonment with the Mississippi Department of Corrections.

## SUMMARY OF THE ARGUMENT

### I.

### THE TRIAL COURT DID NOT ERR IN ITS REFUSAL TO CHANGE VENUE.

Johnson v. State, 476 So.2d 1195, 1223 (Miss.1985) held that where extensive media coverage is involved in cases such as serious crimes against members of prominent, influential families, serious crimes against public officials, multiple crimes, and crimes committed by black person upon white victim, it is incumbent that trial be had in as dispassionate an environment as possible and judicial efficiency and economy would be better served by change of venue prior to trial, rather than by trial, reversal and retrial.

### II.

### THE JURY INSTRUCTIONS WERE PROPER.

The Mississippi Supreme Court held in Smith v. State, 835 So.2d 927, 934 (Miss. 2002) that when considering a challenge to a jury instruction on appeal, the Court does not review jury instructions in isolation; rather, it reads them as a whole to determine if the jury was properly instructed. Dobbs v. State, 950 So.2d 1029 (Miss. 2006) holds that when read as a whole, if the jury instructions fairly announce the law of the case and create no injustice, then no reversible error will be found.

Smith v. State, 907 So.2d 292, 300 (Miss.,2005) holds that a jury instruction on a lesser-included offense is to be given only when a defendant points to evidence in the record from which a jury could reasonably find him not guilty of the crime with which he was charged and at the same time find him guilty of the lesser included offense.

## THE ARGUMENT

### PROPOSITION I.

### THE TRIAL COURT DID NOT ERR IN ITS REFUSAL TO CHANGE VENUE.

Johnson v. State, 476 So.2d 1195, 1223 (Miss.1985) held that where extensive media coverage is involved in cases such as serious crimes against members of prominent, influential families, serious crimes against public officials, multiple crimes, and crimes committed by black person upon white victim, it is incumbent that trial be had in as dispassionate an environment as possible and judicial efficiency and economy would be better served by change of venue prior to trial, rather than by trial, reversal and retrial. None of the aforementioned elements occurred in this instance.

The rational of the learned trial judge is properly on point.

> BY THE COURT: The State, having the burden of proof in this case to withstand the suggestion of an impartial trial made by the Defendant, has called six witnesses to testify, six resident citizens of Newton County. The first witness who testified was Bob Boykin, who lives in the northwest part of this county, who testified that daily he would talk or would see ten to twelve persons. One time he saw a newscast on television, no newspaper accounts. There had been no discussion of the case, no ill will, no widespread publicity. He was of the opinion that the Defendant could receive a fair trial. He further stated that he did not know the victim or the Defendant.
>
> Brother Richard Benson from Union, the north part of the county, testified that he was a minister of the Church of Christ in Union; that he would see six or twelve persons daily and would see more, of course on Sunday. He never heard of the case, did not know the victims. He was of the opinion that the Defendant could receive a fair trial. He did not know the victim or the Defendant.
>
> Mike Spence, who lives in Decatur, the central part of the county, who is a coach at Newton County, he attends church here in Decatur. He would see some, what, like 100 persons daily. He saw a little bit of this on television, perhaps in The Newton Record but nothing lately. He knew of nothing prejudicial or inflammatory about the reports that he had seen. He had heard of no talk of being prejudiced or biased in this case. There was not a prejudicial atmosphere here in Newton County, no ill will. He felt that the Defendant could receive a fair trial.
>
> Reuben Hoskin is an election commissioner of this county who is president of the school board. He would see 25 to 50 persons daily. He did not know the Defendant in this case. He did know the victim, Boulton, in the case. He saw the newscast on TV but nothing lately. He is of the opinion there was nothing prejudicial. There was no prejudgment of guilt, no ill will. He was also of the opinion that the Defendant could

receive a fair trial.

Jack Winstead lives south and west of Decatur, more west of Newton. He attends church, however, in Decatur, the central part of the county. He would see ten to twelve persons a day. He read an account of this matter in The Newton Record, He did not see it on television. He has heard no discussion of the matter. He did not know the Defendant in this case, nor did he know the victim in this case. He has heard no ill will, prejudgment. He has the opinion that the Defendant could receive a fair trial.

Ed McGowan lives in Lawrence, which is west of the city of Newton where this incident is said to have occurred, the western part of this county, southwest. Mr. McGowan would see 20 or 30 persons daily. He knew about the case. He saw it on TV. He read about it in the newspaper. He was of the opinion that it was not prejudicial coverage; that there was only coverage of reporting the incident, no prejudgment of guilt, no discussion of guilt, no ill will. He was of the opinion that the Defendant could receive a fair trial. He knew the victim of this case. He did not know the Defendant, but he has seen him around locally.

Ms. Betty Buckley, the mother of this Defendant, lives in Newton. She saw the news items in the paper. She saw it on the television. She was of the opinion that her son could not receive a fair trial; there was widespread discussion of the case. She worked in the cafeteria at East Central Junior college and saw persons daily. Of course, she knew her son. She knew the Boultons. She is of the opinion that the Boulton is a prominent family, more so perhaps than the McCune or the Buckley family. She was of the opinion that the people looked up to the Boultons.

Ms. Annie Minners, who is the aunt of this Defendant and also the mother of a Defendant who has been indicted as a result of this incident, is from Newton. She is of the opinion that no fair trial could be had in this county because of the media attention and because of the public opinion. She says as a result of the public opinion, she and her families have lost the respect of the people and she has lost friendship with people because of it.

Those are the facts that are before the Court. The Court only has one item before it, and I would like to see that, please, the exhibit, please. The Court only has before it one exhibit, and that is an article that was presented in The Newton Record. This Court will note that in addition to The Newton Record, there is another paper of this county, The Union Appeal, which is published in the north part of this county, and no exhibit of The Union Appeal has been filed in this case.

Those are the facts that appear before me. Therefore, this Court now is required to rule on the law. In doing so, I refer to the case law that has been decided in Mississippi regarding a motion to change a venue when there is a motion and affidavit that a defendant could not receive a fair trial. I refer to Johnson v. State, a 1987 case that was reported at 511 So. 2d 1350. That is a case that this Judge tried, which the Supreme Court ruled that there must be a totality of the circumstances for a motion for change of venue -- that the Court would consider the totality of the circumstances of the case.

Further, this Court would refer to another case, that is Chambers v. State, reported at 800 So. 2d, page 1178, a 2001 case where this Mississippi Supreme Court case held that the trial judge must make an informed decision based on the evidence

presented at the venue hearing, coupled with his reasoned application of his sense of the community. Additionally, the judge must be aware of the impact of publicity on the attitudes of the community.

Also, Gavin v. State, reported at -- I'm sorry, I do not have the citation of this, but it is a 2001 case. The Mississippi Supreme Court held that the trial judge looks at two factors when evaluating the request for a change of venue: first, the level of adverse publicity, both in extent of coverage and its inflammatory nature; and second is the extent and the effect of the publicity had upon the venired persons in the case.

Now, a controlling -- a very prominent case occurring in Mississippi regarding the change of venue occurred just locally really over here in Lauderdale County in the Fisher case. This Court, being from Union, at the time of that case saw multiple, multiple, multiple news accounts regarding the case. There were 60 publications in that case over a ten-month period. And the Mississippi Supreme Court in that case held that the pretrial media coverage through radio, newspaper, and television was extensive and unfavorable to the Defendant. In that case they felt that the extent -- the nature of the coverage as well as the saturation of the coverage prejudged the guilt of the defendant; therefore, he could not receive a fair trial.

In Johnson v. State, a 1985 case reported at 476 So. 2d at page 1195, the defendant was charged with capital murder after robbing a convenience store and raping the clerk. There were 15 persons who testified regarding the media coverage, the extradition problems of having the defendant returned from out of state back to Mississippi, the nature of the crime and the character of the crime and concluded that the defendant could not receive a fair trial. Sixty-four newspaper articles were published on this crime and numerous radio reports, broadcast as many as six times a day. Now, additionally, this was a black on white crime. Now, the Court said the following reasons, following factors that the Court should consider:

> No. 1, whether the case is a capital case -- and, of course, the case before this Court is a capital case, and a heightened standard of review is employed on appeal in a case such as this.
>
> No. 2, that there are crowds threatening violence toward the accused. Well, there's nothing in this evidence that I've heard this morning, and the Supreme Court case that I've just announced to you held that my decision must be based on the testimony I hear during this motion during change of venue. So I have heard nothing about the crowds threatening violence.
>
> Extensive media exposure -- well, the only evidence I have other than the testimony of various witnesses was that there was only one account. And, of course, this Court knows that there were more accounts published in The Newton Record than the one account. I know that. But as far as this hearing is concerned, I only know of one; and reading that one report, there's no evidence to me that that report would cause a fair and impartial juror to prejudge the guilt of this Defendant.
>
> Four, serious crimes against members of prominent, influential families or serious crimes against public officials and serious crimes

such as mass or serial murders. Well, that's nonexistent in this case, other than the testimony of a mother and an aunt who say that the victim's family was more prominent than the Defendant himself. Other than that, I've heard testimony from witnesses who did not know either of the parties, the Defendant or the victim, and they did not testify that one was more prominent than the others.

Crimes committed by a black defendant on a white victim -- that's not the situation here in this case -- and other matters.

Pretrial publicity can be so damaging and the presumption so great that no voir dire can rebut it. However, this Supreme Court of the State of Mississippi on numerous cases has looked to the voir dire examination. There was one case where all but five -- five had stated that they had a fixed opinion as to guilt in the voir dire examination and 15 others stated that they could be fair and impartial, and the Court noted that the five who stated that they had a prefixed opinion of the guilt were stricken from the venire by the Judge for cause, which is available in the trial of this case. The Supreme Court in numerous Mississippi cases has on numerous times stated that during voir dire, if jurors can state that they can be fair and impartial, then that's the linchpin of a fair and impartial trial.

Now, referring back to the case I've just outlined, first, is there a level of adverse publicity. Well, that's not true in this case considering the evidence that I've heard. The extent of the coverage and its inflammatory nature, it's not inflammatory in my opinion; it's reporting the incident itself. The extent and effect the publicity had upon the venired persons in the case, well, that's a matter, of course, I would determine certainly in voir dire examination.

So, considering all the totality of the case, the evidence of the case, the publicity of the case, the testimony that I've heard, it's the opinion of this Court that your motion for change of venue should be denied. (Tr. 53 - 61).

Evidentiary rulings are within the broad discretion of the trial court and will not be reversed absent an abuse of discretion. Coleman v. State, 697 So. 2d 777, 784 (Miss. 1997).

The State would submit that this issue brought by the Appellant is therefore lacking in merit.

## PROPOSITION II.

## THE JURY INSTRUCTIONS WERE PROPER.

Appellant's counsel wrongly contends that proposed jury instructions, D - 1, D - 5, D - 8, and D - 11, should have been issued to jury. (Appellant Brief 7 - 9).

Smith v. State, 907 So.2d 292, 300 (Miss.,2005) holds that a jury instruction on a lesser-included offense is to be given only when a defendant points to evidence in the record from which

a jury could reasonably find him not guilty of the crime with which he was charged and at the same time find him guilty of the lesser included offense.

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Brassfield v. State, 905 So.2d 754 (Miss. App. 2004) holds that instructions should clearly inform jury of elements of crimes and State's burden of proof, and there was no risk that jury was confused about elements of crime necessary to convict. It is the State's contention that the jury was properly instructed.

The Court does not review jury instructions in isolation; rather, it reads them as a whole to determine if the jury was properly instructed. Smith v. State, 835 So.2d 927, 934 (Miss. 2002), Kelly v. State, 493 So.2d 356, 359 (Miss. 1986) and Norman v. State, 385 So.2d 1298, 1303 (Miss. 1980). Reading the jury instructions as a whole, all elements to the crime of capital murder are present and properly stated.

The State counters that the jury heard all of the evidence, exhibits and testimony, and the members of the jury believed the evidence produced by the prosecution. The jury verdict should stand.

The State would submit that this issue brought by the Appellant is therefore lacking in merit.

## CONCLUSION

Based upon the arguments presented herein as supported by the record on appeal the State would ask this reviewing court to affirm the jury verdict and sentence of the trial court.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Deshun T. Martin, 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 4th day of January, 2007.

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