IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2007-KA-01048-COA

WILLIAM NELSON, III
a/k/a Billy Nelson — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE



# BRIEF OF 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. William Nelson, III

THIS 5th day of November 2007.

George T. Holmes

GEORGE T. HOLMES
Mississippi Office of Indigent Appeals
Counsel for William Nelson, III

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## STATEMENT OF THE CASE

This appeal proceeds from a capital murder conviction against William Nelson, III, out of the Circuit Court of Jackson County, Mississippi, following a trial held May 14-16, 2007, Honorable Robert P. Krebs Circuit Judge, presiding. Nelson was sentenced to life without parole and is presently incarcerated with the Mississippi Department of Corrections.

## FACTS

The victim in this case was Willie Martin Broughton. [T. 182]. At the time of his death Broughton was a drug dealer in Jackson County. [T 206]. He was shot and killed December 8, 2005 in a house where he lived with several family members and his girlfriend Keisha Bolton. [T. 193-96, 201, Ex. 29 ].

Keisha Bolton, William Nelson, III, the appellant here, and a third person named Earnest Covan, had been involved in an ongoing arrangement where Bolton was surreptitiously stealing drugs from Broughton and sharing them with Nelson and Covan. [Ex. 29, pp. 10, 39] On the night of the shooting, Bolton called Nelson and signaled him that there were some stolen drugs ready to be retrieved. [Ex. 29, p. 3].

When Nelson arrived at the house, Covan, who was already there, gave Nelson a sawed off shotgun, because of a concern that Broughton had learned of the thievery. [Ex. 29 pp. 11, 21-23, 41] Nelson tucked the gun in his pants and when he met Broughton in the hall, nothing was said by Broughton about drugs being stolen, instead Broughton complained to Nelson about not shutting the door. [T. 200-01; Ex. 29 pp 4-8, 30]. Some brief words were exchanged, the gun was displayed, Broughton said "shoot me" and Nelson cocked the sawed off shotgun and it discharged into Broughton's abdomen. *Id.* Nelson said the gun discharged accidently. [Ex. 29 pp. 2, 4-8, 17, 29-36].

When officers arrived, Broughton was barely alive and incoherent. [T. 182-83]. One family member said that Nelson was seen picking up a pill bottle from the floor near the fallen victim; but, later said that that is what she imagined. [T.222, 227-28]. Nelson denied retrieving anything from Broughton. [Ex. 29. pp 24-25, 37]. Nelson said that from the way Broughton was acting, Broughton never knew any drugs were being stolen. [Ex. 29, p. 30].

Nelson's defense was that of accidental shooting and that the shooting did not

occur during the commission of any underlying robbery. Theft was admitted, but it was denied that all of the elements of robbery were proven.

## SUMMARY OF THE ARGUMENT

The state did not prove robbery as an underlying offense. The court allowed prejudicial character evidence. The defendant was not allowed to present competent expert testimony which prevented him from presenting a defense; and the jury was not properly instructed about accidental homicide.

## ARGUMENT

**ISSUE NO. 1: WHETHER THE STATE PROVED ALL OF THE ELEMENTS OF CAPITAL MURDER?**

In reviewing a motion for directed verdict which challenges the sufficiency of evidence, "the Court looks to all the evidence before the jurors to determine whether a reasonable, hypothetical juror could find, beyond a reasonable doubt, that the defendant is guilty." *Nichols v. State* 822 So.2d 984, 989 (Miss. App. 2002). In reviewing a motion for *JNOV*, to determine whether trial evidence is sufficient to sustain a conviction "the critical inquiry is whether the evidence shows 'beyond a reasonable doubt that [the] accused committed the act charged, and that he did so under such circumstances that every element of the offense existed.'" *Bush v. State*, 895 So.2d 836, 843(¶ 16) (Miss. 2005) (quoting *Carr v. State*, 208 So.2d 886, 889 (Miss.1968)). The deciding factor is

"whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* If the minimum conclusion is reached that, "reasonable fair-minded men in the exercise of impartial judgment might reach different conclusions on every element of the offense," the evidence is sufficient. *Id.*

The indictment in this case charged capital murder with the underlying offense of robbery. [R.11 ].[1] The appellant's position under this issue is that there was no robbery occurring when Broughton was shot and killed, and, therefore, no capital murder. Based on the testimony and evidence, the admitted theft of drugs was not from the person and presence of the victim and any theft of personal property was not the product of violence nor force, nor threat nor fear of the same.

There are three elements of robbery: "(1) felonious intent; (2) force or putting in fear as a means of effectuating the intent; and (3) by that means, taking and carrying away the personal property of another from the person or in his presence."[2] *Crocker v. State*, 272 So.2d 664, 665 (Miss.1973) See also *Garner v. State,* 944 So.2d 934, 939-40 (Miss.

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Miss. Code Ann. §97-3-19(2)(e) (Rev. 2004): The killing of a human being without the authority of law by any means or in any manner shall be capital murder ... [w]hen done with or without any design to effect death, by any person engaged in the commission of the crime of ... robbery ... or in any attempt to commit such felon[y]..."

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Miss. Code Ann. §97-3-73 (Rev.2006): Every person who shall feloniously take the personal property of another, in his presence or from his person and against his will, by violence to his person or by putting such person in fear of some immediate injury to his person, shall be guilty of robbery.

App. 2006). If a deadly weapon is used or displayed to effect the robbery, the offense becomes armed robbery under Miss. Code Ann. §97-3-79 (Rev.2006).

The shooting of the victim in this case occurred when the victim confronted Nelson about the door being left open. [T. 200-01; Ex. 29 pp. 4-8,11, 21-22, 17, 29-35]. When Broughton complained, Nelson showed him the gun, and Broughton said "shoot me". *Id.* Nelson cocked the gun and it discharged. *Id.*

The reasoning in *Clayton v. State*, 759 So.2d 1169, 1172 (Miss.1999) is informative on this issue and persuasive. In *Clayton* a lady's purse was snatched in the parking lot of the Piggly-Wiggly in Winona. The perpetrator came up from behind the victim so that the victim was never put in fear. Clayton was indicted, and convicted of robbery. On appeal, Clayton argued that the state did not prove a causal connection between fear and the taking of the victim's property. The indictment did not charge that the taking was by force. *Id.*

The Court reversed Clayton's conviction recognizing that, "the State must have shown that Clayton took some action which was intended by him to intimidate or cause fear in the victim...," citing *Register v. State*, 232 Miss. 128, 132-33, 97 So.2d 919, 921-22 (1957). In *Register*, the court held

> If force is relied on in proof of the charge, it must be the force by which another is deprived of, and the offender gains, the possession. If putting in fear is relied on, it must be the fear under duress of which the possession is parted with. The taking, as it has been expressed, must be the result of the force or fear; and force or fear which is a consequence, and not the means, of the taking, will not suffice. 'The fear of physical ill must come before the

> relinquishment of the property to the thief, and not after; else the offense is not robbery.' 2 Bish.Crim. Law, § 1175. 'It may also be observed,' says Archibold, 'with respect to the taking, that it must not, as it should seem, precede the violence or putting in fear; or, **rather, that a subsequent violence or putting in fear will not make a precedent taking, effected clandestinely, or without either violence or putting in fear, amount to robbery**.' 2 Archb. Crim. Pr. & Pl. p. 1289; also 2 Russ. Crimes,108; *Rex v. Harman*, 1 Hale, P.C. 534. 'It must appear,' says Roscoe, 'that the property was taken while the party was under the influence of the fear; for **if the property be taken first, and the menaces or threats inducing the fear be used afterwards, it is not robbery**.' Rosc.Crim. Ev. p. 924. And Mr. Wharton recognizes the same doctrine. 1 Whart. Crim. Law, § 850. [Emphasis added].

In *Clayton*, the victim did not know that she was being robbed until her purse was snatched. Like the victim in *Clayton*, Broughton, in the present case, never knew that he was the victim of any theft. [Ex. 29 p. 30]. More importantly, the theft in the case at bar was accomplished by deceit, separate from the shooting, not force.

The *Clayton* court was, therefore, required to reverse the robbery conviction in that case. It follows, as a matter of law, that this Court now should reverse Nelson's capital murder conviction because there was no robbery.

The rational suggested to the Court now has been consistently applied. See *Jones v. State* 567 So.2d 1189, 1192 (Miss. 1990) where the Court reversed a robbery conviction stating that a jury instruction was fatally defective because it did not "set out the cause and effect relationship between the taking and the putting in fear." Citing *Crocker v. State*, 272 So.2d 664 (Miss.1973). The *Jones* court again made it abundantly clear that it is the force or fear of force must be what causes the owner to part

with his or her possessions for a robbery to have occurred.

The state will argue that there was testimony from a family member that the defendant was seen picking up something described as a pill bottle from the floor near the victim and that this would satisfy all of the elements of robbery.[T. 222].

A review of the record, however, shows that the witness only imagined what she claimed to have seen:

> Q. Pick it up off the floor?
> A. Well, he went down I imagine so, maybe. [T. 227]
>
> * * *
>
> Q. Did you see Billy [Nelson] taking any money, or anything like that?
> A. I didn't see him take no money. I think I saw him reach down and get a pill bottle, that is all I saw.
> Q. Grabbed the pill bottle off the floor or whatever? You don't know for sure.
> A. When I saw the blood, I was through. I was gone. [T. 228]

However, it was never established, that even if it were true an object was retrieved from the floor near the victim, that this alleged object was the personal property of another, nor that the object was in Broughton's possession before the shooting.

Morever, for the sake of argument, even if the court finds there was a robbery in the present case, in the context of capital murder, the homicide must nevertheless have a nexus to the underlying felony for a capital murder to have transpired. The rule stated in *Pickle v. State*, 345 So. 2d 623, 625-27 (Miss. 1977) would apply here:

> It is the general view that a homicide is committed in the perpetration or attempt to perpetrate another crime when the accused is engaged in any act required for the full execution of the initial crime, and the homicide is so

> closely connected with such other crime as to be within the *res gestae* thereof.
>
> * * *
>
> ...where the two crimes are connected in a chain of events and occur as part of the *res gestae,* the crime of capital murder is sustained. at 627

The record in this case, however, shows clearly that the shooting of Broughton was not part of the *res gestae* of any theft in this case. The shooting of Broughton was not necessary to complete the offense, the gun was not used to affect any theft. Broughton was shot because he complained to Nelson about leaving the door open, thus, provoking Nelson to point and cock the shotgun.

Since the shooting was accidental and not during any underlying robbery, the only verdict supported by the evidence was manslaughter under Miss. Code Ann. § 97-3-35 (1972) defined as:

> 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.

See *Mullins v. State*, 493 So. 2d 971, 974 (Miss. 1986).

Appellant respectfully asks the court to reverse the capital murder conviction and grant him a new trial or render a conviction for manslaughter.

**ISSUE NO. 2: WHETHER THE COURT ERRED IN ALLOWING THE INTRODUCTION OF CERTAIN BAD CHARACTER EVIDENCE?**

The state introduced a transcript and tape of Nelson's statements to investigators. [Ex. 29; T. 290]. In these recorded discussions, Nelson speaks of expected behavior and mores of individuals who are incarcerated versus those who are not incarcerated. [T. 250-52; Ex. 29]. These comments were completely ancillary to any of the elements required or necessary to be proven by the state. *Id.* Defense counsel objected to this information and requested that it be redacted. *Id.* The objection was that the evidence tended to prejudice Nelson as evidence of bad character which was not probative of any material issue and the jury would probably infer that Nelson was speaking from first hand knowledge gained from being in prison. *Id.*

Specifically, Nelson is purported to have said

> ...See it's a difference between being in the penitentiary and being involved in a organization and being out on the streets and involved in an organization. If you out on the street the same rules don't apply for being in the penitentiary cause you out on the street you doing your own thing out there. You ain't obligated to no one out there on the street but in the penitentiary you obligated to be your brother's keeper. [Ex. 29. p. 23].

In *Palmer v. State*, 939 So.2d 792, 795 (Miss.2006), the Court held that when an objection under Miss. R. Evid. 404(b) is overruled, there is an automatic invocation of the right to a Miss. R. Evid. 403 balancing analysis. Citing *Brown v. State*, 890 So.2d 901, 912 (Miss.2004). Under Rule 403 evidence must be excluded , even if relevant, where

the risk of undue prejudice outweighs the probative value of the evidence against which the objection is made. See also *Simmons v. State*, 813 So.2d 710, 716.(Miss. 2002).

Usually, evidence of another crime or prior bad act is not admissible. *Ballenger v. State*, 667 So.2d 1242, 1256 (Miss.1995). However, where another crime or act is so interrelated to the charged crime so as to constitute a single transaction or occurrence or a closely related series of transactions or occurrences, proof of the other crime or act is admissible. *Townsend v. State,* 681 So. 2d 497, 506 (Miss. 1996) . Nevertheless, in the case at bar, there was no connection at all. Improperly admitted character evidence constitutes reversible error. *Rose v. State*, 556 So.2d 728, 732 (Miss. 1990).

In this case, the trial court did not conduct the required balancing test. The only analysis offered before allowing the questionable evidence was , "...but it doesn't say he's in the penitentiary, nor does it say where he got his knowledge, does it?" [T. 252 ].

There was no fact of any consequence which would make the fact that Nelson had been in prison before relevant. According to Miss. R. Evid. Rule 401:

> "Relevant Evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Yet assuming there is some scintilla of relevancy, for the sake of argument, once some relevance is established, there should be some determination of the quality and quantity of prejudice:

> Relevant evidence is admissible where its probative value is substantially outweighed by, *inter alia*, the danger of unfair prejudice. MRE 403 Determining whether evidence is prejudicial requires a balancing test. *Foster v. State*, 508 So. 2d 1111, 1117 (Miss. 1987). Thus, the more probative the evidence, the less likely that the existence of prejudice will outweigh its value. *Blue v. State*, 674 So. 2d 1184, 1222 (Miss. 1996).

"Prejudicial evidence that has no probative value is always inadmissible." *Roberson v. State*, 595 So. 2d 1310, 1315 (Miss. 1992). See also *Smith v. State*, 530 So. 2d 155, 160-61 (Miss. 1988).

It is Nelson's position that evidence of any unrelated criminal acts or incarceration was irreparably harmful because of the obvious unfavorable effect this information would have had on the jury. Since the trial court allowed it, the jury was influenced by it during their deliberations.

In *Reynolds v. State*, 585 So. 2d 753, 754-55 (Miss. 1991), a prosecution witness stated that she was "familiar...with [defendant's] criminal record." There was an objection and motion for mistrial. The trial court admonished the jury to disregard the improper testimony, and the Supreme Court affirmed, stating:

> Rule 404(b) of the Mississippi Rules of Evidence makes such statements improper and inadmissable. Rule 5.15 of the Mississippi Uniform Criminal Rules of Circuit Court Practice provides that the trial court shall declare a mistrial on the motion of the defendant if there occurs an 'error or legal defect in the proceeding, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case.' In accordance with the rule, this Court has held that an occurrence of any prejudicially inadmissable matter or misconduct before the jury, the damaging effect of

> which cannot be removed by admonition or instructions, necessitates a mistrial. Citing, *Davis v. State*, 530 So. 2d 694, 697 (Miss. 1988)
>
> * * *
>
> Where the remark creates no irreparable prejudice, then the trial court should admonish the jury to disregard the improper remark. Citing *Roundtree v. State*, 568 So. 2d 1173, 1177 (Miss. 1990) Such remedial acts of the trial court are usually deemed sufficient to remove any prejudicial effect from the minds of the jurors. The jury is presumed to have followed the instruction of the trial court. [emphasis added] 585 So. 2d 754-55

In *Reynolds* the trial court's admonition was deemed sufficient. *Id.* Here, at Nelson's trial, the improper evidence was allowed, and of course there was no admonition.

There was no way to negate the implication that Nelson had been in prison without increasing the actual and potential prejudice of the flawed evidence. It follows, as a matter of law, that in the case at bar, the trial court should have sustained Nelson's objection. Failure to do so warrants a new trial.

## ISSUE NO. 3: WHETHER THE COURT ERRED BY NOT QUALIFYING THE DEFENSE'S PROFFERED FIREARMS EXPERT?

A key element of Nelson's defense was that the gun which killed Broughton, accidently discharged. [T. 382-88 ; Ex. 29 pp. 2, 4-8, 17, 29-36]. To present this

defense, Nelson's appointed counsel was authorized to obtain the services of a firearms expert, James Bowman. [R. 126 ; T. 305, 327-29]. The weapon in this case was never recovered, so Mr. Bowman had to rely on limited descriptions from the statements in the case. [T. 323].

Mr. Bowman performed experiments and demonstrations of how a weapon such as the one described in this case could fire accidently and video taped these experiments and demonstrations. [T. 305- 09]. The court declined to qualify Bowman so the jury did not hear his testimony nor view his recorded demonstrations. [T. 327-29].

Mr. Bowman's cirriculum vitae shows that he had extensive law enforcement and military training and experience and that he had been accepted as an expert in firearms by other courts. [Ex. 31-ID]. The trial court here, nevertheless, declined to qualify Mr. Bowman as an expert . [T. 327-29].

The trial court acknowledged Mr. Bowman's training and experience and that Bowman had trained others in the use of firearms. *Id.* The trial court was given Mr. Bowman's *curriculum vitae* [Ex. 31-ID ]. The court stated that it was "ignorant of guns" and ruled that Mr. Bowman was unreliable. [T. 311, 327-29 ].

The court said that Mr. Bowman did not have sufficient experience with shotguns to know the particular workings of the one at issue, even though Mr. Bowman used to have an old single shot shotgun and been trained and trained other military personnel in Viet Nam with the use of shotguns. [T. 304-328]. Mr. Bowman's personal experience

and training in firearms included that he was a Navy SEAL, he was on the Pascagoula Police Department where he was a master shooter, he attended FBI SWAT training, he had a bachelor of science degree and had been accepted as an expert before. *Id.*

All of Bowman's training and experience was not abstract for purposes of this case. Mr. Bowman also spoke knowledgeably about the manufacture of shotguns both before and after the 1960's. All total, Mr. Bowman answered clearly and directly approximately forty-four (44) general and specific questions about shotguns from counsel and the court. [T. 305-328]. These questions included the internal workings of shotguns and national and international manufacturing issues. *Id.*

By not accepting Mr. Bowman as an expert, the trial court prevented Nelson from putting on a defense, and although intending to make a ruling under *Mississippi Transportation Commission v. McLemore*, 863 So.2d 31, 34-36 (Miss 2003) and its progeny, the trial court actually made ruling of credibility thus invading the province of the jury in the process.

In *Jackson v. State*, 962 So.2d 649, 673 (Miss. App.2007), the court said:

> The decision whether a witness is qualified as an expert in fields of scientific knowledge is one left to the discretion of the circuit court. *Cowart v. State*, 910 So. 2d 726 (¶ 11) (Miss. App.2005). We will only reverse the circuit court if the decision was clearly erroneous. *Id.* That is, we will not reverse the circuit court's decision unless it is clear that the witness was not qualified. *Id.* Additionally, an expert's testimony is always subject to M.R.E. 702 . To give a M.R.E. 702 opinion, a witness must have "experience or expertise beyond that of an average adult." *Id.*

The present issue is akin to that in *Amacker v. State*, 676 So. 2d 909, 912 (Miss. 1996). In *Amacker*, the trial court excluded a certain child defense witness as incompetent because the child could not remember certain details. The Supreme Court reversed stating that the trial court made a ruling of credibility not competency and that only a jury is allowed to address credibility. Amacker was granted a new trial because the trial court prevented him from presenting a defense which constituted a clear violation of the Sixth and Fourteenth Amendments to the U. S. Constitution and Article 3 § 26 Mississippi Constitution.

In *Terry v. State*, 718 So. 2d 1115, 1120-21 (Miss. 1998), the defendant was charged with embezzling money from her employer. She wanted to present evidence that other people, including the business owners, were possible suspects, but was prevented from doing so by the trial court. The *Terry* court cited *Kennedy v. State*, 278 So. 2d 404, 406 (Miss. 1973) which held "when an accused is being tried for a serious offense, the jury is entitled to hear any testimony that the appellant might have in the way of [a] ... defense."

The *Terry* court also cited *Love v. State*, 441 So. 2d 1353, 1356 (Miss. 1983) where the court ruled:

> A criminal defendant is entitled to present his defense to the finder of fact, and it is fundamentally unfair to deny the jury the opportunity to consider the defendant's defense where there is testimony to support the theory. citing *Keyes v. State* 635 So. 2d 845, 848-49 (Miss. 1994).

The *Terry* court reversed. 718 So. 2d p. 1123. Nelson is entitled to, and respectfully requests, the same relief. The expert opinion evidence which was excluded by the court under this issue was relevant, plus a proper foundation had been established. The jury should have been allowed to hear and consider Mr. Bowman's testimony and to view his demonstrations.

Regarding the trial court's ruling on reliability. The standard of reliability has been set very low. In *Lattimer v. State*, 952 So. 2d 206, 220 (Miss. App. 2006), the court found that even though a child interviewer could not objectively verify any results he was reliable. Here in the case at bar the proffered witness is much more reliable.

All Mr. Bowman was going to say was that he was trained in firemarms and the weapon could have misfired as the defendant described it. He was operating on the same facts that the jury had. The weapon had not been recovered, so he had to depend on the descriptions of the weapons provided by the defendant and other witnesses. The fact that the weapon had not been discovered makes the need for expert testimony all the more necessary.

Exclusion of relevant evidence in support of a defense is clearly reversible error. *Heflin v. State* 643 So. 2d 512, 516-17 (Miss. 1994). See also *Chinn v. State* 958 So.2d 1223 (Miss. 2007) where the Court said " We have held that "[i]t is, of course, an absolute right of an accused to have every lawful defense he asserts, even though based upon meager evidence and highly unlikely, to be submitted as a factual issue to be

determined by the jury under proper instruction of the court. This Court will never permit an accused to be denied this fundamental right." *O'Bryant v. State*, 530 So.2d 129, 133 (Miss.1988) (citing *Ward v. State*, 479 So.2d 713 (Miss.1985); *Lancaster v. State*, 472 So.2d 363 (Miss.1985); *Pierce v. State*, 289 So.2d 901 (Miss.1974))."

Nelson was entitled to present the expert he proffered. The jury was entitled to here the evidence. Since neither was afforded this right, a new trial would correct the error.

**ISSUE NO. 4: WHETHER THE COURT ERRED IN REFUSING OFFERED INSTRUCTION D-16 REGARDING ACCIDENT?**

In Nelson's statement, he describes how he was armed with the shotgun for the purpose of self-defense; because, he and Covan were afraid that Broughton had learned about the drug stealing. [Ex. 29, pp.11, 21-22]. He also stated that Broughton made "some kind of a move at [him]", an aggressive advance, and when Nelson cocked the weapon, it discharged. [Ex. 29 p. 7]. Nevertheless, the trial court denied D-16[3] offered under a accident theory without any explanation. [R. 152; T. 351-52 ].

In *Chinn v. State* 958 So.2d 1223 (Miss. 2007), the Court made it clear that "every accused has a fundamental right to have [his] theory of the case presented to a jury, even

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D-16: The Court instruct the Jury that the killing of any human being by the act, procurement, or omission of another shall be excusable when committed by accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation. [R. 152].

if the evidence is minimal." The Court recently has stated that "[w]e greatly value the right of a defendant to present his theory of the case and 'where the defendant's proffered instruction has an evidentiary basis, properly states the law, and is the only instruction presenting his theory of the case, refusal to grant it constitutes reversible error.' " *Phillipson v. State*, 943 So.2d 670,71-72 (Miss.2006) (citing *Adams v. State*, 772 So.2d 1010, 1016 (Miss.2000)).

In *Chinn, supra*, the Supreme Court reversed for failure to give an accidental homicide instruction w hen there was sufficient evidence and the defense was not covered by other instructions. 958 So.2d 1226-27. The trial court's denial of the accident instruction in *Chinn* was determined to be a denial of a fundamental right requiring reversal. *Id.*

According to *O'Bryant v. State*, 530 So. 2d 129, 133 ( Miss. 1988)

> It is, of course, an absolute right of an accused to have every lawful defense he asserts, even though based on meager evidence and highly unlikely to be submitted as a factual issue to be determined by the jury under proper instructions of the court. This court will never permit an accused to be denied this fundamental right.

In *Hester v. State*, 602 So. 2d 869, 871-73 (Miss. 1992), the defendant was charged and convicted of capital murder involving the armed robbery and shooting of a sailor in Pascagoula by four young men. Hester testified that he tried to abandon the hastily planned robbery. There was testimony however from others that he did not abandon. A proffered jury instruction the defense of abandonment was refused, and the

supreme court reversed.

In the present case, even though counsel was prevented from fully developing the facts for the defense of accident through expert testimony, it is undeniable that there was a factual basis for the instruction, as pointed out from Nelson's statement. The trial court was well aware of this and even acknowledged this evidence right before refusing the instruction. [T. 350].

D-16 properly stated the law. It is a verbatim recitation of the instruction from *Chinn*, which is a verbatim tracking of the applicable statute Miss.Code Ann. § 97-3-17 (Rev.2006). 958 So.2d 1225

The authority of *Chinn*, *supra*, controls and requires reversal.

## CONCLUSION

Mr. Nelson is entitled to a new trial or is entitled a rendered manslaughter conviction with remand for resentencing.

Respectfully submitted,

WILLIAM NELSON, III

BY: George T. Holmes

GEORGE T. HOLMES,
Mississippi Office of Indigent Appeals

## CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 5th day of November, 2007, mailed a true and correct copy of the above and foregoing Brief Of Appellant to Hon. Robert P. Krebs, Circuit Judge, P. O. Box 998, Pascagoula MS 39568, and to Hon. Anthony Lawrence, III, D. A. , P. O. Box 1756, Pascagoula MS 39568, 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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