IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MICHAEL HENRY HEARN — APPELLANT

VS. — NO. 2007-KA-1439-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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BRIEF FOR THE APPELLEE

PROCEDURAL HISTORY:

On November 21-25, 2007, Michael Henry Hearn, "Hearn," was tried for two counts of intimidation of a judge under M. C. A. § 97-9-57 as a M. C. A. § 99-19-83 habitual offender before a Lauderdale County Circuit Court jury, the Honorable David M. Ishee presiding. R. 1. Hearn was found guilty and given two concurrent life sentences in the custody of the Mississippi Department of Corrections. R. 394-395. From these convictions and sentences, Hearn appealed to the Mississippi Supreme Court. C.P. 124.

ISSUES ON APPEAL

I.

WAS THERE SUFFICIENT, CREDIBLE EVIDENCE IN SUPPORT OF HEARN'S CONVICTION?

II.

WAS THERE SUFFICIENT EVIDENCE THAT HEARN WAS COMPETENT BOTH TO STAND TRIAL AND TO REPRESENT HIMSELF?

III.

WAS DR. MOORE'S TESTIMONY PROPERLY RECEIVED?

IV.

WERE JURY INSTRUCTIONS PROPERLY ADMITTED?

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VI.

DID ALLEGED CUMULATIVE ERRORS DENY HEARN A FAIR TRIAL?

STATEMENT OF THE FACTS

On April, 2005, Hearn was indicted for two counts of intimidating of a judge under M. C. A. § 97-9-55 on or about July 29, 2004 as an M. C. A. §99-19-83 habitual offender. C.P. 2.

On November 21-25, 2007, Hearn was tried for two counts of intimidation of a judge before a Lauderdale County Circuit Court jury, the Honorable David M. Ishee presiding. R. 1. Hearn was represented by Mr. Dan Duggan, Jr.. R. 1.

Mr. Duggan filed a motion to suppress statements made by Hearn to Doctor Tom Moore. This was on general grounds of a patient's right to refuse disclosure of medical records. C.P.60-61. Duggan also filed a motion for defense by reason of insanity. C.P. 58-59.

A hearing was held on the motion to suppress. R. 19-26. Dr. Moore testified that when Hearn informed him of his intention to kill Judge Roberts, he warned him that should he repeat the threats , he would be required to disclose the information. After being warned, Hearn repeated the threats many other times. Hearn also told Moore he wanted the information shared with the intended victim. R. 22; 179-182..

On the day of the trial, Mr. Duggan informed the trial court that Hearn did not want him to continue representing him. R. 30-35. Hearn expressed a desire to have another lawyer represent him. He had made no arrangements for any another counsel. The trial court advised Hearn that he was not entitled to an attorney of his choice. The trial court informed Hearn that Duggan would not be "forced" upon him. R. 33.

After listening to Hearn and Mr. Duggan, the trial court advised Hearn that he could represent himself. Duggan, his appointed counsel, could serve as his legal advisor. He also warned Hearn that he should listen to Duggan's advice since he was not trained or knowledgeable about court procedures.

Hearn chose to represent himself with Duggan serving as an advisor. R. 37.

Dr. John Montgomery , a forensic psychiatrist, testified that he was requested to evaluate Hearn's competency to stand trial, as well as his competency at the time of the offense. R. 258-259. Dr. Montgomery along with another psychiatrist Dr. McMichael determined that Hearn knew the difference between right and wrong at the time of the offense. They also determined that he had "sufficient ability" to understand the legal proceeding and assist in his own defense to the charge. R. 257-260.

Mr. Danny Knight with the Mississippi Bureau of Investigation testified to reading letters sent from Parchman to Judge Roberts. R. 195-208. Knight testified that while the letters were rambling and filled with legal terminology , they also clearly included a threat "to kill" or do bodily harm to Judges Roberts and Bailey. R. 200.

The record reflects that Dr. Tom Moore identified Hearn as the person who made threats on the lives of Judges Bailey and Roberts. R. 183. Hearn was angry with Judge Roberts. Roberts had presided over a trial in which he was convicted of aggravated assault. This was for stabbing someone in the back, which came close to being fatal. Judge Bailey had not presided over any trial involving Hearn. He merely had been involved with some of Hearn's numerous vulgar, offensive and threatening letters written to the Lauderdale County Judges from prison.

During an interview with Hearn, Dr. Moore heard Hearn express his intention of harming Judges Roberts and Bailey of Lauderdale County. After warning Hearn that he could be obligated to warn others of his intent to do them harm, Hearn repeated his threats toward them more than once. Hearn confronted Dr. Moore in a hall way over whether he had warned the judges. R. 182.

Dr. Moore testified that based upon his interviews and conversations with Hearn while at the state mental hospital he believed that Hearn was capable of carrying out threats made against the

judges on more than one occasion. R. 184.

In Dr. Tom Moore's August 24, 2004 letter to Judge Roberts, he warned him of Hearn's threat "that he would carry out his threats to harm" him and Judge Bailey.

> I met with the inmate on 7-29-04 for approximately one hour. During that initial session he reported that he would carry out his threats to harm the two judges whom he feels unjustly incarcerated him for "the stabbing incident..where I was just trying to defend myself." The inmate perceives that he is "..justified, out of love.. to correct the injustice." He is willing ("eager") to risk incarceration again to complete his goal. On 8/ 13/ 04 the inmate approached the undersigned in the hall to question whether this letter was sent to the two judges. He again verbalized vehemently his intentions to do harm .
> See Exhibit 5, the August 31, 20004 letter from Dr. Tom Moore to Judge Larry E. Roberts, warning him of Hearn's repeated statements of his intent to harm Judge Roberts and Bailey once given an opportunity. C.P. 37-38.

Judge Larry Roberts testified that he presided over Hearn's aggravated assault trial in Lauderdale County. R. 128-129. Hearn's sentence was twenty years with one year suspended which was within the range called for by statute. R. 131. This was corrected to twenty years with no suspension. R. 132. After his conviction, and incarceration, Roberts received numerous offensive letters from Hearn. R. 134. He received as many as a hundred letters. R. 135. They were generally "vulgar and obscene." R. 135.

Judge Roberts testified that he also received a warning from Mr. Arthur Nored who was with the state parole board. Nored warned him of Hearn's desire to murder him. R. 139.
Judge Roberts also received a letter from Dr. Moore, a psychiatrist , warning him of Hearn's threats to kill or do him bodily harm. R. 141.

Judge Roberts testified that he took the threats seriously. He believed that Hearn was willing and capable of carrying out the threats he had been making through the mail. This had an intimidating affect upon Judge Roberts. It was a threat based upon his carrying out of his official duties as a circuit court judge. Judge Roberts expressed concerns to MDOC. He did not want

Hearn ever released on parole or incarcerated near Meridian. C.P. 38-39.

Judge Bailey testified that he handled some of the pre-trial motions dealing with Hearn. After Hearn was tried and convicted, Bailey received more than ten letters from Hearn. They were addressed from prison. Judge Bailey was warned of credible threats against him by Dr. Moore. R. 213. Judge Bailey testified that he took the threats seriously. R. 213. Judge Bailey tried unsuccessfully to prevent Hearn from being considered for parole or early release in 2005. R. 216.

At the conclusion of the prosecution's case, the trial court denied a motion for a directed verdict. R. 277-278.

On direct examination, Hearn testified that he did not make statements threatening bodily harm to the judges in question. He also testified that he did not intend to carry out any threat to the judges. R. 296.

Hearn also stated in his testimony that while he had made what appeared to be threats, they were not really serious threats. It was "a way of speech." This was in keeping with his use of hyperbole defense. R. 327.

During closing argument, Mr. Duggan on behalf of Hearn, argued that Hearn was suffering from various mental problems, and that he should not have chosen to represent himself before the jury. R. 369-376. The prosecution argued in response that there was record evidence indicating that Hearn was sane and knew what he was doing when he made his threats to kill. He like many others suffered from some personality problems but he was, nevertheless, responsible for his actions. R. 374-382.

During jury instruction selection, Mr. Duggan on behalf of Hearn requested an insanity instruction, which was denied. The trial court found that Hearn's defense was not that he was delusional or out of touch with reality, but rather that his statements of harm to the judges was being

misinterpreted. R. 351.

Hearn was found guilty of both counts of intimidation of a judge. R. 384. After a separate sentencing hearing with offers of proof of prior convictions, Hearn was given two concurrent life sentences as an M. C. A. §99-19-83 habitual offender in the custody of the Mississippi Department of Corrections. R. 394-395; C.P. 164. From that conviction and sentence, Hearn appealed to the Mississippi Supreme Court. C.P. 124.

SUMMARY OF THE ARGUMENT

1. There was credible, substantial corroborated evidence in support of Hearn's convictions. **McClain v. State**, 625 So. 2d 774, 778 (Miss. 1993). This evidence was sufficient for denying all peremptory instructions, as well as a motion for a new trial. R. 277-278; C.P. 118-121. This evidence not only included testimony from Dr. Moore about Hearn's statements of his intention to harm Judges Roberts, and Bailey but also Hearn's own admissions. Hearn admitted to having told Judge Roberts in writing of his desire to harm him. R. 184; 324-327. Investigator Dan Knight testified to reading letters Hearn sent to Judge Roberts. Hearn informed Roberts he was going "to kill" him. R. 200. Hearn's defense of merely using hyperbole was for the jury's consideration. R. 288-333.

In addition to Hearn's admissions of stating his threats to kill, Mr. Nored with the State Parole Board testified to Hearn's threats against Judge Roberts. R. 232. Nored testified that Hearn stated "that he would take care of the Judges that placed him in the penitentiary." R. 232. Judge Roberts knew from his association with Hearn that he had a history of violence both outside and inside prison. R. 164; C.P. 38-39.

Hearn is not entitled to give himself the benefit of favorable inferences from conflicts created by his own testimony on motions for a peremptory instruction or a new trial. His "hyperbole" defense was contradicted by substantial, corroborated evidence indicating his desire to carry out his threat to harm Judges Bailey and Roberts.

2. The record reflects that the trial court correctly determined that Hearn was both competent to stand trial as well as to represent himself with some requested assistance from Mr. Dan Duggan. **Conner v. State** 632 So.2d 1239, 1251 (Miss.1993). The record reflects Hearn's desire to have another attorney without having obtained one. R. 30-37.

The record also reflects that Hearn intelligently waived his right to counsel. **Brooks v. State** 763 So.2d 859, 867 (25 ¶) (Miss. 2000). The record reflects that Hearn chose to represent himself with some limited assistance from his court appointed counsel, Mr. Duggan. The trial court advised Hearn to consult with Duggan for his "own protection." R. 33. The trial court also informed Hearn would be held to the same standards as a licensed attorney. R. 112.

In short, the record indicates that Hearn was competent to stand trial, as well as competent to "intelligently waive" his right to counsel in accordance with Rule 8.05 of the URCCC.

Mr. Duggan, consistent with Hearn's testimony, argued his "misunderstanding of Hearn's intentions theory of the case" before the jury in closing. R. 369-376. Duggan also participated in jury instruction selection. R. 334-355.

3. This issue was waived for failure to raise it with the trial court. R. 174-194; C.P. 118-119. **Haddox v. State**, 636 So. 2d 1229, 1240 (Miss. 1994). And there was no "plain error" involved in allowing Dr. Moore's testimony.

The record reflects that the trial court correctly found that Dr. Moore's testimony was properly received. **Mississippi State Bd. of Psychological Examiners v. Hosford** 508 So. 2d 1049, 1055 (Miss.1987). While confidentiality should normally be maintained, there is equally a professional "duty to warn." See M. C. A. §73-30-17 .

In the instant cause, after being warned that repeating threats to kill judges would require disclosure, Hearn not only repeated his threats but also wanted to be sure that the judges had been notified of the threats. R. 182-183.

Therefore, the record reflects no breach of confidentiality. Hearn's letters, and statements to others, including Mr. Nored with the Parole Board, indicated that he did not confine his threats to the limits imposed by a doctor patient consultation relationship. R. 139.

In addition, Mr. Dan Knight with the Mississippi Bureau of Investigation testified that he read letters addressed to Judge Roberts and Bailey. He testified that it was clear these letters expressed a desire "to kill" the judges. R. 200.

A duty to warn obtains where there is reason to believe a threat to harm is capable of being brought to fruition. M. C. A. §73-30-17.

There was sufficient credible, corroborated evidence for concluding that Hearn was capable of carrying out his threat to harm the judges he had repeatedly threatened.

4. The record reflects that the jury was properly instructed based upon the facts of this case. There was corroborated medical testimony indicating that while Hearn suffered from some personality disorders, he was legally sane. R. 264. He was found to have been competent both at the time he made the threats as well as at the time of trial. R. 273-275. **Woodham v. State** 800 So. 2d 1148, 1158 (¶29) (Miss. 2001).

While Hearn's counsel initially attempted an insanity defense on his behalf, Mr. Hearn rejected this defense. C.P. 58-59. Instead, Hearn chose to present his "misinterpretation" of his often expressed intent to kill defense. R. 351.

5. The Constitutionality of M. C. A. § 97-9-55 was waived for failure to raise it with the trial court. C.P. 118-119. **Patterson v. State**, 594 So. 2d 606, 609 (Miss. 1992). In addition, the statute properly provides advance notice that attempts to intimidate judges or other public officials in order to interfere with the administration of justice will not be tolerated.

Hearn never expressed any desire to express himself on any issues of political, social or artistic significance that could be considered protected under the First Amendment. Rather his defense of his speech was about his admitted "hatred" that resulted in a personal vendetta against the judges.

6. There were no trial errors which denied Hearn a fair trial. **Gibson v. State**, 731 So. 2d 1087, 1098 (Miss. 1998). The record reflects that Hearn was competent to stand trial and represent himself. Although suffering from personality disorders, he presented a rational defense to the charge. It was he who rejected an insanity defense and chose a misunderstanding of his written and spoken intentions theory of defense. He had a right to do so. Hearn's testimony before the judge and jury indicate he knew who he was, what he was charged with, and how he was defending himself. In short, there is a lack of evidence for concluding that Hearn was delusional or out of touch with reality.

The record reflects that under the facts of this case, Dr. Moore did not err in warning Judge Roberts in writing of Hearn's intentions and capability of carrying out a threat on his life. This is not a case of a patient exercising his right not to disclose medical records, but of a patient who wanted information provided to his psychiatrist revealed to the objects of his vendetta.

ARGUMENT

PROPOSITION I

THERE WAS CREDIBLE, SUBSTANTIAL CORROBORATED EVIDENCE IN SUPPORT OF HEARN'S CONVICTION.

Hearn believes that the trial court erred in denying his peremptory instructions, and his motion for a new trial. He does not think there was evidence for establishing all the elements of the offense involving intimidation of a judge by threats. He believes there was inadequate evidence that he seriously intended to harm the judges. Rather he thinks his expressions of harm were merely "hyperbole." His appeal counsel thinks that there was evidence that Hearn was mentally ill, and in need of professional counseling rather than further incarceration. Appellant's brief page 20-23.

To the contrary, the record reflects substantial, fully corroborated evidence of Hearn's repeated expressions of his intention to harm the two Lauderdale County Circuit Court Judges. This was expressed not only by Hearn to Dr. Moore repeatedly, but also to Mr. Arthur Nord who was on the state parole board . R. 184; 200.

Judge Roberts testified to having received many threatening letters. R. 135. He testified that he believed they were direct threats to do him bodily harm. R. 139. Investigator Knight, who read letters addressed by Hearn to Judge Roberts , testified that these letters expressed a desire "to kill"Judge Roberts. R. 200. See Exhibit 6 through 10 for selection of letters written and sent by Hearn from Parchman to Judge Roberts in manila envelop marked "Exhibits."

The record reflects that Dr. Tom Moore identified Hearn as the person who made threats on the lives of Lauderdale County Circuit Court Judges Bailey and Roberts. R. 183. Hearn was angry with Judge Roberts. Roberts had presided over a trial in which he was convicted of aggravated assault. This was for stabbing someone in the back, which came close to being fatal. Judge Bailey

had not presided over any trial involving Hearn. He merely had been involved with some of Hearn's numerous vulgar, offensive and threatening letters written from prison to the Circuit Court where Hearn was convicted of aggravated assault.

During an interview with Hearn, Dr. Moore heard Hearn express his intention of harming Judges Roberts and Bailey of Lauderdale County. After warning Hearn that he could be obligated to warn them of his intent to do them harm, Hearn repeated his threats toward them more than once. Hearn confronted Dr. Moore in a hall way over whether he had warned the judges. R. 182.

Dr. Moore explained that based upon his interviews with Hearn, he believed that Hearn was capable of carrying out threats made on more than one occasion. R. 184.

In Dr. Tom Moore's August 24, 2004 letter to Judge Roberts, he warned him of Hearn's threat "that he would carry out his threats to harm" himself and Judge Bailey.

> I met with the inmate on 7-29-04 for approximately one hour. During that initial session he reported that he would carry out his threats to harm the two judges whom he feels unjustly incarcerated him for "the stabbing incident..where I was just trying to defend myself." The inmate perceives that he is "..justified, out of love.. to correct the injustice." He is willing ("eager") to risk incarceration again to complete his goal. On 8/ 13/ 04 the inmate approached the undersigned in the hall to question whether this letter was sent to the two judges. He again verbalized vehemently his intentions to do harm . Exhibit 5, the August 31, 20004 letter from Dr. Tom Moore to Judge Larry E. Roberts, warning him of Hearn's repeated statements of his intent to harm Judge Roberts and Bailey once released from incarceration. C.P. 37-38.

Judge Roberts testified that he presided over Hearn's aggravated assault trial in Lauderdale County. Hearn's sentence was twenty years which was called for by statute. After his conviction, and incarceration, Roberts received numerous regular offensive letters from Hearn. There were as many as a hundred letters.

Judge Larry Roberts testified that he also received a letter from Dr. Moore. This was the letter warning him of Hearn's intention of doing him bodily harm. Judge Roberts testified that he

took the threats seriously. He believed that Hearn was willing and capable of carrying out the many threats he had been making through the mail. This had an intimidating affect upon Judge Roberts. It was a threat and interfered with the carrying out of his official duties as a circuit court judge. Judge Robert Bailey also testified that he believed Hearn's letters were a credible threat which he took very seriously. R. 214.

> Q. Now, Judge Roberts, the threat that was contained in the letter, (exhibit 5) that is, the threat that was related to you by Dr. Moore in the letter, did you take that seriously?
>
> A. Yes, sir.
>
> Q. **And for lack of a better word or way to describe it, did you feel it was-did you feel it intimidating?**
>
> A. **Yes, sir.** R. 143. (Emphasis by Appellee)
>
> ...
>
> Q. **Now, you indicated in your warn letter that you believed that Mr. Hearn was capable of acting on his threats, is that right?**
>
> A. **That's correct.**
>
> Q. **Do you still have that feeling?**
>
> A. **Yes, I do.** R. 184. (Emphasis by Appellee).

Mr. Danny Knight with the Mississippi Bureau of Investigation testified to reading letters sent from Parchman to Judge Roberts. Knight testified that while the letters were rambling and apparent attempts to file something in court , they also clearly included threats "to kill" the judges. R. 200.

> Q. If those threats from what you observed or read through in all those reams and reams of paper, was there–could you interpret those threats to be threats that, I'm going to sue you versus I'm going to kill you?
>
> A. **No. They were threats that, I'm going to kill you.**

Q. Okay. So there may–he did talk about and did file–apparently try to file things–filing with courts?

A. That's correct.

Q. But what you're talking about threats-wise was not, I'm going to sue you, but I'm going to do bodily harm to you?

A. **No, sir. Mine was–through my investigation, it was no doubt in my mind that he was going to do bodily harm to them.** R. 200. (Emphasis by Appellee)

Mr. Arthur Lee Nored, former Chief of Police in Waynesboro, and a member of the State Parole Board, testified that Hearn informed him that "he would take care of the Judges" that sentenced him to prison. He believed that he had been "falsely imprisoned."

Q. And–but what did–what did you hear from Mr. Hearn that caused you concern, if any?

A. When Mr. Hearn came in after the normal formalities there, I asked Mr Hearn–I believe I was chairing at the time, and I asked Mr. Hearn concerning what he would like to do if he had a job in society if he was paroled. **And at that time, Mr. Hearn responded in a very vehement fashion that–he said he was falsely imprisoned, that he would take care of the Judges that placed him in the penitentiary and called Judge Roberts specifically by name.**

Q. All right other than saying he would take care of him, did he elaborate at all on what he planned to do?

A. **He continued in tones such as this that he had something to do, that he would take care of it, that they would pay for placing him in the penitentiary and general comments of this nature.**

Q. I believe you used the word he was "vehement"; is that right?

A. **He was very belligerent, very vehemently–basically in my interpretation of it that he was spewing hatred of anyone that associated or either had official power over him.** R. 232. (Emphasis by Appellee).

...

Q. And was there any mention–did Mr Hearn given you any indication that what he was threatening to do was file a lawsuit or something of that nature?

A. **I took the threat as a personal vendetta and a physical threat of great bodily**

harm toward Judge Roberts, Judge Bailey and also Attorney Bilbo. R. 234. (Emphasis by Appellee).

Mr. Hearn testified in his own behalf. R. 288-333. He admitted that he "hated" Judge Roberts. He admitted that he had definitely told others that he was going to kill him "to the best of his ability." R. 323-324.

Q. **And, in fact, you told Milton Williams that "hatred" was not a strong enough word for how you felt toward Judge Roberts, correct?**

A. **In fact, that was more than correct, and I still do.**

...

Q. **And he asked you the question, Are you telling me that you're going to kill all them? And you said, to the best of my ability?**

A. **Definitely.**

Q. **Did you tell Milton Williams that they are either going to take me to court or they are going to die?**

A. I can't remember that one, sir.

Q. Do you deny that you said that?

A. I wouldn't deny that, but I can't remember that–

Q. **Well, it's right there on that videotape you asked for yesterday. Do you want to see it?**

A. **If you say I said it, I said. I agree that I said it.** R. 324. (Emphasis by Appellee).

M. C. A. § 97-9-55 states that using threats in an attempt to intimidate a judge from carrying out his duties makes one guilty of Intimidation of a Government Official:

> If any person or persons by threats or abuse, attempt to intimidate or otherwise influence a judge, ..in the discharge of his duties, or by such force, abuse or reprisals or threats thereof after the performance of such duties or to obstruct or impede the administration of justice in any court, he shall be punished by imprisonment not less than one month of more than two years in the state penitentiary.

not imminent waived

As to the treats not being imminent because Hearn was incarcerated when he made his threats through Dr Moore, the record reflects this issue was never raised with the trial court. C.P. 118-119. It was therefore waived. **Haddox, infra.**

The record contains a letter from Judge Roberts to the Commissioner of the Department of Corrections. It expresses the Judges' concern about Hearn possibly being considered for parole in December, 2005. It also wanted assurances that Hearn would not be incarcerated in a penal institution near Meridian, which was home for the two threatened Lauderdale County Judges. See exhibit C, letter from Judge Roberts to Commissioner Christopher Epps. C.P. 38-39.

Judge Bailey testified that he did not succeed in making sure that Hearn would "not get out on parole or early release." R. 216.

> Q....**He had served as of 2004 about ten years of that (twenty year) sentence. Did you have any luck in basically making sure that he did not get out on parole or early release?**
>
> A. **No, I didn't have any luck.** R. 216. (Emphasis by Appellee).

In **McClain v. State**, 625 So. 2d 774, 778 (Miss. 1993), the Court stated that when the sufficiency of the evidence is challenged, the prosecution was entitled to have the evidence in support of its case taken as true together with all reasonable inferences. Any issue related to credibility or the weight of the evidence was for the jury to decide, not for an appellate court.

> The three challenges by McClain (motion for directed verdict, request for peremptory instruction, and motion for JNOV) challenge the legal sufficiency of the evidence. Since each requires consideration of the evidence before the court when made, this Court properly reviews the ruling on the last occasion the challenge was made in the trial court. This occurred when the Circuit Court overruled McClain's motion for JNOV. **Wetz v. State**, 503 So. 2d 803, 807-08 (Miss. 1987). In appeals from an overruled motion for JNOV, the sufficiency of the evidence as a matter of law is viewed and tested in a light most favorable to the State. **Esparaza v. State**, 595 So. 2d 418, 426 (Miss. 1992); *Wetz* at 808; **Harveston v. State**, 493 So. 2d 365, 370 (Miss. 1986);...The credible evidence consistent with McClain's guilt must be accepted as true. **Spikes v. State**, 302 So. 2d 250, 251 (Miss. 1974). The prosecution

> must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. *Wetz*, at 808 , **Hammond v. State**, 465 So. 2d 1031, 1035 (Miss. 1985); *May* at 781. Matters regarding the weight and credibility of the evidence are to be resolved by the jury. **Neal v. State**, 451 So. 2d 743, 758 (Miss. 1984);..We are authorized to reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty. *Wetz* at 808; *Harveston* at 370; **Fisher v. State**, 481 So. 2d 203, 212 (Miss. 1985).

When the evidence cited above was taken as true with favorable inferences, there was more than sufficient, credible partially corroborated evidence in support of the trial court's denial of all peremptory instructions. Dr. Moore testified to having interviewed Hearn, at the East Mississippi Mental Health facility. He testified, as stated in exhibit 5, that Hearn had expressed more than once an intention to do bodily harm to Judge Roberts and Bailey. R. 184. Hearn believed that he had been unfairly harmed by the judges. This was because of the twenty year sentence he received after being convicted of aggravated assault in his Court. Moore testified that he consulted with other mental health professionals on this matter prior to taking action. R. 180.

It was their consensus that there was a duty to warn Judges Roberts and Bailey of Hearn's intention of doing them harm. Dr. Moore testified that he believed initially as well as at the time of trial that Hearn was fully capable of carrying out his threats. R. 184. Hearn himself in his own testimony admitted to having written letters to Judge Roberts and Bailey. He admitted he "hated" them. R. 321-322. He admitted that he told them of his desire "to kill" them. R. 323-324.

Hearn is not entitled to give himself the benefit of favorable inferences from the lack of evidence or from conflicting evidence in the record on a motion for a peremptory instruction.

In **Noe v. State**, 616 So. 2d 298, 302 (Miss. 1993), this Court stated that when the sufficiency of the evidence is challenged that the evidence favorable to the State must be accepted as true with all reasonable inferences. Evidence favorable to the defense must be "disregarded."

> In judging the sufficiency of the evidence on a motion for a directed verdict, or request for peremptory instruction, the trial judge is required to accept as true all of the evidence that is favorable to the state, including all reasonable inferences that may be drawn therefrom, and to disregard evidence favorable to the defendant. **Clemons v. State**, 460 So. 2d 835 (Miss. 1984)

While Hearn claimed his numerous abusive written and verbal statements of his desire to kill the judges was mere hyperbole, we have cited an abundance of corroborated evidence indicating that the threats were real. The threats also intimidated and interfered with the Judges administration of justice while serving as Circuit Court Judges. The jury as trier of fact and judge of credibility did not find Hearn's claims credible. **Neal v. State**, 451 So. 2d 743, 758 (Miss. 1984). This issue is lacking in merit.

PROPOSITION II

THERE WAS PSYCHIATRIC TESTIMONY INDICATING THAT HEARN WAS COMPETENT TO STAND TRIAL THE RECORD ALSO REFLECTS THAT HEARN INTELLIGENTLY WAIVED HIS RIGHT TO COUNSEL. HEARN CHOSE TO REPRESENT HIMSELF WITH SOME ASSISTANCE FROM MR. DUGGAN.

Hearn's appeal counsel believes that the trial court erred when he permitted Hearn to stand trial. He compounded this alleged error by also allowing Hearn to represent himself during his trial. His counsel believes that there was sufficient evidence for determining that Hearn was not competent to stand trial. He cites portions of the record indicating Hearn's alleged inability to fully understand the charges against him and how to defend himself against the charges. He also thinks there was a lack of evidence that Hearn made an intelligent waiver of his right to counsel or that the trial court made sufficient findings on the record on this issue. Appellant's brief page 23-31.

Dr. John Montgomery, a forensic psychiatrist, testified that he evaluated Hearn and found him competent to stand trial. Dr. Montgomery testified that he interviewed Hearn along with Dr. MacVeigh, another forensic psychiatrist. R. 254-276. They evaluated his competence to stand trial based upon their interviews with him and others who knew his history. Dr. Montgomery concluded that while Hearn suffered from some mental problems, such as mild paranoia, and personality disorders, that he was legally competent at the time of the alleged offense.

In **Woodham v. State** 800 So. 2d 1148, 1158 (¶29) (Miss. 2001), the Supreme Court indicated the test for sanity was "whether the accused knew right from wrong at the time of committing the act" in question.

He was also competent to stand trial.

Q. **Okay. So obviously in Mr. Hearn's case, y'all determined that he was okay to go to trial?**

A. **That was our opinion.** R. 258-259. (Emphasis by Appellee).

...

Q. Is it true that you are under the opinion that the defendant's mild paranoia and grandiose–or grandiosity, and his unusual behavior, was largely related to pathological personality traits rather than to a mental disorder?

A. **It was our opinion that most of what we were seeing was due to personality traits rather than ailments...That was just some mild suspiciousness or paranoia on your part, nothing that we thought would get in the say of your ability to stand trial.** R. 273-274. (Emphasis by Appellee).

On redirect, Dr. Montgomery testified that although Hearn had some personality disorders, he was not legally insane. He was fully competent to stand trial.

Q. So, Doctor, Mr. Hearn does have some mental issues, is that right?

A. Correct.

Q. **He just doesn't have the kind of mental issues that makes one legally insane; is that right?**

A. **Correct.** R. 275. (Emphasis by Appellee).

The record cited indicates that the trial court did not err in finding that Hearn was competent to stand trial. This would be prior to trial. Nor does the record indicate that Hearn's behavior, actions and statements during his trial should have required the trial court to order another competency hearing.

In **Conner v. State** 632 So.2d 1239, 1251 (Miss.1993), the Supreme Court found that there was nothing in the record indicating that Conner, who suffered from schizophrenia, was incompetent to stand trial.

The trial court "did not err in not ordering a competency hearing" during the trial. There was evidence that Conner, like Hearn, could understand the nature of the proceedings, appreciate their significance and aid in his own defense.

> The Court must assume that the trial court objectively considered all the facts and circumstances, including those which are not available to this Court, which bore upon Conner's competence to stand trial. There is nothing in the record which, considered in context, leads inexorably to the conclusion that Conner "could neither understand the proceedings or appreciate their significance, nor rationally aid his attorney in his defense." The trial court did not manifestly err in not ordering a competency hearing.

The Appellee would submit that the record reflects that there was no need for the trial court to have sua sponte ordered an additional competency hearing based on Hearn's behavior during the trial.

Hearn's statement prior to the trial about the maximum two year sentence for a conviction for intimidation of a judge was correct. See M. C.A. § 97-9-55. Contrary to what Hearn's counsel argues on appeal, it shows that Hearn knew that with which he was charged and the statutory sentence to which he could be subjected if convicted. R. 34-35.

In addition, the record reflects that Hearn stated later in the trial that he fully understood that if convicted as "an habitual offender" then he could receive a life sentence without parole. R. 351.

In short, while Hearn made some rambling and crude statements during the trial, it is clear that he knew who he was, where he was, what he was doing, the seriousness of the charges against him, as well as what his defense was to the charge for which he was being tried.

The record, when viewed in its entirety indicates , what a team of experienced forensic psychiatrists found after interviewing Hearn, viz. that while Hearn had some personality problems, he was fully competent to stand trial and participate rationally and intelligently in his own defense.

Secondly, the record reflects that the trial court properly permitted Hearn to represent himself. R. 37. He had been previously found competent to stand trial after being given forensic interviews with more than one psychiatrist.

However, his court appointed counsel, Mr. Dan Duggan, informed the trial court that Hearn wanted to dismiss his representation. This was on the day of the trial. R. 30-37. This was partly the result of Hearn's refusal to allow Mr. Duggan to present an attempted insanity defense. R. 351.

The trial court informed Hearn of his right to an attorney to assist in his defense. However, he also informed him that he did not have a right to another attorney where he had not obtained one, and the jury was waiting to take their seats in the courtroom. R. 30-37. The record reflects that after being informed that if he wanted to dismiss Mr. Duggan, then he would have to represent himself, Duggan chose to represent himself. R. 37.

The dialogue over Hearn's rights of representation was as follows:

> Court: **Mr. Hearn, you just need to be quiet and listen for now. Mr. Hearn, while you are entitled to a lawyer to represent you, a lawyer will not be forced on you.** I will release Mr. Duggan as your attorney. However, Mr. Duggan, I would ask that you stay and give him legal advice at this point in time and guide him in representing himself. Now, Mr. Hearn, I' m doing this for your own protection. R. 33.
>
> ...
>
> Court: All right. Then I will allow you to dismiss Mr. Duggan as your attorney but I will request and order that he stay here as your attorney legal advisor at this time, and I would strongly suggest you heed his advise that he has--that he gives you at this point. R. 34.

The record reflects that after being given his options, Hearn informed the jury that he was representing himself.

> Hearn: **My name is Michael Hearn. I'm representing myself really, but we just got this straight before y'all came in.** R. 37.

After hearing Hearn's statement to the jury, the trial court informed the jury that Hearn had chosen to represent himself. Mr. Duggan would be his legal counsel offering his assistance. R. 37.

> Court: All right. Thank you, Mr. Hearn. All right. **So I can clarify that, Mr Hearn is representing himself on this matter; however, Mr. Duggan has graciously consented to stay here as he was court appointed to do and given Mr Hearn**

> **advice as an attorney.** He will not be representing Mr. Hearn, but he is a legal counsel designed to help an individual representing himself in this matter due to the nature –the serious nature of the offense. R. 37. (Emphasis by Appellee).
>
> ...

The record reflects that the trial court informed Hearn on the record that he would have to represent himself by the same standard required for licensed attorneys.

> Court: **All right. Mr. Hearn, we will hold you–since you have elected to represent yourself, we will hold you to the same standard as we would a licensed attorney.** R. 112. (Emphasis by Appellee).

In **Evans v. State** 725 So.2d 613, 703 (Miss.1997), the Court quoted with approval **Faretta, infra**, which stated that "the right to defend is personal." This is true even if a defendant's own defense, to a trained attorney or judge, could be interpreted as being conducted to his own detriment.

> The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of that respect for the individual which is the lifeblood of the law. **Faretta**, 422 U.S. at 834, 95 S. Ct. at 2541 (1975).

In **Howard v. State** 701 So.2d 274, 284 (Miss.1997), the case relied upon by Hearn's appeal counsel, the Supreme Court pointed out that Howard's four attorneys all informed the trial court that they did not believe that he could assist in or carry out his own defense. Additionally, Howard, unlike Hearn, was not given a competency hearing.

In the instant cause, Mr. Duggan never expressed such an opinion of incapacity to assist or carry out a defense. As stated above with cites to the record, Hearn was found to be competent to stand trial by two forensic psychiatrists. R. 273-275. And the record indicates that Hearn , unlike Howard, was rational, and coherent enough to present his "hyperbole" defense to the charge. R. 288-

333.

As stated by the court in **Howard**:

> The language in **Metcalf v. State**, 629 So.2d 558 (Miss.1993), that defense counsel is in the best position to determine if the defendant has executed a knowledgeable waiver of counsel, is particularly applicable to this case. Each and every one of the four attorneys who found themselves dealing with Howard told the court in some form or fashion that Howard could not assist them in his defense, much less carry out his own defense. The court below could not have known whether Howard was capable of knowingly and intelligently waiving the right to counsel, as a competency hearing should have been ordered before or during the proceedings. The failure to do so, under these circumstances, constitutes error.

In the instant cause, Hearn's opening statement was consistent with his own testimony in defense of the charge. His argument was that he made what appeared to be threats, but they really were not threats. This was just his way of expressing himself due to his frustration over the government "trying to railroad me." R. 121. In addition, the record reflects that Hearn relied upon his counsel, Mr. Duggan, during the trial as well as allowed him to make his closing argument before the jury. R. 120-122; 369-376.

In **Howard, supra**, p .287, the court found there was a presumption that participation by stand by counsel was with the consent of a pro se defendant who had chosen to conduct his own defense.

> Finally, the **McKaskie** Court (**McKaskie v. Wiggins**, 79 L. Ed. 2d 122 (1984)) established that once the pro se defendant invites or agrees to participation by counsel, any subsequent appearances by counsel must be presumed to be within the defendant's acquiescence, at least until the point that the defendant expressly and unambiguously renews his request that counsel be silenced.

In **Brooks v. State** 763 So.2d 859, 867 (25 ¶) (Miss. 2000), the Supreme Court found that where there is evidence that a defendant's right to represent himself was honored, and stand by counsel's participation was in accordance with the defendant's right to control his own defense, there

was no evidence of any harm under **Feretta, supra.**, and its progeny in this State.

> ¶ 26. This Court should not ignore a defendant's persistent pleas that he be allowed to exercise a constitutional right, even if it appears that the defendant would have been wiser to waive the right in question. It should be noted, however, that the trial judge did not completely deny, but merely limited, Brooks his right to represent himself at trial. In considering a defendant's rights in the present "hybrid" representation context, the United States Supreme Court has stated that:
> (T)he primary focus must be on whether the defendant had a fair chance to present his case in his own way .... First, the pro se defendant is entitled to preserve actual control over the case he chooses to present to the jury. This is the core of the **Faretta** right. If standby counsel's participation over the defendants' objection effectively allows counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of the witnesses, or to speak instead of the defendant on any matter of importance, the **Faretta** right is eroded. Second, participation by standby counsel without the defendant's consent should not be allowed to destroy the jury's perception that the defendant is representing himself. **McKaskle v. Wiggins**, 465 U.S. 168, 178-79, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984).

The Appellee would submit that there was sufficient evidence for determining that Hearn was competent to stand trial, as found by a team of forensic psychiatrists. R. 273-275. The record also reflects that Hearn intelligently and knowingly of his own free will waived his right to Mr. Duggan's counsel during his trial. R. 30-37. The record reflects that the trial court correctly stated for the record that after being informed of his options, Hearn intelligently chose to represent himself. R. 30-37.

The record also reflects that Duggan's participation during the trial was at the invitation or consent of Hearn. R. 369-376.

The Appellee would submit that this issue is lacking in merit.

PROPOSITION III

THIS ISSUE WAS WAIVED. AND THE RECORD REFLECTS THAT DR. MOORE'S TESTIMONY WAS PROPERLY RECEIVED.

Hearn argues that the trial court erred in admitting psychiatrist Dr. Tom Moore's testimony. Hearn believes that this was "plain error." Hearn thinks that a psychologist can only reveal confidential patient information under very limited circumstances. This would include situations where the patient consents or where failure to disclose would result in danger to others. Hearn did not think that either of these exceptions applied in his case. Appellant's brief page 31-37.

To the contrary, as recognized by Hearn's appellant counsel, the record reflects there was no objection to Dr. Moore's testimony. There was no objection based upon the violation of the physician's duty of maintaining professional confidentiality, under the circumstances of this case, which is being argued for the first time on appeal. R. 174-195 ; C.P. 118-119.

In **Haddox v. State**, 636 So. 2d 1229, 1240 (Miss. 1994), the Court stated:

> Because these arguments are not preserved for appeal, this Court cannot reverse based upon them. The assertion on appeal of grounds for an objection which was not the assertion at trial is not an issue properly preserved on appeal. **Baine v. State,** 606 So. 2d 1076 (Miss. 1992); **Willie v. State**, 585 So. 2d 660, 671 (Miss. 1991); **Crawford v. State**, 515 So. 2d 936,938(Miss. 1987);...

The record reflects a hearing was held on a motion to suppress Hearn's statements on grounds of violation of confidentiality under M. R.E. 503 (b). C.P. 60. R. 6-30. This section states "the general rule of privilege." The general rule is that "the patient" has a general privilege to refuse to disclose or let others disclose knowledge about his medical condition as revealed to a physician as part of diagnosis and treatment for his illness.

However, the record indicates that Hearn was advised and warned that statements of threats

to kill others exceeded the confines established for confidentiality between a patient and a physician. In short, this was not a case of a patient refusing to disclose but rather of a patient clearly wanting disclosure.

Without conceding that this issue was waived, the Appellee will also consider the merits. The Supreme Court has stated that "plain error" constituted trial error serious enough to have resulted in a "miscarriage of justice." It must also be error that effected "substantial rights of a defendant." The record reflects that neither of these conditions were met in the instant cause.

In **Morgan v. State** 793 So.2d 615, 617 (Miss. 2001), the Court stated that only errors that generate "a miscarriage of justice" rise to the level of plain error. The Court of Appeals has followed this precedent in many of its prior rulings, including **Taylor v. State** 754 So.2d 598, 603 (¶11) (Miss. App. 2000).

> ¶ 9. The plain error rule is codified in Miss. R. Evid. 103(d). It provides that nothing precludes the Court from taking notice of plain errors affecting the substantial rights of a defendant, even though they were not brought to the attention of the trial court. If a party persuades the court of the substantial injustice that would occur if the rule were not invoked, the court may invoke the rule. See **Edwards v. Sears, Roebuck & Co.**, 512 F.2d 276 (5th Cir.1975). "Only an error so fundamental that it generates a miscarriage of justice rises to the level of plain error," however. **Gray v. State**, 549 So.2d 1316, 1321 (Miss.1989); **Kuehne & Nagel (AG & Co.) v. Geosource, Inc.**, 874 F.2d 283, 292 (5th Cir.1989).

The record reflects that Hearn's communication with Dr. Moore was not confidential. The record indicates that Hearn was warned about the possibility of disclosure to prevent harm or danger to others. The record also reflects that after being warned, Hearn indicated to Dr. Moore in a public place that he did not care if his threats to the judges were revealed to them. R. 179.

The record also indicates that Hearn had been writing numerous letters addressed to the judges in question expressing his desire to do them harm. These letters, which he admitted writing, were sent by Hearn himself without any disclosure to Dr. Moore or any other mental health official.

See exhibits 6-10 which are copies of letters addressed to Judges Roberts and Bailey by Hearn. They are contained in the manila envelope marked "Exhibits."

Dr. Moore testified that he warned Hearn that if he repeated his threats to kill , he would be require to reveal this information. R. 25-26; 179-182. After that warning, Hearn repeatedly informed Dr Moore of his intent to carry out his threats to kill. Dr. Moore believed Hearn both intended to do them harm but was also capable of carrying out his threat when released from incarceration.

> Q.–**after the initial statement that he made regarding killing the judges, is that when you informed him that you would have to tell?**
>
> A. **Yes, sir.**
>
> Q. **After that, did he continue to tell you that again and again?**
>
> A. **Yes, sir.** R. 25-26.

During the trial, with Mr. Hearn representing himself, the trial court permitted Dr. Moore to testify about his conversation with Hearn at the hospital. While Hearn objected, the trial court overruled the objections which were general and not on the same grounds being raised on appeal.

> Q. What did Mr. Hearn tell you regarding Judge Roberts and Judge Bailey?
>
> A. **Well, basically, you know, at that particular point in time, he basically was- said that he would risk incarceration again even if–if he was caught doing personal injury to either one of them.** So I questioned him as to his intent, and he says when he got out, he was fully intending to do that..
>
> And I asked him —I said, Do you realize the consequences of that? **And he says, I'll–I don't care whether I'm incarcerated again. I'm going to do it–** R. 179.
>
> ...
>
> Q. Okay. So if the assessment of his history, that sort of thing indicated that he might make threats from time to time but there was no information or really any way to substantiate that he might actually carry them out, normally that would be privileged?
>
> A. Uh-huh.

Q. You would not be able to even tell–

A. No.

Q. **But in this case, once you reached that threshold where it appears to everyone that there is some possibility that that will be carried out, you actually have a legal duty to inform?**

A. **That's correct.**

Q. And is that why there was a letter written in August to Judge Roberts and Judge Bailey regarding these threats?

A. That's correct. R. 180-181.

...

Q. So he was wanting to know whether or not you had actually given them that information?

A. That is correct.

Q. **Did he indicate that that was what he wanted to happen?**

A. **Well, basically, he just, you know, basically said that it didn't matter to him. And so it was a very brief matter.** R. 182

....

Q. Now, you indicated in your warn letter that you believed that Mr. Hearn was capable of acting on his threats, is that right?

A. That's correct.

Q. Do you still have that feeling?

A. Yes, I do. R. 184. (Emphasis by Appellee).

In **Mississippi State Bd. of Psychological Examiners v. Hosford** 508 So. 2d 1049, 1055 (Miss.1987) the Court concluded that a psychologist may disclose "otherwise confidential information" where "not to do so would result in clear danger to the person or to others."

> One provision of that code regards patient confidences. Principle 5 of the Ethical Principles of Psychologists requires respect for "the confidentiality of information

> obtained from persons in the course of their work as psychologists." Only two exceptions to the principle of confidentiality are found. The first, of course, is where the patient consents to the disclosure. In the second, even though no consent be given, the psychologist may disclose otherwise confidential information where "not to do so would result in clear danger to the person or to others."

M. C. A. §73-30-17 states that one ground for revealing otherwise confidential information received from a mental health patient was the patient's "contemplation of a crime or harmful act."

> No licensed professional counselor may disclose any information acquired during professional consultation with clients except:
>
> a) With the written consent of the client, or in the case of death or disability or in case of a minor, with the written consent of his parent, legal guardian or conservator, or other person authorized by the court to file suit
>
> b) **When a communication reveals the contemplation of a crime or harmful act, or intent to commit suicide.** (Emphasis by Appellee).

The record cited above reflects that Dr. Moore's testimony was properly received into evidence. The record reflects that Hearn was warned that intentional threats with an intention to carry them out could require disclosure to prevent warn. The record also reflects even after the warning, Hearn repeated his threats and intention to carry them out. He also expressed his desire to have those threatened warned of his intent to harm them. R. 182.

The Appellee would submit that this issue was waived, and it was not plain error. This issue is also lacking in merit.

PROPOSITION IV

THE RECORD REFLECTS THE JURY WAS PROPERLY INSTRUCTED, GIVEN THE FACTS OF THIS CASE.

Hearn's counsel believes that the trial court erred in not granting the jury insanity instructions. He believes that Hearn's actions and statements before the jury should have sufficiently indicated to the jury that his sanity was an issue in the instant cause. Appellant's brief page 37-40.

To the contrary, the record reflects that Mr. Duggan, counsel for Hearn, attempted to present an insanity defense on behalf of Hearn. C.P. 58-59. That request also indicated that Mr Hearn stated that he would not cooperate with any mental evaluation. He stated that he would be "disruptive and uncooperative" with Dr. Webb. C.P. 58. Duggan therefore wanted Dr. Tom Moore to be consulted for "information of Hearn's psychological health." C.P. 58.

The trial court pointed out that Hearn rejected the request of his counsel. R. 351. Hearn's theory of the case, as one representing himself, was not to rely upon insanity but rather upon an alleged misunderstanding of his intentions by the physicians, mental health professionals and judges to whom he addressed many of his threatening and obscene letters. R. 120-121. Hearn admitted that these letters appeared to be threatening. R. 327.

In addition, the record reflects there was an agreed order on behalf of Hearn's counsel, the prosecution and the trial judge for a mental evaluation of Hearn. C.P. 66-76. Dr. John Montgomery, a forensic psychiatrist at Whitfield State Hospital, testified to having interviewed Mr. Hearn. R. 256. In addition, Dr. McMichael, and psychologist MacVaugh assisted in the evaluation. They found that Hearn knew the difference between right and wrong at the time he made the threats. R. 264. They also found that Hearn was competent to stand trial. While Hearn had some personality disorders, he was, nevertheless, competent under **M'Naughten** to stand trial.

Dr. John Montgomery testified that at the time of the threats Hearn knew the difference between right and wrong.

> Q. All right. **But there was no doubt in your mind that based upon all the evidence that was presented to you as well as agreement from Dr. McVaugh and Dr. McMichael that at the time of the offense, that is July 29, 2004, Mr. Hearn was not experiencing symptoms of a major mental disorder that would have prevented him from knowing the nature and quality and wrongfulness of his acts; is that right?**
>
> A. **That's correct.** R. 264

The dialogue over the selection of jury instructions on insanity was as follows:

> Angero: ...The defense is in this case that he did not threaten the Judges, that he did not communicate that threat to Dr. Moore, that he did not intend to commit any violent act against the-either of the Judges. ..That's the defense that was presented before the jury. The defense was, not, I did not–I committed the crime, but I didn't know what I was doing. R. 348-349.
>
> ...
>
> Court: All right. Looking at this from all points of view, all we have in defense is Mr. Hearn's testimony. **Quite frankly, his testimony was basically I did this; I wrote this, but it's not–but you misinterpreted; it's not what I meant. At no time did he raise his own sanity question. He was completely uncooperative with counsel in that regard. It is my understanding he did not want to place forth a defense of insanity which is why he terminated Mr. Duggan's representation of him on the first day of trial. So I'm afraid at this point he will have to live with it...** R. 351. (Emphasis by Appellee).

did not use insanity

On direct examination, Hearn testified that he did not make statements threatening bodily harm to the judges in question. He also testified that he did not intend to carry out any threat to the judges. The Appellee has found no testimony from Hearn in the record indicating that he made the many threats, but did not know what he was doing at the time because of delusions or some mental disease. R. 288-333.

> Q. Mr. Hearn, when you made any of these statements to any of these judges, did you do anything to threaten bodily harm to either one of these Circuit Court Judges?
>
> A. Never.

Q. Was it your intent to do any threats to either Judge Roberts or Judge Bailey, to do any threats–do bodily harm to either one of those Judges?

A. Never. R. 296.

Hearn also stated in his testimony that while he had made what appeared to be threats, they were not really serious threats. This was in keeping with his use of hyperbole defense.

Q. So let me get this straight. You've made repeated and persistent threats to kill Judge Bailey and Judge Roberts; correct?

A. **Yeah-no, because-no, no, no. Not a threat. No, no. Don't go there. It's not a threat. I have not made repeated threats. I have said the word, but it was not a threat.**

Q. It was a fact? It was a promise, right?

A. **It was a way of speech. That's all.** R. 327. (Emphasis by Appellee).

Hearn also testified that the letters he wrote to the judges were to inform them of the law suits he was filing against them. They were also intended to show his defiance of their authority and that he "did not need their help." There was never any claim that he was insane or delusional when he wrote the letters and thus did not know or understand what he was doing.

Q. But you didn't make–you didn't make these statements about killing Judge Roberts and Judge Bailey hopeful that among the many, many, many, letters that you wrote in that they might be afraid and maybe they would change your sentence in some fashion?

A. I wrote them the letters to let them know I was still alive. I wrote them a letter to know I had filed a lawsuit against them. I wrote them a letter to know I don't need their help and still don't need their help. R. 332.

In **Woodham v. State** 800 So. 2d 1148, 1158 (¶29) (Miss. 2001), the Supreme Court indicated the test for sanity was "whether the accused knew right from wrong at the time of committing the act" in question.

Under the **M'Naghten** test, it must be proved that at the time of committing the act that the accused "was laboring under such defect of reason from disease of the mind

> as (1) not to know the nature and quality of the act he was doing or (2) if he did know it, that he did not know that what he was doing was wrong." **Roundtree**, 568 So.2d at 1181 (citations omitted). Essentially, the test is whether the accused did not know right from wrong at the time of committing the act. **Russell**, 729 So.2d at 784 (citing Roundtree, 568 So.2d at 1181). The determination of a defendant's sanity is within the province of the jury, which may accept or reject expert and lay testimony. **Tyler**, 618 So.2d at 1309; **Roundtree**, 568 So.2d at 1181

In **Sharma v. State** 800 So.2d 1190, *1192 -1193 (¶8 and ¶9) (Miss. App. 2001), the Court found that Sharma was not entitled to a jury instruction for simple possession. This was based upon Sharma denying that he ever possessed or sold any cocaine to anyone.

> ¶ 8. In **Humphrey v. State**, 759 So. 2d 368, 380 (Miss.2000), the Mississippi Supreme Court gave this guidance regarding jury instructions:*1193
> Jury instructions are to be read together and taken as a whole with no one instruction taken out of context. A defendant is entitled to have jury instructions given which present his theory of the case; however, this entitlement is limited in that the court may refuse an instruction which incorrectly states the law, is covered fairly elsewhere in the instruction, or is without foundation in the evidence.(emphasis added).
>
> ¶ 9. Sharma testified that he never sold cocaine to Agent Eddie Ray. He claimed that he sold him loose cigarettes. In light of Sharma's testimony, it is impossible to discern an evidentiary foundation for an instruction on simple possession. This assignment of error lacks merit, as we conclude that the trial judge did not err in failing or refusing to grant an instruction which was devoid of an evidentiary anchor.

The record reflects that Hearn's testimony was that the apparent threats contained in his letters and statements to others, such as Dr. Moore, and Mr. Nored, were not really threats. R. 327. He informed the jury that they were hyperbole based upon his frustration over the legal proceedings. He believed that he had been unjustly convicted and sentenced to twenty years imprisonment. This was for stabbing a man in the back which almost resulted in his death.

The Appellee would submit that we have found no testimony or statements from Hearn to the jury about him not knowing who he was or what he was doing when he wrote the threatening letters and expressed his threats to others. This was on July 29, 2004. Therefore, there was a lack of record evidence for being granted an insanity defense instruction to the jury. This issue is also

lacking in evidence.

PROPOSITION V

THIS ISSUE WAS WAIVED. AND M. C. A. § 97-9-55 PROPERLY PROVIDES ADVANCE NOTICE OF A COGNIZABLE OFFENSE.

Hearn's counsel believes that M.C. A.§ 97-9-55 under which he was indicted was unconstitutional. It was unconstitutional because he opines that the statute does not distinguish between a legitimate threat to others and free speech which is protected under the Constitution. Appellant's brief page 41-46.

To the contrary, the record reflects that this issue was never raised with the trial court. It was neither raised during the trial or in Hearn's Motion for a New Trial or a JNOV. C.P. 118-119.

In **Patterson v. State**, 594 So. 2d 606, 609 (Miss. 1992), the Court stated that a constitutional issue not raised with the trial court was waived on appeal.

> The rule that questions not raised in the lower court will not be reviewed on appeal is particularly true where constitutional questions are involved. **Stewart v. City of Pascagoula**, 206 So. 2d 325 (Miss. 1968). These questions were waived–forfeited, if you please–if not asserted at the trial level. **Contreara v. State**, 445 So. 2d 543, 544 (Miss. 1984) [Appellant did not raise in lower court the constitutionality of statute proscribing crime against nature, and for that reason the question could not be considered on appeal].

In **Hill v. State** 853 So.2d 100, 102 -103 (Miss. 2003), the Supreme Court stated that there is a strong presumption that a statute enacted by the legislature was constitutional.

> ¶ 9. Hill asserts that Miss. Code Ann. § 97-41-16 is unconstitutionally vague in that it, inter alia, does not define "spirit of revenge," does not indicate whether the spirit of revenge must be directed toward the dog or its owner, and *103 (Cite as: 853 So.2d 100, *103) fails to define what constitutes wanton cruelty in killing a dog.
>
> [2] [3] ¶ 10. Statutes under constitutional attack have a strong presumption of validity, and that presumption is overcome only with a showing of unconstitutionality beyond a reasonable doubt. **Dillard v. Musgrove**, 838 So.2d 261, 264 (Miss.2003); **State v. Quitman County**, 807 So.2d 401, 406 (Miss.2001); **Richmond v. State**, 751 So.2d 1038, 1047 (Miss.1999); **Genry v. State**, 735 So.2d 186, 199 (Miss.1999); **Nicholson ex rel. Gollott v. State**, 672 So.2d 744, 750-51 (Miss.1996). The test

> concerning statutory construction is whether a person of reasonable intelligence would receive fair notice of that which is required or forbidden. **Posters 'N' Things, Ltd. v. United States**, 511 U.S. 513, 525, 114 S.Ct. 1747, 1754, 128 L.Ed.2d 539, 552 (1994); Lewis v. State, 765 So.2d 493, 499 (Miss.2000) (citing Posters 'N' Things); Miller v. State, 636 So.2d 391, 395 (Miss.1994); Reining v. State, 606 So.2d 1098, 1103 (Miss.1992).

The record reflects that the issue of the constitutionality of the intimidation statute was not raised with the trial court. C.P.118-119. It was therefore waived.

In addition, the claim that this statute could be harmful to protected speech is wide of the mark. The record does not indicate any testimony, claim or evidence that Hearn did not understand the offense with which he was charged. Neither was there any testimony or evidence indicating that the intimidation charge interfered with or hampered Hearn's constitution right to protected speech concerning matters of political, artistic or even social significance for society at large.

The Appellee believes that one who reads exhibits 6 to 10, the letters addressed to Judge Roberts and Bailey, will find nothing worthy of being recognized as protected speech. The Appellee would submit that this issue is also lacking in merit.

PROPOSITION VI

THE RECORD REFLECTS HEARN RECEIVED A FAIR TRIAL.

Hearn's appeal counsel team believes that he did not receive a fair trial. They believe that because of his alleged defective mental condition, the alleged betrayal of confidential information provided by a physician and the alleged misunderstanding of Hearn's "hyperbolic rantings" to the judges that he did not receive a fair trial. Appellant's brief page 41-46.

To the contrary, the record cited above indicates that Hearn was found by forensic psychiatrists to be competent at the time he made the threats and competent at the time of his trial. R. 273-275. In addition, there was no breach of professional confidentiality where the record reflects that Hearn expressed a desire to have his threats revealed to the intended victims. R. 179-182. Dr. Moore warned him that his threats would have to be revealed if he continued to make them with an intent to carry them out. R. 179-182. Hearn also expressed his desire to kill or do bodily harm to the judges not only in his many letters to them, but also by his statements to do harm made before a member of the state parole board, Mr. Arthur Nored. R. 232.

In **Gibson v. State**, 731 So. 2d 1087, 1098 (Miss. 1998), this Court found no errors individual or cumulative that had deprived Gibson of a fair trial.

> Where there is ' no reversible error in any part,...there is no reversible error to the whole.' **McFee v. State**, 511 So. 2d 130, 136 (Miss. 1987). We have examined each one of Gibson's complaints and hold the cumulative effect of all alleged errors was not such as to deny the defendant a fundamental fair trial.

The Appellee would submit that this issue is also lacking in merit.

CONCLUSION

Hearn's convictions should be affirmed for the reasons cited in this brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, W. Glenn Watts, 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 20th day of June, 2008.

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