and

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2007-KA-01439
SCT-T

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2007-KA-01439-SCT

MICHAEL HENRY HEARN **APPELLANT**

vs.

STATE OF MISSISSIPPI **APPELLEE**

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 disqualification or recusal:

Michael Henry Hearn, Appellant;

Dan W. Duggan, Jr., trial attorney;

Jay H. Hurdle, William A. Lewis, and Phillip W. Broadhead, Esqs., Attorneys for the Appellant, Criminal Appeals Clinic, University of Mississippi School of Law;

Bilbo Mitchell, Esq., District Attorney, and **Dan Angero, Esq.,** Assistant District Attorney, Office of the District Attorney;

Jim Hood, Esq. Attorney General, State of Mississippi;

Honorable David Ishee, presiding Circuit Court Judge; and

Danny Knight, Mississippi Bureau of Investigation.

Respectfully submitted,

PHILLIP W. BROADHEAD, MSB #4560
Clinical Professor, Criminal Appeals Clinic

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2007-KA-01439-SCT

MICHAEL HENRY HEARN — APPELLANT

vs.

STATE OF MISSISSIPPI — APPELLEE

STATEMENT OF ISSUES

ISSUE ONE:

WHETHER, GIVING ALL REASONABLE INFERENCES TO THE STATE'S CASE-IN-CHIEF, THE TRIAL COURT ERRED IN REFUSING TO GRANT THE DEFENSE MOTION FOR A DIRECTED VERDICT OR A NEW TRIAL AND WHETHER THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT THE APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT SINCE THE STATE FAILED TO MEET ITS BURDEN OF PROOF AND ESTABLISH EACH AND EVERY ESSENTIAL ELEMENT OF THE CRIME OF THREATENING A JUDGE BY LEGALLY COMPETENT EVIDENCE BEYOND A REASONABLE DOUBT.

ISSUE TWO:

THE TRIAL COURT ERRED WHEN IT FAILED TO CONDUCT THE NECESSARY ON-THE-RECORD EXAMINATION AND WARNINGS REQUIRED PRIOR TO TRIAL TO DETERMINE THE APPELLANT'S COMPETENCY BOTH TO STAND TRIAL AND TO EFFECTIVELY REPRESENT HIMSELF *PRO SE* AT TRIAL.

ISSUE THREE:

WHETHER THE TRIAL COURT ERRED BY ADMITTING PRIVILEGED COMMUNICATION BETWEEN THE APPELLANT AND A STATE PSYCHIATRIST WHERE NO RECOGNIZED EXCEPTION EXISTS OR DUTY TO WARN EXISTS UNDER MISS R. EVID. 503 AND WHERE THE APPELLANT WAS NOT PROPERLY WARNED THAT THE DOCTOR WAS AN AGENT OF THE STATE OF MISSISSIPPI AND THAT THE APPELLANT HAD A RIGHT AGAINST SELF-INCRIMINATION.

ISSUE FOUR:

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENSE JURY INSTRUCTIONS D-10, D-11, AND D-12, REGARDING THE ISSUE OF INSANITY, WHEN SUFFICIENT CIRCUMSTANTIAL EVIDENCE AS TO THE APPELLANT'S MENTAL STATE IN THE CASE WAS PRESENTED TO THE JURY AT TRIAL.

ISSUE FIVE:

WHETHER MISS. CODE ANN. § 97-9-55 IS UNCONSTITUTIONAL UNDER ARTICLE 3, SECTION 26 OF THE MISSISSIPPI CONSTITUTION AND THE FIRST AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AS APPLIED TO THE FACTS OF THE PRESENT CASE BECAUSE THE APPELLANT DID NOT UTTER A SERIOUS EXPRESSION OF AN INTENT TO DO BODILY HARM.

ISSUE SIX:

WHETHER THE CUMULATIVE EFFECT OF THE ERRORS BY THE TRIAL COURT, THOUGH JUDGED BY THIS HONORABLE COURT TO BE HARMLESS, TOGETHER COMBINED TO VIOLATE THE APPELLANT'S FUNDAMENTAL RIGHT TO DUE PROCESS UNDER THE UNITED STATES CONSTITUTION AND THE MISSISSIPPI CONSTITUTION.

STATEMENT OF INCARCERATION

Michael Henry Hearn is presently incarcerated in the Mississippi Department of Corrections.

STATEMENT OF JURISDICTION

This honorable Court has jurisdiction of this case pursuant to ***Article 6, Section 146 of the Mississippi Constitution*** and ***Miss. Code Ann. 99-35-101 (Supp. 2001)***.

STATEMENT IN SUPPORT OF ORAL ARGUMENT

This case is very fact-intensive and the Appellant, through counsel, would respectfully request this Court to grant oral argument to present conflicts in the rulings of the trial court based on the evidence and testimony presented at trial that are alleged by the Appellant to be erroneous. Also, this case presents a novel question of statutory construction in light of First Amendment considerations that needs to be resolved by this honorable Court.

STATEMENT OF THE CASE

When a mentally ill and delusional inmate's conversations with a State psychiatrist are disclosed

without his consent to others to cause fear and concern in the minds of judges, the rush to resolve these fears inevitably leads to a disturbing result. The Appellant, Michael Henry Hearn (hereinafter "Mr. Hearn"), long suffering from a diagnosed disease of the mind, wrote cryptic letters and made threatening statements towards two circuit court judges. These judges had presided over his previous cases and had received numerous communications from Mr. Hearn for some time; however, the judges became concerned only after receiving a warning from a state psychiatrist, Dr. Tom Moore (hereinafter "Dr. Moore"). At trial, Mr. Hearn, confused and impaired as a result of his mental illness, failed to grasp the seriousness of the charges and the possibility of a life sentence. As these facts together contributed to the paranoia of the Appellant, Mr. Hearn unwisely chose to remove his counsel moments before trial began and was forced to represent himself. Mr. Hearn unwittingly became an impediment to his own defense as well as a key asset to the prosecution. Predictably, his conviction was easily secured.

Mr. Hearn was sent to the state hospital for evaluation, where doctors documented several mental disorders including Manic Bipolar and Mixed Personality Disorders and deemed Mr. Hearn incompetent to stand trial on the charge. (CP. I 35-36, RE. 28-29). Mr. Hearn has spent most of his life in the criminal justice system. Mr. Hearn was first convicted in the late 1970s for selling drugs in Oktibbeha County, and subsequently was arrested and charged with false pretense in 1988. In 1994 Mr. Hearn was charged with aggravated assault and his trial was initially presided over by Circuit Judge Bailey (T. II 210-11) and then Circuit Judge Roberts (T. I 124). Mr. Hearn was convicted and sentenced to twenty years' incarceration. (T. I 129). While in prison, Mr. Hearn wrote numerous letters to a wide range of government officials, including Judges Roberts and Bailey. (T. I 133-34; T. II 212, 294). The cryptic nature of these letters reflected the multiple diagnoses made about his mental disorders.

During a mental evaluation in 2004, conducted at East Mississippi Correctional Facility, Mr. Hearn made threatening remarks about Judges Roberts and Bailey to the examining psychiatrist, Dr. Moore. (T.

II 179). Dr. Moore, upon hearing these threats, proceeded to notify the judges of the contents of his session with Mr. Hearn, telling the judges that he believed the threats to be credible. (CP. 37, RE. 30).

After being informed of the statements by Mr. Hearn and of his scheduled release date of December 2005, the judges sent a letter to Mississippi Department of Corrections (hereinafter "MDOC") Commissioner Christopher Epps (hereinafter "Epps"). (CP. I 38-39, RE. 31-32). The judges implored MDOC to recalculate Mr. Hearn's release date and requested MDOC to initiate civil commitment proceedings against Mr. Hearn. (CP. 38-39, RE. 31-32). Epps responded that Mr. Hearn's sentence had been properly calculated and that it was not MDOC's place to institute civil commitment hearings. (CP. 40-42, RE. 33-35).

Only after this failed attempt was an investigation opened by the Mississippi Bureau of Investigation (hereinafter "MBI"). (T. II 195). In March 2005, Mr. Hearn was indicted on two counts of Intimidating a Judge in violation of ***Miss. Code Ann. § 97-9-55*** (Supp. 2004) (CP. 2-3, RE. 15-16) subject to a habitual offender sentencing enhancement under ***Miss. Code Ann. § 99-19-83*** (Supp. 2004) (CP. 4, RE. 17), and faced trial in Cause No. 350-05. (T. I 1, RE. 1).

As the date for trial approached, a number of developments delayed the start of the proceedings. First, the expected recusals of Judges Roberts and Bailey were approved. (CP. 8-9, RE. 36-37). Next, Gary B. Jones withdrew as counsel for Mr. Hearn, and Dan Duggan Jr. was appointed in his stead. (CP. 23, RE. 38). Then, Justice Kenneth Griffis of the Mississippi Court of Appeals was designated Special Judge (CP. 15, RE. 39) but subsequently recused himself from the case. (CP. 27, RE. 40). Just as Justice David Ishee of the Mississippi Court of Appeals was appointed as Special Judge and the trial appeared ready to proceed (CP. 28, RE. 41), the state was struck by Hurricane Katrina and trial was delayed again. (CP. 31, RE. 42). During pretrial motions, Dan Duggan, Jr. (hereinafter "Mr. Duggan") filed a motion in September 2005 requesting a mental evaluation of Mr. Hearn (CP. 32-34, RE. 43-45) which was granted (CP. 47-50, RE. 46-

49). However, Mr. Hearn's mental evaluation was not completed until Early 2007, further postponing trial. (CP. 81, RE. 50).

Trial in the matter finally began July 23, 2007. The chaotic events of trial were precipitated by several pretrial motions minutes before trial. Mr. Hearn requested a change of venue and also hastily requested to have Mr. Duggan removed as counsel. (T. I 30). Motions had not previously been filed on these issues as Mr. Duggan had unexpectedly been informed of Mr. Hearn's decision mere moments before trial was to begin. (T. I 30). Mr. Hearn attempted to explain that he wished to have Mr. Duggan removed as counsel because he did not feel that he was represented by Mr. Duggan and even confusingly commented that Mr. Duggan was "not [his] attorney." (T. I 31). When asked why the motion should be granted, Mr. Hearn responded that he had not seen or talked to Mr. Duggan since November 22, 2005. (T. I 31). At that time, Mr. Duggan consented to act as a legal advisor in the event the trial court should remove him as counsel. (T. I 32).

Regarding the change of venue issue, Mr. Hearn attempted to argue that there had been media coverage and was concerned how people in the community may have felt about the judge who had been threatened. (T. I 31). Due to the confused and incoherent manner which Mr. Hearn addressed the court, the State did not provide any rebuttal nor object to either motion. (T. I 32). The motion for change of venue was also summarily denied since "no sufficient evidence" was presented and that the motion was untimely. (T. I 32, RE. 51).

While the trial judge was explaining the decision of the court, Mr. Hearn interrupted with an objection to the ruling and was reprimanded by the court. (T. I 33, RE. 52). The court granted the motion to remove Mr. Duggan as counsel, though Mr. Duggan was asked to remain on as legal advisor to Mr. Hearn. (T. I 33, RE. 52). The trial judge asked Mr. Hearn if he wished to represent himself and Mr. Hearn replied, "[n]o. I want you to appoint me an attorney." (T. I 33). The trial court refused this request due to the

timeliness of the request and presented Mr. Hearn with the problematic dilemma of choosing to either represent himself or retain Mr. Duggan as counsel. (T. I 33, RE. 52). Mr. Hearn decided, begrudgingly, to represent himself. (T. I 33-34). While explaining the decision of the court on this matter Mr. Hearn again interrupted the trial judge. (T. I 33-34). Ironically, the trial judge warned Mr. Hearn that he would not allow the trial "to start off as any sort of sideshow." (T. I 34). However, the trial judge did not provide a warning as to the pitfalls faced by a *pro se* defendant nor warn Mr. Hearn of the consequences. It was not until after the jury was empaneled that the trial judge finally notified Mr. Hearn that he would be held to the same standard as a licensed attorney. (T. I 112).

During the State's opening argument, the prosecutor admitted that the letters in question were incomprehensible and cryptic; nonetheless, he conjectured they had an ominous tone. (T. I 117). He also informed the jury of the privileged conversation that took place between Mr. Hearn and Dr. Moore. (T. I 118). The prosecutor indicated he could only speculate as to the result Mr. Hearn hoped to obtain as a result of these letters and conversations, since, as the prosecutor admitted, the judges would not have jurisdiction to provide any relief for Mr. Hearn. (T. I 119). Mr. Hearn attempted to make an opening statement, however, due to his tangential thought process and lack of understanding of the proceedings he was interrupted by the trial judge twice before finally being instructed by the court "to have a seat." (T. I 120-21, RE. 53-54).

Several witnesses for the State testified about their impressions of the letters that Mr. Hearn wrote to Judges Robert and Bailey, as well as oral statements Mr. Hearn made about each judge. Judge Roberts testified that before Dr. Moore's warning he regarded the letters as merely "unusual, difficult to understand, intimidating to some degree because you don't know what the innuendo is in the letter." (T. I 134). Judge Roberts also testified that the letters contained obscene and vulgar language. (T. I 134). When questioned by Mr. Hearn as to what comments he perceived as directly threatening, Judge Roberts responded, "you

seem to imply that the court system has gone to hell as you put it." (T. II 153). When questioned where Mr. Hearn had written that statement Judge Roberts responded that he could not read Mr. Hearn's mind and that Mr. Hearn would "have to interpret what [he] meant in that letter." (T. II 155). Again, Judge Roberts indicated that he inferred from the letters that Mr. Hearn was merely upset with the court system. (T. II 155). However, Judge Roberts could not point to a single overt or direct threat of bodily harm that was contained in the letters. The impact of this admission was likely minimized by Mr. Hearn's distracting conduct when he said to the jury, "let me talk out loud for a minute, please. I'm thinking." (T. II 163). Mr. Hearn then asked if Judge Roberts was stating that Mr. Hearn was violent and had a rude attitude. (T. II 164). Judge Roberts responded without objection by the defense that it was his opinion that Mr. Hearn was violent. (T. II 164). Mr. Hearn attempted to argue with the witness that he was not violent and drew yet another reprimand from the trial judge. (T. II 163-64, RE. 55-56).

Next Dr. Moore testified that in the course of the July 29, 2004 assessment that Mr. Hearn commented he would risk incarceration in order to inflict personal injury on Judges Roberts and Bailey. (T. II 179). Dr. Moore indicated that after this assessment, he consulted his supervisor, Dr. James Carter, in order to determine if he had a duty to warn. (T. II 180). Based on Mr. Hearn's background and mental disorder the doctors concluded a duty to warn existed. (T. II 180). On August 13, 2004, Dr. Moore briefly spoke with Mr. Hearn and Mr. Hearn inquired whether Dr. Moore was going to write a letter, in order to, according to Dr. Moore "warn anybody." (T. II 182). After hearing these threatening remarks, Dr. Moore delayed nearly thirty days before he drafted a "duty to warn" letter to Judge Roberts on August 24, 2004 (T. II 181), waiting another seven days before finally signing and sending it. (CP. 37, RE. 30). It is undisputed that prior to the evaluation Dr. Moore did not warn Mr. Hearn that he was free to disclose the contents of the evaluation with either judge; nor did Mr. Hearn consent to such disclosure and thereby waive any confidentiality regarding the conversation. The only "warning" that Mr. Hearn ever received was during the

intake process when he first arrived at the correctional facility four years prior. (T. I 20; CP. 37, RE. 30).

Mr. Hearn attempted to cross examine Dr. Moore; however, Mr. Hearn was incoherent from the outset of his questioning. Mr. Hearn asked whether Dr. Moore knew "that I was not signed up for psychiatric treatment?" (T. II 185). Dr. Moore responded with the question, "[y]ou did not sign up for psychiatric treatment?" (T. II 185). Mr. Hearn confusingly responded, "Yes, I did. I signed up." (T. II 185). Mr. Hearn was able to elicit from Dr. Moore that the decision to conduct the assessment was within Dr. Moore's discretion and not required or ordered by anyone else. (T. II 186). As he noted in the letter to Judge Roberts, Dr. Moore also testified there were mixed judgments among the mental health personnel over whether Mr. Hearn was serious about following through with his intentions to harm the judges. (T. II 192; CP. 37, RE. 30).

Danny Knight (hereinafter "Knight"), a Special Agent with the Mississippi Bureau of Investigation, testified that he began the initial investigation regarding the threats made in the letters sent to Judges Roberts and Bailey in November of 2004. (T. II 195). There was no evidence offered by the State to indicate that Knight was an expert in any field. Knight testified that in the course of his investigation, he read a multitude of letters written by Mr. Hearn. (T. II 196). Knight indicated that in his opinion the letters made "a lot of threats," using vulgar language and biblical verses, that "went along with what he was stating in the letter." (T. II 198). The vulgar language was in the form of "name-calling" directed at the judges. (T. II 198). Knight was questioned if any of the letters included a direct threat. (T. II 198). Knight curiously responded that in his opinion he "perceived direct threats to [the judges]." (T. II 198). Mr. Hearn attempted to object, however, before he could even indicate grounds for the objection, the objection was overruled. (T. II 199, RE. 57). The prosecutor asked Knight if he could decipher whether Mr. Hearn was threatening to sue the judges, as contended by Mr. Hearn, or whether he was threatening to kill the judges. (T. II 200). Knight opined that Mr. Hearn was threatening to kill the judges. (T. II 200).

Mr. Hearn attempted cross-examination; however, again his examination was confused and mired in warnings and admonishments from the trial court. Mr. Hearn attempted to question Knight about letters Mr. Hearn had written to Washington, D.C. asking for an investigation of Judge Roberts and legal filings in a federal district court. (T. II 202). The trial judge attempted to explain that this topic was irrelevant and that the federal system was completely separate from the Mississippi court system. (T. II 203). Mr. Hearn continued to ask Knight if after the trial he could contact the Attorney General or anyone he knew at the Attorney General's office in order to find out why Arthur Lee Nored (hereinafter "Nored"), a member of the Mississippi Parole Board during one of Mr. Hearn's hearings, was never investigated. (T. II 206). Instructing Mr. Hearn to move on from this point, the trial judge became clearly agitated when Mr. Hearn again interrupted him. (T. II 206). In front of the jury, the judge admonished Mr. Hearn that the Appellant was "starting to try his patience." (T. II 206, RE. 58).

Next, Judge Bailey testified that his contact with Mr. Hearn was limited to presiding over a hearing that set a criminal matter of Mr. Hearn's for trial. (T. II 210). After the brief hearing, the matter was reassigned to Judge Roberts and was later *nolle prosequi*. (T. II 210). Judge Bailey indicated that he had never had any contact prior to this hearing with Mr. Hearn, nor any since, other than the letters that he received from Mr. Hearn. (T. II 211-12). When asked about the content of the letters, Judge Bailey admitted they were hard to interpret. (T. II 212). Judge Bailey also admitted that prior to the letter from Dr. Moore he had not worried about Mr. Hearn's letters, did not think about the matter much, and only felt threatened when Dr. Moore called him some time in late August. (T. II 213). Judge Bailey indicated that, as a result of this conversation, he viewed the letters in a different light and had a different feeling about the content of the letters. (T. II 214).

During cross-examination of Judge Bailey, Mr. Hearn asked if Judge Bailey had ever hired an attorney for an inmate and specifically, if he hired Mr. Duggan to represent Mr. Hearn. (T. II 219). Judge

Bailey replied to the bizarre inquiry that he had never done so and did not hire Mr. Duggan. (T. II 219).

With the jury out, a discussion took place over the admission of videotaped interviews of Mr. Hearn. (T. II 223). Mr. Hearn obviously did not understand the legal blunder that introducing the tapes could present, and it took the advice of his legal advisor to keep the Appellant from sabotaging his case. (T. II 224). The next morning before the jury was brought back in, Mr. Duggan notified the court that Mr. Hearn wished to withdraw his request. (T. II 226).

Next, Arthur Lee Nored took the stand, testifying that he had known Judge Roberts for some time. (T. II 230) Nored also testified that during the course of a parole hearing involving Mr. Hearn, he questioned Mr. Hearn about what he would do if paroled. (T. II 232). According to Nored, Mr. Hearn believed he had been falsely imprisoned and would take care of the judges that had put him in jail, specifically naming Judge Roberts. (T. II 232). Mr. Hearn was subsequently denied parole. (T. II 232). Nored contacted the Department of Corrections investigator, Johnny Covington (hereinafter "Covington") and notified him of the conversation that took place; however, Covington said he would not follow up on the matter. (T. II 233). Nored then decided to contact Judge Roberts directly and related the discussion that took place at the parole hearing. (T. II 234). Specifically, Nored indicated that he understood the threat to relate to a personal vendetta and was a physical threat as opposed to a threat of a lawsuit on behalf of Mr. Hearn. (T. II 234).

Mr. Hearn began his cross-examination of Nored by asking if anyone had forced Nored to testify in the manner he did. (T. II 235). Mr. Hearn curiously questioned Nored as to whether he was the same person that had been at the parole hearing, specifically asking if Nored changed his hair style, since Nored "look[ed] nothing familiar like the Arthur Norris I know." (T. II 235). Although Nored indicated that he was the same person as the parole hearing, Mr. Hearn replied, "[t]he jury, he is definitely," before being interrupted by the prosecutor and warned by the judge to not address the jury and assuring Mr. Hearn that the man on the stand was in fact Nored. (T. II 235-36). After another warning for arguing with the witness (T. II 236, RE. 59),

Mr. Hearn asked Nored to repeat the specific threat that Mr. Hearn made at the parole hearing and to explain what was meant by the language. (T. II 237). Nored stated that Mr. Hearn had said he would "take out the judge" and indicated he interpreted the statement to mean great bodily harm. (T. II 237).

Next, Dr. John Montgomery (hereinafter "Dr. Montgomery"), a forensic psychiatrist at Mississippi State Hospital at Whitfield, was tendered as an expert witness in forensic psychiatry. (T. II 254-56). Dr. Montgomery was one of the doctors who determined Mr. Hearn was legally competent to stand trial. (T. II 257-59). As to Mr. Hearn's mental state at the time of the crime, and specifically whether Mr. Hearn was ***M'Naghten*** insane, Dr. Montgomery indicated that based on a personal interview and various medical records, the doctors were unanimous in their determination that Mr. Hearn was not experiencing symptoms of a mental disorder that would prevent him from knowing the nature, quality or wrongfulness of his acts. (T. II 263).

On cross-examination Dr. Montgomery testified that Mr. Hearn "presented in a dramatic manner and exhibited overly elaborate speech and irrelevant and occasionally tangential thought processes" (T. II 266) and "displayed a style of self-expression that was impressionistic and hyperbolic, and exhibits some paranoid and grandiose thinking." (T. II 268). Dr. Montgomery commented that the Appellant would speak in this manner simply to make a point, even if Mr. Hearn himself was unsure of his point. (T. II 269). Dr. Montgomery testified that another example of Mr. Hearn's hyperbolic and bizarre behavior regarded when he planned his wife's funeral, going so far as to hire singer, write the obituary, and pick out a casket, when his wife was not deceased, though Mr. Hearn denied doing this. (T. II 270).

Dr. Montgomery stated he believed this unusual behavior was related to pathological personality traits as opposed to a mental disorder. (T. II 273). Dr. Montgomery testified that felt paranoia was an innate part of Mr. Hearn's personality and that Mr. Hearn's beliefs did not rise to the levels of a delusion or break from reality, indicating a suspicious or paranoid personality. (T. II 274). In light of all of these findings Dr.

Montgomery conceded that Mr. Hearn had some mental problems, though he concluded his mental problems did not rise to the level of legal insanity. (T. II 275).

At the close of the State's case in chief, the Appellant moved for a directed verdict. (T. II 277). Without any argument from the State, the motion was overruled. (T. II 278, RE. 60-61).

Outside the presence of the jury, the trial judge addressed the issue of whether Mr. Hearn intended to testify on his own behalf. (T. II 283). Mr. Hearn adamantly stated that he would testify. (T. II 283). The trial judge warned Mr. Hearn that he could choose to testify on his own behalf, could remain silent, and warned him that if he did testify the prosecutor would be able to cross-examine him. (T. II 283-84). The trial judge also explained to Mr. Hearn that the prosecutor would be able to ask Mr. Hearn about any felony he had been convicted of in the past and that the jury could be instructed to consider any conviction of a felony in order to determine if Mr. Hearn was telling the truth. (T. II 284). Mr. Hearn responded to the questions affirmatively and indicated that he did not have any further questions for the trial court (T. II 285). The trial judge decided to allow Mr. Duggan to ask a few questions of Mr. Hearn and then to allow Mr. Hearn a brief period to speak on his own behalf. (T. II 286).

On direct examination, Mr. Hearn examined one of the letters that he wrote to Judge Roberts (Exh.2, RE. 62-64), and explained he wrote biblical verses and cited several "statures" [sic] at the bottom of the letter. (T. II 289). Mr. Duggan asked Mr. Hearn to read the sentence that immediately followed the biblical passages, which Mr. Hearn read, "Could this be crack cocaine that I was always telling those detectives, especially Rick Harris, I not one of those junkies in that rental." (T. II 289). The State objected to the testimony as irrelevant and the trial judge sustained. (T. II 290, RE. 65). Mr. Hearn testified that the rest of the letter contained legal citations and was informing the judge that he had asked police officers "to stop the dope dealers from coming in my house." (T. II 290). Mr. Hearn testified regarding the content and substance of another hand written document. (Exh. 3, RE. 66-68). Mr. Duggan asked about the writing at the top of

another document was and Mr. Hearn explained, "I plead not guilty, not moving." (T. II 291). Mr. Hearn further explained that a defendant is sometimes called a movant, which is the person "that charges have been filed against." (T. II 291). Mr. Hearn attempted to explain his thought process and stated, "I look at life like I'm not moving. I'm stationary." (T. II 291). Mr. Hearn then indicated that someone had stolen his property while he was in jail and that was the reason for filing a claim against Judge Roberts for theft and intimidation. (T. II 292). Mr. Hearn claimed this was the reason that Judge Roberts "flipped around and filed the charge against me on intimidation." (T. II 292). Oddly, Mr. Hearn testified that this entire concept was depicted by a drawing in the upper right corner of the document. (T. II 292).

The drawing, as described by Mr. Hearn, was a "NA" though the N was backwards. (T. II 292). Mr. Hearn explained the N was backwards because "I wanted to be as mandatory and stationary as possible, but it's not as low as guilty or not a plea." (T. II 292). Mr. Hearn also testified about his confusing certificate of service (Exh. 10, RE. 69-71), which listed the Sunflower County Circuit Court, Lauderdale County Circuit Court, the United Nations, Leonard Vincent, an attorney at the Mississippi State Penitentiary, the Indianola Police Department, the Meridian Police Department, and the Solicitor General of the United State. (T. II 293-94).

In explaining his intent, Mr. Hearn testified that he sent these documents and letters to the judges based on another case he had heard of where a judge conducted an annual review of a prisoner's case after sentencing. (T. II 295). Mr. Hearn indicated that after learning of this he wrote the judge to let them know what he was doing, what type of people he was dealing with in jail, and the conversations that went on in prison. (T. II 295). Mr. Hearn explained, "It got, impregnate self. If there was a homosexual parenthesis which you had been not as low as a lady, boy, man, woman et cetera – I mean, et cetera break your clothes dash; then it got boy, man, woman, et cetera. You would be amazed at the conversations you hear when you're locked behind closed doors . . . ." (T. II 295). The trial judge interrupted and inquired what this had

to do with the letter. (T. II 295). Mr. Hearn replied that he was trying to let the judges know what was going on in prison, including reporting on an inmate that escaped from the penitentiary. (T. II 296). Mr. Hearn testified he never threatened bodily harm against the judges, nor was it his intent to threaten such harm. (T. II 296).

Mr. Hearn then attempted to explain the events that precipitated the current charges. He spoke on his own behalf and testified that he felt that the judge had bribed him by forcing him to take a plea bargain. (T. II 297-98). He reasoned that only guilty people take plea bargains and he maintained his innocence to the charge of aggravated assault. (T. II 298). He continued to write the judges to let them know of the hardships he was incurring in jail as well as reporting on what was happening in prison. (T. II 299). Mr. Hearn testified that the point of the letters was not a threat, rather was supposed to explain what he was going through. (T. II 299). Mr. Hearn testified that he wrote the way he did "because [he] want[ed] to keep focused on getting out of [there]." (T. II 300). Mr. Hearn also claimed he never told a psychiatrist he wanted to kill or intimidate a judge. (T. III 301). Mr. Hearn explained to the jury that if he uses the word kill it has a particular and non-literal meaning. (T. III 301).

On cross-examination, the State immediately asked how many fights Mr. Hearn had been involved in. (T. III 302). While Mr. Hearn stated he had only fought in prison, the prosecutor rebutted that Mr. Hearn had been convicted of simple assault, a misdemeanor, in 1989; there was no objection by the defense. (T. III 303). The assistant district attorney also referenced a simple assault charge from 1990 filed by Mr. Hearn's wife, whom he has been separated from for twenty years. (T. III 303-04). The prosecutor inquired how many lawsuits Mr. Hearn had filed against the judges and whether charges for their alleged misconduct had been filed. (T. III 308-09). Mr. Hearn confusingly explained that had filed a lawsuit that was dismissed and that he had charged the judges with conspiracy. (T. III 308-09). However, for the criminal matter the prosecutor was actually asking for a cause number, which Mr. Hearn did not know. (T. III 309).

Mr. Hearn again stated that he wrote the letters based on his understanding that the judges could conduct an annual review of an inmate's case. (T. III 314). The prosecutor asked Mr. Hearn, "Is that why you thought that continuing to write Judge Bailey and write Judge Roberts that somehow or another they would – in their annual review that they would let you out?" (T. III 314). Confusingly, Mr. Hearn stated that was not why he wrote them. (T. III 314). Mr. Hearn also indicated that the vulgar language was simply how inmates spoke and he merely wrote down what they said. (T. III 314-15). Mr. Hearn reasoned that since the judge had sent him to prison to be rehabilitated he wanted to show him that he was not being rehabilitated and to show how prison made him speak. (T. III 315). Mr. Hearn continued, "[t]his is how I'm going to answer the Judge; if he file 13 or charge me for contempt of court; you're going to give me life without parole eventually anyway. Isn't that the sentence you're going to give me if they find me guilty?" (T. III 315).

Mr. Hearn admitted that he told Milton Williams, an investigator for the MBI, that he hated Judge Bailey, though he denied having told anyone else of those feelings. (T. III 322). However, Mr. Hearn also indicated that he confused Judge Bailey with Judge Roberts as the actual judge who sentenced him. (T. III 322-23). After several repetitive questions the prosecutor asked if Mr. Hearn had said that the judges needed to go to jail or die; Mr. Hearn responded, "[a]nd I still mean it from my heart and from my family – honor and my family's heart." (T. III 324).

Mr. Hearn also elaborated on his use of the word "kill" as a non-literal statement and indicated that "kill" meant to end the careers of Judges Roberts and Bailey. (T. III 325). Mr. Hearn explained that he did not mean to use the word to indicate physical harm, since he had no reason to kill the judges and indicated it would be too difficult to bring himself to commit such an act. (T. III 326). The prosecutor argumentatively responded that it was not too difficult for Mr. Hearn to nearly kill someone in the aggravated assault case; there was no objection made by the defense. (T. III 326).

After the defense rested and the jury was excused, the court addressed the final jury instructions. (T. III 333). Although Mr. Duggan argued that he was concerned that the aggravated assault case would be used to convict Mr. Hearn in the current case, the court merely granted a cautionary instruction that would limit the jury's use of the conviction. (T. III 335-36, RE. 72-73). Mr. Hearn was denied an insanity instruction since, according to the court, there was no evidence of insanity put forward by the defense. (T. III 343-45, RE. 74-76). While the court did allow defense jury instruction that stated the State had the burden of proving the sanity of the Appellant. (T. III 343-44, RE. 74-75), the court denied the request for a ***M'Naghten*** insanity instruction (T. III 349, RE. 77). Revealingly, the trial judge admitted that his decision possibly constituted reversible error. (T. III 351). Curiously, even though the instructions were denied the trial judge allowed Mr. Duggan to reference and mention Mr. Hearn's insanity in closing arguments over the objection of the State. (T. III 352-53, RE. 78-79).

In the State's closing argument the prosecutor argued that if found not guilty Mr. Hearn might try to kill the trial judge or even the District Attorney. (T. III 378). The prosecutor continued, "[t]he only help [an acquittal] would be would be to insure the death of two innocent people who are only trying to do your work." (T. III 380). Having not been instructed of its legally mandated duty to consider insanity, the jury returned guilty verdicts on both counts. (T. III 382-84; CP. 112, RE. 19).

The defense filed a motion for judgment notwithstanding the verdict, or in the alternative, for a new trial. (CP. 118-20, RE. 21-23) The motions were denied by the trial court. (CP. 121, RE. 24) Aggrieved by the verdict and sentence of the lower court, the Appellant herein perfected his notice of appeal to the Mississippi Supreme Court on August 16, 2007. (CP. 124, RE. 27)

SUMMARY OF THE ARGUMENT

When a mentally ill and delusional inmate's conversations with a State psychiatrist are disclosed without his consent to others to cause fear and concern in the minds of judges, the rush to resolve these fears

inevitably leads to a disturbing result. The Appellant, Michael Henry Hearn (hereinafter "Mr. Hearn"), long suffering from a diagnosed disease of the mind, wrote cryptic letters and made threatening statements towards two circuit court judges. These judges had presided over his previous cases and had received numerous communications from Mr. Hearn for some time; however, the judges became concerned only after receiving a warning from a state psychiatrist, Dr. Tom Moore (hereinafter "Dr. Moore"). At trial, Mr. Hearn, confused and impaired as a result of his mental illness, failed to grasp the seriousness of the charges and the reality of a possible life sentence. These facts exacerbated the paranoia of Mr. Hearn, who unwisely chose to remove his counsel moments before trial began and was forced to represent himself at trial. As a result, Mr. Hearn unwittingly became an impediment to his own defense as well as a key asset to the prosecution. Predictably, his conviction was easily secured.

The verdict of the jury was not supported by the weight of the evidence presented at trial. There were numerous conflicts in the testimony regarding Mr. Hearn's mental state; moreover, there were several discrepancies as to the reasons underlying the letters and statements Mr. Hearn made. Thus, the trial judge was obligated to ensure that the jury deliberate and render it's decision based on the evidence presented at trial as opposed to allowing their passions and biases to contribute to the decision to convict. Furthermore, the State failed to meet its burden of proof in the case in chief since there was no evidence presented to suggest that Mr. Hearn's statements constituted a serious expression of an intent to do bodily harm. In fact, given the conditional nature of the statement and the fact that Mr. Hearn is predisposed to speak in grandiose terms, based on his mental illness, it is clear that Mr. Hearn did not utter a serious expression of an intent to do bodily harm. Therefore, the case should be reversed and remanded for new proceedings consistent with the instructions of this honorable Court.

In addition to the weight of the evidence being against the verdict, the court also erred in failing to properly assess the competence of the Appellant. The critical error of the court below was two-fold: the

court failed to properly ascertain Mr. Hearn's competency to represent himself and to stand trial. First, the court failed to conduct a formal hearing, as required under ***Dusky v. United States***, regarding Mr. Hearn's competency to stand trial. In order to determine Mr. Hearn's competency to be tried, the trial court was required to formally evaluate Mr. Hearn with respect to specific competency criteria; however, a formal hearing was never held. Second, the court failed to conduct the necessary inquiries and warnings prescribed by ***Faretta v. California***, as adopted by this Court and codified in ***URCCC 8.05***, in order to ensure the Mr. Hearn was competent to represent himself at trial. Instead of holding the required hearing into the Appellant's competency, the trial court simply allowed Mr. Hearn to "fire" his court-appointed attorney and proceed to trial *pro se*. As a result of the trial court's error in failing to conduct the required on the record inquiries into the competency of the Appellant, this Court should reverse the decision of the trial court, and remand this case with proper instructions to the lower court for a new trial.

Adding to the confusion of the proceeding, the State mistakenly argued that Mr. Hearn's communication with Dr. Moore was not privileged and that a duty to warn was implied by a crude analogy to the attorney-client privilege. Mr. Hearn was not warned the communication between he and Dr. Moore would be disclosed to third parties until after the threatening statement was made. Moreover, Mr. Hearn never consented to such disclosure and effectively preserved the confidential nature of the conversation. Therefore, the communication was confidential and was covered by the patient-psychiatrist privilege. However, it is clear from his testimony that Dr. Moore did not feel his conversations with inmates are private. While Dr. Moore was legally permitted to disclose the information, he did not have a duty to disclose the information nor was he legally privileged to testify. Moreover, Dr. Moore did not adequately notify Mr. Hearn that he was acting as an agent of the State and that any information learned in the evaluation could be used against him in criminal proceedings in violation of his Fifth Amendment right against self-incrimination. This conversation was the sole basis of the indictment and conviction at issue

in this appeal. Therefore, for the trial court to allow Dr. Moore to testify regarding the comments made by Mr. Hearn was plain error and this Court should reverse the decision of the trial court, and remand this case with proper instructions to the lower court for a new trial.

Compounding the initial errors of the trial court, and in spite of substantial evidence to the contrary, the trial judge denied all defense jury instructions on the issue of insanity. Proposed jury instructions D-10, D-11, and D-12 would have given the jury the opportunity to consider the evidence of Mr. Hearn's sanity that was presented and occurred at trial. Because the Appellant proceeded *pro se*, the jury had ample opportunity to view the actions, words, and lack of reasoning of Mr. Hearn that clearly demonstrated his separation from reality. Moreover, the State's psychiatrist admitted Mr. Hearn suffered from a mental disorder. From this direct testimony and circumstantial evidence, the jury could easily have drawn reasonable inferences about Mr. Hearn's mental state. Since jury instructions should always be granted when they are not cumulative and when there is some evidence to support them, the instructions should have been granted. As a result of the denial of the instructions, the jury lacked the option to consider Mr. Hearn's mental state in reaching its decision. Because the trial court's committed error in denying the defense jury instructions on insanity, this Court should reverse the decision of the trial court and remand with instructions for a new trial.

In light of the questionable evidence presented by the State at trial the validity of ***Miss. Code Ann. § 97-9-55*** as applied to the Appellant is brought into question under the First Amendment and Fourteenth Amendments of the United States Constitution as well as Art.3, § 26 of the Mississippi Constitution. In order to constitute a valid threat of intimidation under ***Virginia v. Black***, the speaker must intend to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The critical issue for a court to resolve is whether the statement is a "serious expression." In the present case, due to Mr. Hearn's mental disorder there is no reasonable basis

from which to argue that the statements were a serious expression. The evidence, presented and observed, demonstrates Mr. Hearn habitually spoke in grandiose and extreme language. Based on this fact and the fact that he was incarcerated at the time the statement was made, it is impossible to conclude that the statement was anything more than hyperbole or a purely conditional statement. Moreover, this hyperbolic statement was made to Dr. Moore and then passed along, in violation of the patient-psychiatrist privilege, to the alleged targets of the threat. Therefore, the statute is unconstitutional as applied to the Appellant and this Court should reverse the decision of the trial court, and remand this case with proper instructions to the lower court for a new trial.

Finally, if the court does not find that any one of the errors committed by the trial court is grounds for reversal, it should find that the cumulative effect of all the errors was to deny Mr. Hearn's due process rights to a fair trial. From the refusal to follow ***URCCC 8.05*** and ***9.06***, which mandate specific procedures to protect criminal defendants' rights to the admission of privileged testimony and the denial of proper jury instructions, the trial court's errors culminated in a violation of Mr. Hearn's right to a fair trial. As a result of this violation of the Appellant's due process rights, this Court should reverse the decision of the lower court, and remand this case to the lower court with proper instructions for a new trial.

ARGUMENT

ISSUE ONE:

GIVING ALL REASONABLE INFERENCES TO THE STATE'S CASE-IN-CHIEF, THE TRIAL COURT ERRED IN REFUSING TO GRANT THE DEFENSE MOTION FOR A DIRECTED VERDICT OR A NEW TRIAL AND WHETHER THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT THE APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT SINCE THE STATE FAILED TO MEET ITS BURDEN OF PROOF AND ESTABLISH EACH AND EVERY ESSENTIAL ELEMENT OF THE CRIME OF THREATENING A JUDGE BY LEGALLY COMPETENT EVIDENCE BEYOND A REASONABLE DOUBT.

A. The trial court should have granted the defense motion for a directed verdict or the

motion for a new trial since the verdict of the jury was against the overwhelming weight of the evidence.

The familiar standard of review for the denial of a post-trial motion seeking a new trial is abuse of discretion. ***Dilworth v. State***, 909 So. 2d 731, 736 (¶17) (Miss. 2005). A motion for a new trial challenges the weight of the evidence presented at trial. ***Dilworth***, 909 So.2d at ¶20. A reversal is warranted only if the lower court abuses its discretion in denying a motion for new trial. ***Id.*** When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, an appellate court will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that allowing it to stand would sanction an unconscionable injustice. ***Bush v. State***, 895 So. 2d 836, 844 (¶18) (Miss. 2005). In a hearing on a motion for a new trial, the trial court sits as a thirteenth juror, but the motion is addressed to the discretion of the court, which should be exercised with caution, and the power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict. ***Id.*** The evidence should also be weighed in the light most favorable to the verdict. The ***Bush*** Court stated:

> A reversal on the grounds that the verdict was against the overwhelming weight of the evidence, unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict. Rather, as the "thirteenth juror," the court simply disagrees with the jury's resolution of the conflicting testimony. This difference of opinion does not signify acquittal any more than a disagreement among the jurors themselves. Instead, the proper remedy is to grant a new trial.

Id.

In the context of a defendant's motion for new trial, although the circumstances warranting disturbance of the jury's verdict are "exceedingly rare," such situations arise where, from the whole circumstances, the testimony is contradictory and unreasonable, and so highly improbable that the truth of it becomes so extremely doubtful that it is repulsive to the reasoning of the ordinary mind. ***Thomas v. State***, 92 So. 225, 226 (Miss. 1922). Though this standard of review is high, the appellate court does not hesitate to invoke its authority to order a new trial and allow a second jury to pass on the evidence where it considers

the first jury's determination of guilt to be based on extremely weak or tenuous evidence, even where that evidence is sufficient to withstand a motion for a directed verdict. ***Dilworth***, 909 So.2d at ¶22.

In the present case, the decision of the jury is "so contrary to the overwhelming weight of the evidence that allowing it to stand would sanction an unconscionable injustice." ***Bush***, 895 So. 2d at ¶18. There was conflicting evidence presented as to Mr. Hearn's mental state; furthermore, there was conflicting testimony as to what Mr. Hearn meant to express in his hyperbolic tirades. While the power of the trial court to grant a new trial is limited to rare circumstances, the present case presents those rare circumstances. Mr. Hearn, though clearly suffering from several diseases of the mind was allowed to stand trial, forced to proceed *pro se*, and unable to conduct even a cursory defense. Mr. Hearn elicited testimony beneficial to his case; however, these findings were often undermined by his own erratic actions. The trial judge, sitting as the thirteenth juror had the ability and responsibility to protect Mr. Hearn from the biases of the jury and ensure that if convicted, Mr. Hearn would be convicted only based on the weight of the evidence. Therefore, the case should be reversed and remanded for new proceedings consistent with the instructions of this honorable Court.

B. The Appellant's motion for judgment notwithstanding the verdict should have been granted since the State failed to meet its burden of proof and establish every element of the crime by legally competent evidence beyond a reasonable doubt.

The standard of appellate review for challenges to the legal sufficiency of the evidence is articulated in ***Bush v. State,*** 895 So. 2d at ¶17. In ***Bush***, the Court restated that "the relevant question 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.*** (citing ***Jackson v. Virginia***, 443 U.S. 307, 315 (1979)). The Court emphasized that "[s]hould the facts and inferences considered in a challenge to the sufficiency of the evidence 'point in favor of the defendant on **any** element of the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant

was guilty,' the proper remedy is for the appellate court to reverse and render." ***Bush***, 895 So. 2d at ¶17 (emphasis added) (citing ***May v. State***, 460 So. 2d 778, 781 (Miss. 1984)).

In the case at bar, the State simply failed to put forward any evidence to suggest that Mr. Hearn uttered a serious communication of an intent to do bodily harm. The evidence presented by the State demonstrates that Mr. Hearn often spoke in hyperbole and suffered from grandiose thinking. However, the State never demonstrated that the letters sent to the judges in question or the conversations Mr. Hearn had with others about the judges were anything more than the rantings of a mentally ill person. Furthermore, Mr. Hearn's conduct at trial suggest that the proper conclusion for the jury to draw was that Mr. Hearn was sick and needed help as opposed to Mr. Hearn intended to harm either judge. This conclusion is further supported by the fact that Mr. Hearn was incarcerated at the time the comments were made and thus the statements were purely conditional rantings of a mentally ill person desperately in need of professional help. Based on all the facts presented into evidence there is no reasonable understanding of those facts that allows the conclusion that Mr. Hearn threatened nor was the jury's finding of guilt, even giving all favorable inferences to the verdict, supported by the legally competent evidence presented at trial. Therefore, the case should be reversed and remanded for new proceedings consistent with the instructions of this honorable Court.

ISSUE TWO:

THE TRIAL COURT ERRED WHEN IT FAILED TO CONDUCT THE NECESSARY ON-THE-RECORD EXAMINATION AND WARNINGS REQUIRED PRIOR TO TRIAL TO DETERMINE THE APPELLANT'S COMPETENCY BOTH TO STAND TRIAL AND TO EFFECTIVELY REPRESENT HIMSELF *PRO SE* AT TRIAL.

The fundamental error committed by the trial court was failing to adequately assess the Appellant's competency to stand trial and to represent himself. First, the court failed to properly make a determination on the record, under ***Dusky***, of the Appellant's competency to stand trial. Second, the trial court failed to

perform the required on-the-record ***Faretta*** hearing to determine whether the Appellant should be allowed to appear *pro se.* The trial court did not perform either of two mandated evaluations that would have prevented the unfair outcome of the trial.

A. The trial court failed to perform the required hearing and determination on the record of the defendant's competence to stand trial as required by *Dusky v. United States.*

The standard of review for the issue of incompetence to stand trial is whether the trial judge's "finding was manifestly against the overwhelming weight of the evidence." ***Martin v. State***, 871 So. 2d 693 (¶17) (Miss. 2004). The seminal case of ***Dusky v. United States*** indicates that the standard for determining competency to stand trial is "whether [the accused] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether [the accused] has a rational as well as factual understanding of the proceedings against him." 362 U.S. 402, 402 (1960) (per curiam). In ***Howard v. State***, 701 So. 2d 274 (Miss. 1997), the Court applied the guidelines set forth in ***Connor v. State***, 632 So. 2d 1239 (Miss 1993), as a five-part test for determining competency to stand trial. In order to be found competent, the accused "must be one '(1) who is able to perceive and understand the nature of the proceedings; (2) who is able to rationally communicate with his attorney about the case; (3) who is able to recall relevant facts; (4) who is able to testify in his own defense if appropriate; and (5) whose ability to satisfy the foregoing criteria is commensurate with the severity and complexity of the case.'" ***Howard***, 701 So. 2d at ¶18.

The mandatory requirements for the trial court are well settled:

> If before or during trial the court, of its own motion or upon motion of an attorney, has **reasonable ground** to believe that the defendant is incompetent to stand trial, the court shall order the defendant to submit to a mental examination . . . . After the examination the court **shall** conduct a hearing to determine if the defendant is competent to stand trial. After hearing all the evidence, the court **shall** weigh the evidence and make a determination of whether the defendant is competent to stand trial. If the court finds that the defendant is competent to stand trial, then the court **shall** make the finding a matter of record and the case will then proceed to trial. If the court finds that the defendant is incompetent to stand trial, then the court shall commit the defendant to the Mississippi State Hospital

or other appropriate mental health facility.

U.R.C.C.C. 9.06 (Rev. 1995) (emphasis added). This principle was echoed by the Court in ***Emanuel v. State***, wherein it noted, "**When it appears to the trial court that there is a probability that [the] defendant is incapable of making a rational defense**, the trial should not proceed until the defendant's mental state has been investigated and it appears that he is sufficiently rational to make a defense." 412 So. 2d 1187, 1188 (Miss. 1982) (emphasis original). This responsibility to assess the defendant's competence is not limited to defense motions. *See* ***Conner***, 632 So. 2d at 1248. Rather, the responsibility is one that is vested in the trial judge and is ongoing. ***Id.*** ("Even where the issue of competency to stand trial has not been raised by defense counsel, the trial judge has an ongoing responsibility to prevent the trial of an accused unable to assist in his own defense").

In cases where a competency hearing is not ordered, the appellate court must review such an omission with regard to what the trial court should have perceived. ***Id.*** The decision not to order a competency hearing should be reviewed pursuant to the following question: "Did the trial judge receive information which, objectively considered, should reasonably have raised a doubt about defendant's competence and alerted him to the possibility that the defendant could neither understand the proceedings, appreciate their significance, nor rationally aid his attorney in his defense?" ***Id.*** (citing ***Lokos v. Capps***, 625 F. 2d 1258, 1261 (5th Cir. 1980)). In the case *sub judice*, although the Appellant never raised a motion for a competency hearing, defense counsel moved for and arranged for a mental evaluation (CP. 32-34, RE. 43-45), which was granted by the trial court. (CP. 47-50, RE.). A competency hearing was also never ordered by the trial court *sua sponte* despite the fact that **two** additional orders for mental evaluation were issued pre-trial by the trial court's own motion and order. (CP. 66-70, RE. 80-84; CP. 73-76; RE. 85-88). Yet many more factors combined to present considerable doubt about the Appellant's competence to stand trial. For instance, Mr. Hearn obviously failed to understand the seriousness of the proceedings against him. Prior

to the start of the trial, Mr. Hearn expressed his confusion over the proceedings.

> BY DEFENDANT HEARN: At the sentence - - the sentence stage about habitual offender, I'm working in Washington D.C. I started in Federal Court. Seem like they're working on trying to get that sentence thing straight, so I wouldn't be a habitual offender. What type of bearing would this have on my case?
>
> BY THE COURT: All right. Mr. Hearn, we will address the sentencing at the end. You are at this point in time presumed innocent, and you are as innocent as you - - as I am or anyone else in this courtroom under the law. Only if you are convicted by the jury will they consider a sentence, so we will cross the bridge of sentencing when and if we come to that at this time.

(T. I 34-5).

Despite this explanation, the Appellant clearly did not understand the gravity of the sentence to which he could be sentenced.

> BY DEFENDANT HEARN: This is the last question. The sentence that you impose on me, **the maximum sentence I could get on this charge is two years plus a fine**. I have been out of prison over two years. I have been locked up in the County Jail over two years. I don't understand the technicality or of whatever is going on between the sentence thing - -
>
> BY THE COURT: Again, Mr. Hearn, we will address sentencing when and if we come to that phase of the trial. So have a seat, sir, and we will go ahead and proceed at this point

(T. I 35) (emphasis added).

These exchanges, prior to the start of the trial, should have put the court on notice as to the Appellant's demonstrated incompetence to stand trial. With regard to the ***Conner*** factors, Mr. Hearn was unable to perceive and understand the nature of the proceedings, to rationally communicate with his attorney, to recall relevant facts, to testify in his own defense, nor to do any of these commensurate with the

severity and complexity of the case. It should have been obvious to the trial court from the very beginning of its contact with Mr. Hearn that the Appellant did not understand the magnitude of the charges. Despite the apparent incompetence of Mr. Hearn from the onset and his lack of understanding of the proceedings, the trial court pushed the trial forward without instituting a hearing or soliciting any on-the-record evidence of Mr. Hearn's competence or lack thereof. Instead, the court served only to compound the error by allowing Mr. Hearn to dismiss his attorney and then force him to represent himself *pro se*.

B. The trial court failed to perform the proper on-the-record determination and warnings as required by *Faretta v. California* and *URCCC 8.05* to determine the competence of the defendant to represent himself *pro se*.

Compounding the failure to determine the competence of Mr. Hearn, the trial court further prejudiced the fairness of the trial by declining to follow the well established rules regarding persons who seek to proceed *pro se*. In the landmark decision, ***Faretta v. California***, the Supreme Court addressed the case of a petitioner who was denied the opportunity to represent himself at trial. 422 U.S. 806, 807-09 (1975). In vacating his conviction, the Court held that under the Sixth Amendment to the United States Constitution, each defendant has a right to represent herself, but only when the requirements of a knowing and intelligent waiver of counsel has occurred. ***Id.*** at 835. The Court set forth several measures designed to protect the fair trial rights of individuals for whom a question of competency arises. ***Id.*** at 835-36. Among the requirements laid out by ***Faretta*** is the requirement of a determination of the competency of a defendant whenever a reasonable question of competency arises. ***Id.*** at 835-36. Because of the importance of this issue, the Court requires that this determination be initiated *sua sponte* **when necessary**. ***Id.*** at 835. The Court determined that trial courts are required to first warn of the dangers of representing oneself, then to determine whether the defendant is competent and aware, and finally to find that the defendant can "defend himself." ***Id.*** at 835-36. Even though "technical legal knowledge" is irrelevant to competency, the judge must warn the criminal defendant that she must abide by procedural rules and make her "aware of the dangers and disadvantages

of self-representation." ***Id.*** at 835-36.

Similarly, ***Article 3, Section 26 of the Mississippi Constitution*** provides that a criminal defendant has the right "to be heard by himself or counsel, or both." In ***Brooks v. State***, this Court held that "the test for competency to stand trial must be met before a defendant can be said to be capable of intelligently and knowingly waiving the right to counsel." 763 So. 2d 859 (¶17) (Miss. 2000). Further, ***URCCC 8.05*** governs the very specific on-the-record procedure required to be followed in the event a criminal defendant attempts to proceed *pro* se in his own defense, which states in pertinent part:

> When the court learns that a defendant desires to act as his/her own attorney, the court shall **on the record conduct an examination of the defendant** to determine if the defendant knowingly and voluntarily desires to act as his/her own attorney. The court shall inform the defendant that:
>
> 1. The defendant has a right to an attorney . . .
> 2. The defendant has the right to conduct the defense . . .
> 3. The court will not relax or disregard the rules of evidence, procedure or courtroom protocol . . .
> 4. The right to proceed pro se usually increases the likelihood of a trial outcome unfavorable to the defendant.
> 5. Other matters as the court deems appropriate.
>
> **After instructing the defendant and ascertaining that the defendant understands these matters, the court will ascertain if the defendant still wishes to proceed *pro se* or if the defendant desires an attorney to assist him/her in his/her defense**. If the defendant desires to proceed pro se, the court should determine if the defendant has exercised this right knowingly and voluntarily, and, if so, **make the finding a matter of record** . . . .

URCCC 8.05 (Rev. 1995) (emphasis added).

Howard v. State, provides detailed considerations for trial courts to address when faced with *pro se* criminal defense. 701 So. 2d 274 (Miss. 1997). In ***Howard*** the trial court failed to order a competency hearing, even though prior to his trial, Howard was scheduled to undergo a mental evaluation, but due to confusion about the procedure, Howard would not participate and the evaluation was begun but never completed. ***Id.*** at ¶23.

In reversing Howard's conviction, this Court noted that "Howard frequently exhibited behavior

Howard

which reasonably should have raised a question as to his ability to represent himself and a question of his competency to stand trial." ***Id.*** at ¶28. The Court stated the trial court is in a better position to observe the defendant's actions than is an appellate court, but noted "while [a defendant's] demeanor at trial might be relevant to the ultimate decision as to his sanity, it cannot be relied upon to dispense with a hearing on that very issue." ***Id.*** at ¶¶ 25, 27 (citing ***Pate v. Robinson***, 282 U.S. 375, 385 (1966)). At trial, Howard "would engage in rambling commentary with little or no apparent relationship to the trial . . . apparently rarely asked rational questions, if he asked questions at all . . . [and he] had numerous instances of paranoid behavior." ***Howard***, 701 So. 2d at ¶30. The Court emphasized the importance of defense counsel's opinion as to the competence of the accused in waiving the right to counsel. ***Id.*** at ¶25. In ***Howard***, all four of Howard's attorneys said he was incompetent, in addition to the other evidence of the accused's inability to waive counsel; thus, the trial court should have ordered a competency hearing. ***Id.*** at ¶33. Because it did not, the court reversed the conviction.

Mr. Hearn first sought to have Mr. Duggan removed as counsel on the morning of trial. (T. I 30). Mr. Hearn told the court that he wanted a new lawyer appointed, but the court refused. (T. I 33). Without any warnings or notifications, the trial court then proceeded to remove Mr. Duggan as counsel and to instruct Mr. Hearn to proceed *pro se*, with Mr. Duggan as "legal advisor." (T. I 34). As voir dire commenced, the trial court merely imparted to Mr. Hearn the advice that he should"listen to Mr. Duggan." (T. I 34). After voir dire was completed, at the prosecution's prodding, the trial court finally informed Mr. Hearn he would be held to the same standard as a licensed attorney and to "be prepared and be cautious." (T. I 112).

Mr. Hearn was never formally warned of the "dangers and disadvantages" as mandated by ***Faretta***. As discussed in section A, *supra,* the Appellant was never granted a formal competency hearing, much less a hearing to determine if his waiver of counsel was knowing and intelligent. Though ***URCCC 8.05*** mandates an on-the-record "examination" by the trial court to make a determination of competency, followed by on-

the-record warnings, before again querying the defendant as to his wishes to proceed *pro se*, the trial court in this case never even asked Mr. Hearn if he wanted to represent himself. After determining that Mr. Hearn wanted a different lawyer, it dismissed defense counsel and stated that the Mr. Hearn would represent himself. (T. I 34).

Unlike the petitioner in ***Faretta***, Mr. Hearn is not merely an example of one being "mentally competent" but unknowledgeable about the technical aspects of the law. Rather, like the petitioner in ***Howard***, Mr. Hearn was unable to knowingly, intelligently, and voluntarily waive his right to counsel. The observations of this Court in ***Howard*** strikingly resembled the events of Mr. Hearn's trial. Similar to Howard, Mr. Hearn would often devolve into rambling commentaries in which he demonstrated little ability to ask rational questions of witnesses. (T. I 148, 149; T. II 155, 157, 163-64, 185-87, 201, 205, 218, 235, 237-38, 274-75, R.E. 89-105). He also frequently displayed memory difficulties, paranoid tendencies, and attempted to take actions that were directly averse to his legal position.

In each of the cited examples, the trial court had reason to question the validity of Mr. Hearn's waiver of counsel, both on the grounds of competency to stand trial and on the higher requirement of knowing and intelligent waiver of counsel. The trial court erred by not holding a formal hearing on the issue and listening to the persons this Court has determined have the most accurate views on the issue, the current and former attorneys of Mr. Hearn. The result of this failure was precisely the chaos in the courtroom and "sideshow" Judge Ishee had warned would not happen. In its failure to follow the directives of ***Faretta*** and ***URCCC 8.05***, the trial court summarily removed Mr. Hearn's attorney and forced the Appellant to represent himself, something the Appellant was unable to comprehend, much less perform.

The trial court had many opportunities to view actions, testimony and reasoning that should have seriously called into question the competence of the Appellant to stand trial and to represent himself *pro se.* Such evidence visible to the court mandated that a competency hearing be ordered. From a legal standpoint,

Mr. Hearn's competency to stand trial was never established because a formal hearing was never effected to determine his competency. Furthermore, the competency to waive counsel is based on the competency to stand trial; neither were determined on the record. As a result, the trial court committed reversible error and the case should be reversed and remanded for new proceedings consistent with the instructions of this honorable Court.

ISSUE THREE:

THE TRIAL COURT ERRED BY ADMITTING PRIVILEGED COMMUNICATION BETWEEN THE APPELLANT AND A STATE PSYCHIATRIST WHERE NO RECOGNIZED EXCEPTION EXISTS OR DUTY TO WARN EXISTS UNDER MISS R. EVID. 503 AND WHERE THE APPELLANT WAS NOT PROPERLY WARNED THAT THE DOCTOR WAS AN AGENT OF THE STATE OF MISSISSIPPI AND THAT THE APPELLANT HAD A RIGHT AGAINST SELF-INCRIMINATION.

Even though the error was not properly preserved by defense counsel at trial, the decision to allow evidence of the content of the conversation between Dr. Moore and Mr. Hearn is so patently in violation of the Appellant's rights that the decision constitutes plain error. Plain error is "error that affects the substantive rights of a defendant." ***Taylor v. State***, 754 So. 2d 598, 603 (¶11) (Miss. Ct. App. 2000) (citing ***Grubb v. State***, 584 So. 2d 786, 789 (Miss. 1991). "[T]he plain error doctrine had been construed to include anything that 'seriously affected the fairness, integrity or public reputation of judicial proceedings.'" ***Taylor***, 754 So. 2d at ¶11 (citing ***United States v. Olano***, 507 U.S. 725, 732 (1993)). Thus, the appropriate analysis for this Court to conduct is to determine whether "there is an error that is some deviation from a legal rule, whether that error is plain, clear or obvious, and whether the error is prejudicial in its effect upon the outcome of the trial court proceeding." ***Taylor***, 754 So. 2d at ¶11.

A. The trial court erred by allowing Dr. Moore to testify regarding confidential and privileged communications with Mr. Hearn since no "duty to warn" exception to Mississippi Rule of Evidence 503 exists.

Under ***Miss. R. Evid. 503*** the statements made by Mr. Hearn to Dr. Moore are wholly inadmissible.

The State attempted to argue that Rule 503 did not apply in the present instance; however, this conclusion is based on flawed reasoning and a fundamental misunderstanding of Rule 503. The initial erroneous premise advanced by the prosecutor was that Dr. Moore had an affirmative "moral and ethical obligation" to warn the judges of the threats made by Mr. Hearn. (T. I 26). While the disclosure of confidential medical information is legally permissible in certain limited circumstances under ***Miss. Code Ann. § 41-21-97*** and by HIPPA privacy rules, ***45 C.F.R. § 164.512(j)***, neither of these statutes operate as exceptions to the privilege created by the Mississippi Rules of Evidence. In fact, there is no indication that either the state statute or the federal rule under the HIPPA laws were intended to alter or destroy patient-psychiatrist confidentiality in any sense. Thus, in the present case, there is no legal basis for a "duty to warn."

Furthermore, Dr. Moore did not have an ethical obligation to breach the confidence of Mr. Hearn. There are two potentially applicable recognized exceptions to the duty of confidentiality that is imposed by the American Psychological Association Ethical Principles of Psychologists and Code of Conduct. One is where the patient consents and the other is when the patient does not consent, but failure to disclose "would result in clear danger to the person or to others." ***Mississippi State Board of Psychological Examiners v. Hosford***, 508 So. 2d 1049, 1055 (Miss. 1987). Moreover, the duty of confidentiality extends to "opinions or impressions formed on the basis of patient communication." ***Hosford***, 508 So. 2d at 1055. The first exception is not implicated in the case *sub judice*. There is no evidence in the record to suggest that Mr. Hearn knowingly or voluntarily gave his informed consent to such disclosure. The State is likely to counter that Mr. Hearn was warned during the intake process when he first arrived at the correctional facility; however, that warning occurred four years prior and can hardly be viewed as an adequate warning.

The second exception is not applicable in the present case, either. There was no evidence offered to support the conclusion that Mr. Hearn presented a clear or imminent danger to the judges. Mr. Hearn was scheduled to remain incarcerated until December 26, 2005. (CP. 37, RE. 30). Furthermore, Dr. Moore

admitted there were differing opinions among the "medical and mental health personnel" as to whether Mr. Hearn was even serious about carrying out these threats. (CP. 37, RE. 30). Thus, in the present case, there is no ethical basis for a"duty to warn."

Similarly, even if Dr. Moore's disclosure could be grounded in some legal authority, such as the HIPPA privacy laws, it is clear that such disclosure is only permitted when "necessary to prevent or lessen a serious **and** imminent threat." ***45 C.F.R. S 164.512(j)*** (emphasis added). This simply cannot be the case under these facts as the Appellant was in the custody of the Mississippi Department of Corrections (MDOC) and there was no consensus that he seriously intended to harm the judges. Thus, the element of imminence or clear danger, as a matter of common sense, is not present. Therefore, while Dr. Moore may have been under the mistaken impression that he was morally obligated or legally permitted to notify Judges Bailey and Roberts, he did not have the legal right to testify at trial as to what the Appellant said to him in the course of the evaluation, nor could the statement serve as the basis of the indictment.

The prosecutor's ill-founded argument for an analogous exception of preventing future harm as found in the attorney-client privilege, ***Miss. R. Evid. 502***, is unsupported by existing case law and is further undermined by this Court's statement in ***Hosford***, that "[p]erhaps more so than is the case with either lawyers or physicians, we recognize a **public imperative** that the psychology profession as a whole enjoy a impeccable reputation for respecting patient confidences." ***Hosford***, 508 So. 2d at 1055 (emphasis added). Moreover, even if the Court were uncertain whether such an exception should exist, it is clear from the text of ***Miss. R. Evid. 503*** that no such exception does, in fact, exist. *See* ***Miss. R. Evid. 503(d)*** (recognizing exceptions only in four instances: (1) proceedings for hospitalization, (2) examinations pursuant to a court order, (3) proving breach of duty between patient and doctor, and (4) communications relevant to child custody, visitation, adoption, or termination of parental rights). Such an exception, if it existed, would undermine the public imperative underlying the rule and would dramatically impair the ability of mental

health providers to treat patients who suffer from violent impulses and thoughts due to mental illness, but are understandably hesitant to confide in a state psychiatrist who is free to disclose these statements to be used against the patient in court proceedings. As a matter of policy, this Court should not needlessly graft such a strained exception based on the peculiar facts of this case. The erroneous arguments of the State were the product of working from the faulty conclusion of the prosecutor that since there was a duty to warn, the doctor's the communication could not be confidential in nature. (T. I 26-27). However, Dr. Moore's decision to disclose was optional; therefore, his voluntary choice to disclose the information cannot be the basis for destroying confidentiality. It is undisputed from the record that Dr. Moore simply does not believe his conversations with psychiatric prisoner/patients who are confined in state penal institutions are completely confidential. (T. I 20). This personal belief was the true motivation for his disclosure of what he perceived as a "threat" as opposed to some amorphous duty to warn. Such personal ideologies are not a sufficient basis for breaching the duty of confidentiality of a patient. Thus, the statements were privileged and therefore, inadmissible under ***Miss. R. Evid. 503***.

B. The trial court erred by admitting into evidence a statement by Mr. Hearn that is the basis of this conviction which was made during an interrogation in which Mr. Hearn was not notified of his rights against self-incrimination.

In addition to Dr. Moore's voluntary and unethical disclosure of the information, Dr. Moore clearly failed to notify Mr. Hearn of his ***Miranda*** rights at the time of the evaluation in question. The mere fact that Dr. Moore advised Mr. Hearn he would disclose the nature of their conversation *after* the threat was made does not operate as a sufficient warning nor constitute a valid waiver of any right against self-incrimination.

The Fifth Amendment states "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." ***U.S. Const. Amend. V***. The guarantees of the Fifth Amendment right against self-incrimination are not circumvented merely because the Appellant was incarcerated at the time he made the statements now at issue as opposed to a more traditional police interrogation setting. ***Estelle v. Smith***, 451

U.S. 454, 465 (1981); *see also* ***Miranda v. Arizona***, 384 U.S. 436, 467 (1966) ("the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves"). In ***Estelle***, the United States Supreme Court determined "absent other **fully** effective procedures, a person in custody must receive certain warnings before any official interrogation . . . ." ***Estelle***, at 456-57 (emphasis added). In the present case, there were no procedures, let alone fully effective ones, to notify the Appellant that he had the right not to speak with Dr. Moore, that he had the right to have counsel present, or that anything he said to Dr. Moore could potentially be used against him in later criminal proceedings. The only procedure to which Dr. Moore testified served as such a warning were those conducted during the hectic and traumatic intake process when inmates first arrive at the correctional facility. (T. I 20). Mr. Hearn was admitted to East Mississippi Correctional Facility on March 21, 2000. (CP. 37, RE. 30). This paltry, ineffectual "warning" that was given over four years prior to this evaluation cannot constitute a sufficient advisement of the right to remain silent, nor can it constitute a voluntary, knowing, and intelligent waiver of the Appellant's Fifth Amendment right against self-incrimination.

Two issues likely to be argued to counter ***Estelle*** are that the Appellant initiated the psychiatric evaluation or that Mr. Hearn attempted to introduce psychiatric evidence at trial. *See* ***Estelle***, 451 U.S. at 468. Neither argument is supported by the record. Mr. Hearn did not initiate the evaluation and in fact indicated that he did not wish to participate in the evaluation. (T. II 185). In fact, the evaluation was part of the basic psychiatric services at East Mississippi Correctional Facility. (T. II 176). Furthermore, the evaluation on July 29, 2004, was the basis of the indictment; however, it was not related to a defense of insanity on behalf of the Appellant. Therefore, while Estelle is not directly on point, the Court's holding is highly persuasive.

This Court recognized the holding of ***Estelle*** in ***Jordan v. State***, 912 So. 2d 800 (Miss. 2005).

However, in ***Jordan*** the issue of whether the Petitioner had made a knowing and intelligent waiver to mental health professionals was procedurally barred though this Court addressed the merits of Jordan's claim. ***Id.*** at ¶49. This Court commented that ***Estelle*** applies in capital cases, ***id.*** n.7 (citing ***Gardner v. Johnson***, 247 F.3d 551 (5th Cir. 2001); however, there is no indication that ***Estelle*** would not apply in other scenarios as well. Nonetheless, this Court considered several factors to distinguish ***Jordan*** from ***Estelle***; these factors also distinguish ***Jordan*** from the case *sub judice.*

In ***Estelle*** and ***Gardner***, the mental evaluations were court-ordered and defense counsel was not aware that the information would be used later against the defendants. ***Jordan***, 912 So. 2d at ¶51. In ***Jordan***, however, defense counsel requested the evaluation and thus apparently intended for the information to be used at trial. ***Id.*** at ¶52. Moreover, because the doctor was appointed at the request of the defendant, he could not be a "'state actor' for the purposes of an [***Estelle***] warning." ***Id.*** As a result, this Court concluded that self-incrimination "warnings were not warranted." ***Id.*** at ¶53. Furthermore, the report of the doctor was neither put into evidence nor read to the jury. ***Id.***

In the present case, the Appellant did not request the evaluation and in fact did not wish to participate at all. Moreover, since the Appellant was incarcerated at the time of the evaluation he was without counsel to advise him of his legal rights. It is unclear if the Appellant could refuse to participate in the evaluation. Furthermore, since Dr. Moore is an employee at East Mississippi Correctional Facility he is clearly a state actor and was required to provide the Appellant with a sufficient warning of his rights prior to the evaluation.

These errors are clearly prejudicial since the conversation between Mr. Hearn and Dr. Moore on July 29, 2004, was the sole basis for the indictment. There is no evidence that before this statement was disclosed by Dr. Moore either judge considered the letters from Mr. Hearn as threatening in nature. (T. I 134; T. II 155; T. II 213). Therefore, but for this critical mistake by the trial court of admitting this

testimony the prosecution could not establish a *prima facie* case of intimidating a judge. While a contemporaneous objection was not made by counsel, the error in this case was so patently in violation of the Appellant's rights as to constitute plain error. Moreover, but for the testimony of Dr. Moore neither judge would have been able to testify as to the content of the discussion between Dr. Moore and Mr. Hearn. Without this testimony, which was attained in violation of the Appellant's Fifth Amendment rights and was also a privileged communication, the jury would have no evidence of a threat except for4 the confused writings of the Appellant and the speculative impression of those who read the letters. As a result, the trial court deprived the Appellant of his right to a fundamentally fair trial in addition to violating his Fifth Amendment right against self-incrimination. This Court should reverse the finding of the trial court and remand this case with proper instructions to the lower court for a new trial.

ISSUE FOUR:

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENSE JURY INSTRUCTIONS D-10, D-11, AND D-12, REGARDING THE ISSUE OF INSANITY, WHEN SUFFICIENT DIRECT AND CIRCUMSTANTIAL EVIDENCE AS TO THE APPELLANT'S MENTAL STATE IN THE CASE WAS PRESENTED TO THE JURY AT TRIAL.

The errors that began this trial were compounded by the errors that ended this trial. The trial court refused every defense jury instruction regarding the consideration of a verdict based on insanity. Despite testimony presented by the State's expert witness, the jury's observation of Mr. Hearn's conduct during trial, bizarre actions, nonsensical statements, and lack of reasoning, the jury was never allowed to deliberate the question of the Appellant's sanity. The well-established standard of review for the grant or denial of jury instructions has been set forth many times by this Court:

> 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 instructions, or is without foundation in the evidence.

Chandler v. State, 946 So. 2d 355 (¶21) (Miss. 2006) (quoting ***Ladnier v. State***, 878 So. 2d 926, 931 (¶20) (Miss. 2004)).

The Mississippi standard for insanity is the familiar ***M'Naghten*** test, under which "it must be proved 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.'" ***Woodham v. State***, 800 So. 2d 1148 (¶29) (Miss. 2001) (citing ***Roundtree v. State***, 568 So. 2d 1173, 1181 (Miss. 1990)). Questions of sanity are to be directed to the jury because "the determination of the defendant's sanity is within the province of the jury, which may accept or reject expert and lay testimony." ***Woodham***, 800 So. 2d at ¶29. The accused is presumed sane until a reasonable doubt is presented, at which time the burden of proving sanity shifts to the State. ***Clemons v. State***, 952 So. 2d 314 (¶8) (Miss. Ct. App. 2007).

Under Mississippi law, an accused may "present his theory of the case to the jury if it is supported by the evidence and contains a correct statement of the law," as well as having "the jury instructed as to this theory." ***Woodham***, 800 So. 2d at ¶23. While "the trial court enjoys considerable discretion" in jury instruction, the jury should be instructed both "fully and fairly." ***Clemons***, 952 So. 2d at ¶8. However, instructions that are "without foundation in the evidence" may be denied without constituting reversible error. ***Id.*** (citing ***Jackson v. State***, 645 So. 2d 921, 924 (Miss. 1994)).

In the present case, Mr. Duggan before his "dismissal," filed motions for a mental examination of the Mr. Hearn and a notice of intent to proceed with a defense of insanity. (CP. 58-59, RE. 106-07). Obviously, upon the removal of defense counsel, whatever defense that counsel may have intended to promote at trial never took place. Instead, the Appellant was forced to conduct his own defense, when the trial court failed to hold the required on-the-record hearings, as noted in § II, B, *supra*. The verbatim proposed defense jury instructions that were subsequently denied are the following:

Instruction D-10

The Court instructs the jury that in order to prove the defendant legally insane at the time of the commission of an offense, the state must prove beyond a reasonable doubt, that at the time of the commission of the offense the defendant had the mental capacity to know the nature and quality of his acts and to distinguish between right and wrong with reference to the acts committed.

(CP. 110, RE. 108).

Instruction D-11

The Court instructs the jury that the following is the definition of insanity in Mississippi: Insanity exists when at the time of committing the act 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 the nature and quality of the act, he did not know what he was doing was wrong.

(CP. 109, RE. 109).

Instruction D-12

The court instructs the jury that once the defendant places the evidence of the his [sic] lack of sanity before the jury, it becomes the burden of the State of Mississippi to prove the sanity of the defendant beyond a reasonable doubt before the defendant can be found guilty.

(CP. 111, RE. 110).

Despite the removal of defense counsel and with it any planned, coherent defense, substantial evidence that raised reasonable doubt about Mr. Hearn's sanity was produced at trial. Dr. Moore testified that he wrote to Judge Roberts and Judge Bailey, that Mr. Hearn suffered from Delusional Disorder, a classification of mental illness under the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV). (T. II 177-83; CP. 37, RE. 30). As noted previously, it is a question for the jury to determine the sanity of Mr. Hearn once a reasonable doubt is raised. As an expert witness, the jury could have rejected all or part of Dr. Moore's testimony and found Mr. Hearn to be suffering from a mental illness but not insane, suffering from a mental illness and insane, or not suffering from mental illness at all. However, because rational doubts based in the evidence presented at trial concerning the Appellant's sanity existed, the matter was a question solely for the jury.

Mr. Hearn presented substantial evidence regarding his sanity. Mr. Hearn often made inquiries and statements completely severed from logic or fact. (See T. I 148, 149; T. II 155, 157, 163-64, 185-87, 201,

205, 218, 235, 237-38, 274-75, R.E. 89-105). Mr. Hearn described and explained numerous oddities and delusional references in his supposedly threatening letters to Judge Roberts and Judge Bailey. (T. II 288-96). The jury observed Mr. Hearn testify as to the incongruous references his letters made to the Bible, crack cocaine, his high school, alternate definitions of the word "movant," prison escapes, the Declaration of Independence, homosexuality, and many other topics that were very difficult to understand from his explanations. (T. II 297- III 302). These letters, supposedly written around the time that Mr. Hearn made his threats, certainly raise significant doubts about his sanity. Despite being presented with such evidence regarding Mr. Hearn's sanity, the jury was never instructed on if or how they could apply it.

Throughout the trial, the jury witnessed to Mr. Hearn's actions, statements and a general lack of reasoning that presented a clear question of fact for the jury question as to the Appellant's sanity. The jury also heard the direct evidence of Dr. Moore, who stated that Mr. Hearn had a diagnosed mental condition that could have easily prevented him from knowing right from wrong or the nature and quality of his actions in writing the letters in question. Even though the jury witnessed considerable evidence presented on Mr. Hearn's sanity, they were never properly instructed to consider the law governing this issue. Rather, by denying the defense jury instructions on the matter, the jury was never "fully and fairly" informed of the issue and of their responsibility. Based on the evidence presented, the instructions were a fair statement of the law, were supported by the evidence and were not in any way cumulative; thus, they should have been granted, and the denial by the trial judge amounted to an abuse of discretion. Therefore, this matter should be reversed and remanded for a new trial with proper instructions to the lower court as to the jury issue of insanity.

ISSUE FIVE:

MISS. CODE ANN. § 97-9-55 IS UNCONSTITUTIONAL UNDER ARTICLE 3 SECTION 28 OF THE MISSISSIPPI CONSTITUTION AND THE FIRST AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AS APPLIED TO THE FACTS OF THE

it is unlikely that Mr. Hearn would meet the criteria for a reasonable person. Moreover, due to Mr. Hearn's mental illness and Dr. Moore's professional training, even if Mr. Hearn were considered to be a reasonable person, it is unlikely that a doctor (both trained in mental abnormalities and having noted the Appellant's tendency to speak in grandiose terms) would interpret the statement as a serious expression of intent to do bodily harm. Instead, the language that the Appellant used would be mere hyperbole and the type of rhetoric often employed by the mentally ill. For these same reasons, even if this Court adopted the Seventh Circuit's reasonable listener standard, the Appellant's speech would still be outside the scope of a true threat and protected speech.

In order to craft the most logically consistent and accurate test for distinguishing true threats from protected speech this Court could also consider the analysis provided in ***United States v. Dinwiddie***, 76 F.3d 913 (8th Cir. 1996). The court in ***McMillan*** favorably viewed the ***Dinwiddie*** analysis as "a reasonable template for the analysis" of whether there was a true threat in violation of FACE. ***McMillan***, 53 F.Supp.2d at 904. The Eight Circuit considered many factors including "the reaction of the recipient . . . and of other listeners; whether the threat was conditional; whether the treat was communicated directly to its victim; whether the maker of the threat had made similar statements in the past; and whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence." ***Dinwiddie***, 76 F.3d at 925. The court was careful to note that there is often little difference between offensive and passionate speech and that courts must analyze speech within the entire factual context in which it occurs. ***Id.***

In the present case the reaction of the listeners is unclear and muddled at best. While both Judges Roberts and Bailey indicated that they felt threatened, this was only after the unethical breach of confidence on the part of Dr. Moore. Moreover, there is simply no way to know the manner in which Dr. Moore described the comment, which could certainly change the opinion of the listener. While the personal reaction of Dr. Moore is evident, for reasons mentioned above it is unwise to allow his reaction, which was

certainly tainted by his role as an agent for the State to be determinative. Thus, this factor does not clearly weigh against the Appellant.

The conditional nature of the statement clearly weighs against a finding of a "true threat." In the present case, the Appellant was incarcerated at the time of the statement. Thus, the only was the alleged threat could possibly have become actionable was in the event that he was in fact released from custody. Since part of the letters he had sent to the judges was based on a desire to be free from prison it is unlikely that once the object of his letters had been attained that he would then seek retribution on those who he believed freed him from his condition.

The threat was clearly not communicated directly to the intended recipient. In fact, the only reason the judges had knowledge of these statements is the unethical conduct of Dr. Moore in breaching his duty of confidentiality owed to Mr. Hearn.

There is no evidence in the record to suggest that Mr. Hearn had made similar comments to the judges in the past before the comment made to Dr. Moore. The letters that were sent directly to the judges certainly cannot be construed as prior instances of threatening comments since the testimony of the judges and the time line of the proceedings clearly demonstrate that no one understood the letters to be threatening until Dr. Moore notified them that they should be afraid. Thus, this factor too weighs against a finding of a true threat.

The record does suggest that the targets of the alleged threat had reason to believe the maker had a propensity to engage in violence. However, this factor should be read with a tempered eye since the perspective of the judges at trial was obviously biased by the remarks made by Dr. Moore. It is unclear whether these judges believed the Appellant was a substantial risk before Dr. Moore's betrayal of Mr. Hearn's trust. Based on the totality of the circumstances surrounding the comments made by the Appellant, it is clear that he labors under a disease of the mind that causes him to speak in grandiose terms and makes

him unable to comprehend how those words are interpreted by others. As a result, this Court should find that the remarks of the Appellant did not constitute a serious expression of an intent to do bodily harm and, therefore, are not a true threat and are protected by the First Amendment. This Court should reverse the finding of the trial court and remand this case with proper instructions to the lower court for a new trial.

ISSUE SIX:

THE CUMULATIVE EFFECT OF THE ERRORS BY THE TRIAL COURT, THOUGH JUDGED BY THIS HONORABLE COURT TO BE "HARMLESS," TOGETHER COMBINED TO VIOLATE THE APPELLANT'S FUNDAMENTAL RIGHT TO DUE PROCESS UNDER THE UNITED STATES CONSTITUTION AND THE MISSISSIPPI CONSTITUTION.

If this honorable Court finds that the trial court committed error but that the individual error was "harmless," the Appellant respectfully submits that the cumulative effect of the errors contributed to deny the Appellant's right to a fair trial. "The cumulative error doctrine stems from the doctrine of harmless error... [which] holds that individual errors, which are not reversible in themselves, may combine with other errors to make up reversible error, where the cumulative effect of all errors deprives the defendant of a fundamentally fair trial." ***Harris v. State***, 970 So. 2d 151 at ¶24 (Miss. 2007) (citing references omitted).

Numerous errors by the trial court that affected the fairness of the trial have been presented. Perhaps most notably was the trial court's failure to follow the affirmative guidelines found in ***URCCC 8.05*** and ***9.06***. These procedural rules, which mandate procedures to protect the criminal defendant's rights under ***Faretta***, were simply ignored by the trial court. Such clear error, if it is held to be harmless on its own, certainly contributed to the nature of the Appellant's unfair trial.

The trial court's allowance of the privileged communication as between the Appellant and a state psychiatrist competent evidence is another example where the trial court clearly committed error. Because no exception to the rules of evidence exists for the duty of confidentiality that Dr. Moore had to Mr. Hearn, the trial court's admission of the evidence was apparent error. The trial court's error in allowing the

confidential testimony contributed greatly to the cumulative effect of prejudice against the Appellant, which resulted an unfair trial.

Finally, the trial court also committed error when it denied jury instructions on the factual issue of insanity. Because the instructions were supported by the evidence, contained accurate statements of the law, and were not cumulative, the court should have allowed the jury to consider the law during their deliberations, which might have resulted in Mr. Hearn receiving treatment, instead of a heavy term of imprisonment. Even if such a denial of instructions was not reversible error in itself, combined with the other errors of the trial court it contributed to a violation of Mr. Hearn's due process rights.

Taken together, if no individual error of the trial court is deemed by this honorable Court to constitute reversible error, the cumulative effect of all of the errors asserted by the Appellant was to deny him the right to a fundamentally fair trial under both the United States and the Mississippi Constitutions. As a result, the judgment should be vacated and remanded for a new trial with proper instructions to the lower court.

CONCLUSION

The fractured and unfair outcome of this matter could easily been avoided at many stages during the proceedings had in this case, as set out hereinabove. The Appellant herein submits that based on the propositions cited and briefed hereinabove, together with any plain error noticed by the Court which has not been specifically raised, the judgment of the trial court and the Appellant's conviction and sentence should be reversed and vacated, respectively, and the matter remanded to the lower court for a new trial on the merits of the indictment on two charges of intimidating a judge, with instructions to the lower court. In the alternative, the Appellant herein would submit that the judgment of the trial court and the conviction and sentence as aforesaid should be vacated, this matter rendered, and the Appellant discharged from custody, as set out hereinabove. The Appellant further states to the Court that the individual and cumulative errors

as cited hereinabove are fundamental in nature, and, therefore, cannot be harmless.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Phillip W. Broadhead, Criminal Appeals Clinic Professor and attorney for the Appellant herein, do hereby certify that I have this day mailed postage fully pre-paid/hand delivered/faxed, a true and correct copy of the foregoing Brief of Appellant to the following interested persons:

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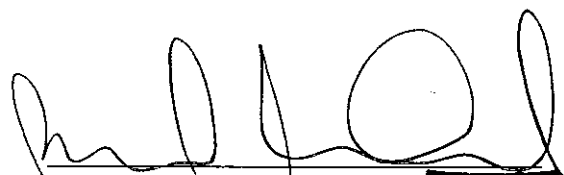
Mr. Michael Henry Hearn, Appellant
MISSISSIPPI DEPARTMENT OF CORRECTIONS
Leakesville, Mississippi

This the 2nd day of April, 2008.



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