IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

ANTONIO KNOWLES — APPELLANT

VS. — NO. 2007-KA-1786

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

ANTONIO KNOWLES **APPELLANT**

vs. **CAUSE No. 2007-KA-01786-SCT**

THE STATE OF MISSISSIPPI **APPELLEE**

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against a judgment of the Circuit Court of Quitman County, Mississippi in which the Appellant was convicted and sentenced for his felony of **MURDER**.

STATEMENT OF FACTS

The Appellant brings no challenge here as to the sufficiency of the evidence in support of his conviction or as to its weight. It is therefore unnecessary to set out the facts of his guilt in detail. Stated generally, the evidence produced by the State showed that the Appellant, for reasons unknown, pulled a gun out at a place called the Smoke House Grill and shot one John Paul Roberson in the leg and head, killing Roberson. The Appellant was seen to do this by Roberson's romantic interest. The Appellant then drove away from the Smoke House Grill; he was apprehended a short time later.

STATEMENT OF ISSUES

1. WAS THE APPELLANT'S TRIAL COUNSEL INEFFECTIVE IN HAVING FAILED TO ESTABLISH AN EVIDENTIARY PREDICATE FOR A MANSLAUGHTER INSTRUCTION?

SUMMARY OF ARGUMENT

1. THAT THE RECORD ON APPEAL IS INSUFFICIENT TO DEMONSTRATE THAT COUNSEL FOR THE APPELLANT WAS INEFFECTIVE IN HIS DEFENSE OF THE APPELLANT

ARGUMENT

1. THAT THE RECORD ON APPEAL IS INSUFFICIENT TO DEMONSTRATE THAT COUNSEL FOR THE APPELLANT WAS INEFFECTIVE IN HIS DEFENSE OF THE APPELLANT

In the sole assignment of error presented on this appeal, the Appellant contends that his attorney failed to establish an evidentiary predicate for an instruction on the heat of passion form of manslaughter. It is claimed that the attorney now in the dock might have put questions to two witnesses in the case that would have resulted in answers that would have provided that evidentiary basis for the instruction.

When a claim of ineffective assistance of counsel is raised for the first time on direct appeal, this Court is limited to the trial court record in its review of the claim. The Court will reach the merits of an ineffective assistance of counsel claim only in instances in which (1) the record affirmatively shows ineffectiveness of constitutional dimensions, or (2) the parties stipulate that the record is adequate to allow the appellate court to make the finding without consideration of the findings of fact by the trial court. *Wilcher v. State*, 863 So.2d 776, 825 (Miss. 2003). We do not stipulate that the record before this Court is sufficient or adequate to make any finding concerning the ineffectiveness of the attorney. Additionally, the record does not affirmatively demonstrate that the attorney was ineffective.

There is no testimony in the record before the Court that would support a manslaughter instruction. The Appellant, however, after quoting some parts of testimony from two witnesses, suggests that ". . . there [was] a strong probability that there was a confrontation between [the Appellant and the victim].

The problem with this position is that the very parts of the testimony quoted by the Appellant clearly shows the absence of any "heat of passion." The witnesses simply saw nothing that would indicate that the Appellant, or the victim, for that matter, was in the heat of some passion. The Appellant's supposition that there was a confrontation in the restaurant, which continued outside the restaurant, is simply that. This supposition is not an evidentiary predicate for an instruction.

Contrasted against this rank speculation by the Appellant, it was actually in evidence that the Appellant showed no sign of being in the heat of passion when he returned to his car and drove off. When one of his passengers asked him what had happened, the Appellant replied, "It wasn't nothing." The Appellant then gave a cellphone and some money to that passenger. (R. Vol. 2, pg. 106). This testimony certainly negates any notion that the Appellant was acting in the heat of passion. Likewise, the description of how the Appellant was driving just before he was apprehended negates any claim of heat of passion. (R. Vol. 2, pg. 72).

The Appellant then contends that once a "heat of passion" issue is raised, the State has the burden of proving that the victim did not strike, threaten or provoke him. No citation of authority is provided for this claim, and we do not believe that this is an accurate statement of law. In any event, there was nothing in the evidence to support a heat of passion manslaughter theory.

The Appellant then lists eight questions that he supposes that, if his attorney had put them

to the witnesses, the responses would have established an evidentiary predicate for manslaughter. (Brief for the Appellant at 9 - 10). However, even if the response to each of these questions had been "no" (i.e., No, I cannot say whether the victim struck the Appellant inside the restaurant), that answer would provide no basis for a manslaughter instruction. The most these questions would have gotten the Appellant would have been negative answers; the State, on redirect, would have quickly brought out that the witnesses could not say that the Appellant was struck. That the witnesses presumably would have testified that they could not say that one thing or another did or did not happen would not amount to testimony that it did happen.

As to questions four and seven, they suggested the existence of facts that were never proved. Questions themselves are not evidence; questions cannot, of themselves, cannot provide an evidentiary predicate for the granting of an instruction.

Given these questions suggested by the Appellant, we think it is interesting that he did not testify. He, of course, had the right not to testify; but it seems to us that if there was any basis for asking these questions, if there was any ground to seek a manslaughter instruction, he surely could have provided it in his own testimony. We see no reason for this roundabout attempt to establish an evidentiary predicate for manslaughter where a far more direct and effective means existed. It leads one to believe that there was no basis at all in the events at the grill to permit a manslaughter instruction. The Appellant does not contend here that his attorney was ineffective on account of his failure to testify. This is no surprise since the trial court questioned the Appellant twice about his decision in this regard. It was the Appellant who chose not to testify. (R. Vol. 3, pp. 160 - 161).

There is nothing in this record to suggest that manslaughter was available as an option for the jury. The Appellant has pointed to nothing in the record to demonstrate this. The questions

he supposes would have created an evidentiary basis for manslaughter would not have done so.

It may be that the attorney did not attempt to make out a case of manslaughter, but this does not require the conclusion that the attorney did not investigate the possibility. For all this Court knows from this record, the attorney did investigate the viability of that strategy but found that he could develop no evidence for it. *Cf. Page v. State*, No. 2007-KA-00334-COA (Miss. Ct. App., Decided 15 April 2008, Not Yet Officially Reported)(Fact that no evidence was presented by the defense concerning that defendant's mental state did not require the conclusion that the attorney did not investigate the issue). In these ineffective assistance of counsel issues, an attorney's representation of a criminal defendant is presumed to be reasonable and effective. *Bell v. State*, 879 So.2d 423 (Miss. 2004). The mere fact that a particular strategy was not pursued – and that is the only thing this record shows – is insufficient to rebut this presumption.

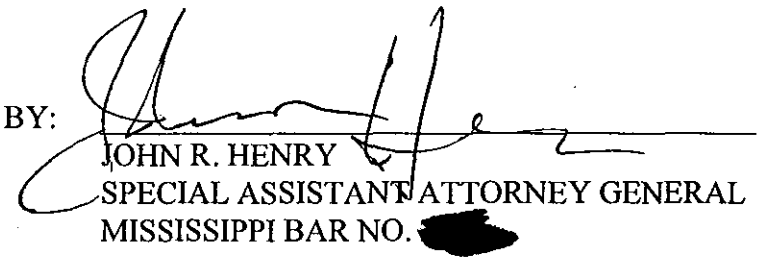
The record before the Court does not affirmatively show ineffective assistance of counsel of constitutional dimensions. In other words, nothing in this record comes close to demonstrating that the trial court should have declared a mistrial or granted a new trial on account of the attorney's performance. The verdict here does not amount to a mockery of justice. Consequently, this Court should affirm the Appellant's conviction and sentence. *Colenburg v. State*, 735 So.2d 1099 (Miss. Ct. App. 1999).

CONCLUSION

The Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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CERTIFICATE OF SERVICE

I, John R. Henry, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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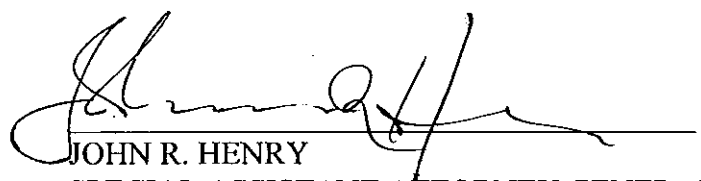
This the 9th day of May, 2008.



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