IN THE SUPREME COURT OF MISSISSIPPI
NO. 2007-KA-02130 SCT

STEPHEN JOSEPH DELASHMIT — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Stephen Joseph Delashmit

THIS ___ day of April 2008.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Stephen Joseph Delashmit

By: George T. Holmes

George T. Holmes, Staff Attorney

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STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Lee County, Mississippi where Stephen Joseph Delashmit was convicted of Enticement of a Child for Sexual Purposes under Miss. Code Ann. §97-5-33 (1972). A jury trial was conducted November 26-27, 2007, with the Honorable Thomas J. Gardner, III , Circuit Judge, presiding. Delashmit was sentenced to life imprisonment as an habitual offender under Miss. Code Ann. §99-19-83 (1972) and is presently incarcerated with the Mississippi Department of Corrections. [R. 77].

FACTS

It was October 24, 2006, in the Town of Verona, South of Tupelo, in Lee County. About 4:10 p. m., Corey Mallory was driving home from work and as he passed Lee Memorial Cemetery, Mallory saw a man in a small blue car talking to a small girl on a bicycle. [T.156-57, 183-84, 321-24, 332-33]. Mallory became concerned and turned

around. *Id.* As he approached the cemetery, he saw the bike abandoned on the ground and the blue car driving off. *Id.* He thought the little girl had been abducted, so Mallory followed the blue car to an industrial park area and was able to confront the driver who said he had asked the girl for directions and then drove off again. *Id.* Still unsure about the location of the girl, Mallory called 911 and gave a description of the events, the man and the car. *Id.* At trial, Mallory identified the appellant Stephen Joseph Delashmit as the man in the blue car. *Id.*

Delashmit became a suspect on a hunch; he had been a registered sex offender in Monroe County and a Lee County deputy thought the vehicle description matched. [T. 11, 159-60]. Officers went to Delashmit's house, but he was not there. *Id.* Deputies searched areas where Delashmit was thought to be working. [T. 385-86]. When his car was located in a parking lot of a business, deputies went inside located Delashmit, detained him and called the Sheriff. [T.161-209; 356-83]. When the Sheriff arrived, Delashmit was placed in a patrol car with the Sheriff and a deputy. *Id.* Delashmit was questioned and purportedly gave a statement to the Sheriff that he had had contact with this little girl, offered her $50.00 for "some pussy" and showed the girl his genitalia. *Id.*

Since the Sheriff did not record Delashmit's statement in the patrol car, he had Delashmit questioned again by Inv. Donna Franks Fincher with the Lee County Sheriff's Office. [T.210-25, 399-406; Exs. 2, 6-7]. After being *Mirandized* again, Delashmit told Fincher that he would prefer to have counsel present for any further discussion. *Id.* After

Fincher persisted, Delashmit acquiesced and repeated his confession which was given to the Sheriff initially. *Id.* Some additional details were obtained, like, Delashmit reportedly said he exposed his genitals to the girl by raising his mid-section and that when the little girl ran off, she left her bike laying on the ground. *Id.* The little girl's testimony was substantially the same. [T. 335-51].

Delashmit allegedly added that, after leaving the cemetery, he headed towards work and briefly spoke with Mallory who was following him and calling for law enforcement. [T. 404-05]. From Delashmit's standpoint, this was only a case of indecent exposure.

SUMMARY OF THE ARGUMENT

Neither of Delashmit's statements should have been admitted into evidence; and, he was entitled to a lesser offense jury instruction which was denied. Delashmit suffered irreparable prejudice from the trial court limiting his closing arguments.

ARGUMENT

ISSUE NO. 1: WERE DELASHMIT'S STATEMENTS PROPERLY ADMITTED?

Delashmit's position here is that, when he was interrogated by the sheriff in the back of the squad car and gave his first statement, he was under arrest, but, the arrest was

without probable cause, so the statement to the sheriff was inadmissible "fruit of the poisonous tree." The second statement to Inv. Donna Franks Fincher, which was recorded, was inadmissible also, because, Delashmit requested, or invoked his right to, counsel during the interrogation, yet made the subsequent confession after Fincher wrongfully persisted in her questioning.

There is a "mixed standard of review" under this issue. *Dies v. State*, 926 So.2d 910 (Miss. 2006). For [d]eterminations of reasonable suspicion and probable cause, the review is *de novo*. The *de novo* review of the trial court's decision should be "based on historical facts reviewed under the substantial evidence and clearly erroneous standards." *Id.*

The test for determining when a person is "in custody" is whether a reasonable person would feel that they were going to jail and not just being temporarily detained. *Godbold v. State*, 731 So.2d 1184, 1187 (Miss.1999). From Delashmit's standpoint, he was under arrest. The sheriff had him in the back seat of the patrol car sitting next to him and there was another deputy up front. [T. 187-88]. According the sheriff, Delashmit was "totally detained". [T 190]. Prior to the sheriff arriving on the scene, deputies did not consider Delashmit under arrest because he was outside the car and he was not handcuffed. [T. 167, 175]. Once inside the car, Delashmit could not have gotten out without being let out. Nevertheless, the deputy said if a request had been made, he would have let Delashmit out of the car. [T. 176].

Contrarily, the sheriff, could not remember if Delashmit was handcuff, but clearly indicated that Delashmit was not free to go or leave the patrol car. [T. 199]. It follows, that the sheriff would not have allowed Delashmit to go if he had requested so. *Id.*

When Delashmit was placed in the back seat of the patrol car, all the sheriff knew was there was a white male in a blue car involved and that someone in his office "had had contact with a registered sex offender... doing pretty much the same thing" in a nearby town, who they claimed was Delashmit. [T. 172, 192].

In *Qualls v. State,* 947 So. 2d 365, 371-72 (Miss. Ct. App. 2007), Qualls was convicted of burglary and attempted grand larceny. The victim in Qualls was waked from his evening slumber, about 3:30 a..m., by his wife to see his pickup truck was being driven down the street. Whoever was stealing the truck, stopped and jumped out and ran, and disappeared. Officers searching the area found a car they did not recognize with two people inside. One officer "knocked on the window [of the car], identified himself as a police officer, and asked the person twice to exit the vehicle." *Id.* The request was ignored so the officer broke the driver's side window and "found two men in the car-one lying on the front seat and one lying on the back seat. The men were observed to be breathing heavily and sweating." *Id.* Qualls claimed that the police did not have probable cause to arrest him and that "officers only had a suspicion of guilt which was insufficient probable cause to arrest or search the occupants of the vehicle."

The *Qualls* court pointed out that officers have authority "to detain an individual

for mere investigatory purposes. ... [g]iven reasonable circumstances ... to resolve an ambiguous situation," even without "sufficient knowledge to justify an arrest." *Id.* Examples of investigatory stops include "[s]topping a suspicious individual to determine his identity"or temporarily detaining someone when the officer "has a reasonable suspicion that the accused is involved in a felony" or other criminal activity." However, "mere hunches" or "looking suspicious" is insufficient to establish reasonable suspicion for an investigatory stop.

The definition of "arrest" is the "taking into custody of another person by an officer ... for the purpose of holding him to answer an alleged or suspected crime." "[a]n arrest without a warrant is valid if the arresting officer has "probable cause to believe a felony has been committed, and probable cause to believe the suspect to be arrested committed the felony."

A person may be arrested without a warrant "for an indictable offense committed, or a breach of the peace threatened or attempted" in the officer's presence, or for a felony not committed in the officer's presence, where the officer has "reasonable ground to suspect and believe the person proposed to be arrested to have committed it...." See Miss. Code Ann. § 99-3-7(1) (Supp.2005). 947 So. 2d 371-72.

> 'Probable cause' means 'less than the evidence which would justify condemnation, but more than bare suspicion', .. [and] [t]o determine if an officer had probable cause to arrest an individual, the court must look at the facts and the totality of the circumstances within the knowledge of the officer, not only at that time, but in the preceding circumstances before the arrest, and ask if 'that information was reasonably trustworthy and

sufficient to warrant a reasonably prudent person to believe that a crime had been committed.

The standard of review for the Court here is to "decide whether there was substantial, credible evidence to support the trial judge's ruling." *Id.*, citing *Culp v. State*, 933 So.2d 264, 274(¶ 26) (Miss.2005).

The *Qualls* court decided, based on the fact there, the officers had probable cause to arrest. Comparing Delashmit's facts to *Qualls*, shows that the deputies and sheriff here did not.

In *Qualls*, "the officer had reasonable suspicion to knock on the vehicle's window" because the officers had seen two people fleeing the scene and knew that the car did not belong in the neighborhood and had out of county tag. Here, there was nothing more than a hunch that Delashmit was involved. In *Qualls,* the suspects in the car "did not respond to the officer's two requests to exit the vehicle, the officer had probable cause to break the car window and detain the individual[s] ... for additional questioning, and at the very least, charge both individuals with the misdemeanor of failure to comply with the lawful commands of a police officer." In the present case, there was no resistance at all.

Under a totality of these circumstances, *Qualls* is distinguishable from the present facts. What occurred was a violation of Delashmit's rights under 4th and 14th Amend. U. S. Const. and Art. 3 §23, Miss. Const. (1890). Law enforcement here exceeded all authority set out in *Dies v. State*, 926 So.2d 910, 918 (Miss. 2006), where the court pointed out that law enforcement interaction with individuals is divided into three types:

(1) "Voluntary conversation" where an officer approaches a person to engage in conversation regardless of known facts and there is no force or detention (2) "Investigative stop and temporary detention", where the purpose is to "stop and temporarily detain" so long as the officer has "reasonable circumstances" to stop, but without "sufficient knowledge to justify an arrest", the length of the detention is based on the need to resolve any ambiguous situation; (3) "Arrest: An arrest may be made only when the officer has probable cause". Delashmit's detention exceeded the investigatory nature of the stop under a totality of the circumstances.

Concerning the Delashmit's second statement, prior to the beginning of questioning, Delashmit said to Deputy Fincher that he "preferred" to have a lawyer present. [T. 217-18; Exs. 2, 7]. Without any ambiguity, Inv. Fincher said "You prefer" and Delashmit said, "... well you know, I'll go ahead." Then Fincher asked, "without an attorney?" and Delashmit said "without an attorney." *Id.* Fincher's questioning continued and another confession resulted. *Id.* The gathering of the second statement was accomplished by the state with a circumvention of Delashmit's 5th, 6th, and 14th Amendments to the U. S. Constitution as well as by Article 3 §26 of the Mississippi Constitution.

The standard of review regarding the admissibility of a confession is for the reviewing court to determine under the totality of the circumstances whether the "correct legal standard was applied ..,.[whether] manifest error was committed, or [whether] the

decision [of the trial court] is contrary to the overwhelming weight of the evidence. *Tyler v. State,* 911 So.2d 550, 554-56 (Miss. Ct. App.,2005).

In *Holland v. State*, 587 So.2d 848, 857-58 (Miss.1991), Holland urged on appeal that a confession he gave should not have been admitted into evidence because he asked during interrogation "Don't you think I need a lawyer?" The supreme court ruled that Holland's inquiry was an ambiguous invocation of the right to counsel and questioned then "whether the police detective responded ... within constitutional parameters." *Id.* The interrogating officers repeated Holland's right to counsel and that he was not required to talk to them, but the they wanted to hear his side of the events, to which Holland said, "OK", he would talk to them. This was not an overreaching according to the court rather a clarification of the ambiguous question. *Id.*

In *Tyler v. State, supra*, Tyler asked whether he needed counsel several times during questing by law enforcement, but when asked directly, "Do you want a lawyer?" Tyler said, "No, I don't" and proceeded to produce a written statement. 911 So.2d 550, 554-56. The court said this was permissible. *Id.*

In this case, Delashmit was succinct and not ambiguous, "I prefer a lawyer." There was no question. It is reminiscent of Herman Melville's short story *Bartleby the Scrivener*, (1853), where the only reply that Bartleby would give to his employer's request for work was, "I would prefer not to". Delashmit responded with a statement, where Tyler and Holland responded with questions and the officers clarified the

ambiguity. Here the continuing questioning by the investigator made Delashmit acquiesce a clear violation established parameters.

A request for counsel is not "triggered" unless made during an "interrogation." *Scott v. State* 947 So.2d 341, 343-44 (Miss. Ct. App., 2006), citing on *Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), where the court held "that once an accused has requested counsel during the interrogation process, that the accused may not be questioned further until the attorney is present, unless the accused voluntarily begins to talk again." This "bright line rule" from *Edwards* "prevents overriding a suspect's unequivocal request for counsel by badgering or lesser forms of persistence". Since there was no ambiguity here in Delashmit's case, the second statement to Fincher should have been suppressed.

Therefore, neither of the statements should have been admitted into evidence. Accordingly, Dalashmit respectfully requests a new trial.

ISSUE NO. 2: WAS DELASHMIT ENTITLED TO A LESSER OFFENSE INSTRUCTION?

The lesser offense instruction which Delashmit requested and which should have been given was for indecent exposure.[1] Trial counsel requested this in two instructions,

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1

Miss. Code Ann. § 97-29-31 (Rev. 2006) Indecent exposure
A person who willfully and lewdly exposes his person, or private parts thereof, in any public place, or in any place where others are present, or procures another to so expose

D-2 and D-3 which were both denied. [T. 418-21; R. 67-68].

In *Green v. State,* 884 So.2d 733, 735-38 (Miss. 2004), Green requested but was denied an instruction to allow the jury to consider a lesser non-included offense of sale of a substance falsely represented as a controlled substance.

The *Green* court noted that a criminal defendant is most definitely entitled to have "the jury instructed regarding any offense carrying a lesser punishment arising out of a common nucleus of operative fact", where there is an evidentiary basis for the same. See also *Griffin v. State*, 533 So.2d 444, 447-48 (Miss.1988).

The *Green* court pointed out that in deciding "whether there is sufficient evidence that an issue be submitted to the jury, we must consider all of the evidence in the light most favorable to the party requesting the instruction ... [t]hat party must also be given the benefit of all favorable inferences that may reasonably be drawn from the evidence." [Citation omitted.]. *Green,* 884 So.2d 735-38.

Since Green had "testified that he sold the undercover narcotics agent fake cocaine [and] offered [a] video tape of the transaction in which the undercover narcotics agent is heard to say that he thinks the substance that Green sold him ... fake cocaine" there was sufficient evidence for the trial court to have been required to give the instruction. The result is that the *Green* court reversed. *Id.*

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himself, is guilty of a misdemeanor and, on conviction, shall be punished by a fine not exceeding Five Hundred Dollars ($500.00) or be imprisoned not exceeding six (6) months, or both. It is not a violation of this statute for a woman to breast-feed.

In *Griffin v. State, supra* the defendant was charged with rape. 533 So.2d 444. He presented evidence in defense of consensual sex, but that he later assaulted the victim. Since the alleged victim had been beaten up, the defendant requested a lesser offense instruction for simple assault which the trial court refused. The supreme court found fault with this ruling.

> [A] lesser included offense instruction should be granted unless..., taking the evidence in the light most favorable to the accused, and considering all reasonable favorable inferences which may be drawn in favor of the accused from the evidence, that no reasonable jury could find the defendant guilty of the lesser included offense (and conversely not guilty of at least one essential element of the principal charge).

The *Griffin* court found that there was an evidentiary basis for the lesser offense instruction. There was evidence Griffin "had engaged in [consensual] sexual intercourse with [the victim] ... earlier that evening only [to], at some point [later] during that night, ... [become] enraged and [strike her'] a number of times". On this evidence the jury may have "found Griffin guilty of simple assault but not guilty of rape", and "[b]ecause the Circuit Court refused that instruction, and because of the enormous disparity in maximum punishments between rape and simple assault, we find the error of reversible proportions."

Applying the *Green* and *Griffin* to the present set of facts, it is clear that there is an evidentiary factual basis arising out the same set of operative facts pled in the indictment and presented at trial giving Delashmit, who reportedly said he lewdly exposed himself to

the little girl, the right to have the jury deliberate the lesser offense of indecent exposure under Miss. Code Ann. § 97-29-31 (Rev. 2006). There could be no wider gap between sentences here: misdemeanor versus life in prison. The appellant respectfully requests a consistent application of *Green* and *Griffin*, *supra* to the case, with a reversal and remand for new trial.

ISSUE NO. 3: WAS DELASHMIT'S COUNSEL UNCONSTITUTIONALLY PREVENTED FROM MAKING A CLOSING ARGUMENT ON REASONABLE DOUBT?

During closing, defense counsel was making the following argument about reasonable doubt, the state objected and the trial court sustained the objection:

> BY DEFENSE COUNSEL:
> [Continuing] You have to think to yourself what is the hurdle that the State would have to overcome to prove to me beyond a reasonable doubt.
> Now what is reasonable doubt? If you're thinking right now "[why would Delashmit confess"]? If you wonder about that, why would he do that, and you're doubting whether that means that he intended to do that, then that is reasonable to you. And that could be a reasonable doubt. A doubt that you have about any of the evidence, about any of the "why did this happen " or "why did that event take that course", if you have a question in your mind about why, that's a doubt, and if you can put a reason on top of that - -
> [Objection from the state]
> THE COURT:
> Yes , sir. You cannot define that, Counsel. It's for the jury to determine. All right, you may proceed. ... Go ahead, but you can't tell them what it is. There's no definition to prove as to what reasonable doubt is. [T. 443 -44].

By this, the trial court ruled that the topic of what constitutes reasonable doubt was

forbidden territory in closing argument. Case law reveals exactly the opposite. Delashmit's rights under the 1st, 5th, 6th, and 14th Amendments to the U. S. Constitution and Article 3 §§ 13, 26 Miss. Const. (1890) to free speech, due process and fair trial were thwarted.

Appellant would show that the law is that trial courts should not define reasonable doubt. However, the topic is fair game during argument of counsel, and case law even appears to encourage the debate of the topic in closing.

In *Chandler v. State*, 967 So.2d 47, 53-54 (Miss. Ct. App.,2006), the *pro se* appellant, complained that his trial counsel was ineffective for not requesting a jury instruction defining reasonable doubt. The court pointed out "the Mississippi practice ...[to] unvaryingly ... refuse such an instruction. [Citations omitted]. The court went on the specifically say, "Chandler's counsel was not ineffective for not submitting an improper jury instruction. **Chandler's counsel did what he could on this point by explaining reasonable doubt in closing arguments.**" [Emphasis added]. See also, *Curry v. State,* 939 So.2d 785 (Miss. 2006), where the court found it proper for defense counsel to argue the meaning of reasonable doubt *vis a vis* the factual realm of possibilities and identification evidence. See also, *Griffin v. State*, 504 So.2d 186, 193 (Miss. 1987)

In *Simon v. State,* 857 So.2d 668, 696 (Miss. 2003), the Simon complained on appeal about comments during *voir dire* by the state which arguably diluted the state's

burden of proof under the reasonable doubt standard. The *Simon* court agreed with the state's argument that the statements were not objectionable, "so long as reasonable doubt is not defined when the trial court instructs the jury." The court said, "[t]he statements were made during *voir dire*, yet **this Court has found such statements unobjectionable as late as closing arguments so long as reasonable doubt is not defined by the trial court."** [Emphasis added].

Perhaps the most clear statement about this topic applicable here comes in *Christmas v. State*, 700 So.2d 262, 269-70 (Miss. 1997), where the court said that the topic of what constitutes reasonable doubt "should be limited to the remarks of counsel, not embodied in instructions emanating from the court." citing *Gillum v. State*, 468 So.2d 856, 863 (Miss.1985).

The Court of Appeals recognized in *Stigall v. State*, 869 So.2d 410, 413 (Miss. App., 2003):

> The Mississippi Supreme Court has held that distinctions between "reasonable doubt," "all possible doubt," "beyond a shadow of a doubt," and the like, while, not properly the subject of jury instructions, **are permissible during trial counsel's closing argument.**

In *Lewis v. State,* 814 So.2d 819, 831-32 (Miss. App.,2002) the court clearly recognized that Mississippi Constitution Article 3, §26 (1890) provides, in part:

> In all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both, . . .

The refusal to permit defendant to argue his case is in direct violation of the above constitutional provision and requires reversal.

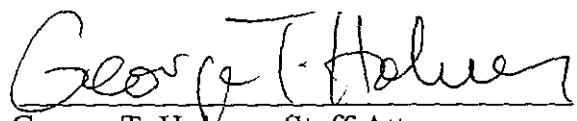
Therefore, Delashmit is entitled to a new trial.

CONCLUSION

Stephen John Delashmit entitled to have his conviction reversed with remand for a new trial.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Stephen John Delashmit, Appellant

By: 
George T. Holmes, Staff Attorney

CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 7th day of April, 2008, mailed a true and correct copy of the above and foregoing Brief Of Appellant to Thomas J. Gardner, III, Circuit Judge, P. O. Box 1100 , Tupelo MS 38802-1100, and to Hon. David Daniels, Asst. D. A. , P. O. Box 7237, Tupelo , MS 38802-7237, and to Hon. Charles Maris, Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid.

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