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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-KA-02145-COA

MARIO BROWN **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:

Mario Brown, Appellant;

David L. Tisdell, Esq., trial attorney;

Lauren R. Hillery, David L. Horsley, George T. Holmes , and **Phillip W. Broadhead, Esqs.,** Attorneys for the Appellant, Criminal Appeals Clinic, University of Mississippi School of Law;

Charles Kirkham, Esq., Assistant District Attorney, Office of the District Attorney;

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

Honorable Kenneth L. Thomas, presiding Circuit Court Judge; and

Friars Point Police Department, investigating/arresting agency.

Respectfully submitted,

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Clinical Professor, Criminal Appeals Clinic

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STATEMENT OF ISSUES

ISSUE ONE:

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO ELICIT UNRELIABLE, FACTUALLY INACCURATE, AND SPECULATIVE TESTIMONY FROM DR. STEVEN HAYNE WHERE HE GAVE OPINION TESTIMONY OUTSIDE FORENSIC PATHOLOGY AND ENGAGED IN RANK SPECULATION THAT MISLED THE JURY.

ISSUE TWO:

WHETHER THE TRIAL COURT ERRED IN REFUSING THE DEFENSE'S PROPOSED SELF-DEFENSE JURY INSTRUCTIONS WHERE THEY WERE SUPPORTED BY THE EVIDENCE, WERE A CORRECT STATEMENT OF THE LAW, AND WERE NOT DUPLICATIVE OF ANY OTHER INSTRUCTION, EFFECTIVELY DEPRIVING THE DEFENSE TO PRESENT TO THE JURY THEIR THEORY OF THE CASE.

ISSUE THREE:

WHETHER THE TRIAL COURT ERRED BY FAILING TO SUSTAIN THE APPELLANT'S MOTIONS FOR A NEW TRIAL, OR IN THE ALTERNATIVE, FOR A DIRECTED VERDICT, PEREMPTORY INSTRUCTION OF ACQUITTAL, AND J.N.O.V., AS THE JURY'S VERDICT WAS NOT SUPPORTED BY THE WEIGHT NOR WAS THE EVIDENCE LEGAL SUFFICIENT TO MAKE OUT A *PRIMA FACIE* CASE.

STATEMENT OF INCARCERATION

Mario Brown is presently incarcerated in the Mississippi Department of Corrections.

STATEMENT OF JURISDICTION

This honorable Court has jurisdiction over this case pursuant to ***Article 6, Section 146 of the Mississippi Constitution*** and ***Miss. Code Ann. 99-35-101 (Supp. 2008)***.

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.

STATEMENT OF THE CASE

As in all small towns, conflicts between persons in the community can lead to problems, which in turn can lead to violence. Often, this violence has no rhyme or reason, and a reliable basis in assigning blame can be difficult, if not impossible, to establish. As a result of this confusion, sometimes the wrong man is accused, tried, and convicted without proof beyond a reasonable doubt, and only speculation, conjecture, and guesswork from the circumstantial evidence in the case rules the day.

The problems in this case began in the late evening of September 8, 2006. Mario

Brown (hereinafter "Mr. Brown") was at a local hangout, Nanny's Food and Games Café (hereinafter "Nanny's"), with Mary Hopson (hereinafter "Hopson"), the mother of his children, and other friends, including Clarence Henderson (hereinafter "Henderson") and Tauri Martin (hereinafter "Martin"). (T. II. 290) The initial altercation began after words were exchanged between Martin and Corey Dorrough (hereinafter "Dorrough") who was standing out in front of Nanny's with the deceased, Seanl Cole (hereinafter "Cole"), and several other individuals. Henderson initiated a heated verbal altercation with Dorrough, in response to the altercation between Dorrough and Martin. At this point Mr. Brown punched Dorrough. During the confusion that ensued, Cole "blind-sided" Mr. Brown, taking him to the ground. (T. II. 281, 300-01) When Mr. Brown got up he noticed that Cole, Dorrough and Jamarcus Brady (hereinafter "Brady") were approaching him with empty beer bottles. Mr. Brown was fearful and drew a black Taurus .9 millimeter revolver from his pants to stop the men from advancing any closer. (T. II. 155) At this point Dorrough ceased his aggressive advances with the beer bottle. At this point Mr. Brown was still being pressured by Cole and Brady and continued to point the weapon at them to stop their advances. (T. III. 301) Brady stopped his advances but Cole continued to advance towards Mr. Brown with the beer bottle in hand. A fight, described as a "scuffle" or "tussle" at various times in the testimony, ensued between Mr. Brown and Cole. Mr. Brown tried to strike Cole with the gun several times. (T. III. 302) During the tussle the gun discharged three times. (T. III. 302) There is no conclusive evidence, either testimonial or physical, that any of these shots struck Cole.

After the fight, Mr. Brown and Cole ran to opposite sides of Nanny's. (T. II. 302) At this point, two males followed Cole to one side of the building. Mr. Brown stopped at the edge of the building and heard shots being fired. (T. III. 303) Mr. Brown, fearful for his life and believing that Cole or one of the other men were shooting at him, fired an additional three shots in no particular direction or target. (T. III. 310) Mr. Brown then left with Henderson and was driven by him to his brother's house. (T. III. 304) About an hour after arriving at his mother's house, Hopson called and informed Mr. Brown that Cole was dead. After hearing that Cole was dead, Brown went to a local sewage lagoon and threw the .9 millimeter into the lagoon, fearing that he would be the one who would receive the blame for Cole's death. (T. III. 304) At about 4:30 the next morning, Mr. Brown left his brother's house and went to his mother's house.

The next morning Mr. Brown went and turned himself in at the police station. He waived his Miranda rights and voluntarily gave the police a statement regarding the events of the previous evening. (T. II. 176) He explained to them about the fight and that the weapon had discharged on accident during the "tussle." (T. III. 307) He also explained that Cole and the other males had come after him with bottles, and that he had feared that they were going to cause him harm if he did not take some kind of action to prevent their advances. (T. III. 307)

The Appellant was subsequently indicted (CP. 2, RE. 5), at trial the State called seven witnesses, including police officers, forensic scientists and a medical. The State did not call

any eyewitnesses to the murder of Cole or any persons in Friars Point that knew Mr. Brown or the deceased. The prosecution introduced various photographs into evidence including seven pictures of the deceased (Exh. S-2A through S-2T); one picture of the deceased depicted a beer bottle next to his body, the crime scene, shell casings, a purported blood stain and a brown paper bag with supposed blood on it (no testing was had to determine if blood was present). (T. II. 186-193) The witnesses testified that there were seven .9 millimeter shell casings found at the crime scene; a group of three found on the east side of the building and the other four found in front of the building. (T. II. 192-93, 205) Starks Hathcock, a forensic scientist, testified that all of the shell casings found at the scene were fired from the same weapon, however, he could not match the bullet recovered from the body to the shell casings. (T. II. 225-26, 230, 232-33) The officers testified about a "red mark" found in front of the building which was repeatedly referred to as a "blood stain." (T. II. 181, 192, 201) The officers tested for the presence of blood at the scene with "hemo sticks," however, there was no conclusive report from the crime laboratory verifying the initial findings. (T. II. 201-02) The officers took a gun shot residue test from the deceased hands and the findings were negative. (T. II. 212-13) Gun shot residue tests were not performed on Mr. Brown, nor were they performed on the deceased's clothing to determine the proximity of the gun to the deceased when it was fired

Dr. Steven Hayne (hereinafter, "Dr. Hayne") performed the autopsy and testified that the deceased died of three gun shot wounds; the shot to the chest and the abdomen were both

lethal. (T. II. 240-43) Dr. Hayne also expressed an opinion as to the victim's posture when he was shot, stating that in order that to achieve the angles of entrance, the deceased was "ducking" when he was shot in the chest and leaning slightly away when he was shot in the abdomen. However, he did not give any basis or reasoning for those conclusions. (T. II. 247-48) Dr. Hayne could not reach a conclusion as to the distance the gun was fired from the deceased; he could only rule out a point blank shot. (T. II. 248-250) Dr. Hayne also testified that a person could run 100 to 200 yards after being shot through heart. (T. II. 251-252)

Walter Davis, the investigator who interviewed Mr. Brown, testified that he informed Mr. Brown of his Miranda rights, Mr. Brown then signed the Miranda form and proceeded to give his statement voluntarily. (T. II. 258-260) The statement written down by police differed only from Mr. Brown's testimony in respect to the second set of gunshots heard that night and the deceased and his friends threatening him with beer bottles. (T. II. 263-64) The statement was written by Investigator Davis and signed by Mr. Brown; no videotape or audio recording was made of the interrogation. (T. II. 267-68)

After the State rested its case-in-chief and the directed verdict motion was overruled, the defense called Henderson, who was an eyewitness to the altercation with the deceased and his friends the night of the incident. He testified that Mr. Brown and the deceased were fighting and he heard two to three shots. (T. II. 281) The deceased got up and ran away and did not appear to be shot. (T. II. 282) He also testified that he was looking right at Mr. Brown when the second set of four shots were fired and Mr. Brown was not the shooter. (T.

II. 282-83) After the shooting, Henderson was arrested on a gun charge where he subsequently gave a statement in which he said he saw Mr. Brown shoot the deceased. (T. II. 283-84) Henderson testified that he told the police there was a second group of shots fired, but that was also not included in the written statement. (T. II. 282) Henderson explained that he lied in his original statement because he wanted to get himself out of trouble. (T. II. 292-93)

Mr. Brown also testified as to his version of the events that night. He testified the statement written by the police officers did not accurately reflect that which he told them. He testified that the details concerning the deceased and his friends being armed with beer bottles and the second group of shots being fired behind the building were omitted from the written statement. (T. III. 305-06) He stated that the statement was not correct and denied ever reading it prior to receiving it from defense counsel in preparation for trial. (T. III. 317)

The trial judge refused three proposed jury instructions regarding self-defense, and defense counsel withdrew an accident instruction. (T. III. 331-34) (CP. 36-38, RE. 17-19) The jury subsequently found Mr. Brown guilty of the lesser-included offense of manslaughter and the trial judge sentenced him to twenty years imprisonment. (T. III. 375, 389) The defense filed post-trial motions for J.N.O.V. and for a new trial (CP. 6-7, RE. 9-11), which were denied by the trial judge. (CP.15, RE. 9-11). Feeling aggrieved by the verdict of the jury and the sentence of the trial court, the Appellant perfected his appeal to this honorable Court.

SUMMARY OF THE ARGUMENT

It was like reading a John Grisham novel. It was a Friday night, and Mario Brown was just hanging out with friends when an argument ensued, shots were fired, and someone was dead. At trial, a man was convicted of manslaughter with no conclusive, substantial evidence of guilt, just confusion over who "did it." The jury disregarded the evidence presented in the case, and merely took the law into their own hands, to make someone, it did not matter who, pay for the death of Seanl Cole. The State put on evidence, none of which determinately pointed at Mr. Brown as the killer. The State presented a someone to the jury who was scared for his life, who brandished a gun to defend himself, then convinced the jury that Mr. Brown actually pulled the trigger that fired the bullets that killed the deceased. No forensic, scientific, nor methodological evidence backed up these claims, and the jury merely engaged in speculation. Mr. Brown was denied a fair and proper trial, based on the jury's lack of concern for proper evidence and procedure and full concern about making someone, even an innocent man, pay for the crime that was committed.

Mr. Brown first contends the trial court erred in allowing the prosecution to elicit testimony from Dr. Steven Hayne which was inaccurate, misleading, and far beyond the scope of his expertise as a forensic pathologist. Dr. Hayne erroneously testified as to the victim's posture when the shots were fired, speculated as to which of the three gunshot wounds were inflicted first, and then stated without corroboration that a person could run

100-200 yards after being fatally shot through the heart. Dr. Hayne gave no scientific basis for these claims and did not justify his conclusions in any way. Dr. Hayne's testimony was wholly improper as it was misleading, inaccurate, and, as a result, Mr. Brown was deprived of his constitutional right to a fundamentally fair trial.

Mr. Brown further contends that the trial court erred in refusing defense proposed jury instructions D-5, D-8, and D-9. The instructions were correct statements of the law to establish an affirmative defense in that they detailed the elements a defendant must prove for necessary self-defense. The defense established a factual basis for a viable self-defense claim in their case through Mr. Brown's testimony and the testimony of a key eyewitness, Henderson. The proposed instructions were not duplicative of any other instruction given or proposed by the Court or the State. It was an abuse of discretion for the trial judge to refuse the proposed jury instructions. As a result, the jury was not allowed to consider Mr. Brown's claim of self-defense, which left little choice but to convict the Appellant.

Lastly, Mr. Brown's contends that the overwhelming weight of the evidence does not support the jury's guilty verdict for the crime of manslaughter, nor did the prosecution present a legally sufficient case. The State presented no evidence to signify that Mr. Brown was in fact the one who killed the deceased. There was no eyewitness testimony indicating that Mr. Brown fired the shots that killed the deceased, there was no forensic evidence tying Mr. Brown to the death of the deceased, and no additional credible evidence that provided proof beyond a reasonable doubt to show that Mr. Brown was responsible for the death of

the deceased. The only facts that tend to supports the guilty verdict are that Mr. Brown was in an altercation with the deceased, Mr. Brown's gun discharged, chaos ensued, more gunshots were heard, and the deceased was subsequently found dead, far from the scene of the "scuffle." There is no solid evidence that conclusively establishes that Mr. Brown is the person responsible for the death of the deceased, merely weak circumstantial evidence that did not rise to the level of beyond a reasonable doubt, and the jury's desire for someone to pay for the death that occurred obviously produced the erroneous verdict.

Mr. Brown was found guilty based on evidence that could not be described as overwhelming, following a trial infected with multiple errors. The jury reached a verdict on proof that does not rise to the level established by the Constitution's requirement that all defendants receive a fair trial. Therefore, for the above reasons, this honorable Court should reverse and render this case, thereby discharging the Appellant from custody, or, in the alternative, reverse and remand this case for a new trial on the merits, with proper instructions to the lower court.

ARGUMENT

ISSUE ONE:

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO ELICIT UNRELIABLE, FACTUALLY INACCURATE, AND SPECULATIVE TESTIMONY FROM DR. STEVEN HAYNE WHERE HE GAVE OPINION TESTIMONY OUTSIDE FORENSIC PATHOLOGY AND ENGAGED IN RANK SPECULATION THAT MISLED THE JURY.

The speculation, conjecture, and guesswork that is the hallmark of this case was taken

to a new level through the testimony of Dr. Steven Hayne, the prosecution's expert witness in the field of forensic pathology whose suppositions about exactly what happened that fateful night in this case served only to discombobulate the jury. This further confusion caused by this so-called "expert" testimony caused the jury to come to the conclusion that skillful doctors cannot be wrong, producing a guilty verdict where the proof was not convincing beyond a reasonable doubt.

According to ***M.R.E. 702***, expert testimony must be relevant and reliable. Expert testimony is only relevant " if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Reliability is judged by whether the witness is qualified by virtue of his/her knowledge, skill, experience or education where "the testimony is based upon *sufficient facts or data* . . . , is the *product of reliable principles and methods*, and . . . the witness has applied the principles and methods *reliably* to the facts of the case." ***Miss. Transp. Com'n v. McLemore***, 863 So.2d 31, 35 (¶7) (Miss. 2003) (emphasis added); ***M.R.E. 702.***

The prosecution introduced Dr. Hayne's "expert" testimony after a voir dire that included only very basic information concerning his qualifications. He stated that he was "certified" without any further explanation as to his "certification," and that he had received some training in the field of forensic pathology. (T. II. 237). Dr. Hayne also testified under oath that he was the "chief state pathologist for the Department of Public Safety medical examiner's office, State of Mississippi." (T. II. 236). All of these statements are fallacious

or at the very least misleading. As Justice Diaz pointed out in his well-known concurring opinion, Dr. Hayne is not qualified to serve as the State Medical Examiner because he is not certified by the American Board of Pathology. ***Edmonds v. State***, 955 So.2d 787, 802 (¶47) (Miss. 2007) (Diaz, J., concurring). Dr. Hayne is purportedly certified by two organizations, the American Board of Pathology and the American College of Forensic Examiners, neither of which are recognized by the American Board of Medical Specialties. ***Id.*** at ¶49. The prosecution simply showed that Dr. Hayne had gone to medical school, had performed an exorbitant number of autopsies (averaging over 1,000 per year), and had testified thousands of times (not without controversy) in Mississippi courts, including before the trial judge in the case at bar. (T. II. 237-38).

The decision to admit expert testimony is within the sound discretion of the trial court and will be reviewed under an abuse of discretion standard of review. ***Williams v. State***, 937 So.2d 35, 42 (¶18) (Miss. Ct. App. 2006). An erroneous ruling which results in an abuse of discretion will be deemed reversible error where a substantial right of the accused is affected. ***Green v. State***, 614 So.2d 926, 935 (Miss. 1992); *see also* ***M.R.E 103(a)***.

A forensic pathologist's duty as an expert witness in a homicide case is "to answer two basic questions: the cause and the manner of death?" ***Williams***, 937 So.2d at ¶20 (*citing* ***Bell v. State***, 725 So.2d 836 (¶51) (Miss. 1998)). A forensic pathologist may also testify as to what caused the injuries, what trauma would result from those injuries. ***Id.*** (*citing* ***McGowen v. State***, 859 So.2d 320 (¶53) (Miss. 2003)). Further, a forensic pathologist may

testify as to a person's "wounds, suffering, and the means of infliction of injury." ***Id.*** (*citing* ***Holland v. State***, 705 So.2d 307 (¶127) (Miss. 1997)).

Dr. Hayne did testify as to the cause of death, two gunshot wounds, and the manner of death, homicide. (T. II. 250). However, Dr. Hayne went far beyond the cause and manner of death and testified to opinions, unsupported by any facts in evidence or stated scientific principles that would confirm his postulations in support of the State's theory of prosecution. For example, Dr. Hayne testified to the following at trial:

Q: So if the gunman is standing in front of the victim, how could that bullet have entered the body, assuming that the gunman is standing and the, assuming that the gunman is standing.

A: And they're both standing, sir?

Q: Yes, sir.

A: It would be consistent with a person ducking like that, one would get that trajectory, sir. One fires a weapon towards me and I'm ducked in that position, you would line up with this white rod.

Q: All right.

A: Which, in turn, would line up when we put them on the autopsy table with the track in the body.

Q: Yes, sir. And what about the abdominal wound?

A: The abdominal wound, the bullet was traveling slightly upward at about 20

degrees and from front to back. If you lean slightly away, you have that line of trajectory. It's possible if he's close enough, you wouldn't even need that shooting downward.

(T. II. 247-38, R.E. 13-14)

After this highly speculative opinion testimony as to the question in which position the deceased might have been standing, sitting, or lying at the time exact time he was shot (a fact never conclusively established by direct evidence presented at trial, therefore, this testimony also relied upon facts not in evidence), Dr. Hayne then continued to opine as to what else might have happened that night, which coincidentally was consistent with the prosecution's theory of the case:

Q: Do you have an opinion as to about how far a person could have run just after having received these injures?

A: The most serious injury would be the injury to the heart, sir. Certainly a person could run the distance of a 100 yards or even 200 yards with a gunshot wound to the heart. There would be some residual pumping effect though very inefficient. In addition, the running would increase the oxygen demand. It would decrease the distance one could actually go. If one walks, one could live for a longer period of time without exerting tremendous injury. But death would intervene in a relatively short period of time, though one could run for a distance of a hundred yards, maybe a little longer.

Q: Okay. A hundred yards. That's about a the length of a football field, isn't it?

A: It is sir.

(T. II. 251-52, R.E. 15-16)

The trial court also abused its discretion in allowing Dr. Hayne to testify as to matters outside the realm of his expertise and a substantial right of Mr. Brown was affected by these errors. An expert's testimony is often given more weight by juries than that of lay witnesses, especially in the era of "C.S.I." television shows. They hear a list of honors, education, qualifications and experience before they hear the testimony, and as a result, they tend to take their testimony as fact, no matter how preposterous the opinion of the so-called expert might be. ***Edmonds v. State***, 955 So.2d 787 (¶9) (Miss. 2007). Dr. Hayne's testimony as an "expert" bolstered the State's theory of the case. As a result, the Appellant asserts that the trial court erred in admitting this testimony, and the matter should be reversed and remanded to the lower court with proper instructions to disallow this testimony.

This opinion testimony goes far beyond any of the accepted areas of expert testimony by a forensic pathologist as articulated by the Mississippi Supreme Court. The trial court's allowance of this testimony was clearly an abuse of discretion. These highly speculative opinions given by Dr. Hayne were also particularly damaging. His assumption that the deceased was "ducking" and "leaning slightly away" when he was shot effectively negates a claim of self defense. Further, the unsupported testimony that a person can run "a 100 or even 200 yards with a gunshot wound to the heart," ridiculous as it was, bolstered the state's

theory of the crime. "The error was magnified when Dr. Hayne's testimony was the only evidence – other than Tyler's contested confession – to support the State's theory of the case." ***Edmonds***, *supra*, at ¶9. Like ***Edmonds***, Dr. Hayne's testimony was the only evidence suggesting the guilt of Mr. Brown. It is clear from the guesswork in this regard that Dr. Hayne's conjectures served no other purpose than to improperly bolster the State's theory of the case, and as a result, the jury placed an improper weight of credibility on this highly questionable and totally hypothetical testimony presented by the prosecution.

"Expert witnesses, however, qualified, may not present the jury with rank speculation." ***Fowler v. State***, 566 So.2d 1194, 1200 (Miss. 1990) (emphasis added). A court should not give an expert "carte blanche" to give any opinion he chooses; the testimony must be based on scientific methods and procedures, not just speculation or guesses. ***Edmonds v. State***, 955 So.2d 787, 792 (¶8) (Miss. 2007).

The statements as to "defensive posturing" and how far a person can run after being fatally shot through the heart were pure hypothesization. The State offered no proof of any scientific testing conducted to support the theories garnered by Dr. Hayne. This situation is very similar to what the Court considered in ***Edmonds***. In that case, Dr. Hayne incredibly testified the gun shot wound inflicted was consistent with two people firing the gun simultaneously. ***Id.*** at 791. He further stated in ***Edmonds*** that it was less likely, based on the evidence and to a reasonable medical certainty, that only one person fired the weapon. ***Id.*** The Court found absolutely no factual basis for the testimony and held it should have been

excluded. ***Id.*** The testimony given in the present case should be treated in the same manner. There was no factual basis given or even in existence for the opinions of Dr. Hayne. It was an abuse of discretion for the trial court to allow these opinions to be presented to the jury.

A erroneous ruling on evidence is not reversible error unless a substantial right of the party is affected. ***Id.*** (¶9) (citing ***Green v. State***, 614 So.2d 926, 935 (Miss. 1992)). As argued previously, expert testimony is generally given great weight by juries. ***Id.*** The opinions supplied to the prosecution by Dr. Hayne were detrimental to the defense. The "expert" testimony that the deceased was likely ducking when shot virtually destroys any claim of self defense. The opinion that a person can run 100 to 200 yards after being shot through the heart bolstered the State's theory that the deceased was shot at the front of the building and ran around the building, after being lethally wounded, to his final place of death. Without Dr. Hayne's patently absurd opinion concerning this lethal wound to the heart, the jury would have found the State's theory of what happened that night to be highly unlikely and found Mr. Brown not guilty.

Also, the other prosecution evidence against Mr. Brown was rather thin. This is not a situation where, although Dr. Hayne's testimony was unreliable, the error could not be said to be reversible error due to the other "overwhelming" evidence of guilt. *See, e.g.* ***Flaggs v. State***, 2008 WL 2169747 (¶32) (Miss. Ct. App. 2008). There was no physical evidence, dependable forensic evidence, nor eyewitness testimony conclusively linking Mr. Brown to the killing of Cole. Without Dr. Hayne's speculative testimony, the prosecution would have

been unable to present proof of guilt beyond a reasonable doubt, and Mr. Brown would not have been convicted. The speculative testimony cannot be said to be only amount to "harmless error beyond a reasonable doubt." ***Haynes v. State***, 934 So. 2d 983 (Miss. 2005).

Therefore, the Appellant respectfully requests this Court to find that the trial court abused its discretion in allowing Dr. Hayne to testify as to matters outside his expertise, to give the jury persuasive opinions based purely on speculation, conjecture, and guesswork, as aforesaid, and to reverse this matter, and remand to the lower court with proper instructions for a new trial.

ISSUE TWO:

WHETHER THE TRIAL COURT ERRED IN REFUSING THE DEFENSE'S PROPOSED SELF-DEFENSE JURY INSTRUCTIONS WHERE THEY WERE SUPPORTED BY THE EVIDENCE, WERE A CORRECT STATEMENT OF THE LAW, AND WERE NOT DUPLICATIVE OF ANY OTHER INSTRUCTION, EFFECTIVELY DEPRIVING THE DEFENSE TO PRESENT TO THE JURY THEIR THEORY OF THE CASE.

Conflicts that extend into unreasonable violence often can lead to confusing conclusions in both the investigation and prosecution of a fight that results in the death of one of the combatants. This type of situation was compounded in this case when the trial court refused to properly instruct the jury as to the law of necessary self-defense, an essential element in the State's burden of proof in a homicide case, which was the result of a hostile attack that made it difficult to choose whom to correctly lay the ultimate blame for the death.

The Mississippi Supreme Court has repeatedly held that "[i]n determining whether

error lies in the granting or refusal of various instructions, the instructions actually given must be read as a whole. When so read, if the instructions fairly announce the law of the case and create no injustice, no reversible error will be found." ***Coleman v. State***, 697 So.2d 777, 782 (Miss.1997) (*quoting* ***Collins v. State***, 691 So.2d 918, 922 (Miss.1997)) Moreover, "[e]ven though based on meager evidence and highly unlikely, a defendant is entitled to have every legal defense he asserts to be submitted as a factual issue for determination by the jury under proper instruction of the court." ***Hester v. State***, 602 So.2d 869, 872 (Miss. 1992) (emphasis added). However, the trial judge may refuse to grant an instruction which incorrectly states the law, is repetitious, or without foundation in the record. ***Fairley v. State***, 871 So.2d 1282, 1285 (Miss. 2003). Here, the defense instructions were a correct statement of the law, were supported by the evidence, and were not covered by any other instruction, and, therefore, should have been granted by the trial court.

Under ***Miss. Code Ann. § 97-3-19(1)(a),(b)*** (Supp. 2006) as relevant to this case, murder is defined as:

> (1) The killing of a human being without the authority of law by any means or in any manner shall be murder in the following cases:
> (a) When done with deliberate design to effect the death of the person killed, or of any human being;
> (b) When done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual.

To constitute murder the State must first prove that Mr. Brown in fact killed the deceased. Second, the State must prove that Mr. Brown killed the deceased either with deliberate

design to effect the death of the person killed, or of any human being; or it was done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual. However, under ***Miss. Code Ann. §97-3-15(1)(f)*** (Supp. 2006):

> (1) The killing of a human being by the act, procurement or omission of another shall be justifiable in the following cases:
>
> . . .
>
> (f) When committed in the lawful defense of one's own person or any other human being, where there shall be reasonable ground to apprehend a design to commit a felony or to do some great personal injury, and there shall be imminent danger of such design being accomplished.

Under the facts of this case, Mr. Brown's actions clearly fall under the exception outlined in this subsection of the Mississippi Code.

The jury was improperly instructed because the defense offered a correct set of jury instructions on a matter central to this case: necessary self-defense. The instructions given fairly and accurately depict the law of the State of Mississippi regarding murder and manslaughter; however, the jury was not instructed regarding the defense's theory of the case. The defense filed several proposed jury instructions, specifically D-5, D-8 and D-9, regarding self-defense, which were refused by the Court.

In order for the Appellant to justify the shooting, the Appellant must have believed, that his actions were consistent with ***Miss. Code Ann. §97-3-15(1)(f)*** (Supp. 2006). Mr. Brown has maintained from the beginning that he did not shoot the deceased, and even if he had, it would have been only in necessary self-defense. After an altercation between

Dorrough and Martin, Mr. Brown punched Dorrough. Mr. Brown was then "blind-sided," taken to the ground by the deceased, and was then approached by three individuals wielding beer bottles. The record shows that Cole was a large man, upwards of 5'10" and 240 pounds, and, with two other individuals advancing on him, Mr. Brown was in great fear for his life. Based on his fear that the individuals were going to inflict great harm on him, Mr. Brown pulled his firearm in order to scare the individuals and halt their threatening advance. Two of the individuals did in fact stop their attack, but the deceased continued to advance towards Mr. Brown with beer bottle in hand. (T. II. 281, 300-01) Mr. Brown and the deceased began to "tussle." During the "tussle," Mr. Brown's firearm discharged approximately three times. The State did not present any conclusive forensic or scientific evidence that these bullets actually struck the deceased. The gunshot residue test done on the deceased's hands showed no gunshot residue present. There were also no contact burns on the deceased, which would also establish that the gunshots that killed the deceased were not fired at a close proximity. Thus, this lack of gunshot residue on the deceased makes it highly unlikely any of the shots that were fired during the "tussle" were directed at, much less actually hit the deceased.

After the tussle, the testimony proved, without contradiction, that the deceased and Mr. Brown ran to two different sides of Nanny's. At this point, Mr. Brown heard more gunshots being fired around the corner. (T.II. 303) After the initial altercation with the three individuals, as well as the tussle where his firearm discharged, Mr. Brown, who was still fearing for his life, fired an additional three shots in the direction from where he thought the

gunshots came.

In ***Flowers v. State***, 473 So.2d 164 (Miss. 1985), Chief Justice Roy Noble Lee's dissent sets out the proper test for a self-defense plea to the jury: "The test on a self-defense plea is not whether the accused is frightened and fearful that he will suffer great bodily harm or loss of life. The test is whether or not a reasonable person had reasonable grounds to fear, and did fear, for his life or great bodily harm." ***Id.*** at 167. Defense instructions when read as a whole with the other instructions given in the case fully encompass the definition of self-defense in the statutory justification and case law test set forth in ***Flowers***, and therefore should have been submitted to the jury.

"If a party has 'an apprehension that his life is in danger' and believes 'the grounds of his apprehension just and reasonable' a homicide committed by that party is in self defense. These are the grounds upon which a claim of self-defense may be predicated." ***Johnson v. State***, 908 So.2d 758 ¶21 (Miss. 2005). Of course, it is for the jury to determine the reasonableness of the ground upon which the defendant acts but if the defendant's apprehension is reasonable, it is proper for the trial court to instruct the jury as to the law of self-defense. ***Id.*** The defense instructions that were denied by the court were a correct statement of the law setting out the standard promulgated in ***Johnson***. Under the facts of this case, Mr. Brown had an apprehension that his life was in danger when he was pursued by three men wielding beer bottles. He pulled a gun to protect himself and stop the three men from advancing any further. Under the circumstances, Mr. Brown acted in a reasonable

manner to protect himself from imminent danger that could have been inflicted on him by the three men who were advancing upon him.

It is beyond dispute that no witnesses were produced by the State to directly testify that the death of Cole was actually caused by Mr. Brown, and if in fact it was caused by Mr. Brown, no witnesses testified that the incident was anything other than justifiable self-defense. No witnesses testified that there had been any previous problems between the deceased and Mr. Brown prior to the incident. The only evidence, presented by the defense witnesses, was that Mr. Brown was in an altercation with three individuals, including the deceased, which resulted in a "tussle" between the deceased and Mr. Brown, shots were fired, everyone ran in opposite directions, additional shots were fired, and the deceased was later found lying behind the building.

Mr. Brown was deprived of an opportunity to subject the jury to his theory of the case, when jury instructions D-5, D-8 and D-9 were denied. The defense's proposed jury instructions on the issue of self-defense were properly before the trial court since there was an evidentiary basis for the instructions to be given, they were a correct statement of the law, and no other instruction covered the question for the jury. The trial court did not properly instruct the jury in light of the evidence presented at trial and the defense theory of the case. Since Mr. Brown was improperly precluded by the trial court from putting his theory of the case in front of the jury. This Court should reverse and remand this case to the Circuit Court of Coahoma County, Mississippi, with proper instructions to the lower court for a new trial.

ISSUE THREE:

WHETHER THE TRIAL COURT ERRED BY FAILING TO SUSTAIN THE APPELLANT'S MOTIONS FOR A NEW TRIAL, OR IN THE ALTERNATIVE, FOR A DIRECTED VERDICT, PEREMPTORY INSTRUCTION OF ACQUITTAL, AND J.N.O.V., AS THE JURY'S VERDICT WAS NOT SUPPORTED BY THE WEIGHT NOR WAS THE EVIDENCE LEGAL SUFFICIENT TO MAKE OUT A *PRIMA FACIE* CASE.

Recognizing that issues involving the weight and legal sufficiency of the evidence presented at trial are separate claims of error, the Appellant would argue them under this single issue heading. 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 (Miss. 2005). A motion for a new trial challenges the weight of the evidence presented at trial. ***Dilworth***, 909 So.2d at 737. 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 (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 737.

In the case at bar, there is no substantial, conclusive evidence that points to Mr. Brown as the one who fired the shots that actually killed the deceased. In the situation at hand, a seldom-applied rule commonly referred to as the ***Weathersby*** Rule must be addressed. The ***Weathersby*** Rule states: "that where the defendant or the defendant's witnesses are the only eyewitnesses to the homicide, their version, if reasonable, must be accepted as true, unless

substantially contradicted in material particulars by credible witness or witnesses for the state, or by the physical facts or by the facts of common knowledge." ***Weathersby v. State***, 147 So. 481, 482 (Miss. 1933) (citing ***Houston v. State***, 78 So. 182 (Miss. 1918)). Although the Rule is applied primarily in issues involving legal sufficiency, here the only eyewitnesses who testified at trial to this incident were witnesses for the defense, Mr. Brown and Henderson. Their account of the story both described an altercation between Mr. Brown and three other individuals who were advancing on Mr. Brown with beer bottles in hand. Mr. Brown pulled out a gun to stop the advances of the individuals, because he was scared of the immediate harm the three individuals could cause him. Mr. Brown also contends that the shots that killed the deceased were not in fact fired by him. Since the beginning Mr. Brown has contended that he was innocent of the crime. The State did not provide any evidence that the bullets that killed the deceased were in fact fired by Mr. Brown. Even if the bullets that killed the deceased had been fired by Mr. Brown, the State did not provide any evidence or witnesses to negate that the shots that caused the death were anything other than justifiable self-defense. There was no solid forensic evidence that linked Mr. Brown to the death of the deceased, only mere speculation. It did not matter who actually killed the deceased, the prosecution was determined to make someone pay for the death, and convinced the jury it was there duty to convict a man, even if that man was not the one who in fact fired the shot. Therefore, when reviewing the weight of all of the evidence, it cannot be said with any confidence that the conviction, even when viewed in the light most favorable to the jury's

verdict, is supported by the overwhelming weight of the evidence presented at trial.

In ***Hester v. Mississippi***, 463 So.2d 1087 (Miss. 1985), Hester was found guilty of the murder of a man with which she was seen leaving a bar. She returned several hours later looking disheveled and was in a hurry to leave. ***Id.*** at 1088. There was no evidence linking Hester to the murder, besides the fact that she was seen walking out of the bar with the deceased. There was no evidence that Hester even actually left the bar with the deceased, but they merely walked out of the bar together. The State put on evidence that there had been an argument between Hester and the deceased several days earlier, but no conclusive evidence that Hester had actually committed the murder. The Court, citing Justice Griffith in ***Westbrook v. State***, 32 So.2d 251, 252 (Miss. 1947), held: "It is a fundamental that convictions of crime cannot be sustained on proof which amounts to no more than a possibility or even when it amounts to a probability, but it must rise to the heigh which will exclude every reasonable doubt that when in any essential respect the states relies on circumstantial evidence, it must be such as to exclude every other reasonable hypothesis that the contention of the state is true, and that throughout the burden of proof is on the state." ***Hester***, 463 So.2d at 1093.

The facts of Hester can easily be applied to the facts of the case at hand. Mr. Brown and the deceased were involved in an argument and a tussle, where a gun discharged. There was no evidence that any of the shots actually struck the deceased. After the tussle Mr. Brown and the deceased ran to opposite sides of the building. At this point Mr. Brown

testified that he heard additional shots in which he fired three rounds in response. It can easily be concluded that the additional shots that were fired, that Mr. Brown shot in response to, were in fact the shots that killed the deceased. There was testimony at trial that the deceased was followed by two individuals to one side of the building. It is not beyond reason to believe that one of the individuals who followed the deceased fired the fatal shots. Based on the angles of the gunshot wounds it can be hypothesized that the shots were fired by someone standing over the deceased and then another shot fired as the individual was fleeing, therefore the "physical facts" also are not contradictory under the ***Weathersby*** Rule. There is no substantial evidence that points to Mr. Brown as the killer, but the evidence does in fact point to another likely scenario which could have happened, making the overwhelming weight of the evidence presented at trial support the jury's decision to convict Mr. Brown.

Mr. Brown was convicted of a crime against all weight of the evidence presented at trial. Accordingly, this Court should reverse and render the defendant's conviction and order him discharged. In the alternative, this Honorable Court should reverse the defendant's conviction and remand this case to the Circuit Court of Coahoma County, Mississippi for a new trial.

The State also failed to offer legally sufficient evidence in its case-in-chief to show that Mario Brown was guilty of the jury's finding of manslaughter, much less the elements of the indicted charge of murder (see *supra*, p. 19). According to ***Miss. Code Ann. § 97-3-47*** (Supp. 2007), manslaughter is "[e]very other killing of a human being, by the act,

procurement, or culpable negligence of another, and without authority of law." Specifically, the State failed to conclusively prove that Mr. Brown was the person who actually killed Cole. The State proved that Mr. Brown engaged in a "tussle" with Cole, however, they did not prove that Cole was killed by Mr. Brown. In fact, the forensic evidence presented by the prosecution tended to prove the exact opposite- that the Appellant did not kill the deceased. The State's forensic pathologist testified that the deceased was not killed by a contact wound, his findings were only "exclusionary" as to distance. Dr. Hayne "deferred" to the Mississippi State Crime Laboratory to make a finding of the distance from where the fatal shots were fired, however, the deceased's clothing were not examined by the Mississippi State Crime Laboratory so a distance was never determined. (T. II. 248-49, 254-55) The State's evidence in regard to the proximity of the gunshot wound that killed Cole is entirely lacking in both weight and legal sufficiency to conclusively establish that he was killed by the Appellant during the "tussle."

In deciding whether the evidence was sufficient to sustain a conviction and the denial of a motion for directed verdict and judgment notwithstanding the verdict (JNOV), "the critical inquiry is whether the evidence shows 'beyond a reasonable doubt that accused committed the act charged, and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction.'" ***Bush v. State***, 895 So.2d 836 (¶16) (Miss. 2005) (*quoting* ***Carr v. State***, 208 So.2d 886, 889 (Miss. 1968)). Further, "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." ***Id.*** (*quoting* ***Edwards v. State***, 469 So.2d 68, 70 (Miss. 1985)).

In order for a person to be convicted of manslaughter, the State must prove that the defendant 1) killed a human being; 2) by the act, procurement, or culpable negligence of another; 3) without authority of law. ***Miss. Code Ann. § 97-3-47*** (Supp. 2007). As stated above, the State completely failed to prove that Mr. Brown was the person who actually caused the death of Cole. It is uncontradicted from the record that Mr. Brown and Cole got into a fight and two to three shots were fired during the "tussle." However, Henderson and Mr. Brown testified that there was a second group of shots that night and that Mr. Brown did not fire those shots. (T. II. 282-8, T. III. 303). Both Henderson and Mr. Brown testified that immediately after the tussle Cole did not appear to be wounded. (T. II 282, T. III 303). The State introduced statements allegedly given by Mr. Brown and Henderson to the police into evidence. Neither of the statements included information regarding the second group of shots heard that night. However, Mr. Brown explained that he told the police of these shots, but they did not include those facts in the statement they wrote for him. (T. III. 305-06)

Henderson also testified that his statement was not accurate in that it left out information about the second shots and that he lied in his statement to police in an effort to get out of trouble. (T. II. 282) Under the ***Weathersby*** Rule, Mr. Brown and Henderson's reasonable version of the events at trial should have been accepted as true since it was not substantially contradicted by any evidence, testimonial or forensic, and the undisputed fact they were the only eyewitnesses to the incident who testified at trial. The State introduced shell casings and bullets into evidence, however, none of these items were ever linked to Mr. Brown. (T. II 230-31). The State did not prove, through testimony, physical or even circumstantial evidence, that Mr. Brown caused the death of the deceased.

The State ultimately failed to prove beyond a reasonable doubt that Mr. Brown killed Cole, and when considering the ***Weathersby*** Rule argument set out hereinabove, the proof presented does not even make out a *prima facie* case at all. Even when viewing all of the evidence in the light most favorable to the prosecution, no rational trier of fact could have found the essential elements of manslaughter were proven by credible evidence beyond a reasonable doubt, and the Appellant would contend that the trial court erred in failing to sustain the defense motion for J.N.O.V. As a result, Mr. Brown's conviction should be reversed and rendered with the Appellant ordered to be immediately discharged from the custody of the Mississippi Department of Corrections.

CONCLUSION

The chaos that ensued during and after the fight between the Appellant and the

deceased continued in the trial of this matter, resulting in a verdict that is in no way conclusive when all of the evidence presented at trial is examined. 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 a charge of murder, 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. The claims of error in this brief are brought by the Appellant under ***Article 3, Sections 14, 23, and 26 of the Mississippi Constitution*** and the ***Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution***.

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:

Honorable Kenneth L. Thomas, Circuit Court Judge
ELEVENTH JUDICIAL DISTRICT
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and
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Mr. Mario Brown, Appellant
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This the 4TH day of November, 2008.

Phillip W. Broadhead, MSB [redacted]
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April is essentially re-arguing the tender years doctrine. While the doctrine has not been abandoned, the child's age is subordinated to the overall determination of what is in the best interest and welfare of the child. Age is but one factor to be considered, carrying no greater weight than any other factor. *Albright* @ 105, reaffirmed the applicability of MCA 93-13-1. April ignored the fact that the Chancellor determined that Shane has demonstrated the ability throughout the marriage to take care of his children and the Chancellor's reference to the cases of Jordan v. Jordan, 963 So. 2d 1235 (Miss. Ct. App. 2007) where a child is no longer "tender years" when the child can be equally cared for by persons other than the mother, (wherein a five year old was determined not to be of tender years); Taylor v. Taylor, 909 So. 2d 1280 (Miss. Ct. App. 2005) (wherein the age of a three year old is slightly favored the wife, but the Court affirmed the Chancellor who allowed the children to primarily reside with the husband; Brewer v. Brewer, 919 So. 2d 1235, 141 (Miss. Ct. App. 2005), (custody of 4 year old girl awarded to father where he was more responsive to her needs).

In addition to cases cited by the Chancellor, the Court reiterated in Gilliland, at ¶57, wherein children being the ages of six and four were awarded to the father reiterating that the child is no longer tender years when the child can be equally cared for by persons other than the mother, citing Mercier v. Mercier, 717 So. 2d 304, 307 (Miss. 1998). Also in the case Copeland v. Copeland, 904 So. 2d 1066, 1075 (¶35) (Miss. 2004) the Court indicated a child over four years old may no longer be subject to the tender years idea. The Court affirmed the custody award to the father of a two year old child. The Appellate Court noted that the factor probably should have weighed slightly in favor of the mother because the record did not readily reveal evidence to the contrary; however, the Court noted that the minor error alone does not rise to the level of manifest error and certainly does not warrant

entitled to custody. In some cases, one or two factors may control an award. See Bell on Mississippi Family Law, 101-102 (2005).

A summary of the *Albright* factors as considered by the Chancellor reveals that most factors were determined not to favor either party; that continuity of care before separation slightly favored April; and that parenting skills, capacity to provide care for the children, moral fitness and other factors specifically addressed by the Chancellor favored Shane.

The Court of Appeals has indicated that specific findings on each *Albright* factor are preferable. See Murphy v. Murphy, 797 So. 2d 325, 329-30 (Miss. Ct. App. 2001). However, notwithstanding the Standard of Review, by way of a respectful general observation, Chancellors appear to be in a "catch 22" in the announcement of specific findings of fact. In essence, Chancellors are placed in a dilemma when lawyers choose to introduce more evidence relating to certain *Albright* factors than others (perhaps because in reality there may be more facts pertaining to certain factors than others). When the Judge considers and discusses the evidence as introduced, the Chancellor is often faced with an accusation that he placed more weight on certain factors while ignoring others (as is alleged in the present case). A review of the total record in this case not only supports the conclusion that there is credible evidence to support the chancellor's decision, but the evidence is overwhelmingly in favor of Shane.

In that the Court typically reviews the *Albright* factors in chronological order, Shane will likewise respond to April's contentions as it relates to each factor.

Age. The parties have two children, namely Lindsey who was born November 1, 2002 and Caitlin who was born October 29, 2004. As noted by the Court, at the time of the Court's rendering of its opinion Lindsey was five years of age and Caitlin was three years of age.

reversal. The Court further noted that in addition, there is the practical consideration that the child was presently four years of age (at the time the appeal was being considered) and may not be subject to the tender years idea any longer. Lee at ¶18. In the present case, the children are now 4 and 6 years of age and any lingering idea of tender years no longer applies, if indeed it ever did considering Shane's ability to provide care for the children. Moreover, post-separation continuity of care, including the time that transpires during an appeal is a factor that must be considered. Jerome v. Stroud, 689 So.2d 755 (Miss. 1997).

In an effort to redundancy, Shane would note that there is an overlay of facts between this *Albright* factor and others, inclusive of continuity of care, which will be discussed more in length subsequently. Suffice to say that the Chancellor stated specific factual reasons for his determination that the age factor did not favor either party. (R. E. 0054; R. 306; R. E. 0055 ; R. 307; R. E. 00111 et seq.)

Health and Sex of the Children. April acknowledged that the trial Court correctly noted that the health of the children does not favor either party. However, April challenges the trial Court's determination that the sex of the girls favored neither party, citing Steverson v. Steverson, 846 So. 2d 304, 306 (Miss. Ct. App. 2003). However, April's reliance on Steverson is misplaced. In Steverson, the two children, both boys, including a two year old at the time of trial, were awarded to the father, which the Appellate Court affirmed. The Steverson case actually followed a line of cases that reason the sex of older children favors same gender parent for a variety of reasons. However, the sex of the child in younger children is more of a consideration as part of the tender years consideration. The real inquiry is whether or not both parties have demonstrated the ability and capacity to provide adequate care for the child. Shane clearly has demonstrated the ability to take care of the children not only at the time of trial, but since the time of their birth, and the sex

of the children has not diminished his ability. By way of example, when the older child Lindsey was an infant, she had difficulty nursing and Shane would be the parent to get up during the night to feed Lindsey (T.9:1242-1244); he was the primary caregiver of Lindsey when he arrived home from work until the child was put to sleep (T.9:1256-1257); that Shane provided care for the children when April would enjoy her "girl's night out" with her friends (being some of the same people who testified by depositions upon written questions) (T.9:1197-1198) Shane cooked, washed, bathed the children and prepared the children for bed (T.1:18), which was not only the testimony of Shane, but others as well, including Jon Jordan (T.6:856-857); Peggy McCullough (T.6:874, 902, as well as corroborated by video clips and photographic evidence) (T.9:1194; exhibit D-45)

Continuity of Care. The continuity of care is essentially who is a primary caregiver with consideration of a number of factors, including sub-factors, which the Court addressed and made a determination for what the Chancellor considered to be credible evidence. (R. E. 0056 - 0061).

The Chancellor observed that continuity of care involves different time periods during a child's life and often changes between the child's infancy and at the time when the child is older.

In consideration of this factor, the Court considered the continuity of care before separation as well as continuity of care after separation. As noted by the Chancellor, the Court looked at a number of factors, such as which party bathed and dressed the children. The Court found Shane's testimony more credible by his "daddytime" routine. (R. E. 0056) By way of illustration the Court noted when the children were younger and the parties resided in Italy, the parties would allow the girls to stay up late and have time with Shane while the mother slept, also allowing the girls and their mother to sleep late the following

morning after Shane left for work (R. E. 0056); that Shane cooked about fifty percent of the time and even baked Lindsay's first birthday cake as corroborated by Lorraine Fischer (R. E. 00139) and not denied by April; that on weekends while the parties resided in Italy, April would sleep in and Shane would prepare breakfast for the children and bathed the children nearly exclusively; further, the Court noted it could not ignore the deposition upon written questions testimony as each of the deponents testified as to Shane's care taking of the children (R. E. 0057. R. 309). The Chancellor also determined that Shane was the primary disciplinarian. (R. E. 0058), as April herself had admitted (T. 4:445).

Next, the Chancellor considered capacity or ability, along with the continuity of care during other time periods, being from the time of separation on January 7, 2006 until November 24, 2006 and from November 24th to the time of trial. (R. E. 0059; 311). The Chancellor determined that from January 7th through much of November, 2006, April primarily filled all the primary caretaker roles due to Shane's job responsibilities. However, The Chancellor observed that the paternal grandparents kept the children on a regular basis and assisted April. In fact, Exhibit D-46 reveals assistance by the paternal grandparents for 141 days during the first ten months of 2006. Upon April's return of the children (under Court Order) on November 24th, and after holiday visitations, the Court found that the roles essentially reversed on December 15, 2006, and Shane was the primary caregiver responsible for the primary care of the children until May 31, 2007, five continuous months, with April exercising alternate weekend visitation. The Court found that it was clear that Shane had demonstrated his ability to provide primary care for the girls and in fact had actually been providing the primary care for the children up until the time of trial. (R. E. 0059-60; R. 312).

April's unsubstantiated and uncorroborated contentions now on appeal lack the

credibility much the same as April's credibility as trial. By way of example, April denied that Shane bathed the children (T. 68) that she alone provided the bathing (T.4:444); and furtherApril testified that she alone fed and clothed the children. (T.5:642) However, after being confronted with the testimony of other witnesses at trial, along with photographic and video evidence produced during discovery, April was forced to re-invent her testimony that Shane bathed and took care of the children "once in a while" (T.4:445; 5:645-647). Photographs and video clips provided credible evidence that April was less than truthful. (Exhibit D-45) Shane's testimony that he provided care for the children, was corroborated by other witnesses. Peggy McCullough testified that Shane bathed the children (T.6:874; 900; 902) and that Shane was the majority caretaker when he was at home and her un-refuted testimony was that "if someone was there to take care of the girls, April would let them no matter who it was". (T.7:902) Peggy observed Shane changing diapers, washing clothes and taking care of the children. (T.7:900-902; T. 905; T. 928-929). Lynn McCullough testified that Shane bathed the children (T.6:880-881) Jon Jordan testified that he observed Shane taking care of the children and personally observed Shane giving the children bottles, changing their diapers, putting them down for their naps and opined that Shane "puts his children down for naps better than we can with our kid". (T.6:856) Jon Jordan characterized Shane is like a "Mr. Mom" in caring for his children. (T.6:856).

Kim Bottarelli stated that it was always Shane that was the primary caretaker of the children (R. E. 00112-00113). It was Shane who was taking care of the children while April was having a good time in discos and liquor bars getting "most definitely drunk" (R. E. 00116-00118). Lorraine Fischer testified that she had been a babysitter for Shane and April and that she had personally observed Shane providing the majority care taking for the children and from her observations and perceptions opined that Shane exhibited more

patience and was a loving parent. (R. E. 00133-00135). Nikki Daly testified that Shane provided the majority of the primary care taking of the children (R. E. 00125, 00131). Boris Ruskovsky testified that he observed Shane being the primary caretaker during the VIP maiden voyage of the Carnival Liberty cruise ship. (R. E. 00155)[9]

Pat Enright, Shane's immediately employment supervisor at the time of trial, observed Shane and children in their home observed the parenting skills of Shane and provided testimony that he observed Shane feeding, bathing and preparing the children for bed, also reading the children bed-time stories and characterized Shane as a very good father. (T.6:758). Pat Enright also testified about an incident where he and the U.S. Navy Commander had a business meeting at Shane's house, wherein he commented on the fact that Shane had the U. S. Navy Commander reading bed-time stories to his children. (T. 6:759-761).

The record reveals the uncontradicted testimony of Shane that while the parties were in Italy, he prepared the children's breakfasts on the weekends and prepared dinner about fifty percent of the time during the weekdays and always cooked for and fed the children when he was at home. (T.8:1154-1155; 1164-1165). Shane further testified that he prepared Lindsey's first birthday cake (T.8:1174, as corroborated by the photographs introduced as part of Exhibit D-45 and the testimony of Lorraine Fischer @ R. E. 00139); that while in Italy he stayed at home and took care of the children while April attended the party on a cruise line. (T.8:1168-1170; also see Exhibit D-45, as well as corroborated by the

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9 The work history submitted by Shane as reflected in the record, along with the testimony, reveals that Shane was and is an electrical engineer specializing in ship design and at the time he worked in Italy worked for Carnival Cruise Lines and as such the family would participate in the maiden voyage of new ships.

deposition testimony of Kim Bottarelli and Lorraine Fischer (R. E. 00113, R. E. 00139).

After returning from Italy, Shane was required to work in Virginia from March 10 thru October 20, 2006 for a period prior to his anticipated relocation to the Mississippi Gulf Coast. Shane had stipulated into his employment contract with employer Sperry Marine that he would be relocated to Pascagoula, Mississippi, and that while he was in Virginia the company would provide his expense to visit Mississippi every three weeks. This temporary arrangement allowed Shane to visit with his children two weeks out of every five weeks. (T.8:1069-1072) Further, the un-refuted testimony was it allowed Shane to be his children seventeen weekends out of a total of thirty-two weekends (T.9:1301-1302) during this transition period of his employment relocation.

As to April's dissatisfaction with the Court's determination that Shane was the primary disciplinarian (R. E. 0058; R. 310) she claims that the Chancellor offers nothing to support his finding. However, April ignores the Court's findings set forth at R. E. 065-66 (R.317, 318). Here April further ignores her own testimony when she acknowledged that Shane was the disciplinarian (T.4: 445) Jon Jordan's testimony that Shane's children were well behaved in his presence (T. 856-857) and as testified by Pat Enright "that Shane's discipline skills are verbal, firm and Shane explains to the children why they are being disciplined".(T.6: 764-765) Shane testified and acknowledged that he would impose corporal-type punishment on his children if necessary, but utilized a spanking as a last resort after attempting other means. Conversely, on the other hand, Nikki Daley testified that she observed April shouting and screaming at the minor child, Lindsey, in an erratic and abnormal way when the child had misbehaved, causing the child to appear to be extremely distressed. (R. E. 00129)

April opines in her brief on page 31 that the Chancellor applied an erroneous legal

standard in that he used the terminology "ability to provide permanent care for these young girls" (R. E. 0060;R 312). Shane would respectfully suggest that April misapprehends this *Albright* factor. Continuity of care overlaps with the willingness and "capacity" factor and clearly encompasses *ability* to provide primary care.

Parenting Skills. April's characterization of the Judge's analysis of the parenting skill factor is nothing more than a rearguing of facts or alleged facts in the record. April's appellate attorney was not present at trial and did not have the benefit of weighing the credibility of the witnesses and the impertinent attacks on the credibility of the Chancellor should not be permitted. The appellate Court's job is not to redetermine facts resolved by the Chancellor, but to determine whether facts exist looking at the entire record which supports the Chancellor's determination and ruling. McNeil v. Hester, 753 So. 2d 1057 ¶26 (Miss. 2000) (" . . . this Court cannot set aside a Chancellor's findings and facts so long as they are supported by substantial credible evidence").

In discussing parenting skills, April revisits the sub-issue of "discipline". This factor has already been discussed; however, in essence the Chancellor found that Shane was a strong disciplinarian in giving guidance, direction and explaining right from wrong and if the child continued to do something wrong then the child would receive a spanking if needed. (R. E. 0065; R. 317).

April claims that the Judge faulted her for having "cats in her house", (following the separation of the parties), but the record does not reveal that Judge placed much emphasis one way or the other regarding cats in the house. Shane has a strong allergy reaction to cats and April recognized Caitlin to have allergies, (T.1:106), but delivered the child to the father covered in cat hair (T.2:243). More importantly, April never bothered to take the children for testing to determine their allergies. Shane, on the other hand, took the children for

allergy testing at the Hattiesburg Ear Nose & Throat Clinic. (T.9:1213) The question is not so much whether the children have allergies- it is how the parents react to potential health issues of the children. Speaking of cats, April ignores Dr. William Kimble's testimony of April's erratic behavior of April when she confronted him in a loud voice and being very upset over a $24.00 bill for a routine test (T.6: 837-838) which is a consideration of "other factors". April comments that the paternal grandparents have animals at their farm, but there is nothing in the record that suggests that they children have any allergic reactions to horses.

As part of the parenting skills, April neglects to mention to this Court her sworn allegation of abuse against Shane in her affidavit, attached in her Petition for Protection from Domestic Abuse (filed in the State of Maine), when April attempted to have the State of Maine take jurisdiction of the custody battle. (Exh. 17; T. 1:92, T.2:279, 569) But, when confronted at trial, April admitted abuse did not exist (T.2:283; 569)

April's unannounced move to the State of Maine, taking her children on October 20, 2006, without giving notice (notwithstanding her stipulation of the record that the children had strong emotional ties with the McCulloughs) (T.7:1012,; 922-923) reflects her lack of stability, erratic behavior and lack of credibility. April testified that she gave her employer two or three days notice, but her employer testified that April gave notice she was quitting her job on the day she left.(T.1:116) Notwithstanding that April had a vehicle of her own, she rented a vehicle and moved the children to Maine without any notice to Shane. (T.1:12; 4:562-563) and took most of her clothes, but only fifteen to twenty percent of the children's clothes (T.1: 20). Upon April's absconding with the children to the State of Maine, (which she claimed was under advice of counsel (T.5:634) Shane filed for a Temporary Restraining Order and the hearing was held on November 2, 2006. April's trial attorney was present,

but April did not appear. Notwithstanding the Court's Order that April immediately return the children to Lincoln County, Mississippi (C.P. 1:50) April did not return the children until November 24, claiming that she was taking the advice of her attorney at that time.(T.5:634-635)[10] April's trial attorney at that time (Mr. Robin White), denied giving her such advice and further testified that he advised April that she should return the children to Mississippi. (T.6:795, 797, 816-817, 832) The Chancellor discussed this issue as being reflective of April's credibility, but also observed it showed a lack of respect for the Court and judicial system and "a fast loose attitude in dealing with the serious issue of child custody". (R. E. 0081-0084; R. 336).

April's transportation of the children to the State of Mississippi is also reflective of parenting skills. Shane offered to go to Maine and fly the children back (T.1:98-99; 3:316;1074), but April testified she thought it was good parenting skills for her to drive the children 1778 miles from Maine to Mississippi over a period of two days in inclement weather (T.9:1128) leaving the children un-bathed, hungry and with the oldest child have diarrhea (T.1:120). April cannot keep her story straight as to when she left the State of Maine to return with the children to Mississippi, first testifying that she left on Tuesday (T. 1:97) then testifying that she left about 4:00 a.m. on Wednesday (T.1:98), but then admitted that she made a cash withdrawal from an ATM machine and mailed a UPS package while still in the State of Maine on Wednesday, November 22. (T.5: 606-607; 609) as well as shown by documentary evidence P-20, p.3. The gamesmanship that April was playing was further illustrated in that she did not return the children to Lincoln County, Mississippi (as ordered by the Court), but dictated to Shane the time he could pick up the children at 5:00

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10 A hearing had been set for Monday, November 27, in the State of Maine. (T.1:96).

p.m. at the Hilton Hotel in Jackson, Mississippi. (T.1:118; 9:1300-1301). When Shane arrived at the Hilton, April was present along with her attorney who had his video camera in hand, but when the children reacted with running and jumping into the arm of their father. April apparently chose not to video tape the exchange. (T.1:92, 119)

The record contains significant events that would pertain to parenting abilities, as well as, overlapping with other factors. For instance Jon Jordan testified he has personally observed Shane's on care giving of the children, (T.6:856) and compared that to April. Jon Jordan testified of an incident at the McCullough's residence when the children were left unattended and unsupervised while April was asleep. (T.6:858). Jon Jordan further testified that he had seen April "stomp her feet on the floor, hit her fist on the counter and basically throw a fit exclaiming "I want to ride my bike" over her motorcycle not being ready to ride. (T.6: 860-861) Then he contrasted Shane as being a very level-headed fellow who has "pretty much changed his whole entire life over —for those girls". (T.6:861)

Pat Enright observed Shane and the children in their home and described Shane's parenting skills including the daily rituals of feeding, bathing and getting the children ready for bed, including the reading of bed time stories and characterized him as a very good father (T.6:758) as well as making observations of Shane's disciplinary skills (T.6:759-761; 765)

Shane encouraged the children to have liberal telephone contact with their mother (T.2:247, 352) as corroborated by Pat Enright who observed an incident when the children resisted talking to their mother on the telephone, Shane removed any distraction, such as television, and insisted that the girls talk with their mother. (T.6:764)

Peggy McCullough testified as to her observations of Shane's routine of taking care of the children both during visits to Italy, (T.7:928-929); how Shane would change the

children's diapers when they were younger and tended to the youngest child when she cried out at night (T.7:900, 905, 928-929) and it was Peggy's observation that Shane took care of the girls more than April did. (T.7:902, 925) Peggy further observed Shane taking care of the children after they were returned to Shane in November 2006 and opined from her personal observations, that Shane "did a very good job and had absolutely no difficulties in taking care of the children". (T.7:934).

Observations of Shane exercising good parenting skills and contrasting that to April's lack of parenting skills, is likewise described in each of the depositions upon written questions. Notably, Nikki Daly describing Shane's parenting skills as being excellent (R. E. 00130); Lorraine Fischer testifying that Shane exhibited excellent parenting skills (R. E. 00144) and provided the majority of the care taking for the children (R. E. 00133); Boris Ruskovsky, who testified based on his personal observations and perceptions, regarding which parent exhibited the best parenting skills stated "Shane without a doubt". (R.E. 00157). It should be noted that Lorraine Fischer and Nikki Daly were both friends of April who socialized both at the McCullough's residence (while the parties were in Italy) and also April's running buddies when they would enjoy their girl's night out events. (R. E. 00123;00126; 00132;00135)

Shane maintains a "living document" when Lindsey and Caitlin's medical history, which April claims only started with this litigation, but her claims are not supported by the record. Shane's attention to the children's medical needs is reflective of parenting skills, as well as the sub-factor of "capacity". As to medical attention, however the relevant inquiry is to how each parent reacted when faced with a health condition of the children. For instance, April filed a Motion for Appointment of a Guardian Ad Litem and testified that she had observed that the children had appeared pale, had significant weight loss, and had

abnormal skin tone indicating the possibility of nutritional problems, if not anemia and worried for the children's emotional and physical well-being. (T.2:211-212,214, 224, 4:590) More revealing however, is the fact that she **never took the children to a doctor** (T. 2:224-225, 5:593-594, 596) **and April never alerted Shane to her observations.** (T. 2:249, 251) (Although April later changed her testimony at trial to inconsistently state that she had brought these matters to Shane's attention) (T.4:471, 472). Shane upon learning of the allegations, initially through the Motion for Appointment of Guardian Ad Litem, immediately took the children to a doctor for a full physical evaluation. (T.2:255-256) Shane's testimony was that the children did not have any weight loss, but in fact had gained weight, did not appear pale and there were certainly no nutritional issues, but more significantly the doctor did not prescribe any medication or treatment for the children (T. 9:1999) Shane, on the other hand, testified that when he observed the children in need of medical treatment, would take the children to the doctor. (T.2:251-255, 263) and gave an example of July 30, 2007, when April returned the children to Shane. Shane observed that Lindsey had red bumps all over her body, was running a fever (when he received the children at the exchange location in Hattiesburg), and he immediately took the child to a doctor who immediately prescribed medication for the child. (T.9:1215-1216; 8:1079-1083; 9:1304; (R. E. 0062)

Contrasting parenting skills is also exhibited in the way that the parties exchange the children. April would promote a dramatic exchange by suspending the children's afternoon naps, cling to the children, (particularly the youngest child, Caitlin) until the child would cry (T.2:228-230; 7:946-947); In contrast, Shane would attempt to get the children excited about seeing their mother days prior to an exchange (T.2:246, 7:946), would maintain the routine of making the children take their daily naps prior to a visitation exchange and would

not cling to his children or excite them into a crying episode. (T.7:946; 9:1221-1223) Shane described an incident in late June, 2007 one child held onto him crying she did not want to go to her mother. Shane testified as to how he handled the situation, as well as his philosophy that a parent should not cling to children at the visitation exchange. (T.9:1219-1220) As recognized by the Chancellor, the point is not whether a child cries during the visitation exchange, but more significant is how a parent handles the situation. The Chancellor found that Shane exhibited the better parenting skills, which was corroborated by other witnesses. (R. E. 0064-65).

As part of parenting skills, April again brings up church attendance claiming that she is a member of First Baptist Church of Brookhaven since March, 2006 (T.5:675), (the church clerk testified that April had not moved her membership from Shady Grove Baptist Church) (T.6:843-844); but, more significantly upon cross-examination, April did not know the names of her children's Sunday School teachers (T.5:641) The record in the present case simply does not support April's claim; instead, the record only demonstrates April's lack of credibility.

On the issue of church attendance, April's reliance on Davidson v. Coit, 899 So. 2d 904, 911 (Miss. Ct. App. 2005), is misplaced in that the record clearly demonstrated that when the parties lived in Ruth, Mississippi, Shane's parents, Pat and Peggy McCullough, were the ones that took the children to church. (T1:142) Beverly Moak, Lindsey's Sunday School teacher, observed April very seldom attended church. (T.6:845-848). Consequently, if the church attendance favored either party it would favor Shane through the nexus of the family and extended family care; however, the Chancellor did not favor either parent in regard to church attendance. The Davidson opinion merely affirmed a Chancellor who favored a parent when credible evidence was introduced as to which parent took the

children to church.

When April did attend church, perhaps the observation of the church worker, Beverly Moak, that April "came to church in shorts and a tank top" is reflective of her "judgment". (T.6:847)

Speaking of credibility, April testified at trial of Shane's lack of involvement with her or the family but offered no corroborating evidence of the same. Shane, on the hand not only offered his testimony, but that of other witnesses who had observed his involvement in family activities (as previously referenced elsewhere in this brief); but also, offered numerous photographs and video clips depicting his involvement with his children and family in direct contradiction of April's unsupported claims. (D- 45, D-52)[11]

Willingness and Capacity. April challenges the Judge on the capacity factor claiming that the Court failed to consider that April was attempting to purchase a house. However, the credible evidence before the Court did not support April's contention that she was "purchasing" but merely supported that she was leasing a small house in the Brookhaven area. (T.2:204; Exhibit P-3 is a lease, not a purchase agreement) April then takes issue that Shane was merely renting an apartment in Ocean Springs, but ignores his testimony that he was in the process of acquiring a house in the area (T9:1192-1194). Shane's testimony was that he researched the schools as part of his consideration toward purchase of a new home in order to determine what was best for the children. This included a comparison of

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[11] Shane recognizes that photographs and digital videos are not the types of evidence that Appellate Courts would normally review, but this type of evidence illustrates why a Chancellor is affording great latitude in determining credibility of witnesses and making a factual determination based on a totality of the circumstances when a presiding Chancellor would be the one that actually viewed each photograph and video clip as it was displayed on a large screen in the courtroom.

the Hurley and Ocean Springs school districts. (T9:1192-1194), which are among the top school districts in the State of Mississippi.

It should also be noted that Shane maintains a home in Lincoln County in close proximity to his parents, which he frequents on weekends with the children. (T.7:1035; exhibit D-7)

April boldly asserts that Lincoln County is the only stable home the girls had ever known (Appellate's Brief page 37), and noted the importance of the paternal grandparents in the children's lives (T.4:394, 540; 7:922, 923). April conveniently ignores her conflicting testimony as it regards her residence. April now claims she is buying a house in Brookhaven, but her documentary evidence at trial was a lease. (Exh. P-3) During a pre-trial Motion hearing on December 14, 2006, April testified that she intended to stay in Maine and had secured a permanent job in the State of Maine. (T.1:64) Later, during another Motion hearing, April first asserted that she was now intending to stay in Lincoln County, Mississippi, but admitted that her job in Maine was being held open for her until the middle of June, 2007. (T.5:616)

Notwithstanding April's assertion that Lincoln County is the only stable home the girls had ever known, the un-refuted facts in this case are that April secreted the children to the State of Maine on October 20, 2006, without any notice to Shane or to the paternal grandparents. (T.1:9; T36; 3:278; 7:1012) April acknowledges the importance of paternal grandparents (and stipulated into the record that the children had a strong emotional tie to the paternal grandparents) (T.3:394, 4:540, 7:922, 923); however, she chose to move to the State of Maine without allowing the children the opportunity to exchange goodbyes with the people who were so important in their lives. (T.7:922-923) (also see T.1:68 and Exhibit D46 as to the strong emotional ties between the children and paternal grandparents). This

factor also overlaps "other factors" as discussed by the Chancellor.

The Court determined that both parties have the *willingness* to provide child care and custody (R. E. 0067), but the *capacity* to provide the support to the children is better exhibited by Shane (R. E. 0068). The Chancellor observed that Shane had the family support network- which had not only exhibited the willingness and ability to provide help in Lincoln County, but had also demonstrated a willingness to travel to assist with the children. (T.8:1083;1177; R. E. 0067) As to the education factor, the Court noted that Shane had methodically compared the schools while April made unsubstantiated opinions regarding a Lincoln County school (T.4:550, 5:639-640). Although the Court did not make an adjudication of the ranking of schools, the significant observation was that Shane had gone to the effort of determining that the Ocean Springs and Hurley school districts were among the top in the state (T.9:1192-1194), while the school proposed by April was below average and on the decline in certain areas of academics. (T.5:639-640)

Employment Responsibilities of the Parents. April contends that this factor favors her due to being an occupational therapist, but misapprehends this *Albright* factor. Although a person's occupation may have some relevance as to that parent's ability or capacity, that is not determinative of the employment responsibility factor. This factor is reflective as to the responsibility traits of the person, but the case law suggests that the usual inquiry goes to job flexibility and its interference with providing care for the child. Shane's employment responsibilities and the nature of his work allows him to perform his job from remote locations, so along as he has internet access, and does not in any way restrict his ability to provide care for his children (T.8:1085). Shane provided an example to the Court of an incident when one of the children remained home due to being ill and he worked out of his house (T.8:1163) On another occasion, when the children were returned to him following

April's escapade to Maine, Shane performed his employment responsibilities in Lincoln County for over a week while taking care of his children at his Lincoln County residence (T.8:1086). Pat Enright corroborated Shane's testimony and further testified that Shane's job hours had been modified around his children's needs to include a totally flexible day schedule (T.6:767-768); that Shane's job has no travel requirements (T.6:756) and Shane's employment does not require the working of any overtime. (T.6:773) Mr. Enright also testified that the employer, Sperry Marine, provided a certified daycare service for its employees should Shane need the same. (T.6:752-753)

Moral Fitness.

April ignores Shane's testimony of an incident during the summer of 2003 when April became irrational and out of control screaming until after one o'clock in the morning. Shane testified that he slept in the room with oldest daughter, Lindsey for the remainder of the night to comfort and protect the child. (Exhibit D45; T.9:1200-1204; 1269-1272), as corroborated by video clips (exhibit D-45)

Shane testified as to his observations of the incident that occurred when the parties lived in Italy-that while he was at home taking care of the children, he received a call late one night from the restaurant owner, Luigi Tonghini, that Shane needed to come pick up his wife. Shane testified that when arrived at the restaurant found his wife intoxicated and transported her back to their home. Shane's testimony is corroborated by Nikki Daley when she testified as follows:

> During the "girls-only", or similar-type outings/parties, from your personal knowledge, observations and perceptions, have you observed other actions/behaviors by April McCullough that you would deem inappropriate for a married woman with small children? If so, from personal knowledge, observations and perceptions, please describe on what occasions those actions/behaviors occurred, and describe precisely the nature of the inappropriate actions/behaviors.

> Response: I observed April getting extremely drunk in a very short space of time, following this she would try to make very open advances with men, on one occasion she approached a group of men, the situation was extremely frightening and I had to ask the bar staff to help escort her outside. (R. E. 00128)

This incident was further corroborated by Luigi Tonghini in his deposition upon written questions when he stated

(R. E. 00148-149). This incident was likewise corroborated by the deposition upon written questions of Lorraine Fischer (R. E. 135-137) and by Nikki Daley in her deposition upon written questions (R. E. 00127-128).

As testified in the depositions upon written questions, Nikki Daley and Lorraine Fischer were friends with April and they would accompany her on monthly "girl's night out", while Shane stayed at home and took care of the children. Lorraine Fischer provided an example of the girl's night out with April when they attended a cruise ship delivery party and they took a cruise while Shane stayed home and took care of the children. Lorraine Fischer testified that April was consuming alcohol, which is corroborated by the photograph attached to her deposition, and that April became very drunk (R. E. 0141-142). Lorraine Fischer further described that after a few drinks April would approach men and specifically testified as follows:

> During the "girls-night-out", or similar-type parties, or any other occasion(s), have you ever observed acts/performances by April McCullough that you deemed inappropriate for a married woman with small children? If so, from your personal knowledge, observations and perceptions, please describe on what occasions those act/performances occurred, and describe precisely the nature of the acts/performances.
>
> Response: After a few drinks April would approach men and on one occasion I had to pull her away from a man in the car park of a bar whom she was kissing. After this occasion there were few nights out we would meet at April's home as I didn't like her behavior when we were out without Shane. (R. E. 00137-138).

Notwithstanding the fact that April had been served with a copy of the deponent's responses of the depositions by written questions in March, 2007 she never offered any credible or corroborating evidence to refute the witnesses' testimony. Instead of contradicting the testimony of eye witnesses to her conduct, April attacks the Chancellor as placing too much weight on the deponents' testimony. Shane would suggest that the Chancellor did not place nearly enough weight on the moral fitness factor particularly in light of April's conduct of making advances on men in a bar and then having her friend remove her from a parked car where she was kissing another man. The Court simply cannot discount the fact that April would routinely have girl's nights out, go out with her friends, get drunk and make advances on men while Shane stayed at home and provided care to the parties' children. The moral fitness factor overlaps with the stability factor particularly when one considers this was April's third marriage and Shane's first marriage. (T.4:528-529).

Stability of the Home Environment. It is ironic that April now contends that the Brookhaven area home would be more stable in stating "it is certainly more unstable to have uprooted the girls and have them live in a different town three hours away than to live where they had always lived and where they have relatives and friends nearby". This argument is particularly disingenuous in light of April's 1778 mile move to the State of Maine, her attempts to have the State of Maine take jurisdiction of this custody battle (T.2: 279-281); 4:569-573) and only returned the children after exhausting her efforts in Maine's Court system and being forced by the Order of this Court to return. (T. 282-287 R. E.0030-0031)

It is even more incredulous that April would contend that they should live in Brookhaven where they have "relatives and friends nearby" when the undisputed evidence

before the Court was that April withheld visitation and withheld any communication, contact or care giving with the paternal grandparents, but instead elected to put the children in daycare during her summer visitation period, (T.3:394, 4:540, 549-550) and asserted that she believed this to be good parenting judgment. It should also be noted that April does not have any family in the Brookhaven area, but her only sibling, a brother, lives in the State of Maine and her mother lives in Canada. (T.3:426) This also overlaps into the *Albright* "other factors".

Other factors. April attempts to misrepresent the record claiming "there is no evidence in the record that April did not or would not allow Pat and Peggy McCullough time to see the girls . . ." (Appellate Brief p. 42). April admitted that after the separation of the parties, she elected to put the children in daycare in the Summer of 2007 and would not allow the paternal grandparents to provide the extended family care for the grandchildren as previously provided (T.3:394; 4:540,549-550) April tried to explain her decision based on "educational" opportunities at daycare, but acknowledged on cross-examination she had no idea what the day care offered in education vs. daycare services (T.4:552). Prior to separation the McCulloughs provided care almost on a daily basis. (exhibit D-46). Interestingly, April denied the paternal grandparents telephone contact with the children during times when she had them for visitation (T.7:937). In contrast, Shane encourages the children to have liberal telephone contact with their mother (T.3:352-353).

April appears to misapprehend the distinction of the nexus of the children being in Lincoln County, Mississippi with the more pertinent nexus of the children being in the extended family care. Shane's family has now continued to provided extended family care for the children, but April has no family in Lincoln County, Mississippi and the children have no extended maternal family care or relationship(T.1:100-101; 7:902-904). In fact, as

admitted by April, she was estranged from her mother for a period of two and one half years prior to this litigation (T.1:100-101)[12]

As part of the other factors, the Judge considered the inaccuracies, inconsistencies, misrepresentations and bad judgment. (R. E. 074-85). April on appeal takes exception that the Judge did not point out any misrepresentations or inaccuracies as it regards Shane, but makes no reference in the record or transcript as to the existence of any inaccuracies. April may not be satisfied with Chancellor's factual determinations, but the record supports the Chancellor's specific factual findings and specific references to testimony references. The inconsistencies and misrepresentations of April not only affects her credibility, but more importantly as it goes to parental judgment or affects bad judgment.

By illustration, April testified that Shane promoted one of the children, Lindsey to urinate in a public place (Fred's Dollar Store parking lot) during a visitation exchange. When asked on direct examination as to whether or not she objected to episode stated "I didn't say anything" (T.4:475), but then later at trial April changed her testimony to be "I asked him not to do that" (T.10:1391). Shane emphatically denied allowing the child to urinate in a parking lot (T.10:1351-1352). April's witness that was present during the visitation exchange, Marsha Carrier, described the exchange of the children at the Fred's parking lot (T.5:735-736) and conspicuously absent from her testimony was any observation of the child urinating in a parking lot. This not only shows April's inconsistency and misrepresentation, but is another example of her fast and loose attitude in dealing with

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Following the birth of Caitlin the parties were in Canada where April's mother resided and after a blow up with her mother took the baby and went to another relatives house in Canada, which was another example of April's impulsive and erratic behavior.

the child custody issue.

ISSUE IV. ALTERNATIVELY, THE COURT ERRED BY FAILING TO AWARD THE PARTIES JOINT LEGAL CUSTODY OF THE CHILDREN.

As an alternative assignment of error, April contends that the Court should have awarded her joint legal custody notwithstanding the fact that physical custody was awarded to Shane. April cites Lorenz vs. Strait, 2007-CA-00322-SET (Miss. July 31, 2008), in her support, but her reliance is misplaced. There is a legal distinction between mandatory GAL's and discretionary GAL's. Lesa Baker was appointed as Guardian Ad Litem in this case by Order of the Court dated June 14, 2007 (C.P.2:223; R.269). The appointment of the guardian ad litem was discretionary (T.2:268) and was pursuant to a Motion filed by April. The Court is not required to itemize the Court's reasoning in rejecting a Guardian Ad Litem's recommendation when the GAL is a discretionary appointment. Passmore vs. Passmore, 820 So. 2d 747, 751 (¶13) (Miss. Ct. App. 2002). The Court has explicitly stated "there is no requirement that a Chancellor defer to the findings of a guardian ad litem . . . such a rule would intrude on the authority of the Chancellor to make findings of fact and apply the law to those facts," . In Floyd vs. Floyd, 949 So. 2d 26 (Miss. 2007), the Supreme Court again reiterated that the Chancellor is in no way bound by Guardian Ad Litem's recommendations in a child custody matter, but the Chancellor is only required to address a summary of recommendations in the Chancellor's finding of fact and conclusions of law.

Even in mandatory appointment of Guardian Ad Litem cases which this case was not, the Chancellor is only required to provide an itemization of facts when he rejects the Guardian Ad Litem's recommendations. S. N. C. and J. H. C. vs. J. R. D. Jr., 755 So. 2d 1077, 1082 (¶18) (Miss. 2000)

Here, however, the Guardian Ad Litem had recommended physical custody be placed

with Shane. After a lengthy analysis of the Albright factors, the Chancellor was not required to reiterate his reasoning in awarding Shane full custody, inclusive of physical and legal custody, of the minor children. The Chancellor stated as follows:

> The next point is the Guardian Ad Litem's report. April requested the Guardian Ad Litem when it was a **discretionary matter**, not a mandatory appointment. The Guardian Ad Litem interviewed all the necessary witnesses, made all the necessary observations, including the entire trial and the Guardian Ad Litem recommended physical custody to be placed with Shane.
> Although the Guardian Ad Litem found this to be an extremely close case, I did not. (R. E. 0085-86; R.___ and R. 337- page number omitted in App. Record Excerpts). (emphasis added)

In the case of Ethridge v. Ethridge, 926 So.2d 264 (Miss. 2006), the Court affirmed the Chancellor and stated that in reviewing the entire record the Chancellor adequately considered the report of the Guardian Ad Litem in awarding custody of the children to the mother in the divorce proceeding the Court further stated

> " although the Chancellor only referred explicitly to the GAL's report one time in his opinion, significant findings and recommendations of the report were fully addressed in the Chancellor's decision... and the Chancellor made some suitable allowances for concerns raised by the GAL." Id. at ¶13.

In Hensarling v. Hensarling, 824 So. 2d 583 (Miss. 2002) the Chancellor's failure to follow child custody recommendations of the Guardian Ad Litem did not constitute reverseable error and the Court reiterated the Chancellor is not bound to follow the recommendations of guardian ad litem. The Court explicitly found in reviewing the entire record that the Chancellor considered the suggestions of the GAL, but placed greater weight on other evidence when making the child custody determination. Hensarling at ¶10.

Chancellors are granted the jurisdiction to make child custody determinations and nothing in the law allows or permits Chancellors to delegate that duty to guardian ad litems- the view of the GAL is treated as "additional information to aid the Chancellor".

Hensarling at ¶10. In the present case it is important to note that the Guardian Ad Litem's recommendation is consistent with the Court's determination that physical custody should be placed with Shane. In re Guardianship of J. N. T., 910 So. 2d 631 (Miss. App. 2005) the Court of Appeals recognized that "the proper function or role of a guardian ad litem [is] one who "investigates, makes recommendations to a court, or enters reports" and is a "representative of the court appointed to assist in properly protecting the [child's interest]." Id @ ¶12. Accordingly, April's assignment of error is without merit and should be denied.

ISSUE V: THE COURT ERRED IN REQUIRING APRIL TO BE RESPONSIBLE FOR ALL MEDICAL EXPENSES NOT COVERED BY INSURANCE.

Again April assigns error to the Judge, inferring that the Judge is required to split to uninsured medical expenses between the parties. April cites the case of Hoar vs. Hoar, 404 So. 2d 1032, 1036 (Miss. 1981), but the Hoar case does not stand for the proposition that the Judge is required to divide uninsured medical expenses.

Child support has been codified under MCA 43-19-101, et seq. as to what a Chancellor is "required" to do. The Chancellor considered the non-custodial parent's gross income, made the statutory deductions and set child support based on non-custodial parent's adjusted gross income in the statutory presumptive amount.

The Chancellor further stated in his opinion

> The Court finds that Shane should maintain the children on his employer, and I suspect that the health insurance he has available to him is better than that available to Mrs. McCullough. Mrs. McCullough will pay the uninsured amounts not covered by that insurance. (R. E.0089; R. 340)

Consequently, the Judge burdened Shane with the expense of health insurance and April was only required to pay those portions not covered by insurance. The Chancellor is granted considerable discretion in assessing who should pay for health insurance, as well as who should pay for uninsured medicals that are reasonably necessary. Mississippi Law

does not require a Chancellor to evenly divide the costs of insurance of uninsured medicals. See Wells v. Wells, 800 So. 2d 1239 (Miss. App. 2001), wherein the Court of Appeals affirmed the Chancellor's decision to require the non-custodial parent to pay child support pursuant to the statutory percentages, plus pay all of the health insurance premiums and one hundred percent of the uncovered medical expenses for the child. The record before the Court contains credible evidence to support the Chancellor's ruling and said adjudication is not manifest error. If necessary, see the 8.05 Financial Declarations, marked as exhibits P-1 and D-2.

CONCLUSION

April has totally failed to show the application of any erroneous legal standard, has failed to show where the Chancellor was manifestly wrong or committed an erroneous finding of any material fact. April is simply making an effort to have this Court act as the fact finder and disregard the factual determinations of the Chancellor. Essentially, April is now making an effort to re-litigate her case without the appellate Judges having the benefit of observing the six days of trial. As stated by the Chancellor, he based his decision on a totality of the evidence and a review of the record clearly supports the Chancellor's decision. The Chancellor's decision should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, W. Brady Kellems, attorney of record for the Appellee, do hereby certify that I have this day mailed, via United States first class mail, postage prepaid, a true and correct copy of the foregoing to the following:

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Honorable Edward E. Patten, Jr.
Lincoln County Chancery Court Judge
P. O. Drawer 707
Hazlehurst, MS 39083-0707

This the 3rd day of December, 2008.

W. BRADY KELLEMS