IN THE SUPREME COURT OF MISSISSIPPI

JOHNNY BROWN	**PETITIONER**
v.	**No. 2008-CT-00484-SCT**
STATE OF MISSISSIPPI	**RESPONDENT**

SUPPLEMENTAL BRIEF OF APPELLANT JOHNNY BROWN

Appealed from the Circuit County of Warren County

On Writ of *Certiorari* to the Court of Appeals of Mississippi

ORAL ARGUMENT REQUESTED

David Neil McCarty
Miss. Bar No. [redacted]
DAVID NEIL MCCARTY LAW FIRM, PLLC
416 East Amite Street
Jackson, Miss. 39201
T: 601.874.0721
F: 866.945.9168
E: dnmlaw@gmail.com

IN THE SUPREME COURT OF MISSISSIPPI

JOHNNY BROWN **PETITIONER**

v. **No. 2008-CT-00484-SCT**

STATE OF MISSISSIPPI **RESPONDENT**

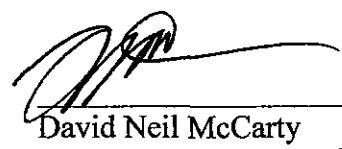
CERTIFICATE OF INTERESTED PERSONS

Pursuant to Miss. R. App. P. 28(a)(1), 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 the Supreme Court may evaluate possible disqualification or recusal:

1. Mr. Johnny Brown, a/k/a Johnny Ray Brown, a/k/a Johnny R. Brown, *Appellant*
2. State of Mississippi, *Appellee*
3. The Honorable Winston L. Kidd, *Hinds County Circuit Court*
4. David Neil McCarty, *Appellate Counsel for Appellant*
5. John R. Henry, *Office of the Attorney General*
6. Faye Peterson, *District Attorney*
7. Violar "Shun" Bracey, *Deceased*

So CERTIFIED, this the 3rd day of May, 2010.

Respectfully submitted,



David Neil McCarty
Miss. Bar No. [redacted]
Attorney for Petitioner Johnny Brown

Table of Contents

TABLE OF AUTHORITIES

Mississippi Supreme Court Cases

Mississippi Court of Appeals Cases

Mississippi Statute

STATEMENT OF THE ISSUES

Without waiving any question addressed by any *pro se* brief or petition submitted prior to the Court's grant of *certiorari* in this case, the petitioner reiterates the following issues for purposes of supplemental briefing:

First, it was reversible error for the trial court to refuse to grant an instruction on accidental homicide. Second, it was plain error to allow the testimony of a witness who misrepresented his credentials on the stand, and whose testimony has previously been rejected by this Court in a criminal case.

Additionally, while oral argument is generally not allowed in these instances, *see* MRAP 17(b)(i), oral argument would provide a material benefit to the Court in understanding the issues involved in this case.

STATEMENT OF THE CASE

This supplemental brief incorporates all assertions of fact and all recitations of procedural history previously offered *pro se* or otherwise by the petitioner.

This case involves a man who was indicted and tried for the murder of his girlfriend in Hinds County and ultimately was sentenced to life as a habitual offender after a jury convicted him. At trial, the trial court refused to allow an instruction on his theory of the case that the homicide might be the result of accident or mistake. Further, the trial judge allowed the testimony of a witness who misrepresented his credentials on the stand, and whose testimony has previously been rejected by this Court in a criminal matter.

PROCEDURAL HISTORY AND RELEVANT FACTS

Mr. Johnny Brown was tried and convicted for the murder of his sometimes-paramour, Violar Bracey, in 2006. The Court of Appeals decision affirming his sentence, ***Brown v. State***, contains extensive details regarding the contested facts of this case. No. 2008-KA-00484-COA,

2009 WL 2999163, *1-4 (Miss. Ct. App. Nov. 22, 2009). After that decision, Mr. Brown requested time to file a *pro se* petition for *certiorari*; it was granted on March 19, 2010. After filing of the petition, this Court considered granted *certiorari* on April 22, 2010, with all justices voting for the grant save one.

This Supplemental Brief is therefore timely and proper under MRAP 17(h), which allows the filing of a supplemental brief after grant of *certiorari*.

SUMMARY OF ARGUMENT

Mr. Brown was improperly denied an instruction detailing that the death of Ms. Bracey could have been excusable under state statute as an accident. Under clear Mississippi Supreme Court precedent, this denial results in reversible error. Further, Mr. Brown's trial was tainted by the testimony of an uncredentialed witness.

STANDARD OF REVIEW

The issues at hand are pure questions of law, which are reviewed *de novo*. ***Brown v. State***, 731 So. 2d 595, 598 (Miss. 1999).

ARGUMENT

The denial of an accidental-homicide instruction creates reversible error. Additionally, it is plain error where a witness materially misrepresents his qualifications to testify, gaining credibility and authority through the misrepresentation.

I. It Was Reversible Error to Refuse to Instruct the Jury Regarding Accidental Homicide.

The Mississippi Supreme Court requires that a jury receive proper instructions regarding accidental homicide, and the failure to do so results in reversible error. When a defendant is the sole witness to a crime, his eyewitness testimony creates an automatic jury issue.

A. An Accidental Homicide Instruction Must Be Given.

Because the trial judge refused to give an accidental jury instruction, this case must be reversed for a new trial. Mississippi law excuses the killing of another person in certain situations. Specifically, state statute provides that:

> [t]he killing of any human being by the act, procurement, or omission of another shall be excusable:
> (a) When committed by accident and misfortune in doing any lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent;
> (b) When committed by accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation;
> (c) When committed upon any sudden combat, without undue advantage being taken, and without any dangerous weapon being used, and not done in a cruel or unusual manner.

Miss. Code Ann. § 97-3-17. In repeated cases the Supreme Court and the Court of Appeals have held that the statute creates a question for a jury to resolve based on the particular evidence in a case. Indeed, the failure to allow a jury instruction regarding accident is reversible error. *See* ***Miller v. State***, 677 So.2d 726, 731 (Miss. 1996). The rule announced in that case is plain: "Whether or not a killing was the result of accident of misfortune is a question for the jury to decide after proper instruction." ***Id.*** at 730.

The ***Miller*** case is strikingly similar to the one at hand. In that case, a man was accused of killing his estranged wife. ***Id.*** at 726-27. The testimony differed wildly between the man, his girlfriend, the police, and the coroner, leading the Court to extensively summarize the recollections of each separately. ***Id.*** at 727-29. The sole issue before the Court was whether the jury was instructed properly: the Defendant argued that the trial court improperly refused him two instructions, based on the excusable homicide statute, which he argued caused reversible error. ***Id.*** at 729.

The Court ruled that "these three sections [of the statute] need not be taken as a whole, but may be read and applied separately." ***Id.*** at 730. After a review of analogous cases, the Court

held that "[i]f the testimony is looked to in the light most favorable to [the defendant], then an excusable homicide instruction was appropriate since under [his] version of the events he and [his wife] were struggling over the gun when it discharged, killing her." ***Id.*** at 731.

While portions of the excusable homicide statute were not applicable, the defendant "should have been allowed an instruction on his defense of accident or misfortune" under subsection (b) of the statute. ***Id.*** at 731. The Court disagreed that a cursory jury instruction regarding accident or mistake was enough, as it "merely informed the jury that [the defendant] could raise the defense of accident or misfortune," and did not instruct "on what such a defense entailed." ***Id.*** at 732.

Instead, "[w]hether or not a killing was the result of accident of misfortune is a question for the jury to decide after proper instruction." ***Miller***, 677 So.2d at 730. Not only is such an instruction proper, the Court noted that it had "*never held* an accident or misfortune instruction to be improper when a dangerous weapon was used and there was evidence that the homicide was committed while the defendant was engaged in lawful conduct, exhibiting usual and ordinary caution, and there was no unlawful intent." ***Id.*** (emphasis added).

The Court was emphatic that "the point remains that [the defendant] was entitled to an accident instruction." ***Id.*** at 732. However, it ruled that the one he submitted "was a confusing self-defense/accident instruction and it cannot be said that the lower court erred in refusing it." ***Id.*** Ultimately, the Court ruled that "[t]his [jury instruction] issue is meritorious and this case is reversed because of the lower court's failure to grant [the defendant] an instruction on his defense of accident." ***Id.*** at 732. The case was reversed and remanded for a new trial on the merits. ***Id.***

Mr. Brown's case echoes ***Miller*** with unusual detail. Like that case, the one at hand involves contradicting testimony from the defendant, a witness, the police, and a testifying

doctor. *See* ***Brown***, 2009 WL 2999163, *1-4. Like ***Miller***, it involved a man and a woman in a turbulent relationship, who struggled with a gun, which discharged in the struggle, killing the woman. ***Id.*** at *3, ¶ 11.

And like ***Miller***, it involved a jury instruction that "was a confusing combination of accident and self-defense instructions." ***Id.*** at *5, ¶ 20. It is the way the Court of Appeals treated the issue where ***Brown*** diverges from ***Miller***. In the Supreme Court case, the Court actually held that while the jury instruction was certainly confusing, "[t]his [jury instruction] issue is meritorious and this case is *reversed* because of the lower court's failure to grant [the defendant] an instruction on his defense of accident." ***Miller***, at 732 (emphasis added).

Yet in an astonishing moment, the Court of Appeals in the case at hand actually cited to ***Miller*** for the proposition that there was "no error in the circuit court's denial of a 'confusing self-defense/accident instruction.'" ***Brown***, at *5, ¶ 20. This is simply *legally* wrong, not to mention a wholesale misreading of ***Miller***.

Under the clear guidance of the Supreme Court in ***Miller***, this case must be reversed and remanded for a new trial, at which a jury instruction on the accident theory must be allowed. *Accord* ***Gilbert v. State***, 934 So. 2d 330, 334-35 (Miss. Ct. App. 2006) (where "[t]he physical evidence and collective testimony of [the police] and Dr. Hayne substantially contradicted [the defendant's] version of events," it was ultimately "the job of the jury to decide which of these accounts were more credible"); ***King v. State***, 315 So.2d 925, 927 (Miss. 1975) (divergent testimony whether shooting was accidental "presents a classic case of conflicting evidence for a jury to decide").

In ***Gilbert***, the Court of Appeals found that "the accounts of [the defendants] were contradicted by physical evidence," as introduced by Dr. Hayne. 934 So. 2d at 335. Yet while "[t]he physical evidence and collective testimony of [the police] and Dr. Hayne substantially

contradicted [the defendant's] version of events," this only warranted a jury trial, as opposed to a directed verdict. ***Id.*** Ultimately, "[i]t was the job of the jury to decide which of these accounts were more credible." ***Id.***

Because the Court of Appeals and the trial court ignored the clear rule of ***Miller***, Mr. Brown is entitled to a new trial.

B. The Defendant's Eyewitness Version of the Facts Warrants an Instruction to the Jury.

Additionally, Mr. Brown's eyewitness account of the death of Ms. Bracey must be accorded enough weight to warrant a jury instruction.

It is well established law in Mississippi 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 a credible witness or witnesses for the state, or by the physical facts or by the facts of common knowledge." ***Weathersby v. State***, 165 Miss. 207, 147 So. 481, 482 (Miss. 1933), *quoted with approval by* ***Barfield v. State***, 22 So. 3d 1175, 1185 (Miss. 2009).

The trial court rejected the "confusing" instruction of Mr. Brown. Yet even the State conceded that "it is clear" the rejected instruction was one for accidental homicide: "While the instruction was rather awkwardly drafted, it is clear that it was drafted in accordance with Miss. Code Ann. Section 97-3-17 (Rev. 2006)." *State's Brief* at 10. The State then argued "that there was no testimony to support the granting of an instruction under this subsection of the statute." *State's Brief* at 10.

Yet there was ample testimony from Mr. Brown that regarding his version of events, where he detailed that Ms. Bracey had cut him on the arm once before in an act of jealousy, sprayed him with mace, and attempted suicide. ***Brown***, at *2, ¶ 9. In his narrative, uncontested

by the State, Ms. Bracey "was unhappy with the fact that he slept with other women and got another woman pregnant." ***Id.*** at *2, ¶ 9

A witness who was friends with the couple "testified that Bracey had attempted to commit suicide a couple of times at least a year and a half or two before her death," and "that Bracey had a handgun, and [she] had seen Bracey with a gun on a previous occasion." ***Id.*** at *3, ¶ 13. And Mr. Brown's mother testified that Ms. Bracey had lived with her for a period of time when Mr. Brown was in jail, that the couple had a "turbulent relationship and that Bracey would get upset with Brown about other women." ***Id.*** at *3, ¶ 15. She corroborated that "Bracey had once attacked Brown and sprayed him with mace." ***Id.*** at *3, ¶ 15. She also testified that Ms. Bracey "had told her that she could not take it and that she would rather be dead than see Brown have a baby with another woman." ***Id.*** at *3, ¶ 15.

The State even conceded Mr. Brown's version of the facts: "While lying in bed in what was a form of post-coital embrace, [Brown] saw that the victim had a gun . . . ." *State's Brief* at 6.

Mr. Brown does not seek a directed verdict based on his version of the facts, which is often the case where modern law seeks to distinguish ***Weathersby***. He only seeks that his version of the facts should be submitted to the jury via an accident instruction. In ***Barfield***, the Court decided that such a scenario was "properly . . . decided by a jury." ***Barfield*** at 1186.

Coupled with ***Miller's*** clear mandate that an accident instruction must be given, ***Weathersby*** and ***Barfield*** compel a new trial in this case, with proper instructions based on Mr. Brown's accident theory of the case submitted to the jury.

II. The Misrepresentations of a Witness Constitutes Plain Error.

The misrepresentations of Dr. Stephen Hayne at Mr. Brown's trial constitutes plain error and warrants reversal.

It is uncontested that at trial Dr. Hayne's qualifications and testimony were not objected to by defense counsel. ***Brown***, at *5, ¶ 24. Plain error will only be addressed on appeal "in unusual circumstances," and "as a means of preventing a manifest miscarriage of justice," such as "the violation of a substantive right of a defendant." ***Dixon v. State***, 953 So. 2d 1108, 1116 (Miss. 2007). This is just such a case.

The Court of Appeals skirted the issue of Dr. Hayne in its opinion, delivering only a cursory analysis that there was no objection at trial, and that Dr. Hayne did not misrepresent himself at trial, as "[h]e testified that he was certified by the American Board of Forensic Pathology, and he never claimed that was certified by the American Board of Pathology." ***Brown***, at *5, ¶ 24.

Yet the Court ignores the fact that the so-called American Board of Forensic Pathology "isn't recognized by the American Board of Medical Specialties," as it was apparently a diploma mill. ***Edmonds v. State***, 955 So. 2d 787, 803 (Miss. 2007) (Diaz, P.J., specially concurring) (internal quotations and citations omitted). The State as much as concedes that the "college" no longer *even exists* as an accrediting agency in its brief, while proffering that its nonexistence should not void the qualifications it once conferred. *State's Brief* at 13-14.

At the time of Mr. Brown's trial, Dr. Hayne's qualifications were rarely in question; his testimony was given great deference. *See* ***Duplantis v. State***, 708 So. 2d 1327, 1339 (Miss. 1998) ("Dr. Hayne is unquestionably qualified to testify in our courts as a forensic pathologist"). Yet after the verdict was tendered in this case in 2006, cracks in the facade began to appear. Importantly, the Mississippi Supreme Court reversed a conviction in part because of Dr. Hayne's flawed testimony. *See* ***Edmonds***, 955 So.2d at 792. In that case, departing from the great deference in ***Duplantis***, the Court underscored that "a court should not give such an expert carte blanche to proffer any opinion he chooses," and determined that "[t]here was no showing that

Dr. Hayne's testimony was based, not on opinion or speculation, but rather on scientific methods and procedures." ***Id.***

Moreover, such testimony is given great weight by the jury, because "[j]uries are often in awe of expert witnesses because, when the expert witness is qualified by the court, they hear impressive lists of honors, education and experience." ***Id.*** at 792. Because "[a]n expert witness has more experience and knowledge in a certain area than the average person," the Court found that "juries usually place greater weight on the testimony of an expert witness than that of a lay witness." ***Id.***[1] After ***Edmonds***, much public scrutiny of Dr. Hayne's work and methodology arose.

In the case at hand, the Court of Appeals heavily relied on Dr. Hayne's testimony in determining that Mr. Brown should not be allowed a jury instruction regarding accident, treating his *testimony* as *certain fact*: "The wound to Bracey's head revealed that the gun was pressed to her head when it was fired, not being snatched away as Brown claimed," the Court wrote, and "[t]here was no powder residue or blood spatter on Bracey's hands, which reveals that her hands were covered and not holding the gun when it was fired." ***Brown***, at *5.

This is the *exact* sort of testimony Dr. Hayne gave in ***Edmonds***—testimony which is nothing but guesswork, yet given the weight and credibility of authority through Dr. Hayne's bogus and outdated credentials. Dr. Hayne's testimony was the paramount evidence the State offered that Ms. Bracey's death was not an accident.

Indeed, the State makes the *exact point* why in the post-***Edmonds*** era Mr. Brown should have a new trial, because "[t]here was, in any event, no reason why the trial court should have

---

[1] The special concurrence went further, and found that Dr. Hayne should not have been qualified at all. ***Edmonds***, 955 So. 2d at 802-03 (Diaz, P.J., specially concurring) (joined by Justice Graves).

known that that Board [allegedly qualifying Dr. Hayne] was defunct, assuming for argument that it is defunct." *State's Brief* at 13-14. Simply put, had the trial court and defense counsel known what is known now about Dr. Hayne, he would have been subjected to much greater scrutiny.

This is just the "unusual circumstance" that ***Dixon*** held is appropriate to consider on appeal. Mr. Brown does not request at this point that Dr. Hayne should be prevented from testifying against him, or presenting his interpretation of the wounds Ms. Bracey. However, in light of ***Edmonds***, Mr. Brown must be accorded the opportunity to fully cross-examine Dr. Hayne regarding his qualifications and testimony.

CONCLUSION

Because Mr. Brown was not allowed a proper accident instruction as required by Miller and other precedent, the trial court committed reversible error. Further, Mr. Brown should be granted the opportunity to full cross-examine Dr. Hayne in light of the post-*Edmonds* evidence that his qualifications were misrepresented or substantially weaker than previously believed. Accordingly, Mr. Brown respectfully requests that this Honorable Court reverse his conviction, and remand for a new trial on the merits.

RESPECTFULLY SUBMITTED this 3rd day of May 2010,

JOHNNY BROWN, by his Attorney,

David Neil McCarty

David Neil McCarty
Miss. Bar No. [redacted]
DAVID NEIL MCCARTY LAW FIRM, PLLC
416 East Amite Street
Jackson, Miss. 39201
T: 601.874.0721
F: 866.236.7731
E: dnmlaw@gmail.com

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he has, on this day, served a true and correct copy of this *Supplemental Brief of Appellant* via United States Postal Service first-class mail, postage prepaid, on the foregoing interested parties:

Honorable Winston L. Kidd
Hinds County Circuit Court
407 East Pascagoula Street
Jackson, Miss. 39205

John R. Henry, Esq.
Office of the Attorney General
P.O. Box 220
Jackson, Miss. 39205

RESPECTFULLY SUBMITTED this 3rd day of May 2010,

David Neil McCarty