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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JOHNNY CHARLES SHORTER — **APPELLANT**

V. — **NO. 2008-KA-0112-COA**

STATE OF MISSISSIPPI — **APPELLEE**

BRIEF OF THE APPELLANT

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V. — NO. 2008-KA-0112-COA

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BRIEF OF THE APPELLANT

STATEMENT OF THE ISSUES

I. **THE TRIAL COURT ERRED IN ADMITTING THE 911 CALL OF SHORTER'S DIVORCE ATTORNEY, GIL BAKER.**

II. **THE TRIAL COURT ERRED IN ADMITTING THE 911 CALL OF SHORTER'S WIFE, ANGELIQUE.**

III. **THE TRIAL COURT ERRED IN REFUSING INSTRUCTION D-1, A MANSLAUGHTER INSTRUCTION.**

IV. **THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE, WHICH SHOWED THAT SHORTER WAS GUILTY, AT MOST, OF MANSLAUGHTER.**

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Rankin County, Mississippi, and a judgment of conviction for murder entered against Johnny Shorter after a jury trial held on May 15 through May 17, 2007, the Honorable Samac Richardson, Circuit Judge, presiding. (C.P. 119, 121-22, Tr. 435, R.E. 11-12). Shorter was sentenced to a term of life imprisonment. (C.P. 121-22, Tr. 438, R.E.12). Shorter is presently incarcerated in the custody of the Mississippi Department of

Corrections and now appeals to this Court for relief.

STATEMENT OF THE FACTS

Johnny Shorter's wife, Angelique, left him and moved into the home of Kenneth Boutwell. (Tr. 229). About a week later, on September 5, 2007, Johnny hired an attorney, Gil Baker, to help him with the inevitable divorce; later that evening/night, Johnny went to a local pool hall, where he was involved in a pool league. (Tr. 229). There, he ran into Jim Beckman, whom Johnny suspected was one of the men Angelique was cheating on him with. (Tr. 229-232). Johnny asked Beckman if he was sleeping with his wife, and Beckman said he was not. (Tr. 230). The two men then talked for "a couple hours." (Tr. 230). At some point during their conversation, Johnny elluded to a suspicion that Angelique may be sleeping with Boutwell. (Tr. 232). Beckman testified that Johnny was visibly upset: "It was pretty much tearing him to pieces." (Tr. 233).

Several hours later, at 1:00 a.m., September 6, 2007, attorney Baker called 911 and reported that Johnny just called and told him that he was going to shoot a man. (Ex. S-34). Baker believed Johnny meant Beckman, and the authorities began searching for Beckman's whereabouts. (See Ex. S-34). However, shortly thereafter, Angelique called 911 from Boutwell's house and reported that Boutwell had been shot by Johnny. (Ex. S-25). Significantly, Angelique told the 911 operator that the shooting resulted from an argument. (Ex. S-25).

Before authorities arrived at the scene, Johnny called his mother and his father-in-law and told them that he had just shot a man. (Tr. 336, 373). Shorter told his father-in-law that he was "going to smoke a cigarette and wait for police." (Tr. 373). When police arrived, they found Shorter in the driveway and immediately arrested him. (Tr. 156). Angelique and her daughter were also present at the scene. (Tr. 173). Shortly after police arrived, Angelique's father, Allan Plotkin, came to Boutwell's home and picked up Angelique's daughter. (Tr. 197). Shorter was cooperative

and did everything the police asked him to do. (Tr. 172).

Inside the house, police found Boutwell lying in a "sunroom" near a doorway leading into a dining room. (Tr. 193). A revolver was found wrapped in a towel on a table in the sunroom. (Tr. 195). The revolver was unloaded, and four spent casings were found in the sunroom. (Tr. 195). The gun was registered to Shorter, as evidenced by a bill of sale. (Ex. S-23). A gunshot residue test was performed on Shorter; the results showed no particles of residue. (Tr. 212-13).

Officer Craig Williams claimed that, at one point, Shorter asked: "is that son-of-bitch I shot dead?" (Tr. 164). However, cross examination revealed that this exact statement was not included in his police report. (Tr. 178).

Dr. Steven Hayne testified that Boutwell died of two gunshot wounds; one entered the right armpit; the other entered the back. (Tr. 292-93). Dr. Hayne testified that both shots were lethal. (Tr. 293). At the conclusion of the evidence, the jury found Shorter guilty of murder. (C.P. 119, 121-22, Tr. 435, R.E.11-12). The trial court denied his motion for a new trial. (C.P. 129, R.E. 16).

SUMMARY OF THE ARGUMENT

The trial court erred in admitting the tape-recorded 911 call of Shorter's divorce attorney, Gil Baker. The communication between Shorter and Baker was confidential and privileged under the attorney-client privilege. Also, the "crime-fraud exception" to the attorney-client privilege does not apply, as there was no evidence that Shorter sought Baker's advise to aid him in furtherance of a crime.

The trial court also erred in admitting the tape-recorded 911 call of Angelique. As Shorter's spouse, Angelique was incompetent to act as a witness against him under Mississippi Rule of Evidence Rule 601(a). Additionally, the 911 call's admission violated Shorter's Sixth Amendment right to confrontation, as Angelique's statements were testimonial in nature..

Further, the trial court erred in refusing to instruct the jury on manslaughter. The evidence warranted such an instruction. It is beyond dispute that the shooting occurred under emotionally-charged circumstances, i.e., a husband allegedly shoots the man his wife is living with. There was evidence that Shorter was very upset just prior to the shooting. Significantly, there was evidence that the shooting arose out of an argument. Viewed in the light most favorable to Shorter, the evidence supported an instruction on manslaughter. Consequently, the trial court erred in refusing Instruction D-1.

Finally, the verdict was against the overwhelming weight of the evidence, and the trial court thus erred in denying Shorter's motion for a new trial. The weight of the evidence established that Shorter was guilty, at most, of manslaughter. Accordingly, the trial judge erred in denying Shorter's motion for a new trial.

ARGUMENT

I. THE TRIAL COURT ERRED IN ADMITTING THE 911 CALL OF SHORTER'S DIVORCE ATTORNEY, GIL BAKER.

Just before the alleged shooting, Shorter's divorce attorney, Gil Baker, called 911 and said that Shorter just called him and said that he was going to kill a man. (Ex. S-34). Prior to trial Baker, Shorter filed a motion in limine to exclude Baker's 911 tape, arguing that the communication was privileged under Mississippi Rule of evidence 502, the attorney-client privilege. However, the trial court ruled that the tape was admissible, reasoning as follows:

> Mr. Baker chose to reveal that, for whatever reason. And once he revealed it, it - - it's a public communication. It was made over public airwaves. I think it's admissible regardless of any privilege that might have existed before. It's done away with when that election was made by Mr. Baker.

(Tr. 147). Later, during Shorter's motion for a directed verdict, the trial court felt the need to clarify its ruling on the admissibility of Baker's 911 tape; there the court stated:

> Also to further clear up the record on the 911 tape or calls from Mr. Baker, I want to make sure that its in the record. I think that it is already, but I want to make sure, that the Court based its ruling in that instance, after reviewing the Rule 1.6 of the Mississippi Code of Professional Conduct for attorneys and Mississippi Rules of Evidence 502, the Court made an analysis of - - 403 analysis of Probative Value versus a prejudicial effect, that the prejudicial effect is substantially outweighed by countervailing considerations found in [Mississippi Rule of Professional Conduct] 1.6 and [Mississipi Rule of Evidence] 502.

(Tr. 399). Thus the trial court gave two reasons supporting its decision to admit Baker's 911 tape: (1) Baker waived the privilege by revealing the communication "over the public airwaves" and (2) the prejudicial effect of the 911 tape was outweighed by the "countervailing considerations found in [Mississippi Rule of Professional Conduct] 1.6 and [Mississipi Rule of Evidence] 502." For the reason's explained below, the trial court's reasoning on both points was clearly wrong, and its ruling amounted to an abuse of discretion.

"This Court reviews a trial court's decision regarding the admissibility of evidence under an abuse of discretion standard of review." *Young v. State*, 987 So. 2d 1074, 1076 (¶8) (Miss. Ct. App. 2008) (citing *Edwards v. State*, 856 So. 2d 587, 592 (¶12) (Miss. Ct. App. 2003)). Also, reversal is not required "unless the error adversely affects a substantial right of a party." *Mingo v. State*, 944 So. 2d 18, 28 (¶27) (Miss. 2006).

A. Only the client may waive the attorney-client privilege; it cannot be waived by the attorney.

The trial court essentially held that the 911 tape was admissible because Shorter's attorney, Baker, waived the privilege. This was clearly incorrect as a matter of law. The attorney-client privilege is addressed in Mississippi Rule of Evidence502(b), which provides, in part, as follows:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between himself or his representative and his lawyer or his lawyer's representative. . . .

Miss. R. Evid. 502(b). The plain language of the rule makes clear that the privilege belongs to client

only. *See generally Barnes v. State*, 460 So. 2d 126, 131 (Miss. 1984) ("Once the client has effectively waived the privilege, the attorney is competent as a witness regarding matters otherwise within the scope of the privilege."). Because, Baker could not waive Shorter's attorney client privilege, the trial court's ruling was based on an incorrect legal standard. Baker *could not* waive the privilege, and Shorter *did not* waive the privilege. Therefore, the trial court erred in admitting Baker's 911 tape.

B. The prejudicial effect is not substantially outweighed by the "countervailing considerations found in Rules 1.6 and 502."

The trial court also held that the prejudicial effect of Baker's 911 tape was substantially outweighed by the "countervailing considerations found in Rule 1.6 and 502. (Tr. 399). The trial court's ruling on this point is curious, and the trial court's rationale was arbitrary and inherently inconsistent.

> Rule 1.6 of the Rules of Professional Conduct provides in pertinent part as follows:
>
> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).
> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
> (1) to prevent reasonably certain death or substantial bodily harm;

M.R.P.C. 1.6 (a) and (b)(1). Rule 1.6 is a discretionary rule, which does not affect the validity of the attorney-client privilege. As stated in the note on "Scope" in the Rules of Professional Conduct:

> These Rules are not intended to govern of affect judicial applications of either the attorney-client privilege or work product privilege. . . The attorney-client privilege is that of the client and not of the lawyer. The fact that in exceptional circumstances the lawyer under the Rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client privilege and work product privilege.

M.R.P.C. note on Scope (found after the Preamble). Thus, it is clear that the considerations of Rule 1.6 are not "countervailing" in any way to Shorter's interests protected by the attorney-client privilege.

The purpose of the attorney-client privilege (Rule 502) is "to encourage clients to make full disclosure to their attorneys." *Upjohn*, 499 U.S. at 390 (quoting *Fisher v. United States*, 425 U.S. 391, 403, 96 S.Ct. 1569, 1577, (1976)). Such full disclosure between a client and his or her attorney "can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." *Id.* (quoting *Hunt v. Blackburn*, 128 U.S. 464, 470 9 S.Ct. 125, 127 (U.S. 1888)). Thus, the considerations underlying Rule 502 actually protect against the admission of the communication at issue and support the suppression of client confidences; they do not run counter to the admission of such communicaltions (as the trial court impliedly held). Accordingly, it is clear that the trial court's reasoning was confused and inherently wrong. The reasons given by the trial court for admitting Baker's 911 tape show that an incorrect legal standard was applied and essentially no consideration was given to the relevant considerations implicated by the issue. The admission of Baker's 911 tape should not be affirmed on such flawed reasoning and in the absence of a ruling based on the relevant legal standard. Because, Baker's 911 tape was the only evidence of any significant weight tending to establish deliberate design, its admission was severely prejudicial to Shorter's case. Therefore, the trial erred in admitting Baker's 911 tape, and Shorter is entitled to a new trial.

C. The communication at issue was confidential and protected by the attorney-client privilege.

To be thorough, Shorter notes that the record establishes that the communication was confidential and protected by the privilege. A confidential communication is one "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the

rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." Miss. R. Evid. 502(a)(5). "The test for confidentiality is intent." M.R.E. 502 cmt. "[T]he privilege relates to and covers all information regarding the client received by the attorney in his professional capacity and in the course of his representation of the client." *Jackson Medical Clinic for Women, P.A. v. Moore*, 836 So. 2d 767, 771 (Miss. 2003) (quoting *Barnes*, 460 So. 2d at 131)). Communications need not "contain purely legal analysis or advice to be privileged." *Williamson v. Edmonds*, 880 So. 2d 310, 319 (¶23) (Miss. 2004) (quoting *Dunn v. State Farm Fire & Cas. Co.*, 927 F.2d 869, 875 (5th Cir. 1991)). "Instead, if a communication between a lawyer and client would facilitate the rendition of legal services or advice, the communication is privileged." *Id.* Further, and most significantly, the attorney-client privilege protects communications made while *seeking* or rendering legal services. *See Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677 (1981).

At the time of the communication, Baker was representing Shorter in divorce matters. Although, the communication did not relate to the divorce, the communication is most reasonably interpreted as an attempt by Shorter to seek to extend Baker's services to a possible homicide case as well as the divorce matter (or to inform Baker that his services may be soon be needed in connection with a shooting). Because communications made while seeking to procure legal services are protected, *Upjohn*, 449 U.S. at 389, the communication in Baker's 911 tape was a confidential communication protected by the attorney-client privilege.

C. The communication at issue does not fall within "the crime-fraud exception" to the attorney-client privilege.

It should also be pointed out that the communication in Baker's 911 tape does not fall within "the crime-fraud exception" to the attorney-client privilege. The "crime fraud exception" is addressed in Rule 502(d)(1), which provides that the attorney-client privilege does not exist "[i]f the

services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have know to be a crime or fraud." M.R.E 502(d)(1).

As stated above, the most reasonable interpretation of the purpose of Shorter's communication was simply to inform Baker that his services may be needed in more than just the divorce. There is simply no evidence to show that Shorter sought Baker's advice to aid him in the planning or carrying out of the shooting, and there is likewise no evidence that Baker gave any such advise. Accordingly, this Court should not find Baker's 911 tape admissible under the crime-fraud exception.

II. THE TRIAL COURT ERRED IN ADMITTING THE 911 CALL OF SHORTER'S WIFE, ANGELIQUE.

Prior to trial, Shorter filed a motion in limine to exclude any testimony of his wife, Angelique, including a tape-recorded 911 call that she made after Boutwell was shot. (C.P. 43-44). In the 911 call, Angelique told the operator (among other things) that Boutwell had been shot by Shorter, and Boutwell was dead. (Ex. S-25). The trial court ruled that Angelique's 911 tape could be played to the jury; the trial court's reasoning is unclear. (Tr. 45-46). For the reasons explained below, the trial court's decision to admit Angelique's 911 tape was error.

A. Angelique was incompetent, under Rule 601(a), to act as a witness against Shorter.

Mississippi Rule of Evidence 601(a) provides that "[i]n all instances where one spouse is a party litigant the other spouse shall not be competent as a witness without the consent of both, except as provided in Rule 601(a)(1) or Rule 601(a)(2)." M.R.E. 601(a). "The Mississippi Supreme Court has consistently held that it is reversible error for one spouse to testify against the other

without the other's consent." *Martin v. State*, 773 So. 2d 415 (Miss. Ct. App. 2000) (citing *e.g.*, *Wallace v. State*, 254 Miss. 944, 183 So. 2d 525, 526 (1966)).

B. Angelique's 911 call was testimonial in nature; therefore, its admission violated Shorter's Sixth Amendment right of confrontation.

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him." U.S. Const. Amend. VI. In *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004), the United States Supreme Court held that a defendant's right to confront the witnesses against him or her prohibits the admission of testimonial out-of-court statements unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. *Crawford*, 541 U.S. at 54, 124 S.Ct. at 1365-66. In *Crawford* the Court declined to comprehensively define "testimonial," and held narrowly that "[s]tatements taken by police officers in the course of interrogations are [] testimonial under even a narrow standard [of what constitutes a "testimonial" statement]. *Id.* at 52-53, 68, 124 S.Ct. 1354, 1374.

Later, in *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266 (2006), the Court was presented with a situation similar to the instant case. In *Davis*, the defendant's girlfriend called 911 during a domestic dispute. *Davis*, 547, U.S. at 817. The 911 operator asked the girlfriend a number of questions including the defendant's name. *Id.* Later in the conversation, the girlfriend told the 911 operator that the defendant had "just run out the door," and driven away. *Id.* The operator then further questioned the girlfriend about the defendant and the incident. *Id.* At trial, a portion of the 911 tape was played to the jury, including the girlfriend's early identification of the defendant during the incident. *Id.* at 819.

On cert, the United States Supreme Court expounded on the definition of "testimonial," stating as follows:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. at 822, 126 S.Ct. at 2273-74. The Court explained that statements may be deemed "testimonial" even in the absence of police interrogation. *See Id.* at 822, 126 S.Ct. 2274, Fn. 1. ("Our holding refers to interrogations . . . This is not to imply, however, that statements made in the absence of any interrogation are necessarily nontestimonial."). To this end (and particularly relevant to this case), the Court further explained that questioning by a 911 operator is considered police interrogation. *See Id.* at 823, 126 S.Ct. 2274, fn. 2.[1]

The Court in *Davis* considered the following factors to determine if the statements there at issue were testimonial: (1) whether the witness was describing past events current circumstances, (2) whether the statements were given to "resolve a present emergency" or "simply to learn (as in *Crawford*) what had happened in the past," and (3) the degree of formality in the circumstances of the giving of the statement. *Id.* at 826-27. The Court ultimately affirmed the trial court's decision to admit the girlfriend's statement of identification on the 911 tape that occurred while she was being attacked. *Id.* at 828-29. However, in so doing, the Court stated:

> This is not to say that a conversation which begins as an interrogation to determine the need for emergency assistance cannot, as the Indiana Supreme Court put it, "evolve into testimonial statements," 829 N.E.2d, at 457, once that purpose has been

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[1] On this point, the Court stated specifically:

> If 911 operators are not themselves law enforcement officers, they may at least be agents of law enforcement when they conduct interrogations of 911 callers. For purposes of this opinion (and without deciding the point), we consider their acts to be acts of the police.
>
> *Davis*, at 823, 126 S.Ct. 2274, fn. 2.

> achieved. In this case, for example, after the operator gained the information needed to address the exigency of the moment, the emergency appears to have ended (when Davis drove away from the premises).

Id. at 828.

Thus, under the Court's reasoning in Davis, statements made in response to 911 questioning are testimonial once the emergency has ended, i.e., "when the circumstances objectively indicate that there is no such ongoing emergency. . . ." *Id.* at 822. For at this point, the witness is describing past events and ,thus, providing information unnessesary to resolve a present emergency or threat.

In the instant case, it is clear from Angelique's 911 tape, that the shooting had already occurred. (See. Ex. S-25). She stated that it had already happened and she said that Boutwell was dead. (*Id.*). Further, Angelique told the operator that Shorter was not a threat to anyone but Boutwell, and he was standing outside. (*Id.*). Unlike the statements in *Davis* (made while girlfriend was being attacked), Angelique was describing past events; at the time she called 911, the emergency had ended and there no longer existed a threat of harm to anyone. Accordingly, the statements on the 911 tape (specifically, the statement of identification) were testimonial in nature. Consequently, the 911 tape's admission violated Shorter's right of confrontation, and Shorter is entitled to a new trial.

II. THE TRIAL COURT ERRED IN REFUSING INSTRUCTION D-1, A MANSLAUGHTER INSTRUCTION.

Thno evidence regarding what happened at Boutwell's house. There was, however, evidence that, a short time before the shooting, Johnny was so upset over the thought of his wife cheating on him that he was visibly upset: "I could tell it was tearing him to pieces." (Tr.). Nevertheless, the jury did not have a chance to consider whether Johnny shot Boutwell in the heat-of-passion because the trial judge refused to give an instruction on manslaughter.

"A criminal defendant is entitled to a lesser offense instruction where there is an evidentiary basis for it in the record." *McGowan v. State*, 541 So.2d 1027, 1028-29 (Miss.1989). The evidence is viewed "in the light most favorable to the accused[,]" in whose favor all reasonable favorable inferences are drawn. *Mease v. State*, 539 So. 2d 1324, 1330 (Miss.1989) (quoting *Harper v. State*, 478 So. 2d 1017, 1021 (Miss.1985)). "[A] lesser-included instruction should be given where the evidence is such that a reasonable jury 'could find the defendant not guilty of the principal offense charged in the indictment, yet guilty of the lesser-included offense.'" *Bright v. State*, 986 So. 2d 1042, 1048 (¶21) (Miss. Ct. App. 2008) (quoting *Monroe v. State*, 515 So. 2d 860, 863 (Miss.1987)).

In the instant case, the evidence viewed in the light most favorable to Shorter, supported an instruction on heat-of-passion manslaughter. Heat-of-passion manslaughter is addressed in Mississippi Code Annotated section 97-3-35, which provides that "[t]he killing of a human being, without malice, in the heat of passion, but in a cruel or unusual manner, or by the use of a dangerous weapon, without authority of law, and not in necessary self-defense, shall be manslaughter." Miss. Code Ann. § 97-3-35 (Re. 2006). Heat-of-passion is defined as:

> [A] state of violent and uncontrollable rage engendered by a blow or certain other provocation given, which will reduce a homicide from the grade of murder to that of manslaughter. Passion or anger suddenly aroused at the time by some immediate and reasonable provocation, by words or acts of one at the time. The term includes an emotional state of mind characterized by anger, rage, hatred, furious resentment or terror.

Neese v. State, 993 So. 2d 837, (¶31) (Miss. Ct. App. 2008) (quoting *Buchanan v. State*, 567 So. 2d 194, 197 (Miss. 1990). This Court has acknowledged that "a homicide may result from a wilful act or deliberate design without being murder if the killing occurs in necessary self-defense or results from an act committed in the heat of passion without malice aforethought." *Bradford v. State*, 910 So. 2d 1232, 1233 (¶7) (Miss. Ct. App. 2005). Thus, the critical inquiry is whether the evidence, considered in the light most favorable to Shorter, supported an instruction on manslaughter.

First, this case involves an emotionally-charged situation–a husband, his wife, and the man she left him to live with, and it is undeniable that Shorter furiously resented Boutwell under the circumstances. Also, the evidence clearly established that, just hours before the shooting, Shorter was very, very upset; Beckman testified: "I could tell it was tearing him to pieces." (Tr.). While there is little evidence about the events immediately preceding the shooting, Angelique told the 911 operator that the shooting arose out of an argument. (Ex. S-25). Also, one bullet entered Boutwell's body under his armpit. (Tr. 308). To this end, Dr. Hayne admitted that his arm would have to have been "raised or moved to the back." (Tr. 308). Thus it is a reasonable inference that as Shorter and Boutwell argued, Boutwell attempted to attack Shorter. Shorter did not even remember everything about the incident. (Tr. 337). Further, Shorter peacefully confronted Beckman about sleeping with his wife on the evening before the shooting. (Tr. 238). Thus it is reasonable to infer that Shorter peacefully confronted Boutwell about the same subject, and the encounter escalated to a fight and a shooting.

In sum, the evidence, viewed in the light most favorable to Shorter, showed that Shorter was very upset over his wife leaving him and moving in with Boutwell. Shorter went to Boutwell's house, where the two got into an argument about the situation. Boutwell began to attack Shorter (or the two began to engage in a physical altercation), and Shorter became so enraged that he shot Boutwell out of passion rather than reason, and could not even remember everything about the incident.

In light of this evidence, a manslaughter instruction was warranted, and the trial court erred in refusing a manslaughter instruction. Accordingly, Shorter is entitled to a new trial.

IV. THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE, WHICH SHOWED THAT SHORTER WAS GUILTY, AT MOST, OF MANSLAUGHTER.

In reviewing a challenge to the weight of the evidence, the verdict will be only be disturbed "when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." *Bush v. State*, 895 So. 2d 836, 844 (Miss. 2005). The evidence is viewed in the light most favorable to the verdict. *Id.* (citing *Herring v. State*, 691 So. 2d 948, 957 (Miss.1997)). This Court "sits as a hypothetical thirteenth juror." *Lamar v. State*, 983 So. 2d 364, 367 (¶5) (Miss. Ct. App. 2008) (citing *Bush*, 895 So. 2d at 844 (¶18)). "If, in this position, the Court disagrees with the verdict of the jury, 'the proper remedy is to grant a new trial.'" *Id.*

The evidence showed that no gunshot residue was found on Shorter. A residue test was not performed on Angelique. (Tr. 212-13). Thus a reasonable doubt exists that Angelique shot Boutwell. Further, as discussed in the issue above, Angelique told the 911 operator that the shooting arose out of an argument, and one bullet entered Boutwell's body under his armpit. (Tr. Thus, the weight of the evidence establishes that Shorter shot Boutwell in the heat-of-passion and is guilty, at most, of manslaughter.

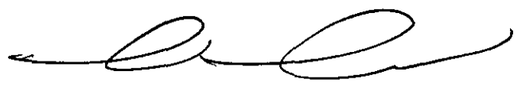
Accordingly, the trial court erred in denying his motion for a new trial.

CONCLUSION

In light of the foregoing arguments and the authority cited therein, together with any plain error this Court may notice, Shorter respectfully submits that he is entitled to a new trial, and requests this honorable Court to grant a new trial.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

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CERTIFICATE OF SERVICE

I, Hunter N Aikens, Counsel for Johnny Charles Shorter, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

Honorable Samac S. Richardson
Circuit Court Judge
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Honorable Michael Guest
District Attorney, District 20
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Honorable Jim Hood
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This the 5th day of January, 2009.

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