IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

RONALD HUSBAND — APPELLANT

V. — NO. 2008-KA-0290-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

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

1. State of Mississippi
2. Ronald Husband, Appellant
3. Honorable Cono Caranna, District Attorney
4. Honorable Roger T. Clark, Circuit Court Judge

This the 21st day of July, 2008.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

RONALD HUSBAND **APPELLANT**

V. **NO. 2008-KA-0290-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF OF THE APPELLANT

STATEMENT OF INCARCERATION

Ronald Husband, the Appellant in this case, is presently incarcerated in the Mississippi Department of Corrections.

STATEMENT OF JURISDICTION

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

STATEMENT OF THE CASE

This appeal proceeds form the Circuit Court of Stone County, Mississippi, a judgment of conviction on two counts of capital murder against Ronald Husband, following a trial on January 14-21, 2008, honorable Roger T. Clark, Circuit Judge, presiding. Mr. Husband was subsequently sentenced to life imprisonment in the custody of the Mississippi Department of Corrections under **Miss. Code Ann. § 99-19-81.**

FACTS

On November 27, 2005, operators at the Stone County 911 office received a "hang up" phone call. (T. 722). When an operator called back, she recognized the voice of Francis Arnold

(Arnold). (T. 723). Sensing a domestic disturbance, the operator dispatched officers to Arnold's residence. (T. 723).

According to Arnold's testimony at trial, when she came home, Ronald Husband (Husband), the Appellant, was at her house. (T. 753). Arnold testified that Husband visited the house almost every day and was friends with her family. (T. 753). Arnold testified that as soon as Husband entered the house that night, he began to strike her. (T. 755). Arnold testified that she dialed 911 (T. 756).

According to her testimony, the police arrived at the door, and asked Husband to go with them and there was struggle. (T. 757). Two officers and Husband struggled on the front porch and into the yard. (T. 761). At some point during the incident, mace was used by the police officers. (T. 762). According to her testimony, Arnold saw a gun in Husband's hand, turned and ran inside. (T. 763). While inside she heard a gun shot, ran through the house, exited through the back window and heard more shots. (T. 764). She testified she heard more gun shots when she was one street over, running from the scene. (T. 792-93). Arnold later made it back to the scene of the incident, where police told her to go to the police station. (T. 767). She was later brought to the police station, where she provided police with Husband's name. (T. 768). At approximately 8:00 that evening, Mississippi Highway Patrol Trooper Dejuan Jamieson (Jamieson) received a call that Wiggins police officers had been sent on a call and no contact had been made with them in quite some time. (T. 823). When Trooper Jamieson arrived at the scene, he saw two officers lying in the front yard of the residence. (T. 824-25). When Trooper Jamieson called out to the officers, he received no response. (T. 826). Trooper Jamieson then made a call for assistance. (T. 826). Trooper Jamieson, along with other officers, drove a vehicle onto the scene and removed the bodies of the officers, fearing that there might be an imminent

threat of harm. (T. 827).

Trooper Jamieson eventually went to Forrest County, where he was met by members of ths Forrest County Sheriff's Department. (T. 831) There, they arrested Husband. (T. 832).

Husband was subsequently indicted for the two counts of capital murder. (C.P. 20-21, R.E. 15-16). Husband was tried, and, after deliberation, a jury returned a guilty verdict against him on both counts. (C.P. 848, R.E.21). After a jury could not unanimously sentence him to death, Husband was sentenced to life in the custody of the Mississippi Department of corrections without the eligibility for parole. (C.P. 851, R.E. 20).

On February 1, 2008, Husband filed a Motion for Judgment Not Withstanding the Verdict. (C.P. 866-70, R.E.22-26). The motion was denied by the trial court on February 13, 2008. (C.P. 1803, R.E. 27). Feeling aggrieved by the verdict of the jury and the sentence of the trial court, the Appellant filed a notice of appeal. (C.P. 1807, R.E. 28).

SUMMARY OF THE ARGUMENT

The trial court erred when it failed to grant the Appellant his motion for a new trial. The weight of the evidence was such that the Appellant should have never been convicted. The State's case was purely circumstantial. There was no physical or forensic evidence tying the defendant to the crime of capital murder. Two jurors ultimately express doubt as to the Appellant's guilt of capital murder.

Secondly, the trial court committed reversible error when it failed to grant the Appellant a manslaughter instruction. The evidence warranted and justified the lesser-included offense instruction. The failure of the trial court to grant said instruction deprived the Appellant of a fundamental right.

Lastly, the trial court's jury instructions misstated the law in a manner rendering them

ultimately confusing to the jury. The instructions included an element that, under one line of Mississippi Supreme Court case law, is not required under the capital murder of a peace officer statute. The instruction did not track the language of the indictment. The failure to adequately instruct the jury deprived the Appellant of his fundamental right to a fair trial.

ARGUMENT

ISSUE ONE: WHETHER THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT APPELLANT HIS MOTION FOR A NEW TRIAL ON THE GROUNDS THAT THE WEIGHT OF THE EVIDENCE WAS SUCH THAT THE APPELLANT SHOULD NOT HAVE BEEN CONVICTED.

i. Standard of Review

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 determining the issue of the weight of the evidence, this honorable Court must consider: (1) That two of the thirteen jurors ultimately expressing their views as to the guilt of the Appellant concluded, ultimately, that he was not guilty of the crime that he was charged with. (2) That the physical and forensic evidence did not support the verdict.

ii. Two of jurors seated ultimately expressed their disbelief as to the guilt of the Appellant.

During the jury's initial deliberation during the guilt stage, the following letter was sent to the trial court:

"What happens if we are all unable to come to the same conclusion?

Candace Andrews
Tricia Marascalco"

(C.P. 1800, R.E. 17).

The trial court instructed the jury to continue its deliberations and retain the note for the record. (C.P. 1800, R.E. 17). Eventually, after more deliberation, the jury returned a verdict of guilt against the Appellant.

Two days later, when sentencing proceedings were set to begin, the trial court received the following note:

> "I was pressured into making the decision that I made. I do not feel that Ronald Husband is guilty. We the jurors listened to the tape which was suppose (sic) to be our evidence. To just hear his voice. But we the jurors have never heard him speak. So how can we say his voice on the tape made him guilty? We can't. We convicted Ronald Husband by his voice on tape which we the jurors never heard. A mistake was made. I am emotionally sick behind this is a big mistake.
>
> Please take me off
> the case?
>
> If this case can't be dropped because of my mistake, it will be too much for me to handle.
>
> Thank you!
>
> P.S. we all assumed it was Ronald Husband. Big mistake. We never heard his voice (unreadable)"

(C.P. 1801, R.E. 19).

After an *in camera* questioning by the trial court, the juror was eventually replaced with an alternate for the purposes of the sentencing hearing. However, the alternate sent the following letter, quoted verbatim, to the trial court,

> "I Rosemary Ruffin do not feel that Ronald Humand is guity. Therefore I can't sentence him. The juror base guity on a voice they never here. I feel that this question should have been ask to Mre Aronald. Have she every had sex with Mr. Humand."

(C.P. 1802, R.E. 18).

While, the notes presented by the jurors, their examination, and their concerns cannot be used, under the Mississippi Rules of Evidence, to impeach the verdict, they do speak volumes concerning the failure of the State to secure a verdict that is soundly based on the evidence.[1]

If the court is to sit as the "thirteenth juror" in cases claiming the verdict is against the overwhelming weight of the evidence, it should be noted that, in the instant case, there was already a thirteenth juror. The alternate who replaced a juror for the purposes of sentencing did not ultimately agree with conclusion reached by her fellow jurors during the guilt phase of the proceedings.

iii. The physical and forensic evidence presented at trial fail show that the verdict is sound.

Jimmy Perdue (Perdue), an expert in latent tire prints from the Mississippi Crime Laboratory, testified that the tire castings made from the scene of the incident did not match any known impressions. (T. 1267). This is further evidence showing that the verdict was against the overwhelming weight of the evidence.

David Whitehead (Whitehead), an expert in glass identification and comparison from the

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1. **Mississippi Rule of Evidence** 606(b) governs the method by which a jury verdict may be impeached. **Rule 606(b)** provides,

> **(b) Inquiry Into Validity of Verdict or Indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberation or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

Miss. R. Evid. 606(b).

While the Appellant questions the appropriateness of **Rule 606(b)** in instances in which a juror's doubts as to his or her's vote occurs in such a short temporal proximity as in the case *sub judice*, it is nonetheless the law in this State. For that reason, the Appellant has chosen to address the jurors' concerns as evidence that the verdict is against the overwhelming weight of the evidence.

Mississippi Crime Laboratory, testified that glass taken from the hoody and blue jeans of the defendant did not match the broken glass from the entryway of the home. (T. 1281). Whitehead further testified that the glass taken from the floorboard of the Appellant's vehicle was not consistent with the known glass from the residence. (T. 1281). The lack of a consistent forensic link is further evidence that the verdict was against the overwhelming weight of the evidence.

iv. Conclusion.

As indicated by the letters sent to the judge by members of the jury, there was significant doubt among those actually serving on the jury whether the Appellant was guilty of the crime of capital murder. Furthermore, there was no match between the tire prints found at the scene and known tire impressions. Moreover, the State was unable to link that glass found in the Appellant's hooded sweatshirt or the Appellant's vehicle to the glass broken during the incident. Therefore, the verdict cast against the Appellant at trial was contrary to the overwhelming weight of the evidence and therefore warrants a new trial.

ISSUE TWO: WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO GIVE THE LESSER-INCLUDED OFFENSE OF MANSLAUGHTER INSTRUCTION SUBMITTED BY TRIAL COUNSEL.

i. Standard of Review

"[I]f the [jury] instructions fairly announce the law of the case and create no injustice, no reversible error will be found." ***Williams v. State***, 803 So. 2d 1159, 1161 (Miss. 2001) (citing ***Hickombottom v. State***, 409 So. 2d 1337, 1339 (Miss. 1982)). "If all instructions taken as a whole fairly, but not necessarily perfectly, announce the applicable rules of law, no error results." ***Milano v. State***, 790 So. 2d 179, 184 (Miss. 2001).

"A defendant is entitled to have jury instructions given which present his theory of a case, however, this entitlement is limited in that the court may refuse an instruction which incorrectly

states the law, or is without foundation in evidence." ***Howell v. State***, 860 So. 2d 704, 745 (Miss. 2003) (citing ***Heidel v. State***, 587 So. 2d 835, 842 (Miss. 1991)).

ii. Criminal defendants have a fundamental right to present their theory of the case.

The Mississippi Supreme Court has long held that, no matter how minimal the evidence, a defendant is entitled to present its theory of the case to the jury. "Every accused has a fundamental right to have her theory of the case presented to a jury, even if the evidence is minimal. ***Chinn v. State*** 958 So. 2d 1223, (Miss. 2007). The Court has further held that;

> "[i]t is, of course, an absolute right of an accused to have every lawful defense he asserts, even though based upon meager evidence and highly unlikely, to be submitted as a factual issue to be determined by the jury under proper instruction of the court."

Chinn, 958 So. 2d at 1225 (citations omitted).

It is essential to know that the right of a defendant to present its his theory of the case is a fundamental right, because, as the Mississippi Supreme Court has held, "This court will never permit an accused to be denied this fundamental right." ***O'Bryant v. State***, 530 S0. 2d 129, 133 (Miss. 1998); *See also* ***Lancaster v. State***, 472 So. 2d 363 (Miss. 1985); ***Pierce v. State***, 289 So. 2d 901 (Miss. 1974).

iii. A manslaughter instruction was appropriate.[2]

Defense counsel proposed jury instructions 9-5 and 9-6, manslaughter instructions for both victims. They read;

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2. The Appellant was sentenced as a habitual offender; therefore, the punishment he would have received if convicted for manslaughter would be life without the eligibility of parole. However, the Appellant contends that there is not absence of prejudice in light of that sentence. One's crime undoubtedly has an effect on the treatment and options afforded while in custody of the Mississippi Department of Corrections, whether it involves placement in particular facilities, eligibility for trustee status or work programs, etc. Therefore, though the Appellant would have had the same sentences would arise from both convictions, the failure to grant a manslaughter instruction prejudiced the Appellant.

> If you find from the evidence in this case that Ronald Husband is not guilty of the crime of capital murder, you may continue with your deliberations to consider the elements of the lesser crime of manslaughter.
>
> If you find from the evidence in this case beyond a reasonable doubt that on or about November 27, 2005 in Stone County, Mississippi, Ronald Husband did kill Brandon Breland/Odell Fite, a human being, without malice, in the heat of passion, by use of a dangerous weapon, and not in necessary self defense then you shall find the defendant guilty of the crime of manslaughter.
>
> If the prosecution has failed to prove any one or more of the above listed elements beyond a reasonable doubt, then you shall find Ronald Husband not guilty of manslaughter.

(C.P. 1782, R.E. 32).

Defense counsel, in arguing for the instruction, presented to the court that "heat of passion manslaughter is a lesser included offense to a capital murder requiring intent." (T. 1316). Defense counsel then presented argument that such an instruction was supported by the evidence;

> "This is simply an evidentiary matter for the jury, the 911 agitation. There is actually if the jury were to believe ti was Mr. Husband on the tape, the very last utterance other than police traffic and static is a loud emotional crying out of the name Francis, Francis, and I think the jury might be entitled to infer from that that if they decide that the person on the tape were Mr. Husband, that that is an expression of a heat of passion that has – that persisted from the confrontation on the tape with Ms. Arnold to whatever ensued after that.
>
> That is one inference that could be drawn from the evidence, and I will tell you -- well, I mean, this is an instruction we are requesting, and we believe it's supported by the evidence."

(T. 1316-17, R.E. 33-34).

The State argued that the 911 call was not enough evidence to support heat of passion and that the agitation did not rise to the level of heat of passion. (T. 1318, R.E. 35). The Court then refused the instruction. (T. 1318, R.E. 35).

Trial counsel, because of the Court's ruling, made an *ore tenus* request to submit and be granted a catch-all manslaughter instruction. (T. 1319, R.E. 36). This request was denied by the

trial court. (T. 1319, R.E. 36).

Mississippi's capital murder of a peace officer statute, **Miss. Code Ann. § 97-3-19(2)(a)**, provides, in pertinent part;

> (1) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:
>
> (a) Murder which is perpetrated by killing a peace officer or fireman while such officer or fireman is acting in his official capacity or by reason of an act performed in his official capacity, and with knowledge that the victim was a peace officer or fireman...

Miss. Code. Ann. § 97-3-19(2)(a).

As noted by the Mississippi Supreme Court in ***Mease v. State***, 539 So. 2d 1324, 1325 (Miss. 1989), the word "murder" within § 97-3-19(2)(a) takes its meaning from **Miss Code Ann. § 97-3-19(1)(a)** which reads:

> (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.

Miss. Code Ann. §97-3-19(1)(a). *See, **Mease,*** 539 So. 2d at 1325 FN1[3]

Under common law, the offense of felony murder, the unintentional killing in the perpetration of or in an attempt to perpetrate a felony, was created. Mississippi has adopted a statute which provides that a homicide, without intent, and in the course of a non-enumerated felony, is manslaughter. **Miss. Code Ann. § 97-3-27** states:

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3. There appears to be conflicting Supreme Court case law regarding whether malice aforethought is required under the capital murder of a peace officer statute. In ***Mease***, the court indicates that the word "murder" in **§ 97-3-19(2)(a)** takes its meaning from the deliberate design in **§ 97-3-19(1)(a)**. "Deliberate design" has been equated to "malice aforethough." ***Gossett v. State***, 660 So. 2d 1285, 1293 (quoting ***Windham v. State***, 520 So. 2d 123, 127 (Miss. 1987)). However, the Mississippi Supreme Court has ruled that there is no malice aforethought requirement for capital murder under **§ 97-3-19(2)(a)**. *See, **Stevenson v. State***, 733 So. 2d 177 (Miss. 1998). Entitled to alternative arguments, the Appellant is proceeding with arguments under both conflicting Supreme Court holdings.

> The killing of a human being without malice, by the act, procurement, or culpable negligence of another, while such other is engaged in the perpetration of any felony, except rape, burglary, arson, or robbery, or while such other is attempting to commit any felony besides such as are above enumerated and excepted, shall be manslaughter.

Miss. Code Ann. § 97-3-27.

The ***Mease*** Court concluded that the defendant, who killed a peace officer, was undoubtedly guilty of at least aggravated assault, but, because aggravated assault was a crime other than rape, burglary, arson or robbery, it warranted a manslaughter instruction. ***Mease***, 539 So. 2d at 1329.

The Mississippi Supreme Court has consistently acknowledged that a defendant on trial for the capital murder of a peace officer is entitled to a manslaughter instruction, if warranted by the evidence. ***Lanier v. State***, 450 So. 2d 69, 81 (Miss. 1984). In ***Lanier***, the court held that a jury might find manslaughter if it concluded that the defendant used his weapon "in response to a shot first fired by an officer in a tense, sudden confrontation arising without design of either party, thereby reducing the offense to manslaughter with a corresponding reduction in sentence." ***Id.***

The Supreme Court has gone further, however, in its analysis of the appropriateness of a manslaughter instruction in capital cases involving the death of a peace officer. In ***Mease v. State***, the court reversed a conviction under **97-3-19(2)(a)** because of the failure of the trial court to properly instruct the jury as to manslaughter. ***Mease***, 539 So. 2d at 1336. In ***Mease***, there was no indication of a shot fired by an officer in any sort of confrontation. Rather, the defendant got into a struggle with a peace officer in which the defendant pulled a gun. ***Id.*** at 1326. After a struggle with the peace officer, another officer came from behind and struck the defendant in the head with the but of his pistol. ***Id.*** During the course of the struggle, the gun held by the

defendant discharged twice, killing the peace officer. ***Id.***

Under the facts of the case *sub judice* there is ample evidence that a manslaughter instruction was appropriate. As was testified to, by Arnold, there were several gunshots fired. (T.764). Yet, as indicated by the pathologist, there were four (4) bullet wounds on the officers. (T.1214-15, 1221-22). Furthermore, there is ample evidence that the tragic deaths of the officers was a result of a sudden confrontation. As indicated by Arnold's testimony, there was a struggle between the Appellant and the officers in which mace was sprayed. (T. 762). All of these lean towards the appropriateness of a manslaughter instruction.

As was testified to by Bryon McIntire (McIntire), the State's expert witness in ballistics, the gun recovered in this case could have been loaded with five additional rounds. (T. 1145). This was treated by the State, in its closing argument as being consistent with its theory of the case. (T.1353). Being that there were four wounds to the officers, and there were five bullets missing from the gun, it is at least conceivable that there was a shot fired first by the officers. Moreover, this is consistent with at least one of the stories regarding the gunshots told by Arnold. (T. 767).

Moreover, as noted by the testimony of Jennifer Harris (Harris), the 911 operator, she could hear an argument in the background, which caused her to dispatch officers fo the scene. (T. 727). As noted in the 911 call, the last voice that was heard on the transcript of the 911, a voice was heard yelling the name "Francis" repeatedly. (Exib. S-1). Harris testified that she believed this was after the officers had arrived. (T. 738). It is entirely conceivable that the heated nature of the argument carried over into the encounter with the police officers. This is further basis for the appropriateness of a manslaughter instruction.

Furthermore, because this was a circumstantial evidence case, there are inferences that can be drawn.[4] There is no reason why, given the evidence presented above, it could not be inferred that the evidence presented itself in a manner sufficient to justify a manslaughter instruction.

iv. Conclusion.

In capital murder of a peace officer cases, manslaughter is a lesser included offense. The evidence presented at trial strongly supports presenting a manslaughter instruction to the jury. Because there was not a manslaughter instruction given to the jury, the trial court committed reversible error.

ISSUE THREE: WHETHER JURY INSTRUCTION S-2A AND S-3A MISSTATED THE LAW IN A MANNER RENDERING THEM ULTIMATELY CONFUSING TO THE JURY, RESULTING IN A VIOLATION OF THE APPELLANT'S FUNDAMENTAL DUE PROCESS RIGHTS.

i. Standard of Review.

"[I]f the [jury] instructions fairly announce the law of the case and create no injustice, no reversible error will be found." ***Williams v. State***, 803 So. 2d 1159, 1161 (Miss. 2001) (citing ***Hickombottom v. State***, 409 So. 2d 1337, 1339 (Miss. 1982)). "If all instructions taken as a whole fairly, but not necessarily perfectly, announce the applicable rules of law, no error results." ***Milano v. State***, 790 So. 2d 179, 184 (Miss. 2001).

ii. Jury instructions S-2A and S-3A misrepresented the law and confused the jury.

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4. Defense counsel submitted, and the trial court gave the following circumstantial evidence instruction to the jury; The Court instructs the jury that if the prosecution has resorted to any degree, to the use of circumstantial evidence to maintain its theory of guilt of Ronald Husband then the evidence for the prosecution and every part and parcel of it not only must be so strong as to establish guilt beyond a reasonable doubt, but must also be so strong as to exclude every other reasonable hypothesis or supposition, except that of guilt. (CP. 1652, R.E. 31).

The State offered, and the trial court gave, jury instructions S-2A and S-3A which provided the purported elements of capital murder of a peace officer. They provided;

> The Court instructs the jury that the defendant, RONALD HUSBAND, has been charged in Count I/II of the indictment with the crime of Capital Murder. If you find from the evidence in this case beyond a reasonable doubt that:
>
> (1) On or about November 27, 2005, in Stone County, Mississippi,
>
> (2) the defendant, Ronald Husband, did wilfully, unlawfully, feloniously and without authority of law kill and murder Brandon Breland/Odell Fite, a human being,
>
> (3) with deliberate design to effect the death of Brandon Breland/Odell Fite,
>
> (4) and with the knowledge that Brandon Breland/Odel Fite was a peace officer, acting within the scope of his official capacity with the Wiggins Police Department
>
> then you shall find the defendant, RONALD HUSBAND, guilty of Capital Murder in Count I/II.
>
> If the State has failed to prove any one or more of these essential elements beyond a reasonable doubt, then you shall find the defendant, not guilty of Capital Murder in Count I/II.

(C.P. 1643/1650, R.E. 29/30).

Under one line of Mississippi Supreme Court case law it has been held that, with regard to **Miss. Code Ann. § 97-3-19(2)(a),** there is no necessity for the State to show malice aforethought in order to obtain a conviction of capital murder against a defendant. As the Mississippi Supreme Court has noted;

> "This statute reflects the [S]tate's special interest in protecting law enforcement officers. To bring a case within the statute, the evidence must reflect that the victim was a peace officer acting in the course of his official duties and that, at the time of the killing, the defendant knew or should have known this fact."

Hansen v. State, 592 So. 2d 114, 146 (Miss. 1991). *See, also,* ***Stevenson v. State***, 733 So. 2d 177, 186 (Miss. 1991)(holding that malice aforethought is not an elemental of the capital murder of a police officer).

Malice aforethough is not an element of the capital murder of a peace officer. ***Stevenson v. State***, 733 So. 2d 177 (Miss. 1998). However, as held by the Mississippi Supreme Court, "malice aforethough" is defined as the equivalent of "deliberate design." ***Gossett v. State***, 660 So. 2d 1285, 1293 (Miss. 1995) (quoting ***Windham v. State***, 520 So. 2d 123, 127 (Miss. 1987)).

The State, in its jury instructions, added an element that, according to Supreme Court precedent, is not required. This is compounded by the fact that there was never any instruction defining "deliberate design" to the jury.

"Just as the State must prove each element of the offense, the jury must be correctly and fully instructed regarding each element of the offense charged.' ***Neal v. State***, 451 So. 2d 743, 757 (Miss. 1984). The Supreme Court has further noted;

> "[i]t is axiomatic that a jury's verdict may not stand upon uncontradicted fact alone. The fact must be found via jury instructions correctly identifying the elements of the offense under the proper standards. Where the jury had incorrect or incomplete instructions regarding the law, our review task is nigh unto impossible and reversal is generally required."

Henderson v. State, 660 So. 2d 220, 222 (Miss. 1995)(citations omitted).

The Mississippi Supreme Court has previously held that "Failure to submit to the jury the essential elements of the crime is 'fundamental error.'" ***Hunter v. State***, 684 So. 2d 625, 635 (Miss. 1996)(quoting ***Screws v. United States***, 325 U.S. 91, 107 (1945)).

It should further be noted that "errors affecting fundamental rights may be excepted from procedural bars which would otherwise prohibit their consideration." ***Bevill v. State***, 669 So. 2d 14, 17 (Miss. 1996). The Mississippi Supreme court has held that the right to a legal sentence is a fundamental right, the violation of which excepts a claim from the procedural bars. ***Ivy v. State***, 741 So. 2d 601, 603 (Miss. 1999).

In ***Hunter***, the court acknowledged that there is a fundamental principle that the prosecution must prove each element of a charged crime, but "because the State has to prove each elements of the crime beyond a reasonable doubt... the State also has to ensure that the jury is properly instructed with regard to the elements of the crime." ***Id.*** at 636.

In ***Hunter***, the Court further held;

> "It is rudimentary that the jury must be instructed regarding the elements of the crime with which the defendant is charged. Therefore, even though the defendant did not present an acceptable instruction, the State was obligated to do so."

Hunter, 684 So. 2d at 636.

What the jury was left with was a nebulous and non-necessary element of the crime that undoubtedly was confusing. The end result was that the jury verdict which convicted the Appellant of murder was not the product of fundamental due process of law guaranteed by the 5th, 6th and 14th Amendments to the U. S. Constitution and Art. 3 §14 of the Constitution of the State of Mississippi.

Furthermore, the language of the instruction given to the jury did not track the language of the indictment.[5] At trial, the jury should be instructed in language that tracks the indictment. ***Richmond v. State***, 751 So. 2d 1038, 1046 (Miss. 1999). The jury instruction presented to the jury in the case *sub judice* was the functional equivalent to a *de facto* amendment to the indictment.

In ***Russell v. State***, the Mississippi Supreme Court reversed a murder conviction where a manslaughter instruction was given, but the jury was not adequately instructed as to the definition of malice aforethought. ***Russell v. State***, 789 So. 2d 779, 780 (Miss. 2001). In the instant case, the Appellant was convicted of capital murder of a police officer with an additional element of "deliberate design," which was not required under the law. As noted, the Supreme Court has equated "deliberate design" and "malice aforethought." *Sub judice*, there is no definition as to what "deliberate design" is. Compounded with the failure of the trial court to properly grant a manslaughter instruction, the jury was undoubtedly confused as to what elements it had to find in order to convict and what the elements' meanings were.

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5. The indictment against the Appellant provides, in relevant part;

> COUNT I
>
> That: RONALD HUSBAND
>
> in Stone County, Mississippi, on or about November 27, 2005,
>
> did then and there wilfully, unlawfully and feloniously kill and murder Brandon Breland, a human being, without authority of law, and with the knowledge that the said Brandon Breland was a peace officer, employed by the Wiggins Police Department, acting within the scope of his official capacity
>
> contrary to and in violation of Section 97-3-19(2)(a), Miss. Code of 1972, as amended, and against the peace and dignity of the State of Mississippi.

(C.P. 20).

The second count reads identically to first, but with Officer Fite's name substituted for Officer Breland.

iii. Conclusion.

The general rule is that jury instructions must be supported by the evidence and must provide that the jury find each element of the crime under the proper standard of proof. ***Dew v. State,*** 748 So. 2d 751 (Miss. 1999). It is the duty of the State to provide such instructions. ***Reddix v. State***, 731 So. 2d 591 (Miss. 1999). In the instant case, the Court instructed the jury that they must find element of the crime which was not required to convict – deliberate design, which, under Mississippi Supreme Court case law has been equated to "malice aforethough." As noted, malice aforethough is not required in order to convict under **§ 97-3-19(2)(a)**. The end result was a jury verdict which was in violation of the Appellant's fundamental due process rights.

CONCLUSION

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 two charges of capital 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 beyond a reasonable doubt.

CERTIFICATE OF SERVICE

I, Justin T. Cook, Counsel for Ronald Husband, 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:

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This the 21st day of July, 2008.

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