IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ISSAC JERMAINE NELSON — APPELLANT

VS. — NO. 2008-KA-0299-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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VS. **NO. 2008-KA-0299-SCT**

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BRIEF FOR THE APPELLEE

PROCEDURAL HISTORY:

On January 22, 2008, Issac Jermaine Nelson, "Nelson", was tried for the capital murder and kidnaping of Mr. Shannon Torrence before a Scott County Circuit Court jury, the Honorable Marcus D. Gordon presiding. R. 1. Nelson was found guilty of the lesser offense of murder and kidnaping. R. 349-50. He was given a life sentence and a forty year sentence in the custody of the Mississippi Department of Corrections. R.353. From that conviction he appealed to the Mississippi Supreme Court. C.P. 56.

ISSUES ON APPEAL

I.

WAS THE KIDNAPING SENTENCE EXCESSIVE?

II.

WAS DR. HAYNE QUALIFIED TO TESTIFY?

III.

WAS THERE CREDIBLE, SUBSTANTIAL EVIDENCE IN SUPPORT OF THE CONVICTIONS?

IV.

WAS NELSON'S CONFESSION ADMISSIBLE EVIDENCE?

STATEMENT OF THE FACTS

On October 25, 2007, Nelson was indicted for the kidnaping and capital murder of Mr. Shannon Lee Torrence on or about February 23, 2007 by a Scott County Grand jury. C.P. 2.

On January 22, 2008, Nelson was tried for capital murder and kidnaping before a Scott County Circuit Court jury, the Honorable Marcus D. Gordon presiding. R. 1. Scott was represented by Mr. James E. Smith. R. 1.

A suppression hearing was held on Nelson's inculpatory statements. R. 159-189. Nelson made them to law enforcement on March 2, 2007. The trial court heard testimony from Officer Steve Crotwell. Crotwell was an investigator with the Scott County Sheriff's Office. R. 152.

Mr. Crotwell spoke with Nelson on both February 28, 2007 and March 2, 2007. On both occasions, Crotwell testified that Nelson was read his **Miranda** rights. R. 161; 166. He was not promised anything or coerced in any way on these occasions. Crotwell testified that on the first occasion, Nelson denied any involvement in the murder. However, he admitted to seeing Shannon Torrance on the morning of the day he disappeared from his mother's home. R. 163.

On the second occasion, Crotwell testified that he was notified that Nelson wanted to speak to him. The following day, Crotwell arranged for Officer Danny Knight to be present. R. 164.

Officer Knight read Nelson his **Miranda** rights on this second occasion. Nelson was not promised anything or coerced in any way. Nelson admitted to understanding his rights. He never requested an attorney at any time. R. 167. Officer Crotwell was cross examined. R. 172-175.

Officer Danny Knight corroborated investigator Crotwell. R. 176-187. He was cross examined. R. 185-187. The Scott County jailer, Officer Gerald Major, also testified. He testified that Nelson requested that he be allowed to speak to investigator Crotwell. R. 188. He was subject to cross examination. R. 188.

Nelson did not testify at the suppression hearing. R. 159-189.

The defense objection to the admission of Nelson's statement was that it was allegedly the result of "duress." The trial court found that there was sufficient corroborated evidence for determining that Nelson had voluntarily and intelligently waived his right to counsel. R. 190.

State's exhibit 8 was a copy of the signed, witnessed and initialed **Miranda** waiver of rights form. It shows Nelson's signature. Nelson wrote in his own hand at the bottom of the page that: "I have requested to talk to Danny Knight and Steven Crotwell without my attorney present." This was on March 2, 2007.

State's exhibit 10 is Nelson's thirty seven page statement about the circumstances surrounding the murder of the decedent Mr. Shannon Torrance on February 23, 2007. Nelson admitted to chocking Torrance. He held him tightly from behind in a "headlock." He admitted that he was angry with Shannon but would or could not say why. Nelson stated, "He didn't do nothing to make mad, man." Exhibit 10, page 8. He and Craig McBeath had been smoking marijuana at Torrance's home. Nelson took a shower. He was ready to leave for his school, East Central. His mother had already left for work.

Nelson attacked Torrance from behind when he came out of the shower. He had him in a head lock, which cut off his breathing. Nelson allegedly decided to release him. He fell on the floor. His companion, Craig McBeath allegedly chocked him again while he was still lying on the ground. Nelson retrieved a garbage bag and duct tape. "I tied the duck tape around his face and we put him in the trunk." Exhibit 10, page 17.

The use of the duct tape was allegedly McBeath's way of being sure the victim was dead. This was to prevent him from being able to report to law enforcement the crimes just committed against him in his own home.

They found the keys to the decedent's car in the house. Nelson stated that he drove the decedent's car. This was after he and McBeth placed Torrance's body in the trunk. He admitted to driving down Midway-Odom Road. Exhibit 10, page 29.

Nelson found a wooded area. He drove into the woods on an unpaved road. There he and McBeath drug the victim's body out and dumped it naked on the ground. Exhibit 10, page 1-37. They took the car and left it at East Central School.

Later Nelson remembered that they had inadvertently left the duct tape in the trunk of the car. Exhibit 10, page 24. When they went back to get it , there were too many people in the area. So they left it in the car. Exhibit 10 page 24-25. Nelson stated that they used "a blue quilt" to set him in when they decided to dispose of Torrance's body. Exhibit 10, page 18.

The trial court found that Dr. Hayne was qualified to testify as a medical expert. R. 270-271. While the defense objected and requested to voir dire him on his qualifications, he did not make any specific objection to his qualifications. Rather he cited Judge Diaz's concurring opinion in the **Edmonds v. State**, 955 So. 2d 787 (Miss. 2007) as his reason for wanting to voir dire him about his qualifications. R. 271.

When given an opportunity to voir dire Dr. Hayne about his physical findings based on his autopsy, the defense declined. R. 272. The record reflects that Hayne was cross examined about his opinions on the cause or causes of death in relation to his physical findings. R. 285-290.

Dr. Hayne testified that there was two possible causes of death. There was evidence that the decedent was "strangled" which cut off the oxygen supply to his brain. There was bruises and scrapes around his neck, as well as internal bleeding in and around his esophagus. There was additional evidence that the decedent was found dead in the woods with plastic taped over his mouth and nose. This would result in "suffocation." A total lack of oxygen to the decedent's brain,

lungs and body. R. 149.

There was also evidence as shown on photographic evidence state's exhibit 20 and 21 consistent with the victim being drug on the ground. Dr. Hayne found that the scrapes and "bleeding" on the decedent's chest, shoulder and back indicated that the decedent still had blood pressure when he was scraped from being dragged on the ground. R. 277.

Mrs. Mary Carpenter testified that she was the mother of the decedent, Mr. Shannon Torrance. She testified that he was sleeping when she left for work on February 23, 2007. Shannon was a senior at East Central High School. He lacked only a few credits needed for graduation. When Shannon did not call her around noon as he did daily, she became concerned. Around two in the afternoon, Mary Carpenter went searching for him.

Mrs. Carpenter identified state's photographic exhibit 2 as being Shannon's car. It was a 2002 Pontiac Grand Am. R. 130. Nelson was a school friend of Shannon's. He had eaten meals in their home. R. 134. Mr. Craig McBeath had also visited in their home. R 135. Nelson told Carpenter that Shannon had given him a ride the day he disappeared. R. 136.

Ms. Betty Lewis , who worked at Scott Central High School, testified on February 23, 2007, she saw Nelson driving a car on Midway-Odom Road. R. 142. She knew Nelson from seeing him at Scott Central School from time to time.

Mr. Stacy Smith, a forensic scientist specializing in crime scene investigation with the Mississippi Highway Patrol, testified to finding latent fingerprints inside the car. R. 231. This was the car identified as belonging to the decedent Mr. Shannon Torrance. Smith also found a roll of duct tape and a blue blanket in the trunk of the car. R. 228.

Mr. Jamie Bush with the Mississippi Crime Laboratory testified that he was certified in forensic science. He was trained in fingerprint identification. R. 251. Bush identified these

fingerprints from the car, exhibit 16, as belonging to Mr. Nelson. R. 256.

Mr. Billy Patrick , an investigator with the Scott County Sheriff's Office, testified that he participated in a search for the missing Shannon Torrance. He saw some car tracks leading into a wooded area. This was within a half mile of where Nelson lived. R. 147. He could see that someone had driven their car in and out from the tire tracks. After walking down the old logging road, he saw what appeared to be a naked body. R. 149. He also saw what appeared to be a plastic bag over the head of the decedent. R. 149.

See state's photographic evidence in manila envelop. Photographic evidence 1 is a photograph of Shannon Torrance sitting in his car. Photographic evidence 2 is a picture of Torrance's car, a 2002 Pontiac Grand Am. Photographic exhibit 3 and 4 show the decedent's nude body with a plastic garbage bag tapped to its face. He is lying on his back. This was how the decedent was initially seen on the ground in the woods by Officer Billy Patrick. Photograph exhibit 12 shows the blue blanket found in the trunk of Torrance's car. Photographic exhibit 13 shows the duct tape that was left in the trunk along with the blanket.

The trial court denied a motion for a directed verdict. R. 291-302. This was based in part upon there allegedly being a lack of evidence for capital murder since the taking of the victim's car allegedly happened after the murder. It was also based upon the alleged lack of evidence that any kidnaping took place. Nelson believed that the victim was already dead when his body was moved to the trunk of his car. R. 291-302.

Nelson was found guilty of non-capital murder, and kidnaping. R. 349. He was given a life sentence and a consecutive forty year sentence in the custody of the Mississippi Department of Corrections. R. 351. The trial court found that the life expectancy for a nineteen year old African American male was forty eight additional years. Therefore, he believed that the forty year sentence

for kidnaping did not exceed Nelson's life expectancy. There was no objection to the sentence. R. 352-353.

From these convictions Nelson appealed to the Mississippi Supreme Court. C.P. 56.

SUMMARY OF THE ARGUMENT

1.The record reflects that the trial court believed a forty year sentence for kidnaping was, according to the life expectancy charts, within the range for the 48 year life span of a nineteen year old African American male. R. 352. The Supreme Court has found that life expectancy charts can be used to assist trial courts in determining sentences which are required by statute to be less than a life sentence. **Stewart v. State** 394 So.2d 1337, 1339 (Miss. 1981)

If the forty year sentence exceeds the thirty maximum permitted by M. C. A. § 97-3-53, then the court should re-sentence Nelson solely on the consecutive kidnaping sentence.

2. The record reflects that the trial court did not abuse its discretion in finding Dr. Hayne was properly qualified to testify as a medical expert witness. R. 270-271. He had the medical education, experience and training. He also had fifteen years of experience in doing autopsies and testifying in court on various causes of death. **Edmonds v. State**, 955 So. 2d 787 (¶ 8) (Miss. 2007).

Questions about the legal opinion offered by Dr. Hayne in another unrelated case were not relevant to his qualifications to testify on the cause of death in the instant cause. Dr. Hayne was cross examined about his opinion on the cause(s) of death, and the basis for his opinion based upon facts in evidence. R. 285-290. These facts included "bleeding" in and around the "drag marks" on the victim's back. See State's photograph 20 and 21 for the marks left on the back of the decedent, Mr. Shannon Torrance.

The concurring opinion of Judge Diaz in the **Tyler Edmonds v. State**, 955 So. 2d 787, 799-811 (Miss. 2007) was not controlling in the instant cause. The majority opinion held that Dr. Hayne was qualified to testify as a medical expert on cause of death and related matters. **Edmonds, supra**. ¶ 8. The majority on the Court in **Edmonds** found that Dr. Hayne's alleged "two shooter" theory in that particular case "was not based on scientific methods and procedures."

In the instant cause, Dr Hayne's opinions were, in the trial court's understanding, based upon physical findings, and scientific method and procedures. His physical findings from the autopsy were not challenged. R. 272. He was cross examined about his opinion on the cause(s) of death based on evidence of both suffocation and manual strangulation. R. 285-290.

3. There was credible, substantial corroborated evidence in support of Nelson' convictions for murder and kidnaping. Nelson admitted to chocking the victim from behind. He admitted to being present when his companion, Mr. McBeath continued chocking him. He admitted to tapping plastic around the victim's face while he was in a weakened state. He admitted to participating with McBeath in disposing of Torrance's body. This included moving the victim from his home to his car after having confined him inside his mother's home against his will. See Nelson's thirty seven page post **Miranda** statement , exhibit 10 which was made on March 02, 2007.

Nelson's fingerprints were found inside the decedent's car. R. 231; 256. Duct tape and a blue blanket were found in the trunk of the car. R. 230; 256. Nelson was seen by Ms. Betty Lewis driving down Midway-Odom Road. This was on the day Mr. Torrance disappeared. R. 142. Officer Billy Patrick saw tire tracks going down and coming out of an old logging road in the woods. This was where he found Torrance's naked lifeless body. Patrick also saw the decedent was lying on his back with a garbage bag tapped over his mouth and nose. R. 148-149.

When the evidence presented by the prosecution was taken as true with reasonable inferences, there was more than sufficient credible, corroborated evidence in support of the trial court's denial of all peremptory instructions for murder and kidnaping and the jury's verdict **McClain v. State**, 625 So. 2d 774, 778 (Miss. 1993).

4. The record reflects that the trial court did not abuse its discretion in admitting Nelson's inculpatory statements. R. 189-190. Nelson "waived his right" to have an attorney present when he

made his inculpatory statements. The record reflects it was Nelson who "initiated conversation" with investigators. R. 188..

The record reflects that Nelson's inculpatory statements were freely and voluntarily made after he acknowledged that he understood his **Miranda** rights and did not request an attorney at any time. See exhibits 8 and 9 showing Nelson's signatures and statement on the two **Miranda** rights forms.

Nelson admitted initiating contact with investigator Crotwell on the **Miranda** waiver of rights form. Nelson admitted that he requested to speak to the investigator from the Scott County Sheriff's Department. R. 164; exhibit 10 page 1. **Hunter v. State** 684 So.2d 625, 632 -633 (Miss. 1996). There was no testimony or evidence indicating that Nelson was promised anything, threatened or coerced in any way to induce his inculpatory statements, whether on February 27, 2007 or March 2, 2007.

There was corroborated testimony indicating that Nelson never requested an attorney on either occasion. Nelson also admitted in his inculpatory statement it was he who initiated communication with Officer Crotwell. State's exhibit 10, page 1. The signed, initialed and witnessed **Miranda** waiver form also contains Nelson's statement, "I requested to talk to Danny Knight and Steven Crotwell without my attorney present." See exhibit 8 page 1.

See state's exhibits volume showing the signed and witnessed **Miranda** rights waiver along with Nelson's transcribed thirty four page inculpatory statement made in the presence of Officers Crotwell and Knight.

ARGUMENT

PROPOSITION I

NELSON'S SENTENCE WAS MORE THAN THIRTY YEARS

Nelson's appeal counsel believes that Nelson's sentences were excessive. He believes that his forty year sentence for kidnaping was excessive. He believes that it should have been no more than thirty years. He thinks that M. C. A. § 93-3-53 stated the sentence should be from "not less than one nor more than thirty years" for kidnaping where the jury did not give a life sentence. Appellant's brief page 5.

The record reflects that while the trial court gave Nelson a consecutive forty year sentence, he did so thinking his sentence should be less than life. To accomplish this, he consulted life expectancy rates for a nineteen year old African American male. The Trial court found that Nelson's life expectancy was some additional 48.2 years. Therefore, a forty year sentence, if appropriate. would not exceed his life expectancy. There was no objection from Nelson or defense counsel.

> Under Mississippi Law I do not have the authority –to pronounce a life sentence upon you. I must sentence you to a term of years less than your reasonable life expectancy. I have return–I have referred to the mortality of tables that's furnished and provided in the Mississippi Bar where it gives expectation of life rates by race, age and sex. You are a member of the black, African American race. It's stated that you are nineteen years old and you're a male person. Referring to that–uh-table, it appears that you have a life expectancy of 48.2 years. It'll be the sentence of this court that you serve forty years in the MDOC for the crime of kidnaping... R. 352.

In **Stewart v. State** 394 So.2d 1337, 1339 (Miss. 1981), the Court found that use of mortality tables were competent for aiding a court in determining the life expectancy of a defendant being sentenced.

> Generally, the Court may take judicial notice of mortality tables. **Tucker v. Gurley,** 179 Miss. 412, 176 So. 279 (1937). In this case, a qualified insurance agent testified and there was introduced in evidence by him the Commissioners' 1958 Standard Ordinary Mortality Table, indicating the life expectancy of a person twenty (20) years

> of age (the age of appellant) to be 50.37 years. Mortality tables are used by courts as aids in arriving at the reasonable life expectancy of persons in reasonably good health and in occupations not unduly hazardous or likely to impair the health. We hold that it was not necessary for a mortality table relating only to persons sentenced to imprisonment in correctional institutions or penitentiaries to be used and that the mortality table introduced here was competent as an aid to the court in determining the reasonable life expectancy of the defendant.

M. C. A. § 97-3-53 (supp. 2004) states, as pointed out by appeal counsel for Nelson that the sentence for kidnaping should be "not more than thirty years." This would be less than the forty year sentence provided by the trial court.

If the court finds that the maximum sentence for the consecutive kidnaping sentence is thirty, as called for by statute, then the appellee believes that Nelson should be re-sentenced solely on his consecutive kidnaping conviction. It should have no effect upon his life sentence for murder.

PROPOSITION II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING THE MEDICAL EXAMINER QUALIFIED TO TESTIFY.

Nelson argues that the trial court erred in not permitting his trial counsel to voir dire the medical examiner, Dr. Hayne. He believed that he should have been allowed to question him about his qualifications to testify in the instant cause. Nelson thinks he should have been allowed to question him based upon Judge Diaz's critical remarks in his concurring opinion in the **Tyler Edmonds v. State , infra** case. Nelson believes that questioning Dr. Hayne about his alleged two possible causes of death theory was crucial to his defense. He also needed to question him about how his interpretation of the facts supported the kidnaping charge. Appellant's brief page 5-10.

The colloquy over the voir dire of Dr. Haynes was as follows:

Court: Do you accept the qualifications of Doctor Haynes?

Harris: No, sir. We'd like to voir dire him.

Court: The doctor has testified as to his educational background, his experience background. What is it that–unless you intended to cross examine him at–voir dire him at this time on those qualifications, I'm going to deny it.

Harris: Yes, sir. I'd like to voir dire him at this time to those qualifications.

Court: That he's made–uh–the examinations, that he has the education and experience he's testified to?

Harris: Well, your honor, I understand he's testified to that, but I also understand he has been denied–uh–to give certain opinions in certain cases, and I believe most recently in **Edmonds v. State.**

Court: I'm familiar with that case, I'm familiar with Judge Diaz, too.

Harris: Yes, sir.

Court: And I'm familiar with what he says and–and the law is that that does not disqualify a person from being–giving an expert opinion. It goes to his credibility.

Harris: I understand that.

Court: He's not given any opinion in this–in this case yet for you to cross examine him on, and until he starts giving an opinion, you're overruled.

Harris: That's fine, Your Honor. R. 270-271.

In Nelson's motion for a new trial, he does not add anything to his initial objection to not being able to voir dire Dr. Hayne further about "his qualifications" to testify as an expert witness. C.P. 51.

There was no objection to Dr. Haynes testimony about his "physical findings" as determined by his autopsy of the decedent Mr. Shannon L. Torrence. R. 272-273.

Court: All right, Mr. Harris. I've heard now the testimony of Doctor Haynes regarding his physical findings of the–uh-victim. Is it at this point you'd like to voir dire the qualifications of Doctor Haynes as to given an opinion regarding those findings?

Harris: **Not at this point, Your Honor. It's going to be later on in his testimony that we understand the state is going to illicit.** R. 272. (Emphasis by Appellee).

When given an additional opportunity to voir dire Dr. Hayne outside the presence of the jury, defense counsel indicated that he wanted to question Hayne about the basis of his opinions in this case. R. 281.

Harris: **Well what procedure I'm suggesting is for them to finish eliciting the testimony from him regarding what that opinion is.** R. 281. (Emphasis by Appellee).

The record reflects that Dr. Hayne was cross examined about his findings, based upon his examination of the body, both externally and internally, as they related to his conclusions on the cause of death. His conclusion was that there was evidence of both "suffocation" and "strangulation." In his opinion, the ultimate cause of death was suffocation. R. 275.

In addition, the record indicates that the trial court provided an opportunity to voir dire Dr.

Hayne prior to his testimony. This was prior to his testimony about the significance of his findings about "the drag markings." This was with regard to his finding that these marking on the decedent meant that he still had blood pressure when he was dragged from the house. R. 279-280. The physical basis for that conclusion was the fact that "there was bleeding" where the decedent' skin was torn. See photographic exhibit 20 and 21 for evidence of scraping and bleeding. This indicated the victim still had blood pressure and cardiovascular activity at that time. R. 282.

> A. **Because there was bleeding underneath the skin surface. It's readily apparent in the photographs that there was bleeding that would indicate that this individual was alive by a cardiovascular criteria, that he was pumping blood into the injured areas and there was bleeding in the areas that he been–uh-injured by tearing of the small blood vessels and scraping of the skin.** R. 282. (Emphasis by Appellee).

Finally, the record indicates that the medical expert was cross examined about his conclusions. He was questioned about the significance of the drag marks on the decedent's back as well as to an opinion that is was possible that there was more than one cause contributed to the death of the decedent. Dr. Hayne explained the actual physical means whereby a person dies from suffocation as opposed to strangulation. He also explained that he could not determine with certainty the time of death. R. 285-289. Strangulation cuts of blood flow to the brain by compressing the carotid artery. Suffocation cuts off oxygen to one's lungs. Both are equally fatal.

After being admitted as a medical expert on the cause of death, Dr. Hayne testified to having conducted an autopsy on the decedent, Mr. Shannon Torrance. This was on February 27, 2007. R. 271. The decedent was found naked with a garbage bag taped over his face. See exhibit 3. R. 273. Dr. Hayne testified to finding abrasions toward the center of his neck. This was in addition to what appeared to be "fingernail scrapings" around his neck. R. 275. These physical findings were consistent with "manual strangulation." R. 276. He also found "drag marks"with some "bleeding"

angling across the decedent's skin on his back. R. 272.

Dr. Hayne testified that, based upon the physical evidence he examined, he believed the ultimate cause of death was "suffocation" due to the decedent's nose and mouth being wrapped in a plastic garbage bag. This would cut off oxygen supply to the decedent's lungs and then to his brain. However, the bruises on the neck, "the hyoid bone"inside his neck and hemorrhaging about his esophagus inside his neck were also indications of strangulation. R. 273.

> Q. Dr. Hayne, I want to make sure we're clear on this as to your findings. The bag and tape were the ultimate cause of death. Is that correct?
>
> A. **Yes, sir. I thought that was the final cause of death, suffocation, though the areas of hemorrhage in the structures in the neck were supportive of strangulation. I felt it was a combination of the two. I felt that the strangulation was incomplete and suffocation was the terminal event.** R. 275. (Emphasis by Appellee).

In **Edmonds v. State**, 955 So. 2d 787 (Miss. 2007), the Supreme Court reversed Edmond's conviction for murder and granted him a new trial. However, the majority found that Dr. Hayne was qualified to give an opinion as to cause of death as a medical examiner expert witness. This would be to give an opinion based upon his autopsy and examination of other relevant facts. See majority opinion on pages 787-799.

The majorities holdings were summarized on page 864. In that case, he gave an opinion on the cause of death of the murder victim in that case, Mr. Joey Fulgham. His conclusion on cause of death was based upon his autopsy and other evidence about what was found at the crime scene.

As the Court stated in its majority opinion:

> ¶8. While Dr. Hayne is qualified to proffer expert opinions in forensic pathology, a court should not give such an expert cart blanch to proffer any opinion he chooses.

While Judge Diaz's concurring opinion joined by Judge Graves did criticize Dr. Hayne's qualifications, primarily based upon his lack of certification specifically as a medical pathologist,

and for the alleged extraordinary large number of autopsies he performed in any given year, that opinion was not shared by the majority. See Diaz concurring opinion on pages 799-811 of **Edmonds v. State, supra.**

The appellee would submit that the record cited above reflects that the trial court did not abuse its discretion in accepting Dr. Hayne's qualifications. The record also reflects that when given an opportunity to voir dire Dr. Hayne about his physical findings, the defense chose not to do so. And the defense was allowed to cross examine the medical expert about his findings on the cause(s) of death, and the significance of the drag marks on the decedent's body. R. 285-290.

The appellee would submit that this issue was therefore lacking in merit.

PROPOSITION III

THERE WAS CREDIBLE, SUBSTANTIAL CORROBORATED EVIDENCE IN SUPPORT OF NELSON'S CONVICTIONS.

Nelson argues that there was insufficient evidence that he was guilty of both murder and kidnaping. Nelson thinks that his companion Mr. Craig McBeath was the person who actually murdered the decedent, and that there was a lack of evidence that any kidnaping ever occurred separate from the murder. He believes there was no evidence that a kidnaping of a living individual occurred. He thinks the confinement of the living victim occurred solely at the time he was murdered by McBeath. He believes the state view that the kidnaping occurred while Shannon Torrance was still alive is erroneous. Nelson thinks the victim was deceased when his body was moved from his mother's home. Appellant's brief page10-12.

The record reflects that the trial court denied a motion for a directed verdict at the conclusion of the prosecution's case in chief. R. 301-302. Nelson believed that the prosecution had not made out a case on the kidnaping charge. The trial court found that there was sufficient evidence, including the voluntarily waived post-**Miranda** statements from Nelson, photographs, physical facts in evidence as well as forensic evidence testimony for finding that the prosecution had made out a prima facie case of kidnaping, as well as capital murder. The Court believed Nelson's admission of having taped a garbage bag to the decedent's face indicated that Nelson believed the victim was still alive at that time. This was prior to his being moved by Nelson to the trunk of his car. R. 291-302.

The trial court's denial of a directed verdict on kidnaping was as follows:

> Court:.. We have two crimes charged, that of capital murder, we have that of kidnaping. I. having heard the testimony of Doctor Haynes, having viewed the exhibits that has been offered into evidence, and having heard the statement of the defendant, find certainly that there is evidence for the jury to accept that the victim

would-had been kidnaped. **I asked the question and I still cannot conceive of any reason that the two defendants would have to place a garbage bag over a man's head and use duct tape to seal it off if they believed him to be dead. To me that's an indication that they believed that he was alive and if they transported im from the house as testified to, then that is the crime of kidnaping.** With the crime of robbery, I–I know there is such a case where-a capital murder case, and I think it happened up in north Mississippi back in the 70's, where there was a killing and then the defendant took the victim's car and left in it, and Supreme Court considered that as a crime of robbery and upheld the death penalty. In this case here, according to the testimony or the statement of the defendant, after the—uh-killing there, that they left with the victim in the trunk of the car, disposed of his body, carried the car to East Central Community College in an effort to conceal the car. I think those are certain issues that the jury can resolve. I think the state has made out a prima facie case of guilt. R. 301-302. (Emphasis by Appellee).

After being "manually strangled," Dr. Hayne testified that the victim could have lived for several minutes or more. R. 285-286. This included his finding "a small aperture" in the garbage bag wrapped around the victim's face. R. 287-288. Therefore, it is within the range of probability that Shannon Torrance was still alive when moved by Nelson and McBeath out his mother's home. The "bleeding" on his skin and body from his being dragged was evidence that he had blood pressure when moved. See photographic exhibit 20 and 21.

In **McClain v. State**, 625 So. 2d 774, 778 (Miss. 1993), the Court stated that when the sufficiency of the evidence is challenged, the prosecution was entitled to have the evidence in support of its case taken as true together with all reasonable inferences. Any issue related to credibility or the weight of the evidence was for the jury to decide, not an appeals court.

> The three challenges by McClain (motion for directed verdict, request for peremptory instruction, and motion for JNOV) challenge the legal sufficiency of the evidence. Since each requires consideration of the evidence before the court when made, this Court properly reviews the ruling on the last occasion the challenge was made in the trial court. This occurred when the Circuit Court overruled McClain's motion for JNOV. **Wetz v. State**, 503 So. 2d 803, 807-08 (Miss. 1987). In appeals from an overruled motion for JNOV, the sufficiency of the evidence as a matter of law is viewed and tested in a light most favorable to the State. **Esparaza v. State**, 595 So. 2d 418, 426 (Miss. 1992); *Wetz* at 808; **Harveston v. State**, 493 So. 2d 365, 370 (Miss. 1986);...The credible evidence consistent with McClain's guilt must be

> accepted as true. **Spikes v. State**, 302 So. 2d 250, 251 (Miss. 1974). The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. *Wetz*, at 808 , **Hammond v. State**, 465 So. 2d 1031, 1035 (Miss. 1985); *May* at 781. Matters regarding the weight and credibility of the evidence are to be resolved by the jury. **Neal v. State**, 451 So. 2d 743, 758 (Miss. 1984);..We are authorized to reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty. *Wetz* at 808; *Harveston* at 370; **Fisher v. State**, 481 So. 2d 203, 212 (Miss. 1985).

In **Carr v. State** 655 So.2d 824, 849 (Miss. 1995), the Supreme Court found that asportation was not a necessary element of kidnaping. This would be in situations were there was evidence that a person was confined or imprisoned against his will. In that case, the victims were confined inside their own home.

> Thus, § 97-3-53 does not require any allegation of transportation of the victim in the indictment. In fact, this Court plainly stated "that asportation was not a necessary ingredient of the indictment, so long as the indictment charges the victim was imprisoned against his will." **Brewer v. State**, 459 So.2d 293, 296 (Miss.1984) (citing **Cuevas v. State**, 338 So.2d 1236 (Miss.1976)).
>
> The language in the indictment satisfied the statutory requirement, as well as this Court's. The jury was properly instructed as to the underlying felony of kidnaping. We find no merit to this assignment of error.

The appellee would submit that the record cited indicates sufficient corroborated evidence for finding that Shannon Torrance was confined against his will inside his mothers' home. There was also evidence that he was removed from his mother's home, while still having some blood flow to his body. There was sufficient for the jury to have found Nelson guilty of kidnaping as a separate criminal offense.

The record also reflects that there was no double jeopardy involved in finding Nelson guilty of both murder and kidnaping.

The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or

only one is whether each provision requires proof of an additional fact which the other does not.

In **Brock v. State** 530 So.2d 146, 150 (Miss.1988) ,the Supreme Court relied upon **Smith v. State**, 429 So.2d 252, 253-54 (Miss.1983), in finding there was no double jeopardy. Where the elements of one offense requires proof not needed for another offense, there is no double jeopardy. In that case, the armed robbery and kidnaping included "a substantial overlap of proof." However, the kidnaping required separate elements of proof separate from the elements of armed robbery. This is true even though the two separate crimes are closely related to each other by time and place, as occurred in the instant cause.

> It is clear from the applicable statutes that the crimes of armed robbery and kidnaping require different elements of proof: This standard frequently has been referred to as the "same evidence" test; however, the **Blockburger** test looks not to the evidence adduced at trial but focuses on the elements of the offense charged. **Brown v. Ohio**, 432 U.S. [161] at 166, 97 S.Ct. [2221] at 2225 [53 L.Ed.2d 187 (1977)] (Blockburger test emphasizes the elements of the two crimes); **Iannelli v. United States**, 420 U.S. 770, 785, 95 S.Ct. 1284, 1294, 43 L.Ed.2d 616 (1975), ("If each [offense] requires proof of a fact that the other does not, the **Blockburger** test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes."); **United States v. Dunbar**, 591 F.2d 1190, 1193 (5th Cir.1979) ("Application of the [Blockburger] test focuses on the statutory elements of the offenses charged.")

The appellee would submit that the trial court did not abuse its discretion in denying a motion for a directed verdict. R. 301-302.There was sufficient evidence for finding that the prosecution had made out a case for both murder and kidnaping, under the facts of this case. The confining of Shannon Torrance against his will required proof of elements that were not included in the elements for murder. See state's exhibit 10 for Nelson's admission of confining the victim while he was within his home, and then removing him from his home to his car.

One can murder a victim without kidnaping him, and one can kidnap a victim without murdering him or her. Nelson admitted to chocking and confining Torrance in his own home. He

also admitted to tapping plastic over his face and moving him out of the house. The suffocation from the blockage of a source of oxygen was the ultimate cause of death. Therefore, the appellee would submit there was credible, substantial evidence in support of the trial court's finding credible evidence in support of kidnaping as well as murder. Therefore, the appellee would submit that this issue is also lacking in merit.

PROPOSITION IV

NELSON'S INCRIMINATING STATEMENTS WERE PROPERLY ADMITTED INTO EVIDENCE.

Nelson argues that the trial court erred in admitting his incriminatory statements. He believes that they were inadmissible because they were made after his initial appearance. This was on February 28, 2007. Since Nelson had a right to counsel, was indigent and none was provided when he spoke to investigators and made his admissions, he believes his statements should have been suppressed. Appellant's brief page 12-14.

The Appellee would submit that the record from the suppression hearing as well as the testimony from the trial transcript indicates that Nelson's incriminating statements were freely, and voluntarily made. They were made after "an intelligent waiver" of Nelson's right under **Miranda v. Arizona** to have an attorney present during any questioning of a suspect.

The record reflects that a suppression hearing was held before the trial court. R. 159-190. After hearing testimony from Officer Steve Crotwell, an investigator with the Scott County Sheriff's Department, the trial court found that Nelson's post **Miranda** inculpatory statements were freely and voluntarily made. The incriminating statements were made after Nelson acknowledged understanding his **Miranda** rights. The record reflects he never requested an attorney.

And on the second occasion, Nelson requested to speak to investigator Crotwell. Therefore, there was evidence that Nelson "initiated contact" with Crotwell. There was sufficient evidence for finding that Nelson intelligently and voluntarily waived any right he had for counsel. R. 159-190.

The record from the suppression hearing indicates that investigator Crotwell spoke to Nelson twice. On both occasion Nelson was given his **Miranda** rights. R. 161; 166. In his first statement, Nelson admitted only to having seen Shannon Torrance on the morning of the day he disappeared.

He denied any involvement in his murder. R. 163. There were no promises or threats made to induce this statement. R. 163.

Nelson made his second statement on March 2, 2007. R. 165. On this second occasion, the record reflects that Nelson "initiated conversation." Officer Crotwell was notified that Nelson "wanted to talk" to him. R. 164. Crotwell arranged to have Officer Danny Knight present when he met with Nelson. R. 164

Q. **A few days later did you get word that he wanted to talk to you again?**

A. **Yes, sir. I was called–I was called around 3:30, 4:00 in the evening on my way home.** I was on my way to get off of duty, and Captain Linda Keith from the jail called me and said Issac Nelson requested to talk to you at this time.

Q. **Did you go talk to him then?**

A. **No, sir. I waited until in the morning. I done that because I wanted Danny Knight to be there also.** R. 164.(Emphasis by Appellee).

Nelson was read his **Miranda** rights a second time. He was given a copy of his **Miranda** rights waiver form. He signed and initialed it. There was no promises made or any threats made to induce the statement. R. 165. He did not request an attorney at any time or request that the interview stop. R. 167.

Q. **At any time did he ask for a lawyer?**

A. **No, sir.**

Q. **At any time did he say stop, I don't want to answer any questions?**

A. **No, sir.** R. 167. (Emphasis by Appellee).

See State's exhibit 8 , 9 and 10 for copies of the signed , witnessed and initialed by Nelson **Miranda** waiver of rights forms in manila envelop marked "Exhibits." Included on exhibit 8 are the words written by Nelson, "**I have requested to talk to Danny Knight and Scott County**

investigator Steven Crotwell without my attorney present." (Emphasis by Appellee).

See also exhibit 10, transcribed 37 page statement by Nelson in the presence of Officers Crotwell and Knight. In that statement, Nelson admitted he "chocked him down." He had Torrance in a "headlock." He did this until Torrance was "red in the face" and begging him to stop. page 13. Nelson supposedly released him. Torrance was lying weakened on the floor. He then admitted to getting a garbage bag and duct tape. He then taped the bag over the victim's head. This was after Craig McBeath, Nelson's companion, had allegedly further chocked Shannon Torrance while he was on the floor. McBeath also struck Torrance in the head. Nelson then assisted McBeath in taking the victim out of the house to his car. They had found the keys to his car in the house.

They used the victim's car for removing his body. They dumped Torrance's body in the woods. They took the victim's car and left it at East Central High School campus. See state's photographic evidence number 3. It shows the naked decedent as found lying on his back in the woods. This was where his body was dumped by Nelson and McBeath. Photograph number 4 shows more clearly the garbage bag tapped around Mr. Torrance's head. This photograph shows the crime scene as first seen by Officer Patrick. Torrance's naked body was found face up in the woods by investigators.

The objection to the admission of Nelson's inculpatory statement was allegedly that it was made "under duress," and was not freely made of his free will.

> Smith: We would object to the statement coming in in that it's not a product of his free admission and free will, free testimony, that he was under duress at the time. R. 189.

The trial court overruled the objection. The court found that Nelson's inculpatory statements were freely, intelligently and voluntarily made. The Court found that Nelson had intelligently waived his right to have an attorney present during his interview.

> Court: The Court first having heard the statement must consider the **Miranda** warnings that was given the defendant on the two occasions to which testimony has been submitted. Uh–pursuant to the **Miranda** case, the **State of Arizona v. Miranda**, there must be a ruling regarding the admissibility of the statement as to whether or not he was properly informed of his rights, and that with knowledge of his constitutional rights he then knowingly and freely and voluntarily waived those rights and made a statement, not the result of coercion, intimidation, pressure, promises of hope of reward or promises of reward. I've heard the testimony–I've—I've reviewed those **Miranda** warnings. I've heard the testimony of the officers. I am of the opinion that the defendant was given the warning as required by law in the form as required by law, that he understood his rights, with knowledge of his rights he's waived them, the waiver was free and voluntary and understandingly made, and the objection to the admissibility of the statements, on both occasions , are overruled. R. 190.

In **Hunter v. State** 684 So.2d 625, 632 -633 (Miss. 1996), the Supreme Court found that Hunter waived his right to counsel. Although he claimed to have requested an attorney prior to his inculpatory statement, he admitted that thereafter he requested to speak to investigators. There was corroborated testimony indicating that he was given his **Miranda** rights and indicated he understood them prior to making his statement.

> First, this Court addresses Hunter's alleged request for an attorney in Jackson on the night he was arrested. Hunter testified that he requested an attorney; Officers George and Savell denied that he made such a request. Regardless of whether he actually requested an attorney, Hunter admits that he sent for Officer George the next day. **The law is well-established that an accused person can waive his right to counsel by initiating conversation with law enforcement:**
>
> An accused, after expressing a desire to deal with police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police. Once the right to counsel has attached, and the accused asserts the right, he is protected from further police-initiated interrogation. **Even if an accused has procured an attorney, the accused may still waive the right to have the lawyer present during any police questioning. Nothing in the Sixth Amendment prevents a suspect charged with a crime and represented by counsel from voluntarily choosing, on his own, to speak with police in the absence of an attorney.** Although a defendant may sometimes later regret his decision to speak with police, the Sixth Amendment does not disable a criminal defendant from exercising his free will. This Court has found that a defendant may waive his Sixth Amendment right to counsel when he waives his

Miranda rights. (Emphasis by Appellee).

The appellee would submit that the issue of whether Nelson had an attorney or not was irrelevant, under the facts of this case, as summarized above. There was corroborated credible evidence in support of finding that Nelson "initiated conversation" with law enforcement. He was given his **Miranda** rights, more than once, and did not either request an attorney, or request that the conversation cease.

In **Brewer v. Williams** 430 U.S. 387, 405-406, 97 S. Ct. 1232, 1243 (U.S.1977), the Supreme Court found that there was a lack of evidence that Williams waived his right to counsel. The Court expressly found that he could have done so, under the circumstances without having a lawyer present, but there was no evidence that he did.

In that case, the court found that law enforcement "induced" Williams to speak, given their knowledge of his troubled psychological condition as an escapee from a mental institution. Law enforcement also admitted Williams' requests for counsel and yet no **Miranda** waiver was ever administered to him.

> Despite Williams' express and implicit assertions of his right to counsel, Detective Leaming proceeded to elicit incriminating statements from Williams. Leaming did not preface this effort by telling Williams that he had a right to the presence of a lawyer, and made no effort at all to ascertain whether Williams wished to relinquish that right. The circumstances of record in this case thus provide no reasonable basis for finding that Williams waived his right to the assistance of counsel.
> [12] The Court of Appeals did not hold, nor do we, that under the circumstances of this case Williams could not, without notice to counsel, have waived his rights under the Sixth and *406 (Cite as: 430 U.S. 387, *406, 97 S.Ct. 1232, **1243) Fourteenth Amendments.FN11 It only held, as do we, that he did not.

In **Michigan v Jackson**, 475 U.S. 625 , 632-633 (1986), Jackson requested counsel at his arraignment, which would be after he had been indicted for murder. Nelson has yet to claim that he requested counsel at his preliminary hearing, much less his arraignment. While Nelson's right to

counsel may have attached, that right was not self executing. Nelson did nothing at any time to claim such a right.

As shown above, there was no request before, during, or even after his confession This was after a valid **Miranda** waiver of rights form. On that form, he admitted that he requested to initiate conversation with Officer Crotwell. Exhibit 10, page 1.

In **Mettetal v. State** 602 So.2d 864, 869 (Miss.,1992), the Supreme Court found that even though Mettetal, unlike Nelson claimed that he requested counsel, this was refuted by the officers present. Mettetal admitted that he understood his rights at the time he made his inculpatory statements.

> There is no indication in the record that Judge Coleman used an incorrect legal standard. The lower court conducted a preliminary hearing on admissibility pursuant to the Agee requirement. There is also no indication in the record that Judge Coleman's finding, admitting the statements as voluntarily given, was clearly erroneous. Mettetal admitted that he understood his rights, and all of his contentions (that he had made repeated requests for counsel) were specifically refuted by the three State witnesses, Sheriff East, Investigator Wooten, and Thomas. Mettetal knowingly and voluntarily waived his right to assistance of counsel during the statement to the police. This assignment of error is without merit.

The appellee would submit that **Williams, and Jackson, supra**, are clearly distinguishable from the instant cause. The trial court, under the facts of this case, clearly did not abuse its discretion in finding that Nelson intelligently and voluntarily waived his right to counsel. Nelson consciously and knowingly waived his right when he requested "to talk with"the Scott county investigator. R. 166-167.

There was corroboration from Officer Danny Knight and jailer Gerald Major that Nelson initiated contact with Officer Crotwell. R. 159-189. The record contains no evidence indicating that law enforcement initiated contact with Nelson when he confessed. There was no claim and no evidence that any action, manipulation or subterfuge by law enforcement induced Nelson to speak

to them.

It is uncontested that Nelson was read his **Miranda** rights more than once. Nelson acknowledged understanding his constitutional rights, including his right to have counsel present during any questioning. He admitted by his own statement on the **Miranda** waiver form and verbally on his post **Miranda** statement, exhibit 10 page 1, that he requested to speak to Officer Crotwell without his attorney present. "I have requested to talk to Danny Knight and Scott County investigator Steve Crotwell without my attorney present."

Therefore, the appellee would submit, this issue is also lacking in merit.

CONCLUSION

Nelson's convictions and life sentence should be affirmed for the reasons cited in this brief. If Nelson's consecutive kidnaping sentence of forty rather than "not more than thirty"is excessive, then he should be, in the appellee's opinion, re-sentenced solely on the kidnaping conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, W. Glenn Watts, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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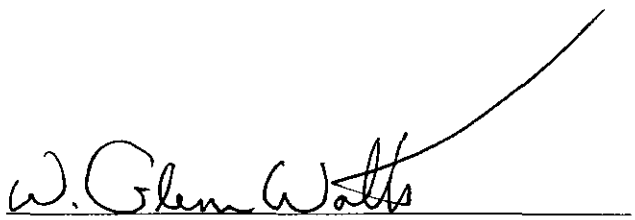
This the 1st day of December, 2008.



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