2008-KA-00299-SCT

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CERTIFICATE OF SERVICE OF INTERESTED PERSONS

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2008-KA-00299-SCT

ISSAC JERMAINE NELSON — **APPELLANT**

VS.

STATE OF MISSISSIPPI — **APPELLEE**

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

Honorable Mark Duncan
District Attorney
P.O. Box 603
Philadelphia, MS 39350

Honorable Marcus D. Gordon
Circuit Court Judge
P.O. Box 220
Decatur, MS 39327

Honorable Jim Hood
Attorney General of MS
P.O. Box 220
Jackson, MS 39205

Issac Jermaine Nelson
APPELLANT

DATED, this the 30th day of September, 2008.

Edmund J. Phillips, Jr.
EDMUND J. PHILLIPS, JR.
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

U. S. CONSTITUTION

Rules

Cases

STATEMENT OF THE ISSUES

1. The Court's sentence of forty years confinement exceeds the period permitted for a kidnapping conviction.

2. The Court erred in refusing to permit voir dire of pathologist Dr. Steven Hayne.

3. The Court erred in denying a motion for directed verdict on both counts, the two requests for peremptory instruction and the motion for new trial. The verdict is against the overwhelming weight of the evidence.

4. The Court erred in admitting Appellant's confession into evidence.

STATEMENT OF THE CASE

Issac Jermaine Nelson appeals his conviction from the Circuit Court of Scott County, Mississippi of guilty of simple murder in Count 1 and guilty of kidnapping in Count II and was sentenced to life in prison on Count 1 and a sentence of a term of forty (40) years on Count II to run consecutive to the sentence of Count 1 in the custody of the Mississippi Department of Corrections.

The primary evidence against Appellant was his confession. He and Shannon Torrence, the victim, were high school seniors playing hooky at Torrence's house accompanied by Craig McBeath.

Appellant was provided his initial appearance on February 28, 2007. He was interrogated on March 1 and 2, 2007 and confessed to killing Torrence on March 2, 2007.

A copy of the Certificate of Initial Appearance is attached.

At trial, the Court refused to permit Appellant's counsel to voir dire State witness Dr. Steven Hayne; pathologist, on his expertise in the field of pathology.

Other pertinent facts will be referred to in the argument.

STATE OF MISSISSIPPI
Scott COUNTY
_____ JUDICIAL DISTRICT

CID FILE # _____
CASE # 233, 302, 303, 32395
INVESTIGATOR: _____
ATTORNEY: _____
DEFENDANT: _____

CERTIFICATE OF INITIAL APPEARANCE

I certify that Isaac Jermain Nelson, whose address is 105 Sand Rd, Forest MS 39074 was granted an initial appearance before me on the 28 day of February, 20 07.

The following information was given to the Defendant verbally, and a copy of this certificate was given to the said Defendant:

1. CHARGE AND PENALTY: You have been charged with the following felony crime(s) and if you are ultimately convicted you may be sentenced to a term in the State Penitentiary.
   A. Kidnapping
   B. Murder
   C. Auto Theft

   RECEIVED
   MAR 5 - 2007
   DISTRICT ATTORNEY

   A copy of the warrant for your arrest is available for your review. If your name and address as shown above are incorrect, the error should be pointed out to this court at this time.

2. RIGHT TO REMAIN SILENT: IT IS NOT NECESSARY THAT YOU SAY ANYTHING at this initial appearance. You are not required to enter a plea of guilty or not guilty to the charge. If you do speak, any statements you make can and will be used against you.

3. RIGHT TO AN ATTORNEY: You have the right to the assistance of an attorney and if you are unable to afford an attorney one will be appointed to represent you. An application for appointment of an attorney may be made at this time. If you wish to hire your own attorney, you will be given an opportunity by the officer in charge of the jail to make the necessary telephone calls to obtain an attorney.

4. RIGHT TO COMMUNICATION: You have the right to communicate with your attorney, family or friends at reasonable times and reasonable means will be provided by the officer in charge of the jail to enable you to do so. If you feel that you have been unreasonably denied an opportunity to communicate with your attorney, family or friends this is the time to make your complaint and arrangements will be made to see that you have an opportunity to make necessary communications.

5. RIGHT TO PRELIMINARY HEARING: You have the right to a preliminary hearing before a judicial officer on the charges made against you to determine whether or not there is sufficient probable cause to believe that a crime has been committed and that you committed it. If such probable cause is found not to exist you will be discharged from custody. If probable cause is found to exist you will be bound over to await the action of the next grand jury which convenes in April 2007. At a preliminary hearing you have the right to have your attorney present, to cross examine any witnesses in your own behalf by subpoena and offer evidence in your own behalf.

6. BAIL: You have / do not have a right to bail. Your bail for the charges presently pending against you is in the total amount of $ Bail denied. The Sheriff of Scott County or his designated representative must approve any bail bond.

This is the 28 day of Feb, 20 07.

CERTIFIED
Scott County Justice Court

Defendant Isaac J Nelson

Justice Court Judge Will McCoy District _____

SUMMARY OF THE ARGUMENT

1. A Court may not sentence a convict of kidnapping to more than thirty years confinement if the jury fails to assess a life sentence.

2. A purported expert witness, whose expert is in doubt, should be subjected to voir dire by parties who wish to challenge his expertise.

3. Proof of guilt must be beyond a reasonable doubt.

4. Right to Counsel attaches at the initial appearance thereafter an accused unable to afford counsel may not be interrogated except in presence of or with permission of counsel.

ARGUMENT

THE COURT'S SENTENCE OF FORTY YEARS CONFINEMENT EXCEEDS THE PERIOD PERMITTED FOR A KIDNAPPING CONVICTION

I.

Section 93-3-53, Mississippi Code of 1972, authorizes a jury to fix the punishment for kidnapping at life imprisonment. Where the convicting jury fails to set the punishment at life, the Court is authorized to set the period of confinement at not less than one year nor more than thirty years.

In the case before the Court, the jury did not prescribe punishment on the kidnapping conviction at life in prison. The Court sentenced Appellant to confinement for forty years. (T-352) Because the Court was authorized to sentence Appellant to no more than thirty years confinement, the sentence adjudicated was error. Erwin v. State, 557 So.2d 799 (Miss. 1990); Smith v. State, 477 So.2d 259 (Miss. 1985); Woods v. State, 393 So.2d 1319 (Miss. 1981).

The sentence should be vacated and Appellant resentenced.

II.

THE COURT ERRED IN REFUSING TO PERMIT VOIR DIRE OF PATHOLOGIST DR. STEVEN HAYNE

After pathologist Dr. Steven Hayne testified for the State about his qualifications as a pathologist, the following colloquy ensued (T-270, 271):

BY THE COURT: Do you accept the qualifications of Doctor Haynes?

BY MR. HARRIS: No, sir. We'd like to voir dire him.

BY THE 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.

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

BY THE COURT: That he's made - - uh - - the examinations, that he has the education and experience he's testified to?

BY MR. 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 vs. State.

BY THE COURT: I'm familiar with that case. I'm familiar with Judge Diaz, too.

The official comment to MRE 702 includes the following: "It is important to note that Rule 702 does not relax the traditional standards for determining that the witness is indeed qualified to speak on opinion on a matter within his purported field of knowledge."

Those traditions include subjecting the expert to voir dire about his qualifications.

It was apparent that Appellant's counsel intended to examine Dr. Hayne about the assertions contained in Justice Diaz's concurring opinion in Edmonds v. State, No. 2004 CT-02081-SCT:

> ¶47. There are serious concerns over Dr. Hayne's qualifications to provide expert testimony. First, he admitted at trial that he was not certified in forensic pathology by the American Board of Pathology because he walked out on the qualifying examination. This means he is unqualified to serve as State Medical Examiner, as our law requires that "[e]ach

applicant for the position of State Medical Examiner shall, as a minimum, be a physician who is eligible for a license to practice medicine in Mississippi and be certified in forensic pathology by the American Board of Pathology." Miss. Code Ann. § 41-61-55 (Rev. 2005).

¶48. Second, Dr. Hayne testified that in his twenty-five-year career, he has performed 25,000 to 30,000 autopsies. This would mean that he has performed at least 1,000 autopsies per year since he was admitted to practice, which seems highly unrealistic.

¶49. Finally, a recent magazine article reported on another case where Dr. Hayne presented questionable testimony. The article examined his qualifications and even discussed his testimony in Tyler's case:

> Mississippi's forensic pathology system is, in the words of one medical examiner I spoke with, "a mess." The state has no official examiners. Instead, prosecutors solicit them from a pool of vaguely official private practitioners to perform autopsies in homicide cases. Steven Hayne, who performed the autopsy on Jones, appears to be a favorite. In the words of Leroy Reddick, a respected medical examiner in Alabama, "Every prosecutor in Mississippi knows that if you don't like the results you got from an autopsy, you can always take the body to Dr. Hayne." Defense attorneys in the state bristle at Hayne's name. In a case last year in Starkville, he testified that he could tell by the wounds in a corpse that there were two hands on the gun that fired the bullet, consistent with the prosecution's theory that a man and his sister team jointly pulled the trigger. Several medical examiners have told me such a claim is preposterous.
> Hayne testified at Maye's trial that he is "board certified" in forensic pathology, but he isn't certified by the American Board of Pathology, the only organization recognized by the National Association of Medical Examiners and the American Board of Medical Specialties as capable of certifying forensic pathologists. According to depositions from other cases, Hayne failed the American Board of Pathology exams when he left halfway through, deeming the questions "absurd." Instead, his C.V. indicates that he's certified by two organizations, one of which (the American Board of Forensic Pathology) isn't

> recognized by the American Board of Medical Specialties. The other (the American Academy of Forensic Examiners) doesn't seem to exist. Judging from his testimony in other depositions, it's likely Hayne meant to list the American College of Forensic Examiners. According to Hayne, the group certified him through the mail based on "life experience," with no examination at all. Several forensics experts described the American College of Forensic Examiners to me as a "pay your money, get your certification" organization. A February 2000 article in the *American Bar Association Journal* makes similar allegations, with one psychologist who was certified through the group saying, "Everything was negotiable—for a fee."
>
> Radley Balko, *The Case of Corey Maye*, Reason (Oct. 2006) (citing Mark Hansen, *Expertise to Go*, 86 A.B.A.J. 44-52 (Feb. 2000)).

¶50. Accordingly, this Court should not give Dr. Hayne, or any expert, a free pass to testify before our juries. With ***Daubert***, we have equipped our trial judges with the appropriate tools to distinguish between qualified expert testimony and "quackspertise." It is up to them to make an individualized determination as to whether each expert meets the requirements of Rule 702.

It was apparent that Appellant's counsel intended to question Dr. Hayne about these allegations. These allegations are serious enough that Dr. Hayne should not be immunized from examination about his expertise.

Dr. Hayne testified that there were two causes of death, one of which he preferred to the other (T-274, 275):

> Q. (By Mr. Kilgore) Doctor Hayne, I want to make sure that 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, was suffocation, though the areas of hemorrhage in the structures in the neck were supportive of strangulation. I felt it was a combination of those two. I felt that the strangulation was incomplete and suffocation was the terminal event.

After Dr. Hayne had completed most of his testimony, the Court permitted Appellant's counsel to conduct voir dire out of the presence of the jury, but did not permit Appellant's counsel to question Dr. Hayne's qualifications. (T-279)

Dr. Hayne's testimony was crucial to justifying the kidnapping charge because he testified that the victim lived for a short time after Appellant choked him (T-288):

Q. Well, if a person - - just for instance, if a person had been choked down to the point of unconsciousness, and then a bag placed around that person's head, and that person was suffocated from the bag, do you believe that person would receive sufficient air flow for him to survive more than a minute or two?

A. It could be possible, counselor. You - - he would most likely survive for a minute or two even with complete occlusion, with no air flow. Death by central nervous standard would probably intervene within a couple of minutes.

Q. So from the time the bag was placed to a person's face, he was - - he was probably dead in a couple minutes. Right?

A. Maybe a minute longer - - couple minutes longer, but certainly, it's a very short period of time, counselor.

Thus, the refusal to permit voir dire of Dr. Hayne about his qualifications denied Appellant a fair trial.

A trial court has discretion to determine a witness's expertise. Appellant's counsel was denied the right to question Dr. Hayne's qualifications. The denial was an abuse of discretion.

The verdict should be overturned.

III.

THE COURT ERRED IN DENYING A MOTION FOR DIRECTED VERDICT ON BOTH COUNTS, THE TWO REQUESTS FOR PEREMPTORY INSTRUCTION AND THE MOTION FOR NEW TRIAL. THE VERDICT IS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE

The primary evidence against Appellant was his confession. He and Shannon Torrence, the victim, were high school seniors playing hooky at Torrence's house accompanied by Craig McBeath. His confession contains the following excerpt:

> And when Shannon came out the bathroom
> I started choking him until he got red in the face, or whatever.
> But I aint kill him though.
> I just kept choking him man.
> I don't know why.
> And then when I let go
> He was still alive

suit under 42 U.S.C. 1983 that held that an accused's right to counsel attached at the time of the initial appearance.

Appellant was provided his initial appearance on February 28, 2007. He was interrogated on March 1 and 2, 2007 and confessed to killing Torrence on March 2, 2007, (T-164 et seq.), a time after his right to counsel had attached but before counsel was provided.

In Michigan v. Jackson, 475 U.S. 625, 629 (1986), the Court was asked to revisit the question whether the right to counsel attaches at the initial appearance. The Court held in the affirmative.

In Brewer v. Williams, 430 U.S. 387 (1977), the Court held that incriminating admissions made after a "preliminary arraignment" were inadmissible. The preliminary arrangement was the equivalent of Mississippi's initial appearance.

In Rothgery, the Court held that:

> By the time a defendant is brought before a judicial officer, is informed of a formally lodged accusation, and has restriction imposed on his liberty in aid of the prosecution, the State's relationship has become solidly adversarial.

Thus the right to counsel has attached. In the case before the Court, Appellant could not afford counsel and has had counsel appointed him in forma pauperis. Thus, at the time he confessed he was entitled to counsel and counsel had not been provided. He had been interrogated after the right had attached; per Brewer the confession was inadmissible.

The verdict should be overturned.

CONCLUSION

The verdict should be overturned.

RESPECTFULLY SUBMITTED,

EDMUND J. PHILLIPS, JR.
Attorney for Appellant

CERTIFICATE OF SERVICE

I, Edmund J. Phillips, Jr., Counsel for the Appellant, do hereby certify that on this date a true and exact copy of the Brief for Appellant was mailed to the Honorable Mark Duncan, P.O. Box 603, Philadelphia, MS 39350, District Attorney, the Honorable Marcus D. Gordon P.O. Box 220, Decatur, MS 39327, Circuit Court Judge and the Honorable Jim Hood, P.O. Box 220, Jackson, MS 39205, Attorney General for the State of Mississippi.

DATED: September 30, 2008.

EDMUND J. PHILLIPS, JR.
Attorney for Appellant