

**COPY**

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**THOMAS TERRELL SMITH**

**APPELLANT**

**V.**

**NO. 2008-KA-0375-COA**

**FILED**

**STATE OF MISSISSIPPI**

**SEP 10 2008**

**APPELLEE**

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COURT OF APPEALS

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**BRIEF OF THE APPELLANT**

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**MISSISSIPPI OFFICE OF INDIGENT APPEALS**

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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.

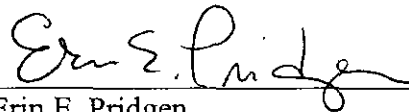
1. State of Mississippi
2. Thomas Terrell Smith, Appellant
3. Honorable Forrest Allgood, District Attorney
4. Honorable James T. Kitchens, Jr., Circuit Court Judge

This the 10<sup>th</sup> day of September, 2008.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:



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**BRIEF OF THE APPELLANT**

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**STATEMENT OF ISSUES**

**THE TRIAL COURT ERRED IN FAILING TO GRANT THE DEFENSE'S REQUESTED JURY INSTRUCTIONS WHICH WOULD HAVE INSTRUCTED THE JURY UPON ALL QUESTIONS OF LAW NECESSARY TO CONSIDER THE DEFENDANT'S THEORY OF THE CASE.**

**STATEMENT OF THE CASE**

On July 19, 2004, the Oktibbeha County, Mississippi grand jury indicted Thomas Terrell Smith for one count of murder, in violation of Mississippi Code Annotated Section 97-3-19 (Rev. 2006). The court set an original trial date of November 1, 2004.

On July 26, 2004, the court granted Smith's motion for mental evaluation and treatment to determine his competency to stand trial. Thereafter, the court granted numerous motions for continuances, while the parties awaited the results of the mental examination.

The trial finally began on October 29, 2007, with the Honorable James T. Kitchens, Jr., Circuit Court Judge, presiding. The jury returned a guilty verdict after a four-day trial. On November 1, 2007, the court sentenced Smith to a term of life, without the possibility of parole, in the Mississippi Department of Corrections.

Smith filed his motion for a new trial on November 9, 2007. The trial court denied such motion and on February 29, 2008, Smith timely filed his appeal of the jury verdict, as well as the denial of his motion for a new trial.

### **SUMMARY OF THE ARGUMENT**

The trial court erred in refusing to grant the defense's proposed jury instructions on "heat of passion" manslaughter, manslaughter following the decedent's commission of a felony, and classic self- defense. Smith was denied his fundamental right to have the jury instructed on his defense theory. The trial court should have determined that the jury could have drawn a reasonable inference from the specific facts of the case.

### **FACTS**

In Early 2004, Thomas Terrell Smith had recently moved from Mathison, Mississippi to Maben, Mississippi, to care for his aunt, Minnie Bell, who was dying of cancer. [Tr.352]. Smith lived at Bell's house with several of Bell's family members. [Tr. 352]. One of the frequent house residents was Latoya Bell, Minnie Bell's daughter and Smith's cousin. [Tr. 300-01].

On the evening of January 26, 2004, Terry Tate, the father of Latoya's children, came to Minnie Bell's house and began assaulting Latoya. [Tr. 353-54]. At some point, Tate threw Latoya down and began choking her on her mother's death bed (Minnie Bell died two months after the incident). [Tr. 354]. Smith and Latoya's brother, Quentin Bell, came into the room and restrained Tate.[Tr. 302-03]. The police were called and Tate left the Bell's residence. [Tr. 305]

Tate had a reputation for being violent and aggressive in the community. [Tr. 328] At the time of the incident, he was thirty-one years old, stood about 6'3", and weighed 230lbs. Contrarily, Smith had a reputation for being peaceful. [Tr. 223-24, 327] He was twenty-seven years old, stood about 5'6", and weighed about 160lbs. [Tr. 356]

Two days after this incident, on January 28, 2004, Smith was summoned to help another cousin involved in a separate domestic altercation. [Tr. 323]. This time, Latoya's sister, Monique Bell, called her family to come and pick her up from "Spann's Place" – a local hangout area in the community located off Highway 50 West in Clay County, Mississippi. [Tr. 130]. Monique had gotten into an argument with her boyfriend and needed a ride home. [Tr. 141]. Harvey Cooper (Minnie Bell's longtime boyfriend) and Smith went to Spann's Place to assist Monique. [Tr. 323].

When Smith and Cooper arrived at the store, Monique informed the men that she no longer needed their help because she and her boyfriend had resolved their problems. Smith and Cooper were at the store only a matter of moments when they turned to exit the building. [Tr. 141-42]. Tate, who happened to be playing pool at Spann's Place, spotted Smith at some point during Smith's brief visit. As Smith was leaving the store, Tate pushed Smith out of the door and hit him in the head with a gun. [Tr. 143]. Smith received a cut on his head as a result of the assault.

Eddie Davis, one of Tate's closest friends, observed the altercation. According to Davis, Tate then said to Smith, "Terrell, do you believe that I'll blow your brain out? Don't never get into me and my old lady's affair again." [Tr. 133, 361]. Monique Bell also heard Tate threaten Smith's life. [Tr. 325]. After this threat, Smith did not retaliate, rather he got in the car with Cooper and went home. [Tr. 311].

The next morning, Smith went to Larry C's, a local hamburgers stand in Maben, Mississippi, and spoke with Desmond Logan about getting a gun for his protection. [Tr. 155-56] Smith had never

owned a gun before, but he was afraid of Tate. [Tr. 336, 363, 365]. Logan provided Smith with the gun, while the men were standing outside of the eatery, and then the men departed. [Tr. 160] Later on, Tate drove by Larry C's and stopped in front the group of his acquaintances. [Tr. 134]. Tate rolled down his window to ask the men if they had seen someone. Witnesses' testimonies vary as to whether Tate asked the men if they had seen Smith or, if he asked the men if they had seen Tate's cousin, Red. [Tr. 134, 192].

Seconds later, Smith pulled up and got out of his vehicle, headed toward Tate's car. [Tr. 193]. There are competing eyewitnesses statements as to what happened next. According to Smith, after he reached Tate's driver side window, he saw Tate reach for something. [Tr. 365]. On the other hand, John Cunningham, one of the men standing outside at the time, testified that he did not see Tate make any threatening movements toward Smith. [Tr. 197] After the shooting, there was an unloaded pistol found in the glove compartment of Tate's car. [Tr. 236]

In any event, Smith stepped back and pulled the trigger to the gun that he recently acquired for his protection. [Tr. 365] With one shot, Tate was struck and killed by a bullet that entered through his arm. [Tr. 282, 287-88].

Following the shooting, Smith left the area. He readily cooperated with the police and led them to the gun that he used in the shooting. [Tr. 223]

### ARGUMENT

**THE TRIAL COURT ERRED IN FAILING TO GRANT THE DEFENSE'S REQUESTED JURY INSTRUCTIONS WHICH WOULD HAVE INSTRUCTED THE JURY UPON ALL QUESTIONS OF LAW NECESSARY TO CONSIDER THE DEFENDANT'S THEORY OF THE CASE.**

An accused is entitled to have a jury instruction that presents his theory of the case. *Murphy v. State*, 566 So. 2d 1201, 1206 (Miss. 1990). In *Manuel v. State*, 667 So. 2d 590, 593 (Miss. 1995), the Court announced the following:



In homicide cases, the trial court should instruct the jury about a defendant's theories of defense, justification, or excuse that are supported by the evidence, no matter how meager or unlikely, and the trial court's failure to do so is error requiring reversal of a judgment of conviction.

The trial court may refuse an instruction if it incorrectly states the law, is adequately covered elsewhere in the instructions, or is not supported by the evidence. *Heidel v. State*, 587 So. 2d 835, 842 (Miss. 1991). In order to determine if the jury has been properly instructed, the jury instructions should be considered as a whole and no one instruction should be taken out of context. *Malone v. State*, 486 So. 2d 360,365 (Miss. 1986).

As referenced in the motion for a new trial, Smith argues that the trial court erred in denying several jury instructions that were necessary in presenting his entire theory of defense before the jury. At trial, the court instructed the jury on the "imperfect self-defense" theory of manslaughter and murder. [C-38]. The jury convicted Smith of murder.

The court refused to offer the defense's tendered instructions on at least two additional forms of manslaughter: (1) "heat of passion" slaying [D-14], and (2) slaying following decedent's commission of a felony. [D-13, D-16, and D-17] In addition, the court failed to properly instruct the jury on theory of self-defense. [D-4, D-7, D-15, D-18, D-19, D-20 and D-23].

#### ***Failure to Instruct on "Heat of Passion" Slaying***

In rejecting the proposed "heat of passion" jury instruction, the trial court denied Smith's fundamental right to present an essential defense theory of the case. Section 97-3-35 of the Mississippi Code Annotated (Rev. 2006), defines manslaughter as the following: " The killing of a human being, without malice, in the heat of passion, but in a cruel and unusual, or by the use of a dangerous weapon, without authority of law, and not in necessary self-defense, shall be manslaughter."

"Heat of passion" has been defined by Mississippi courts as:

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

*Miller v. State*, 493 So .2d 971, 974 (Miss. 1986).

There was sufficient evidence presented that Tate reasonably provoked Smith hours prior to the slaying. Witnesses' statements established that, on the night of January 28, 2004, at Spann's Place, Tate beat Smith over the head with a gun - a deadly weapon. Tate was the initial aggressor. While it is noted that Smith was able to leave the scene without retaliating, he did not leave prior to Tate threatening Smith's life. Because of these threats, Smith believed it necessary to carry a gun to protect himself against future harm.

On the morning of January 29, 2004, Smith testified that he acquired a gun from Desmond Logan in order to protect himself. However, he also testified that, after he obtained the gun, he did not go looking for Tate. Instead, Tate arguably was looking for him when he saw Tate in front of Larry C's that morning.

First, Tate did not live in the area but, rather, several miles away from Maben, Mississippi. Tate had previously threatened Smith so a jury could conceivably conclude that Smith would be alarmed at Tate's presence. Not only was Tate several miles away from home, but he also stopped at Larry C's. Larry C's was a place with many of the same people went to eat everyday. It is arguable that if Tate were looking for Smith, he would likely find him at the local hamburger hangout.

A jury could find that Smith, being afraid and recently receiving a threat on his life, had sufficient provocation to shoot Tate on the morning of January 29, 2004. He considered himself under a continual threat and, unlike self-defense, this threat did not have to initially occur

simultaneously with the slaying. The jury should have been able to consider this theory of defense.

***Failure to Instruct on Slaying Following Decedent's Commission of a Felony***

The court rejected several proposed jury instructions [D-13, D-16, and D-17] that would have conformed to manslaughter, as defined by Section 97-3-31 of the Mississippi Code Annotated (Rev. 2006). Under Section 97-3-31, manslaughter is defined, in pertinent part, as follows: "Every person who shall unnecessarily kill another, either while resisting an attempt by such other person to commit any felony, or to do any unlawful act, or after such attempt shall have failed, shall be guilty of manslaughter."

The defense attempted to present these instructions based on the aggravated assault that Tate committed on Smith the night prior to the shooting. The court erred in failing to grant the jury the opportunity to consider this theory of defense.

***Failure to Instruct on the Defense's Theory of Self-Defense***

The court repeatedly denied the defense the opportunity to present jury instructions that would have allowed the jury to consider the defendant's right to take preemptive steps to defend himself against the decedent. [See D-4, D-7, D-15, D-18, D-19, D-20, and D-23]. As argued in the motion for a new trial, the court erred in failing to fully instruct the jury that, if it found Tate manifested an intent to kill or cause great bodily harm to harm Smith by the use of deadly force, Smith had the right to anticipate Tate's actions and resort to the use of deadly force without waiting on Tate to gain the advantage over him.

~~Testimony established that Tate had an aggressive and violent personality in the community.~~

Tate was a big, tall and violent guy. He stood about 6'3" and weighed 230lbs. He was ruthless. Not only did he threaten and attack Smith, he attacked Smith's family members. He had several altercations with his children's mother, Latoya Bell. On the night of January 26, 2004, he even went

as far as to attack her on the dead bed of her mother, Minnie Bell.

After Tate threatened Smith at Spann's Place, Smith had the right to anticipate Tate's actions and defend himself against Tate's advances. The jury was never presented with the defense's theory of self-defense. When considering D-23, the court denied the instruction because it did not recall any testimony that Tate told Smith, "I'm going to kill you." [Tr.417]. However, while holding the gun up to his head, Tate said, " ...Do you believe I'll blow your brains out?" [132, 361] These threats, coupled with the aggravated assault, placed Smith in reasonable fear of his life. He had the right to anticipate Tate's actions on the next day and the jury should have been presented with this defense.

### CONCLUSION

The rejected proposed jury instructions were necessary to support Smith's defense of his case. The facts of the case give way for the jury to make several reasonable inferences that Smith shot Tate in the "heat of passion", as a result of the aggravated assault Tate committed on Smith, or simply because Smith feared for his life. Due to the trial court's denial of Smith's fundamental right, Smith is entitled to have his conviction reversed and remanded to the trial court for a new trial. If the Court should, however, discover any plain error not set forth in this brief, the defendant requests that this Court reverse based on those grounds.

Respectfully submitted,  
MISSISSIPPI OFFICE OF INDIGENT APPEALS  
For Thomas Terrell Smith, Appellant

By:

  
ERIN E. PRIDGEN  
COUNSEL FOR APPELLANT

## CERTIFICATE OF SERVICE

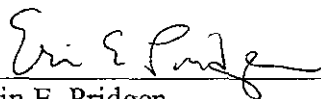
I, Erin E. Pridgen, Counsel for Thomas Terrell Smith, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

Honorable James T. Kitchens, Jr.  
Circuit Court Judge  
Post Office Box 324  
Columbus, MS 39703

Honorable Forrest Allgood  
District Attorney, District 16  
Post Office Box 1044  
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Honorable Jim Hood  
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This the 10<sup>th</sup> day of September, 2008.

  
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