IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MICHAEL GENE RAY — APPELLANT

V. — NO. 2008-KA-0401-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. Michael Gene Ray, Appellant
3. Honorable Forrest Allgood, District Attorney
4. Honorable Lee J. Howard, Circuit Court Judge

This the 4th day of August, 2008.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

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MICHAEL GENE RAY — APPELLANT

V. — NO. 2008-KA-0401-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

STATEMENT OF THE ISSUES

ISSUE ONE:

WHETHER THE TRIAL COURT ERRED WHEN IT OVERRULED THE APPELLANT'S MOTION FOR JNOV BECAUSE THE ACTIONS OF THE APPELLANT WERE CLEARLY IN LINE WITH MISSISSIPPI STATUTORY LAW ALLOWING FOR EXCUSABLE HOMICIDE IN CASES OF SELF-DEFENSE.

ISSUE TWO:

WHETHER THE TRIAL COURT ERRED WHEN IT OVERRULED THE APPELLANT'S MOTION FOR A NEW TRIAL BECAUSE THE OVERWHELMING WEIGHT OF THE EVIDENCE POINTED TOWARDS EXCUSABLE HOMICIDE IN SELF-DEFENSE AND NOT MURDER.

ISSUE THREE:

IN THE ALTERNATIVE, WHETHER THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT APPELLANT HIS MOTION FOR A NEW TRIAL ON THE GROUNDS THAT OVERWHELMING WEIGHT OF THE EVIDENCE POINTED TOWARDS MANSLAUGHTER RATHER THAN MURDER.

ISSUE FOUR:

IN THE ALTERNATIVE, WHETHER THE TRIAL COURT ERRED WHEN IT DENIED THE APPELLANT'S MOTION FOR A JNOV BECAUSE THE EVIDENCE

WAS INSUFFICIENT TO SUPPORT A VERDICT OF MURDER, AND INSTEAD, SUPPORT A VERDICT OF MANSLAUGHTER.

ISSUE FIVE:

WHETHER THE CIRCUIT COURT ERRED IN FAILING TO PROPERLY CONSIDER THE APPELLANT'S MOTION TO DISMISS FOR A VIOLATION OF HIS STATUTORY RIGHT TO A SPEEDY TRIAL.

ISSUE SIX:

WHETHER THE CIRCUIT COURT ERRED IN FAILING TO PROPERLY CONSIDER THE APPELLANT'S MOTION TO DISMISS FOR A VIOLATION OF HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL.

ISSUE SEVEN:

WHETHER TRIAL COUNSEL'S INEFFECTIVENESS DEPRIVED APPELLANT OF HIS CONSTITUTIONALLY MANDATED RIGHT TO A FAIR TRIAL.

STATEMENT OF INCARCERATION

Michael Gene Ray, 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 Lowndes County, Mississippi, a judgment of conviction on one count of Murder against Michael Gene Ray, following a trial on February 21-22, 2008, honorable Lee J. Howard, Circuit Judge, presiding. Mr. Ray was subsequently sentenced to life imprisonment in the custody of the Mississippi Department of Corrections.

FACTS

This case deals with a typical "juke joint" brawl that took a turn for the worse. On June

17, 2005, Danny Hudson (Hudson) was drinking at the Slab House, a bar in Lowndes County, Mississippi. (T. 53). Hudson was drinking liquor (T. 103). Hudson was described in testimony as being "pretty drunk" and "really bad drunk." (T. 88).

Early in the evening, Hudson was having an argument with his girlfriend, Sheila Ray, the Appellant's sister. (T. 81). Hudson and Sheila Ray were seen in front of the bar, cursing at each other. (T. 87). Hudson held onto her shirt and was pulling it trying to prevent her from returning inside the bar. (T. 87). There was other testimony that Hudson was holding Sheila Ray by the arm and was pulling her, not allowing her to enter the bar. (T. 175). According to Sheila Ray, the argument was precipitated by Hudson coming across the street to her home and kicking the door open. (T. 185). Sheila Ray testified she then left to go to the bar when the incident occurred. (T. 185). Sheila Ray testified that she was scared of Hudson, especially when he drank liquor. (T. 192).

Hudson eventually came back into the bar and, according to testimony, "made a comment that if anybody had anything to say, that they could say it." (T. 88). There, he asked the Doris Ray, Sheila's mother, where she was, and Doris Ray informed him that she was at their home across the street and that Hudson should not go over there. (T. 176).

During that time, Sheila had returned home and had talked with her brother, Michael Gene Ray, the Appellant. (T. 186). Later, in the parking lot, the Appellant got into an altercation with Hudson. (T. 82). The owner of the Slab House, James Wright (Wright) testified that it was just a "basic fight" and that it was broken up quickly. (T. 96). The Appellant also had a piece of conduit pipe in his hand during the fight. (T. 97). Wright would later testify that it was a small piece of pipe. (T. 101). The Appellant admitted bringing the pipe to the bar in order to intimidate Hudson. (T. 218). During the fight, Hudson was on top of the Appellant, threatening

to cut him. (T. 92). According to the Appellant's testimony, he was tackled first by Hudson. (T. 217).

After the fight was broken up, both men were asked to leave. (T. 97). The Appellant subsequently left, returning to his home, across the street, where he lived with his Mother, Sheila Ray, and Alicia Ray, Hudson and Sheila Ray's daughter (T. 97, T. 154). Doris Ray testified that Hudson said, "I'm going to kill that SOB," in reference to the Appellant. Others testified that Hudson was "mad" and mumbled something unintelligible before driving away from the parking lot. (T. 97).

The Appellant testified that he saw Hudson drive off, slinging gravel, and turn turn around and come back to the parking lot twice. (T. 218).

According to Alicia Ray's testimony, she and the Appellant were outside of their home talking about the earlier incident when Hudson walked across the street to come over. (T. 153). Hudson was yelling and demanding to talk to Sheila Ray. (T. 153). Alicia Ray testified that she told him that "he didn't need to because it would start more, and he just needed to go back." (T. 153). The Appellant testified that soon after that, Hudson said, "I'm going to kill the weak son-of-a-bitch." (T. 220).

Hudson refused and continued coming and he and the Appellant proceeded to argue. (T. 153). According to Alicia Ray, in the course of the argument, Hudson grabbed a rock and threw it at the Appellant. (T. 153). Alicia's testimony was corroborated by Sheila Ray's testimony. (T. 186). It was further corroborated by the testimony of Detective Rickard who said that it was clear that two landscaping rocks were moved. (T. 123). Detective Rickard testified he could tell because of the visible dead grass that was under them. (T. 123).

The Appellant testified the first rock that Hudson threw hit him in the head and the

shoulder. (T. 220). This was corroborated by a photograph of the Appellant taken the next day, showing a scratch on the Appellant's head. (Exib. 13). The Appellant testified that after the rock was thrown at him, he swung at Hudson. (T. 227). Hudson then backed up and grabbed another rock. (T. 228). Then, Hudson said, again, that he was going to kill the Appellant. (T. 228).

Sheila Ray testified that Hudson said to the Appellant "you might as well put the knife down because I'm going to kill you when you do." (T. 195). Sheila Ray testified that Hudson "kept coming towards" the Appellant and "next thing I know he was stabbed." (T. 195). The Appellant admitted to stabbing Hudson with a knife that had been sitting on the picnic table in front of the house. (T. 235). According to the testimony of the Appellant, he "had no other choice." (T. 235). Sheila further testified that, prior to the stabbing, the Appellant kept backing up as Hudson came toward him. (T. 195).

Renee Taylor (Taylor) testified that she had run over across the street and saw the stabbing. (T. 245). She testified that the appellant told her to shut up. (T. 245). The Appellant, in his own testimony, never denied telling her to shut up, but maintained that he told her to shut up and leave because he was worried about what Hudson might do. (T. 235-36).

Alicia Ray, ran up to the Slab House screaming that her father had been stabbed. (T. 82). Thresa Sorrells (Sorrells) was standing outside the slab house at the time, and ran across the street to the Appellant's property, where Hudson had apparently gone after their previous altercation. (T. 83). Sorrells went across the street to tend to Hudson.

She testified, "There was no blood coming from the wound, but it was rather large. It was from his belly button all the way to his side. The skin was actually just rolled up, and his large intestine had already started protruding out of the wound. It was coming outside his body." (T. 83-84).

This testimony, however, was significantly discredited by the State's own witness, Dr. Steven Hayne (Dr. Hayne), who testified that the wound was seven-eighths (7/8) of an inch by one-eighth (1/8) of an inch. (138-141). Dr. Hayne further testified that he would not expect to see anything coming through the wound. (T. 141).

The Appellant spent that night at his cousin's house and the next morning, went to the jail and turned himself in, telling the police that he had stabbed Hudson. (T. 229-30). Hudson passed away from his injuries the next day at the hospital. (T. 121). The Appellant has been incarcerated since June 18, 2005.

On August 10, 2005 Michael Ray was indicted for the Murder of Daniel Hudson. (C.P. 03, R.E. 12). On August 18, 2005, he was arraigned. (C.P. 11, R.E. 13). On October 19, 2005, the Circuit Court ordered a mental evaluation for the Appellant. (C.P. 28-31, R.E. 16-20). On March 14, 2006, the Mississippi State Hospital wrote a letter saying they needed certain documents pertaining to the mental evaluation. (C.P. 40, R.E. 21). On March 17, 2006, the circuit court ordered that the Mississippi State hospital conduct a mental evaluation with whatever information was available to them within ninety (90) days of its order. (C.P. 39, R.E. 20). On August 31, 2007, the trial court wrote a letter to the Mississippi State Hospital explaining the need to evaluate the Appellant. (C.P. 54, R.E. 22). On September 6, 2007, the State Hospital responded that it had not received the order concerning the mental evaluation. (C.P. 57, R.E. 24). On September 24, 2007, the Appellant filed a motion to dismiss charges for failure to provide a fast and speedy trial. (C.P. 58-59, R.E. 25-26). The Appellant also wrote a letter to the circuit clerk curious as to why he was even in need of a psychiatrist. (C.P. 60, R.E. 27). On October 4, 2007, the Circuit Clerk received the results of the Appellant's evaluation, and it was determined that he was competent to stand trial. (C.P. 62-64, R.E. 28-30). On November

9, 2007, the Appellant filed a motion for a speedy trial. (C.P. 65, R.E. 31). On November 19, 2007, the Appellant's trial counsel requested a continuance for the purpose of seeing a friend receive the Medal of Honor from the President. (C.P. 67). Finally, on December 12, 2007 the Appellant filed another Motion for at and Speedy Trial. (C.P. 70, R.E. 32).

On February 21-22, 2008, without any hearing on his speedy trial motions, the Appellant was tried, and, after deliberation, a jury returned a guilty verdict against him. (C.P. 126, R.E.33). The Appellant was sentenced to life in the custody of the Mississippi Department of corrections (C.P. 126, R.E. 33).

On February 25, 2008, the Appellant filed a Motion for JNOV, Alternatively, New Trial. (C.P. 124, R.E.34). The motion was denied by the trial court on February 25, 2008. (C.P. 138, R.E. 35). On March 3, 2008, feeling aggrieved by the verdict of the jury and the sentence of the trial court, the Appellant filed a notice of appeal. (C.P. 129, R.E. 36).

SUMMARY OF THE ARGUMENT

The trial court erred when it overruled the Appellant's motion for JNOV. The Appellant's conduct was clearly in self-defense, as Hudson entered onto the Appellant's property after threatening, at the very least, to assault the Appellant. Furthermore, the State failed to prove the element of deliberate design.

Secondly, the overwhelming weight of the evidence supports that the Appellant was acting in self-defense when he stabbed Hudson.

In the alternative, the trial court erred when it failed to grant the Appellant's motion for a new trial, because the overwhelming weight of the evidence supported a conviction of manslaughter rather than murder.

In the alternative, the trial court erred when it failed to grant the Appellant's motion for

JNOV, because the State failed to prove the crime of murder, but, instead, manslaughter.

The trial court also erred in failing to properly consider the Appellant's motion to dismiss for violation of his statutory speedy trial right. The Appellant was incarcerated for eight hundred and eighty-five (885) between arraignment and trial, and there was not good cause for the State's failure to bring him to trial.

Furthermore, the Appellant's constitutional speedy trial rights were violated because of oppressive pre-trial incarceration. All factor's in the ***Barker v. Wingo*** analysis weigh in favor of the Appellant.

Lastly, the Appellant was deprived of his fundamental right to a fair trial by his trial counsel's ineffectiveness.

ARGUMENT

ISSUE ONE: WHETHER THE TRIAL COURT ERRED WHEN IT OVERRULED THE APPELLANT'S MOTION FOR JNOV BECAUSE THE ACTIONS OF THE APPELLANT WERE CLEARLY IN LINE WITH MISSISSIPPI STATUTORY LAW ALLOWING FOR EXCUSABLE HOMICIDE IN CASES OF SELF-DEFENSE.

i. Standard of Review

The Mississippi Supreme Court has set forth the standard of review for a sufficiency of the evidence claim as follows:

> This Court must review the trial court's finding regarding sufficiency of the evidence at the time the motion for JNOV was overruled. *See* ***Wetz v. State***, 503 So.2d 803, 807-08 (Miss.1987). The evidence is viewed in the light most favorable to the State. All credible evidence supporting the conviction is taken as true; the State receives the benefit of all favorable inferences reasonably drawn from the evidence. ***McClain v. State***, 625 So.2d 774, 778 (Miss.1993). Issues regarding weight and credibility of the evidence are for the jury to resolve. ***Id.*** Only where the evidence, as to at least one of the elements of the crime charged, is such that a reasonable and fair minded juror could only find the accused not guilty will this Court reverse. ***Id.***

Holloman v. State, 656 So.2d 1134, 1142 (Miss. 1995).

ii. Taking the evidence in the light most favorable to the state, the evidence is such that reasonable and fair minded juror could only find the Appellant not guilty.

It has long been a principle at common law that a person has no duty to retreat when faced with force in his home. This theory is perhaps embodied best by Justice Benjamin Cardozo;

> "It is not now, and never has been the law that a man assailed in his own dwelling, is bound to retreat. If assailed there, he may stand his ground, and resist the attack. He is under no duty to take to the fields and the highways, a fugitive from his own home."

People v. Tomlins, 107 N.E. 496, 496 (N.Y. 1914).

In Mississippi, a similar premise has been codified. **Mississippi Code Annotated section 97-3-17** provides that a homicide may be excused "[w]hen committed by accident and misfortune in doing any lawful act by lawful means, with usual and ordinary caution, and without unlawful intent." **Miss. Code Ann. § 97-3-17(a).**

Homicide may further be excused;

> "(e)When committed by any person in resisting any attempt unlawfully to kill such person or to commit any felony upon him, or upon or in any dwelling, in any occupied vehicle, in any place of business, in any such place of employment or in the immediate premises thereof in which such person shall be;
>
> (f) When committed in the lawful defense of one's own person or any other human being, where there shall be reasonable ground to apprehend a design to commit a felony or to do some great personal injury, and there shall be imminent danger of such design being accomplished"

Miss. Code Ann. § 97-3-17(e)-(f).

Sub judice, there is no dispute that the Appellant was at his home at the time of the incident. (T. 97). There is no dispute that Hudson got into a verbal and at least somewhat physical altercation with the Appellant's sister. (T. 87, T. 175). There is no dispute that the Appellant and Hudson were involved in a physical altercation at the bar across the street in

which blows were exchanged. (T. 96). It was testified to in the State's case-in-chief that the Appellant and Hudson were both asked to leave and that the Appellant complied and returned to his home. (T. 97). There is no dispute that Hudson came onto the Appellant's property.

There is further testimony, elicited during the State's case-in-chief, that the Appellant's life was threatened by Hudson, or, at the very least, Hudson had threatened to "cut" the Appellant. (T. 92).. The State's own police witness testified as to the obvious fact that rocks had been picked up and moved. (T. 123). Such testimony corroborates the Appellant's position that he was defending himself against an individual who had just minutes beforehand threatened to end his life. (T. 235).

It is more than reasonable that the Appellant would be in fear of imminent harm when Hudson, with whom he had previously fought with, who had kicked him while he was down, and who had threatened to "cut" him, followed the Appellant to his house and began to argue and yell at him. Hudson was undoubtedly extremely close to the Appellant as the Appellant was in close enough proximity to stab him. Hudson had physically assaulted the Appellant, threatened, at the very least, to commit the crime of aggravated assault against him, and was at arm's length. The Appellant respectfully contends that the facts lend themselves to the unquestionable conclusion that he acted in self-defense.

Furthermore, It cannot be concluded that the state presented any evidence of the element of deliberate design. In ***Tran***, the Mississippi Supreme Court defined "deliberate design," saying; "Deliberate design means intent to kill without authority of law and not being legally justifiable, legally excusable or under circumstances that would reduce the act to a less crime [than murder]." ***Tran v. State***, 681 So. 2d 514, 516. (Miss. 1996).

The State failed to present any evidence that the Appellant's actions were not legally

excusable. It is more than telling that, in the instant case, Hudson was merely stabbed once. The nature of what caused the death also lends itself to self-defense. In order to stab someone, the two parties must be in close proximity to one another. This is further corroboration that the Appellant was acting in self-defense.

In ***Gray v. State***, the victim threatened the Appellant, saying "I am going to kill you." ***Gray v. State***, 130 So. 150, 150 (Miss. 1930). The Court found this to be a "vile epithet" and determined that the testimony of self-defense was corroborated, "in many respects" by the State's witnesses. ***Id.*** The Court concluded, "taking as true all the facts which the state's evidence tended to prove, we are of the opinion that they are not inconsistent with the appellant's innocence." ***Id.*** at 150-51.

The facts in the case *sub judice*, just as in ***Gray***, involve a threat being made at the Appellant by the person who ultimately lost their life. Just as in ***Gray***, the Appellant's story is significantly corroborated by the State's witnesses. Hudson was overheard threatening to "cut" the Appellant. (T. 92). Rocks used by Hudson when he entered onto the Appellant's property in order to confront him were noticed by the State's own witness, Detective Rickard. (T. 123). The facts presented by the state are not inconsistent with the Appellant's innocense.

iii. Conclusion

Because the State was unable to prove that the Appellant's actions were not in self defense and the element of deliberate design, the Appellant respectfully submits that the Court should reverse and render the Appellant's murder conviction based on this insufficiency of the evidence.

ISSUE TWO: WHETHER THE TRIAL COURT ERRED WHEN IT OVERRULED THE APPELLANT'S MOTION FOR A NEW TRIAL BECAUSE THE OVERWHELMING WEIGHT OF THE EVIDENCE POINTED TOWARDS EXCUSABLE HOMICIDE IN

SELF-DEFENSE AND NOT MURDER.

i. Standard of Review

A motion for a new trial challenges the weight of the evidence; reversal is only warranted if the lower court abused its discretion in denying a motion for a new trial. ***Dilworth v. State***, 909 So. 2d 731, 737 (Miss. 2005). "Only in those cases where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal." ***Herring v. State***, 691 So. 2d 948, 957 (Miss. 1997).

A jury verdict will only be disturbed on appeal in exceedingly rare cases. ***Thomas v. State***, 92 So. 225, 226 (Miss. 1922). Despite the standard of review being so high, "this Court has not hesitated 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 v. State***, 909 So. 2d 731, 737 (Miss. 2005) (citing ***Lambert v. State***, 462 So. 2d 308, 322 (Miss. 1984).

ii. The overwhelming weight of the evidence supports the conclusion that the Appellant was acting in self defense.

It is more than telling that, in the instant case, Hudson was merely stabbed once. The nature of what caused the death also lends itself to self-defense. In order to stab someone, the two parties must be in close proximity to one another. This is further corroboration that the Appellant was acting in self-defense.

Again, as noted above, the Appellant was at his home at the time of the incident. (T. 97). There is no dispute that the two parties were involved in a physical altercation at the bar across

the street where Hudson threatened to cut the Appellant. (T. 92, T. 96).

Hudson was asked not to come over to the house. Hudson's own daughter testified that she told him that he did not need to come over to the house because it would only start another altercation. (T. 153). The Appellant testified that Hudson threatened to kill him. (T. 220). Such activity on the part of Hudson is consistent with the way that he had behaved the entire night.

There is ample evidence to believe that Hudson picked up a rock and threw it at the Appellant. Photos taken the evening after the incident corroborate the testimony of witnesses who say that a rock thrown by Hudson hit the Appellant in the head. (Exib 13). This is further supported by the testimony of Detective Rickard who could tell that two rocks had been moved because of the dead grass that was under them. (T. 123).

Hudson confronted and fought with the Appellant or the Appellant's family on multiple occasions that evening. He was told not to come over to the house by his own daughter. The evidence is overwhelming that the Appellant acted in a manner consistent with self-defense.

iii. Conclusion

Because the overwhelming weight of the evidence shows that the Appellant was acting in self-defense when Hudson came onto his property and threatened his life, this honorable Court should reverse and remand for a new trial.

ISSUE THREE: IN THE ALTERNATIVE, WHETHER THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT APPELLANT HIS MOTION FOR A NEW TRIAL ON THE GROUNDS THAT OVERWHELMING WEIGHT OF THE EVIDENCE POINTED TOWARDS MANSLAUGHTER RATHER THAN MURDER.

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.

ii. The weight of the evidence supports "imperfect self-defense" manslaughter.

Mississippi Code Annotated § 97-3-31 provides for manslaughter when an individual unnecessarily kills a person while resisting an effort of the slain person to commit a felony or do an unlawful act. It reads;

> "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.."

Miss. Code Ann. § 97-3-31.

As the Mississippi Supreme Court has noted, the imperfect self-defense theory is;

> "that [the defendant] killed the deceased without malice, under the bona fide belief, but without reasonable cause therefor, that it was necessary for him so to do in order to prevent the appellant from inflicting death or great bodily harm from him..."

Cook v. State, 467 So. 2d 203, 207 (Miss. 1985)(quoting ***Williams v. State***, 90 So. 705, 706 (1921).

In the instant case, there is ample support in the record to indicate that the Appellant's actions fell in accordance with the imperfect self-defense theory. As noted above, immediately prior to the incident resulting in the death of Hudson, the Appellant and Hudson were in a physical altercation. (T. 82). The Appellant's life was threatened by Hudson when Hudson threatened to "cut" the Appellant. (T. 92). Hudson arrived at the Appellant's home, on the Appellant's own property and wielded a weapon. (T. 153). The resulting death of Hudson more than adequately supports the theory of imperfect self-defense.

iii. The weight of the evidence supports "heat of passion" manslaughter.

Manslaughter is defined as "[t]he killing of a human being, without malice, in the heat of passion, but in a cruel or unusual manner, or by the use of a dangerous weapon, without authority of law, and not in necessary self defense." **Miss. Code Ann. § 97-3-35**. The Mississippi Supreme Court has defined heat of passion as;

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

Tait v. State, 669 So. 2d 85, 89 (Miss. 1996)(quoting ***Buchanan v. State***, 567 So. 2d 194, 197 (Miss. 1990)).

In ***Dedeaux v. State***, an estranged husband and his wife's live-in boyfriend got into an argument at a bar which ended when the boyfriend shot and killed the husband. ***Dedeaux v. State***, 630 So. 2d 30, 31 (Miss. 1993). The Mississippi Supreme Court described the argument and fight as "representative of the typical 'juke joint' confrontation." ***Dedeaux***, 630 So. 2d at 31. The ***Dedeaux*** Court further acknowledged that there was inconsistent testimony given by various witness. ***Id.*** Because of this inconsistent testimony, the Court found that it was virtually impossible to determine who the aggressor was and what exactly took place during the altercation. ***Id.*** The Supreme Court reversed as to murder and remanded for re-sentencing on manslaughter or some lesser-included charge.

In the instant case, it is clear who the aggressor is. Hudson came onto the Appellant's property after threatening his life. (T. 92). The Appellant returned to his home and was later met by Hudson. (T. 153).

Furthermore, in ***Dedeaux***, the Court found that even though the boyfriend had retrieved a

gun in the parking lot with intentions of confronting and shooting the husband, the facts clearly indicated that a conviction for manslaughter was appropriate, not murder. ***Id.*** at 33. The Court determined that the shooting occurred in the heat of passion of a bar room argument, and although there was more force used than necessary, the evidence showed that the husband was shot without malice or premeditation. ***Id.***

In comparing ***Dedeaux*** to the case at bar, it is apparent that if going to the parking lot, retrieving a gun, and using that gun to shoot the person with whom you are fighting is ruled to be heat of passion manslaughter, then a single stab to someone who has already threatened your life, and who has entered onto your property after you had retreated from a previous altercation with the individual would also clearly and unequivocally be manslaughter or less.

Another similar case to the case *sub judice* is ***Clemons v. State***, which involved a bar room brawl that resulted in a stabbing death. ***Clemons v. State***, 473 So. 2d 943 (Miss. 1985). In ***Clemons***, two men were involved in two different fights inside the bar, followed by a third altercation on a street not far from the bar. ***Id.*** 473 So. 2d at 943. In the last altercation, the two men fought with sticks until one man pulled a butcher knife, stabbing the other, causing his death. ***Id.***

The ***Clemons*** Court held that, as a result of the varying testimony in the case and the questionability surrounding the multiple stab wounds that cause the victim's death, there was "more than enough conflicting evidence to cast at least a reasonable doubt as to murder." ***Id.*** at 945. The ***Clemons*** Court compared the facts of its case to that of ***Wells v. State***, 305 So. 2d 333 (Miss. 1974).

The ***Wells*** Court held that evidence in the case was insufficient to support the conviction of murder, and, rather, found that the defendant was guilty, as a matter of law, of manslaughter

and reversed and remanded the case for re-sentencing for manslaughter. ***Id.*** 305 So. 2d at 333. Basing its opinion on the ***Wells*** precedent, the ***Clemons*** Court chose to reverse the murder conviction and remand for re-sentencing, declaring that the evidence and testimony of the stabbing proved only heat of passion manslaughter.

The facts in the case *sub judice* are comparable to the above cases. This case involved a "juke joint" brawl that boiled over into the home of the Appellant. There is inconsistent testimony detailing what occurred when Hudson confronted the Appellant at the Appellant's own home. There is ample evidence that their encounter was a heated confrontation involving physical blows, anger, yelling, and cursing. Therefore, the evidence supports a conviction of manslaughter rather than murder.

iv. Conclusion

Because the weight of the evidence overwhelmingly lends itself to the appropriateness of a verdict of manslaughter, the Appellant respectfully requests that this honorable Court reverse the Appellant's conviction of murder, render a verdict against the Appellant on the charge of manslaughter, and remand this matter to the lower court for sentencing on the conviction of manslaughter.

ISSUE FOUR: IN THE ALTERNATIVE, WHETHER THE TRIAL COURT ERRED WHEN IT DENIED THE APPELLANT'S MOTION FOR A JNOV BECAUSE THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A VERDICT OF MURDER, AND INSTEAD, SUPPORT A VERDICT OF MANSLAUGHTER.

i. Standard of Review

"A motion for JNOV challenges the legal sufficiency of the evidence. ***Montana v. State***, 822 So.2d 954, 967 (Miss. 2002)(citing ***McClain v. State***, 625 So.2d 774, 778 (Miss.1993)). "Under this standard, this Court will consider the evidence in the light most favorable to the

appellee, giving that party the benefit of all favorable inference that may be reasonably drawn from the evidence." ***Coleman v. State***, 697 So.2d 777, 787-788 (Miss.1997)(citing ***Sperry-New Holland, a Div. of Sperry Corp. v. Prestage***, 617 So.2d 248, 252 (Miss.1993). "If the facts so considered point so overwhelmingly in favor of the appellant that reasonable men could not have arrived at a contrary verdict, we are required to reverse and render." ***Id.***

ii. The State failed to establish that the killing of Hudson was done with deliberate design.

"'Malice aforethought,' 'premeditated design,' and 'deliberate design' all mean the same thing for the purposes of the offense of murder." ***Tran v. State***, 681 So. 2d 514 (Miss. 1996). It has been further held that malice aforethought or deliberate design is the single most important element in the crime of murder. ***Pendergraft v. State***, 213 So. 2d 560 (Miss. 1968).

Deliberate design cannot be formed in an instant. As the Mississippi Supreme Court has held;

> "[while it is not doubt true that a deliberate design to kill aa person may be formed very quickly, and perhaps only moments before the act of consummating the intent, it is a contradiction in terms to state that a 'deliberate design' can be formed at the very moment of the fatal act."

Windham v. State, 550 So. 2d 123, 126 (Miss. 1987).

The ***Windham*** Court further defined deliberate design as a "full awareness of what one is doing; it generally implies careful and unhurried consideration of the consequences along with calculation, planning, and contemplation" ***Id.***

In ***Jordan v. State***, the Mississippi Supreme Court found error in even submitting to the jury the issue of murder when there was no evidence of premeditation and the victim was the aggressor. ***Jordan v. State***, 160 So. 2d 926, 927 (1964). The ***Jordan*** Court noted that, ordinarily, the decision of whether a homicide is murder or manslaughter is a question for the jury, however,

the court noted that the evidence showing that the victim was the aggressor was enough to preclude the question of whether Jordan was guilty of murder. ***Id.***

As noted above, there is no evidence to support any premeditation on the part of the Appellant. The death of Hudson, while tragic, was the result of a bar brawl that took a turn for the worse. After a heated physical confrontation in the parking lot of the bar, where testimony showed that Hudson had threatened to "cut" the Appellant, Hudson went to the Appellant's home and confronted him. On his way across the street, Hudson had threatened to kill the Appellant. Hudson was stabbed once after, as shown by the evidence presented at trial, he had thrown rocks at the Appellant.

iii. Conclusion

Because the State failed to prove the element of deliberate design, the Appellant respectfully asks that this Court reverse the Appellant's conviction for murder, render a conviction for manslaughter and remand this case to the lower court for sentencing.

ISSUE FIVE: WHETHER THE CIRCUIT COURT ERRED IN FAILING TO PROPERLY CONSIDER THE APPELLANT'S MOTION TO DISMISS FOR A VIOLATION OF HIS STATUTORY RIGHT TO A SPEEDY TRIAL.

i. Standard of Review

The Standard of Review for assessing a speedy trial claim is as follows:

> "Review of a speedy trial claim encompasses the fact question of whether the trial delay rose from good cause. Under this Court's standard of review, this Court will uphold a decision based on substantial, credible evidence. If no probative evidence supports the trial court's finding of good cause, this Court will ordinarily reverse. The State bears the burden of proving good cause for a speedy trial delay, and thus bears the risk of nonpersuasion."

DeLoach v. State, 722 So. 2d 512, 516 (Miss. 1998)(citations omitted).

ii. The delay was in violation of the Appellant's statutory right to a speedy trial.

The Appellant asserts that his right to a speedy trial guaranteed by **Miss. Code Ann. § 99-17-1** was violated. **Section 99-17-1** provides:

> Unless good cause be shown, and a continuance duly granted by the court, all offenses for which indictments are presented to the court shall be tried no later than two hundred seventy (270) days after the accused has been arraigned.

Miss. Code Ann. § 99-17-1.

Explicit waiver of arraignment may also be used to trigger the state right. ***Felder v. State***, 831 So. 2d 562, 570 (Miss. Ct. App. 2002).

In the case *sub judice*, the applicable time line was as follows:

SPEEDY TRIAL TIME LINE

Event	Date	Time Elapsed
Arraignment (C.P. 11)	August 18, 2005	0 days
Agreed Upon Continuance, Order Filed for mental exam (C.P. at 11)	September 2, 2005	15 days
Order Granting Exam (C.P. at 28-31)	October 19, 2005	62 days
Order for MSH to Conduct Mental Evaluation (C.P. at 39)	March 17, 2006	210 days

- The Circuit Court ordered the Mississippi State Hospital to conduct a mental evaluation with whatever information was available to them. This examination was to be done within ninety (90) days of the order.

Master Order of Continuance (C.P. at 41)	May 26, 2006	279 days
Master Order of Continuance	September 14, 2006	361 days

- Not present in Clerk's papers but listed in trial court's docket.

Master Order of Continuance	December 11, 2006	448 days

- Not present in Clerk's papers but listed in trial court's docket.

Master Order of Continuance (C.P. at 52)	January 9, 2007	477 days
Master Order of Continuance (C.P. at 53)	June 1, 2007	618 days
Letter to State Hospital	August 31, 2007	710 days

- The Circuit Court sent a letter to the Mississippi State Hospital to inquire when the Appellant was to be seen. The letter mentioned the order directing the hospital to do the examination within ninety days.

Letter from State Hospital	September 6, 2007	717 days

- The Mississippi State Hospital responded to the Circuit Court that it had failed to receive the order and that the Appellant's evaluation was scheduled soon.

Master Order of Continuance (C.P. at 56)	September 7, 2007	718 days
Motion to Dismiss Charges for Failure to Provide a Speedy Trial (C.P. at 58-59)	September 24, 2007	735 days
Letter from MSH that Appellant is competent. (C.P. at 62-64)	October 04, 2007	745 days
Motion for Speedy Trial (C.P. at 65)	November 9, 2007	781 days
Agreed Upon Order of Continuance (C.P. at 67)	November 19, 2007	791 days
Motion for Fast and Speedy Trial (C.P. at 70)	December 12, 2007	814 Days
Trial begins	February 21, 2008	885 Days

As can be clearly seen above, 885 speedy trial days elapsed from the time of the Appellant's arraignment to the time of the Appellant's trial, well in excess of the 270-day statutory scheme. When the length of delay between arraignment and trial exceeds 270 days and is, therefore, presumptively prejudicial, the state then carries the burden of persuasion to demonstrate that the delay did not prejudice the Appellant and violate his rights. ***Duplantis v. State***, 708 So. 2d 1327 (Miss. 1998). This is because the accused is under no duty to bring

himself to trial. ***Herring v. State***, 691 So. 2d 948 (Miss. 1997).

In the instant case, the trial judge, more than once, refused or failed to properly consider the speedy trial motions of the Appellant. There was no hearing on any of the three motions for a speedy trial filed by the Appellant. Moreover, for the delays, the state has provided no good faith explanation and, therefore, cannot carry its burden.

While the Appellant recognizes that part of the delay was due to the length of time it took to adequately examine the competency of the Appellant, there is no good cause for why it took two years to perform such an examination. The Mississippi State Hospital failed to receive the order from the circuit court that it should perform the competency examination ion the Appellant. The circuit court, after no competency examination was performed in five hundred (500) days, contacted the State Hospital. The only explanation for such a delay is negligence and failure to keep track of the goings on of an individual awaiting trial.

Also, it may be that some of the delay occurred as a result of court congestion. However, for speedy trail purposes, a crowded docket will not automatically suffice to establish good cause for delay. ***Walton v. State***, 678 So. 2d 645 (Miss. 1996). Crowded court dockets are good cause for delay only if the court actually grants a continuance on that basis. ***Johnson v. State***, 666 So. 2d 784 (Miss. 1995). However, there is nothing in the record to indicate that any of the continuances in the instant case were granted on the basis of a crowded docket.

iii. Conclusion

The State's failure to bring the Appellant to trial within the appropriate time, and, additionally, provide good faith explanations as to why it failed to bring the Appellant on for trial on three (3) separate occasions clearly weighs against the State. For the violation of the Appellant's statutory right to a speedy trial, the judgment of the trial court should be reversed and

a judgment of dismissal rendered.

ISSUE SIX: WHETHER THE CIRCUIT COURT ERRED IN FAILING TO PROPERLY CONSIDER THE APPELLANT'S MOTION TO DISMISS FOR A VIOLATION OF HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL.

i. Standard of Review

Constitutional right to speedy trial exists separately from the statutory right. ***Simmons v. State***, 678 So. 2d 683 (Miss. 1996). Review of a speedy trial claim involves a question of fact: whether the trial delay arose from good cause. ***Flora v. State***, 925 So. 2d 797, 814 (Miss. 2006) (citing ***Deloach v. State***, 722 So. 2d 512, 516 (Miss. 1998)). An appellate court will uphold the trial court's finding of good cause if the decision is supported by substantial credible evidence. ***Id.*** (citing ***Folk v. State***, 576 So. 2d 1243, 1247 (Miss. 1991)). On the other hand, if no probative evidence supports the trial court's findings, the appellate court must reverse the decision and dismiss the charge. ***Ross v. State***, 605 So. 2d 17, 21 (Miss. 1992) (citing ***Strunk v. United States***, 412 U.S. 434, 440 (1973)). The State bears the burden of proving good cause for the speedy trial delay, and thus bears the risk of non-persuasion. ***Flores v. State***, 574 So. 2d 1314, 1318 (Miss. 1990); ***Nations v. State***, 481 So. 2d 760, 761 (Miss. 1985).

The Sixth Amendment of the United States Constitution guarantees the right to a speedy trial, which is a fundamental right. ***State v. Woodall***, 801 So. 2d 679, 681 (Miss. 2001). Unlike the statutory right provided to a criminal defendant via the Statutes of the State of Mississippi, a defendant's constitutional right to a speedy trail arises when an indictment or information is returned against him, or when "actual restraint [are] imposed by arrest and holding to a criminal charge." ***Bailey v. State***, 463 So. 2d 1059, 1062 (Miss. 1985); *See also* ***U.S. v. Marion***, 404 U.S. 307 (1971). The Mississippi Supreme Court has held that the placing of a detainer against an individual "suffices to make him an accused." ***Perry v. State***, 419 So. 2d 194, 198 (Miss. 1982).

In ***Barker v. Wingo***, the United States Supreme Court established the test for judging the merits of speedy trial claims. ***Barker v. Wingo***, 407 U.S. 514 (1972). There, the United States Supreme Court declined to make a bright line rule, but instead adopted a four-factor balancing test "in which the conduct of both the prosecution and the defendant are weighed." ***Id.*** at 529. The four factors are: (i) length of the delay, (ii) the reason for the delay, (iii) the defendant's assertion of his right, and (iv) prejudice to the defendant. ***Id.*** at 530.

ii. Length of the Delay

Any delay of over eight months is presumptively prejudicial and triggers the balancing of the other three ***Barker*** factors. ***Woodall***, 801 So. 2d at 682. The lodging of a detainer again a person otherwise in custody suffices to make the prisoner an accused. ***Bailey***, 463 So. 2d at 1062. Because the Appellant was in custody since the day after his alleged crime, nine-hundred and forty-six (946) days passed between the accusation against the Appellant and his trial. Therefore, a balance of the other three factors of the ***Barker*** test should be conducted.

iii. Reason for the Delay

Under the ***Barker*** test, " 'different weights' are to be 'assigned to different reasons' for delay" ***Doggett v. United States,*** 505 U.S. 647, 657 (1992)(quoting ***Barker,*** 407 U.S. at 531).

Official negligence and court congestion, the likely causes of the delay in this instance, are "more neutral" reasons that weigh "less heavily," but are nevertheless counted against the government in terms of balancing. ***Barker***, 407 U.S. at 531.

While some of the delay in bringing the Appellant to trial might be attributable to "official negligence," the substantial amount of time that passed seems to surpass mere negligence. The Court issued an order that the Mississippi State Hospital perform an examination within ninety (90) days. (C.P 39). It was not until five-hundred (500) days had

passed before the trial court inquired about the order it had previously given. In total, it took six-hundred and eighty-three (683) days for a competency examination to be completed upon the Appellant. Meanwhile, the appellant was incarcerated during the entirety.

While it is true that there was some delay because of trial counsel's request for a continuance in November, the delay still amounted to over seven-hundred (700). Therefore, it should not be considered that the simple fact that trial counsel asked for a continuance after a overwhelmingly prejudicial delay had already occurred.[1]

This factor weighs in favor of the Appellant.

iv. The Defendant's Assertion of his Right

The duty to bring a defendant to trial always rests with the State. ***Stevens v. State***, 808 So. 2d 908, 917 (Miss. 2002); ***Sharp v. State***, 786 So. 2d 372, 381 (Miss. 2001). While the State bears the burden to bring the defendant to trial, the defendant has some responsibility to assert the speedy trial right. ***Wiley v. State***, 582 So. 2d 1008, 1012 (Miss. 1991). The Appellant asserted his speedy trial right on three separate occasions.[2]

In recent cases, the courts have relied on ***Perry vs. State***, for the proposition that the defendant's demand for dismissal or for an instant trial is insufficient to assert the speedy trial right. ***Perry v. State***, 637 So. 2d 871, 875 (Miss. 1994). The facts in ***Perry***, however, are easily distinguishable from the case at bar. In ***Perry***, the defendant did not assert his right until he filed a motion to quash and dismiss the indictment. ***Id.*** In the instant case, the Appellant on three

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1. In the alternative, should the Court find that the continuance for defense counsel is dispositive in its speedy trial analysis, the Appellant respectfully contends that trial counsel was ineffective, as alleged in Issue Seven, *infra*.

2. It is arguable that the Appellant asserted his right to a speedy trial in a letter written to the Circuit Court in which he exclaimed that he had been incarcerated for 800 days. (C.P. 55).

occasions made a motion for a speedy trial. The Appellant was in jail or at Mississippi State Hospital for the entire duration of the delay in coming to trial, whereas the defendant in ***Perry*** was only in jail for one month during the delay. ***Id.***

It should further be noted that Mississippi courts have been open to demands for speedy trials offered by defendants. *See,* ***State v. Fergusson***, 576 So. 2d 1252, 1254 (Miss. 1991) (noting "Nothing in the law requires that the demand [for a speedy trial] be in writing").

Therefore, this factor weighs in favor of the Appellant.

Should this Honorable Court find this case to be similar to ***Perry*** and conclude that the Appellant did not sufficiently assert his demand for a speedy trial, it should be noted that the Appellant made three (3) separate assertions of his speedy trial rights. The Appellant respectfully contends that this Court should consider that more persuasive and more in the favor of the Appellant than if he had merely filed one demand for a speedy trial or one motion to dismiss for failure to provide.

v. Prejudice

There are three interests that an individual's speedy trial rights are intended to protect: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *See* ***Jenkins v. State***, 607 So. 2d 117 (Miss. 1992).

In ***Doggett***, the United States Supreme Court concluded that "the speedy trial enquiry must weigh the effect of delay on the accused's defense just as it has to weigh any other form of prejudice." ***Doggett***, 505 U.S. at 655. The ***Doggett*** Court further concluded that "affirmative proof of particularized prejudice is not essential to every speedy trial claim." ***Id.*** at 655. Excessive delay may compromise the trial in ways that neither side can prove, so that the longer

the delay becomes, the prejudice it may cause, even without proof, should take an increasing role in the mix of relevant factors. ***Id.*** at 656.

The Appellant spent nearly two years awaiting a competency examination. This delay was entirely unreasonable. The Appellant respectfully contends that this delay was oppressive and undoubtedly prejudicial to the Appellant. This delay amounted to a *de facto* commitment of the Appellant by the State. There can be very little doubt that such a delay constituted an oppressive pre-trial incarceration.

Furthermore, there can be little doubt that the Appellant's anxiety and concern were in no way minimized by the failure to provide him a speedy trial. The Appellant repeatedly wrote letters and motions expressing his anxiety and concern regarding the lengthy pre-trial incarceration he was subjected to, all the while keeping up with the length of time that he had been incarcerated.

On August 27, 2007, the Appellant wrote a letter to the circuit judge saying that he had been in jail for eight hundred (800) days. (C.P. 55). The Appellant noted, "I have heard of "the wheels of justice" a lot in my life, turning. Well, Sir, in my case they are stuck and spinning." (C.P. 55).

On September 24, 2007, the Appellant wrote a letter to the circuit clerk noting that he had been waiting for twenty-four (24) months for an evaluation and that he had been in jail, in total for twenty-seven (27) months and one (1) day. (C.P. 60). The Appellant characterized the length of the time period as "ridiculous." (C.P. 60).

Because of the oppressive nature of the Appellant's pre-trial incarceration and the large amount of anxiety and concern caused to the Appellant, the delay was prejudicial to the Appellant; therefore, this factor weighs in favor of the Appellant.

vi. Conclusion

Upon a balancing of the ***Barker*** factors, this honorable Court should conclude that the Appellant was denied his constitutionally-mandated right to a speedy trial. All four factors weigh in favor of the Appellant; therefore, this Honorable Court should grant the Appellant the proper remedy for the violation of his constitutional rights.

It is widely established that the sole remedy for a Sixth Amendment speedy trial violation is the dismissal of the charges with prejudice. ***Bailey,*** 463 So. 2d at 1064. *See also* ***Ross v. State***, 605 So. 2d 17 (Miss. 1992); ***Strunk v. United States***, 412 U.S. 434 (1973). Because of this, the Appellant asks this Honorable Court to reverse appellant's conviction and release him from the custody of the Mississippi Department of Corrections.

ISSUE SEVEN: WHETHER TRIAL COUNSEL'S INEFFECTIVENESS DEPRIVED APPELLANT OF HIS CONSTITUTIONALLY MANDATED RIGHT TO A FAIR TRIAL.

i. Standard of Review

"When a defendant raises an ineffective assistance claim on direct appeal, the question before this Court is whether the judge, as a matter of law, had a duty to declare a mistrial or order a new trial *sua sponte*, on the basis of trial counsel's performance." ***Roach v. State***, 938 So. 2d 863, 869 (Miss. Ct. App. 2006)(citing ***Colenburg v. State***, 735 So. 2d 1099, 1102 (Miss. Ct. App. 1999).

The benchmark for judging any claim of ineffectiveness of trial counsel is whether counsel's conduct undermined the proper functioning of the adversarial process so that the trial cannot be relied on as having produced a just result. ***Strickland v. Washington***, 466 U.S. 668, 686 (1984). In order to successfully claim ineffective assistance of counsel, the Appellant must

meet the two-pronged test set forth in ***Strickland*** and adopted by the Mississippi Supreme Court. ***Stringer v. State***, 454 So. 2d 468, 576 (Miss. 1984).

Under the ***Strickland*** test, the Appellant must prove that (1) his attorney's performance was defective and (2) such deficiency deprived him of a fair trial. ***Id.*** at 477. Such alleged deficiencies must be presented with "specificity and detail" in a non-conclusory fashion. ***Perkins v. State***, 487 So. 2d 791, 793 (Miss. 1986).

The deficiency and any prejudicial effect are assessed by looking at the totality of circumstances. ***Hiter v. State***, 660 So. 2d 961, 965 (Miss. 1995). This review is highly deferential to the attorney and there is a strong presumption that the attorney's conduct fell within the wide range of reasonable professional assistance. ***Id.*** The Appellant must show that there is a reasonable probability that, but for his trial attorney's errors, he would have received a different result in the trial court. ***Stringer v. State***, 627 So. 2d 326, 329 (Miss. 1993). With respect to the overall performance of the attorney, "counsel's failure to file certain motions, call certain witnesses, ask certain questions, or make certain objections falls within the ambit of trial strategy." ***Cole v. State***, 666 So. 2d 767, 777 (Miss. 1995). In order to find for the Appellant on the issue of ineffective assistance of counsel, this Court will have to conclude that his trial attorney's performance as a whole fell below the standard of reasonableness and that the mistakes made were serious enough to erode confidence in the outcome of the trial below. ***Coleman v. State***, 749 So. 2d 1003, 1012 (Miss. 1999).

ii. According to the record, defense counsel had never tried a murder case before being appointed to represent the Appellant.

On October 13, 2005, the circuit court, on an *ore tenus* motion from trial counsel, ordered the appointment of trial counsel. (C.P. 25). The order stated the following; : "The Court is

aware that [trial counsel] has never tried a murder case and finds that his motion is reasonable and well taken and it is sustained." (C.P. 25).

While there is a significant passage of time between the date of the order and the beginning of trial, there is nothing in the record to indicate that trial counsel had, in fact, tried a murder case. Furthermore, there is no indication that co-counsel that was appointed was ever involved in the proceedings. There are no court filings containing the appointed co-counsel's name. Furthermore, there is nothing in the record to indicate that appointed co-counsel was present at trial.

While the fact that defense counsel had never tried a murder case, is not, in and of itself, dispositive as to whether his representation of the Appellant passed constitutional muster, it is relevant in inquiring as to the adequacy of that representation.

iii. Trial counsel was ineffective when asking for a continuance on November 19, 2007.

Trial counsel for the Appellant was granted a continuance by the trial court because he would "be in Philadelphia, PA, to see a friend receive the Medal of Honor from the President." (C.P. 67, R.E. 67). The Appellant contends that, should this honorable Court find that the continuance granted by the trial court on said date had any negative effect on the outcome of the speedy trial analysis presented in Issues Five (5) and Six (6), *supra*, trial counsel's conduct was ineffective.

Trial counsel must have certainly been aware that the Appellant had been incarcerated for over two (2) years at the time of his request for a continuance. Trial counsel undoubtedly must have also been aware that asking for a continuance would have had significant effects on the speedy trial rights of the Appellant. Therefore, should this continuance be in any way dispositive

on the Appellant's claim of violation of his speedy trial rights, trial counsel's representation was below the standards required by the United States Constitution.

For, if, but for trial counsel's ineffectiveness, the Appellant would have had the charges against him dismissed due to violation of his speedy trial rights.

iv. Trial counsel was ineffective in conceding the State's case during opening statements.

In its opening statements, the State argued that it intended to show that the actions in question were not done in self-defense, when it stated; "what I intend to prove is that when this defendant made the decision to stab Danny Hudson, it was not in reasonable self-defense." (T. 47).

After the State had given its opening statements, outlining what the evidence was going to show, trial counsel conceded the case. Trial counsel's opening statement began; "Thank you, Your Honor. Good morning again. I can't dispute anything that [the prosecutor] said. It happened." (T. 48).

No attorney representing a client who has pleaded not guilty should concede in his oral argument to a jury that his client was in fact guilty of the crime charged in the indictment. ***Faraga v. State***, 514 So. 2d 295, 307-308 (Miss. 1987). In the case *sub judice*, the State had made its opening statement, saying what the evidence would show, the defense counsel conceded that the evidence would show that, therefore conceding guilt to the crime charged in the indictment, murder.

The Appellant contends that this was not a tactical decision, and was, rather, the result of trial counsel's ineffectiveness. This was not a calculated gamble by trial counsel. Rather, such a statement was improper, ineffective, prejudicial, and warrants reversal.

v. Trial counsel was ineffective in vouching for the State's witness.

After the State's witness, Dr. Steven Hayne had testified, trial counsel, when it began its cross-examination. Trial counsel questioned;

> I'm a country lawyer. And you're a - - if I might say - - brilliant medical technologist or expert. Could you put this in language that Mama can understand? Can you tell me precisely – or where I can understand it and hopefully the ladies and gentlemen of the jury, did he just stick him?

(T. 140).

As noted in the arguments presented in Issues One through Four, *supra*, this was a case where the weight and credibility of the testimony was of utmost importance. Such bolstering and vouching for the credibility of the State's witness could only have tipped an already sensitive scale in favor of the State. Therefore, trial counsel was ineffective.

vi. Conclusion

The Appellant's trial counsel was clearly ineffective. This ineffectiveness prejudiced the Appellant to a large degree. The multiple instances of ineffectiveness noted *supra* show trial counsel's representation of the Appellant fall well below the acceptable guidelines, and, as a result, created substantial prejudice. For this reason, this honorable Court, should reverse and remand this case for a new trial where the Appellant may be afforded the opportunity to have effective legal representation.

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 for manslaughter, with instructions to the lower court. In the alternative, the Appellant herein would

CERTIFICATE OF SERVICE

I, Justin T. Cook, Counsel for Michael Gene Ray, 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 Lee J. Howard
Circuit Court Judge
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This the 4th day of August, 2008.

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