IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO.2008-KA-00489-COA

WILLIE PRATER — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
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CERTIFICATE OF INTERESTED PERSONS

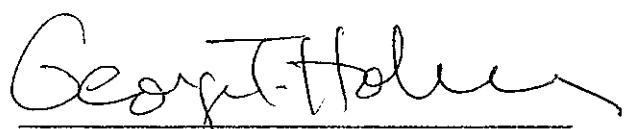
The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Willie Prater

THIS 17th day of July 2008.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Willie Prater

By: 

George T. Holmes, Staff Attorney

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STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Oktibbeha County, Mississippi, where Willie Prater was convicted of capital murder in a jury trial conducted July 31, 2006 through August 3, 2006, with Honorable Lee J. Howard, Circuit Judge, presiding. Prater is presently incarcerated with the Mississippi Department of Corrections serving a mandatory life sentence without parole.

FACTS

Smoke detectors at 226 Reed Road in Starkville sent automatic 911 calls to authorities at about 10:30 a. m on August 20, 2001. [T. 381, 394, 401, 422]. Responding fire-fighters entered the smoke filled house and found seventy-seven year old Mrs. Wynetta Miller unconscious, clinging to life on the floor of the second room they entered. [T. 380-90]. When they brought Mrs. Miller outside, the firemen saw she had severe head injuries. *Id.* Mrs. Miller was sent to a hospital in Columbus where she expired the same day. [T. 251].

Pathology did not attribute Mrs. Simmons' death to the fire, rather she died from cranial cerebral trauma resulting due to blunt force. [T. 275-83, 298-302]. It appeared that Mrs. Miller had been beaten to death with a steam iron found on the scene. [*Id.* ; Ex. 36].

There was no sign of forced entry into the house, and no fingerprints. [T. 430-31]. Mrs. Miller's husband, Dalton Miller, said he left for daily errands around 8:45 a.m., and it was his habit not to lock the garage entrance to the home. [T. 249]. When Mr. Miller returned home about 10:45 a.m., his yard was filled with emergency responders and his wife was lying on the ground. [T. 250]. The house had been ransacked, personal property and money were missing. [T. 253, 259, 435, 444; Ex. 30-34].

The fire was produced by arson, there were six (6) points of origin. [T. 402]. Extrapolating from two smoke alarm triggers and the time of the automatic 911 calls,

experts determined that the six fires were set within seconds of each other indicating more that one arsonist. [T. 423-26, 449]. The fires only burned about ten (10) minutes before being extinguished and the alarms would have sounded within 41 to 46 seconds from ignition of the fire. *Id.* So, the fire was set around 10:20 p. m.

Law enforcement had no leads in the search for Mrs. Miller's killer. [T. 478-79]. Then, almost five months later, Bentoire Riley of Starkville went to police on January 6, 2002, with an admission of being a lookout for the following men whom he said burglarized the Miller home on August 20, 2001: Devail Hudson, James Paster, Destimy Moore, "Little Mark", Derrick Turner, Marcus Evans, and the appellant here Willie Prater. [T. 307, 309-23, 481-85; Ex. D-1].

Riley's statement and testimony was that he approached the group of other men on a corner near the home of the Millers adjacent to a trailer park where some of them lived. *Id.* The men were planning a burglary, Devail Hudson was doing most of the talking saying he was going to burglarize the Miller home and kill Mrs. Miller if she were at home. *Id.*

Riley said he watched Hudson, Paster, Moore, Little Mark, Turner and Prater go into the Miller home from the carport entrance. [T. 309-23; 482, Ex. D-1]. After a while, the burglars hurriedly exited the home and scattered, except, Devail Hudson went back in the house about 45 minutes later, after which, Riley said he saw smoke and called the fire department. [T. 309-23, 336-37, 346, 350-52, 365-66, 373, 481-85; Ex. D-1]. Law

enforcement denied this 911 call was ever made. [T. 382, 500]. Based on Riley's testimony, the burglary would have occurred around 9:45 a. m. on August 20, 2001.

Riley's written statement included, "I think Devail went back into the house to kill the old lady & burn the house down." [Ex. D-1]. There was a corroborating witness who testified that she saw a group of men, including Hudson and Riley, near the Miller home on the morning of the fire. [T. 375-79].

Riley's testimony at trial was that he was only asked to be a lookout, but refused, and that law enforcement did not properly transcribe his statement where he said he agreed to be a lookout. [T. 309, 368]. After giving his statement to police, Riley was incarcerated and remained so through Prater's trial. [T. 485-86]. Riley said he had no deal to testify for the state, but, he was hoping his testimony would result in his release from jail. [T. 306, 369, 486].

Since Riley had mentioned him, police questioned Willie Prater on January 6, 2002. [T. 488-92]. Prater denied any involvement and he was released. *Id.*

Prater was questioned again on February 19, 2002, wherein he allegedly told police in a two part statement that he met Devail Hudson, Bentoire Riley, Destiny Moore, Demarcus Evans, James Paster, Joshua Williams and Derrick Turner on the corner of North side and Westside streets between 9:00 a.m. and 10:00 a.m on August 20, 2001, with Devail Hudson discussing plans to burglarize the Miller home. [T. 496-97; Ex. 40]. Prater allegedly said he agreed to be one of the lookouts, while Hudson, Riley, Moore and

Williams went into the Miller house . *Id.* Prater reportedly made a subsequent statement to Oktibbeha County Sheriff also on February 19, 2002 after Prater requested to see the Sheriff Adolph Bryant. [T. 659-660 ; Ex.37-38]. This statement was basically the same as the one given earlier to Starkville Police. *Id.*

Prater denied making the statements to police as recorded and challenged the voluntariness of his alleged confessions. [R. 98; T. 51-129]. The challenges were overruled. [T. 128].

Prater's defense was alibi, that he was at "Community Counseling" at the Discovery House on Vine Street in Starkville during the morning of August 20, 2001, which was where he was every weekday. [T. 88, 641]. Prater presented testimony of his mother who said she saw Prater leave for the bus between 7:30-8:00, and did not see him again until about 2:30 p.m. the same day. [T. 538-48]. Jadsie Bush, who currently works for the Oktibbeha County Sheriff as a jailer, delivered meals to elderly people back in 2001 and testified she saw Willie Prater at a bus stop between 7:30 and 8:00 a.m. and saw him again around 1:00 - 1:30pm. on the day of the Miller's burglary. [T. 568-71]. Joanne Miller said she saw Willie also between 7:30 and 8:00 a.m. on the morning in question. [T.585-86]. Gloria Elliot, the Starkville Pilot Mini-Bus driver who picked up Willie Prater on the morning of August 20, 2001, said she picked Willie up between 7:30 a.m. and 8:00 a.m., watched him enter the facility, and probably brought him home around 1:00 or 1:30 p.m. [T. 641-44].

The trial court precluded another alibi witness Tommy Scales for an alleged discovery violation. [T. 602- 639]. Mr. Scales was to testify that he saw Prater at the time of the crime in the parking lot of the counseling center. *Id.*

SUMMARY OF THE ARGUMENT

The trial court erroneously excluded a defense witness on the basis of a discovery violation. Prater's counsel was ineffective. The state made inflammatory closing arguments. The court allowed incompetent opinion testimony about canine tracking. There should have been a lesser included offense instruction. The verdict was contrary to the evidence. Prater was not mentally competent to stand trial nor competent to waive his privileges against self incrimination.

ARGUMENT

ISSUE NO. 1: WHETHER THE COURT ERRED IN EXCLUDING A DEFENSE WITNESS?

Prater's trial counsel failed to disclose alibi witness Tommy Scales until the morning of the first day of trial. [T. 601]. This was the same day counsel filed a motion to suppress Prater's statements. [T. 53]. The standard of review regarding the admission or exclusion of evidence is abuse of discretion. *Burton v. State*, 875 So.2d 1120(¶ 6) (Miss. Ct. App.2004).

The undisclosed witness, Tommy Scales, was a bus driver who said in his proffer

that he saw Prater going into the community counseling facility around 8:00 a. m. as did the other defense witnesses, but added that he said he saw Prater again around 10:00 to 10:30 in the parking lot of the facility, which would have been near the time of the burglary and murder. [T. 601, 626-27;Ex. 42 ID]. Upon the disclosure of Scales on the first trial day, the district attorney's investigator interviewed Scales and recorded a statement from him. [T. 610, 618].

Defense counsel advised the court that he had just learned about Mr. Scales a few days before trial and supplemented the defendant's discovery as soon as possible. [T. 604, 608, 623, 627]. However, there was testimony that Mr. Scales had spoken to an investigator some six years earlier, Jackie Bolton, who was not working for Prater's trial counsel at that time but subsequently became employed with trial counsel two to three years before the trial. [T. 628-29, 632-33].

The district attorney here stated to the court that he desired neither a continuance nor mistrial. [T. 609]. The court granted the state an overnight adjournment to investigate and prepare rebuttal to Mr. Scales. [T. 614]. Yet even with the state knowing about the witness and being given extra time, the court, nevertheless, refused to allow Mr. Scales' testimony. The trial court, relying on the opinion in *Morris v. State* 927 So.2d 744 (Miss. 2006), ruled that defense counsel's non-disclosure of alibi witness Scales was intentional and done with an intent to obtain a tactical advantage. [T. 636-39].

The state already knew that Prater would be asserting a defense of alibi so they

could not claim total surprise. [T. 603, 605, 635-36]. The prosecutor knew about the other witnesses who claimed to have seen the defendant earlier in the day, but the prosecutor did not consider those witnesses to be technically "alibi", and did not request UCCCR 9.05 information from the defense. [T. 603, 605, 635-36]. So, this is a UCCCR 9.04 situation rather than Rule 9.05

The case of *Taylor v. Illinois*, 484 U.S. 400, 415-17, 108 S.Ct. 646, 656-57, 98 L.Ed.2d 798, 814 (1988) is an appropriate starting point for the analysis of this issue. Generally, there is overriding principle that the Compulsory Process Clause bestows upon a criminal defendant "the right to compel the presence and present the testimony of witnesses." 484 U.S. at 409, 108 S.Ct. 646.

The *Taylor* Court, however, recognized a narrow exception to this rule and held that excluding defense evidence which has been wilfully withheld from the state during the discovery process by a defendant with the motivation of obtaining a tactical advantage did not violate the the Sixth Amendment Compulsory Process Clause. 484 U.S. 415-17, 108 S.Ct. 656-57.

In *Taylor*, non-disclosure of a defense witness was found to be willful because Taylor's lawyer had actually interviewed the non-disclosed witness the week before the trial and waited a week to make the disclosure to the state at trial when there had been ample opportunity to do previously. *Id.* This led the Court to infer that the defense deliberately sought a tactical advantage. *Id.*

The Mississippi Supreme Court referenced the *Taylor* decision the same year it was decided in *Houston v. State*, 531 So.2d 598, 612 (Miss.1988) and made clear the limitations of the exception by stating:

> [i]n this context, the radical sanction of exclusion of a substantial portion of the defendant's evidence is one that should rarely be used. Generally, it ought to be reserved for cases in which the defendant participates significantly in some deliberate, cynical scheme to gain a substantial tactical advantage."

It is suggested here that the learned trial court misinterpreted, or misapplied, the opinion of *Morris v. State* 927 So.2d 744, 746-47 (Miss. 2006). The facts of *Morris* are strikingly different from those here on the discovery violation claim. In *Morris*, defense counsel presented the state a list of nineteen previously undisclosed witnesses. 927 So. 2d 746. When the state objected, Morris' counsel offered the brilliant excuse that the state should have known about the witnesses if it had done its job, and should have in turn disclosed the witnesses to the defense. *Id.* Not biting on this bogus argument, the trial court found the "cynical scheme" and sinister motivation referenced in *Houston*, *supra*, and carefully excluded only the evidence which was found to be prejudicial to the state and the Supreme Court affirmed. *Id.*

The present case is more akin to *Sandefer v. State* 952 So.2d 281, 293 (Miss. Ct. App. 2007) where the court recognized that homage must always be paid to "the compulsory process clause of the Sixth Amendment" in ruling on discovery violations of a defendant under UCCCR Rule 9.04 or 9.05, because, even if the procedures under the

rules are followed, the trial court cannot exclude defense evidence unless the "court determine[s] that the 'defendant's discovery violation [was] 'willful and motivated by a desire to obtain a tactical advantage.' *Id.* In *Sandefer*, supra, the court found no proof that the discovery violation there was "willful or motivated by a desire to obtain an unfair advantage over the State" because defense counsel learned of the unnamed witness at issue "shortly before it was disclosed to the court". 952 So. 2d at 293. The *Sandefer* court found that the defense witness should not have been excluded and reversed with remand for a new trial. *Id.*

The present case does not involve a "cynical scheme" nor wilful misconduct by either defense counsel nor the defendant. Instead, here there was neglect, excusable or not, of a mentally weak defendant by counsel with some level of physical infirmity. The record shows that trial counsel needed assistance with seeing documents. [T. 363]. The defendant had a long history of mental illness and was arguably competent to stand trial only with the aid of medication. [T. 44-45].

The punitive measure of witness exclusion is reserved for the worst cases of defendant misconduct of which there is none in the record of this case. Punishing Prater for his counsel's neglect does not comport with the Sixth Amendment nor the *Taylor* decision.

The case of *Coleman v. State,* 749 So.2d 1003, 1006-09 (Miss.1999), is a classic case of a defendant trying to manipulate the system by not telling his lawyer about a

witness until the last minute. Coleman wanted to call an alibi witness Tiffany Jones, a former girlfriend. Coleman had not notified his lawyer of the witness until a week before trial. The judge excluded the alibi witness due to noncompliance by the defense with UCCCR9.05. *Id* The *Coleman* court applied *Taylor* finding justification in the trial court excluding the girlfriend alibi. *Id.* The defense conduct in the present case is not comparable to *Coleman.*

Not only was there no showing of misconduct here by the defense, there was really no prejudice to the state here. The state here knew about Mr. Scales the first day of trial. [T. 601-03]. The witness cooperated and gave a recorded interview. [T. 613]. The state had every opportunity to have a subpoena duces tecum instanter issued for any documentation it needed. The court gave the state an additional overnight adjournment to investigate further. [T. 614]. The state knew from other discovery disclosure that Prater defense was that he was elsewhere. The state chose not to invoke Rule 9.05.

To affirm the trial court's exclusion of Mr. Scales here in Prater's case violates the sound rule that a defendant always has a right to establish a defense. *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019 (1967), *Wilson v. State*, 390 So.2d 575, 581 (Miss.1980). *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297 (1973).

The case of *Hall v. State*, 546 So.2d 673, 676 (Miss.1989) is informative on the point of prejudice to the state. In *Hall*, the defendant wanted to introduce a baseball

uniform. The prosecution objected claiming a discovery violation that it had not been told that any uniform would be offered as evidence and the trial court excluded the uniform. On appeal Hall argued that the state should have asked for a continuance and that it was improper to exclude the uniform. *Id.* It was pointed out, similarly the situation here in Prater's case that the state in *Hall* had known about the uniform, so there was no surprise. As here Hall argued that the uniform was key to his defense. The *Hall* court held that the uniform should not have been excluded but did not reverse because the error was harmless. 546 So.2d at 677. Here the evidence was not overwhelming because so many people confirmed the whereabouts of Prater just prior to the crime.

Prater respectfully requests a new trial.

ISSUE NO. 2: WHETHER APPELLANT'S COUNSEL WAS INEFFECTIVE?

If the court finds that Scale's testimony was properly excluded, Prater would nevertheless be entitled to a new trial due to ineffective assistance of counsel. But for the dilatory failure to disclose perhaps the most crucial evidence for this mentally weak defendant, the jury would have heard the testimony of a totally disinterested witness that Prater was somewhere other than the scene of the crime in this case between 9:00 and 10: 00 a.m on August 20, 2001.

In *Ransom v. State*, 919 So.2d 887 (Miss. 2005), the trial court excluded non disclosed alibi defense witnesses, and, on appeal, Ransom claimed that trial court abused

its discretion as the sanction was too harsh violating his Sixth Amendment right to compulsory process.

The *Ransom* court recognized that the "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 919 So.2d 889. (Citing *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Under the two-pronged test of *Strickland,* adopted by the Mississippi Supreme Court in *Stringer v. State*, 454 So.2d 468, 476 (Miss.1984), a defendant "must prove under the totality of the circumstances, that (1) his attorney's performance was defective and (2) such deficiency deprived the defendant of a fair trial." 919 So.2d 889-90 . There is a "strong, but rebuttable presumption that the attorney's conduct fell within the wide range of reasonable professional assistance." *Id.*

The defendant must also establish "that there is a reasonable probability that but for his attorney's errors, he would have received a different result in the trial court." *Id.* The actions which fall within "trial strategy" include "failure to file certain motions, call certain witnesses, ask certain questions, or make certain objections" and do not render counsel's actions ineffective. *Id.* Trial counsel's "performance as a whole [must fall] below the standard of reasonableness and that the mistakes made were serious enough to erode confidence in the outcome of the trial" *Id.*

Ransom claimed, exactly like Prater here, that his trial counsel did not fulfill the

simple process of reciprocal discovery under the rules of the court. Ransom, like Prater established that his trial attorney was dilatory in waiting until the morning of the trial to comply with discovery requirements, arguably meeting Strickland's first prong. However, the *Ransom* court decided that the second prong was not proven because Ransom's alibi was weak and there was "strong opposing" evidence. *Id.*

In *Ransom* the court said that trial counsel's performance was not "error free", but the nondisclosed evidence which was suppressed was not so material that there was a resulting "undermined confidence [in the] outcome" of the trial. *Id.*

Ransom is different from Prater's case. Ransom's alibi witnesses were all family and there testimony inconsistent. *Id.* Here Prater had disinterested witnesses which were all 100% consistent with each other and, except for the challenged statements of Prater, were only contradicted by the testimony of Prater's accomplice Riley. In *Ransom* there were two eyewitnesses who identified Ransom. Here, there were none.

Prater's case is more like *Payton v. State,* 708 So. 2d 559, 560-64 (Miss. 1998), where the court found that defense counsel's failure to investigate rendered the representation constitutionally ineffective. Payton's counsel basically did not make any effort to interview easily available witnesses nor investigate physical aspects of the case. *Id.* By thus failing, the court found that Payton's counsel did not provide a basic defense. *Id.* In *Payton,* the case boiled down to the defendant's word against the victim's word. The court found that the lack of investigation "affecting the outcome of the trial by

casting doubt on the credibility of the complaining witness". *Id.*

Here in Prater's case, the conviction rest on the testimony of an accomplice and a challenged confession. The lack of the alibi witness adversely affected the outcome of the case because the alibi fully supported the challenge to Prater's alleged confession and further contradicted the state's key witness.

The *Payton* court labeled the investigation there "non-existent." *Id.* Here, because Prater's counsel was not even familiar enough with the work of his investigator, his neglect rendered his investigation non-existent because the information was utterly useless due to non-disclosure. The *Payton* court reversed and the same relief is respectfully requested by Prater.

ISSUE NO. 3: WHETHER THE STATE ENGAGED IN INFLAMMATORY CLOSING ARGUMENTS?

A. Reference to Other Cases and Appeal

During closing argument, the prosecutor said:

> And you're told ... people get convicted of crimes that they didn't commit. And I've had those. I've had those. I tried a woman in Columbus for killing her baby. The case got appealed to [the] Supreme Court. The Supreme Court refused to allow some of the evidence that was introduced in the first trial in at a second trial. The second trial jury never got to hear that evidence and they found her not guilty. Does that mean that she is subjective not guilty? No, it doesn't. What is means is, that the second jury didn't hear the same case the first jury did. [T. 767-68].

The appellant's position here is that the state's reference to another case and the

appellate process violated the rule recognized in *Wiley v. State* 449 So.2d 756, 762 (Miss. 1984) and *Howell v. State*, 411 So.2d 772 (Miss.1982), where the court held that an argument from the state which informs a jury that its verdict was apt to be reviewed on appeal constitutes reversible error. The rationale is not to dilute any juror's "sense of responsibility for the fate of the accused." *Id.*

In *Hill v. State*, 432 So.2d 427 (Miss.1983), the court said:

> Any argument by the state which distorts or minimizes this solemn obligation and responsibility of the jury is serious error. Every attorney knows the jury verdict is indeed the last word on a factual dispute. Neither the circuit judge nor this Court is authorized to set aside a jury verdict on conflicting evidence, or a disputed factual issue.

Similarly an argument which advises a jury that its verdict is not the "last word" results in reversible error. *Howell v. State*, 411 So.2d 772 (Miss.1982). The *Wiley* decision reminds all that since, jury deliberations are so critical, the utmost caution should be in place to prevent any occurrence "which tend[s] to reduce the jurors' sense of responsibility for their decision." 449 So.2d 762 Jurors "must not be permitted to look down the road for someone to pass the buck to." *Id.*

The *Wiley* court also said that comments by prosecutors "which relate the reviewability of a jury's verdict" have a "dangerous effect"; because, jurors faced have the awesome responsibility of deciding a defendant's fate and should not be comforted by the hope that their decision will be reviewed which would tend to make a jury "view their role as merely advisory, a view that can prove fatal to an accused." *Id.* The *Wiley* court

said, by making such arguments, the state was "asking for a mistrial". *Id.*

In *Howell v. State,* 411 So.2d 772, 776 (Miss. 1982) the state included the following in its closing argument, "you are not the final judges of this and if he appeals, he has the right to be out on bond." The court recognized this was "an inaccurate statement of the law and could have been very misleading to the jury." The *Howell* court found that argument exceeded the bounds "a completely fair trial ... by injecting into the closing argument the instructions to the jury, both directly and indirectly by implication, that if they should make a mistake, it would be corrected."

> The jury was not informed that the jurors only were the ones who determined the facts, not the appellate court. Just the opposite was left in the minds of the jurors. The quoted parts of the argument could only leave in the jurors' minds that if they decided a close, contradicted fact and found the defendant guilty thereby, the appellate court could change that finding. The actions of the trial court were not sufficient to cure the error.

B. Send a Message/jury an extension of law enforcement

The prosecutor here also said in closing:

> We have long held in the law the man's home is his castle. The one refuge you have from the world that we spoke of ... And on August 20th, 2001, castle was breached and slaughtered and pillage fall on its heels. [Sic]. And which of us can say we're immune from that?
>
> This Defendant has admitted that he had a hand in that horror, that meas something. An now the question becomes , whatever are you going to do about it? You take the jury instruction, you find the facts, that's your job. And what all the State of Mississippi ask of you is justice, that's all. Nothing more and I hope nothing less.[T. 776-77]

It is the appellant's position that the above argument constituted a forbidden

send-a-message argument condemned by the court is *Payton v. State,* 785 So.2d 267 (Miss.,1999) and *Brown v. State,* --- So.2d ----, 2008 WL 2522499 (Miss. 2008). See also *Alexander v. State*, 736 So.2d 1058 (Miss. Ct. App.1999), where the court said, "[t]oday, by order of this opinion, we condemn the use of the 'send a message' argument by prosecutors and state that in the future the 'send a message' remark used expressly or impliedly will alone constitute reversible error."

The state's closing here also involves the forbidden implication that the jury in this case was an extension of law enforcement. *Forbes v. State,* 771 So.2d 942, 950-51 (Miss. Ct. App. 2000) and *Fulgham v. State*, 386 So.2d 1099, 1101 (Miss.1980). In either event, these inflammatory argument should strain the court's confidence that Prater's trial was fair and would support the just decision of granting a new trial.

ISSUE NO. 4: WHETHER TRIAL COURT ERRED IN APPROVING OPINION TESTIMONY ABOUT CANINE OLFACTORY EVIDENCE?

Recall that Devail Hudson was the alleged leader of the group of burglars who returned to the Miller's home to burn the evidence and kill Mrs. Miller. T. 309-23, 336-37, 346, 350-52, 365-66, 373, 481-85; Ex. D-1]. The state had Hudson's clothes because he was arrested on the morning of the fire on an unrelated domestic violence charge. [T. 475]. To corroborate the testimony of accomplice Bentoire Riley, the state presented evidence that, during their investigation to confirm that Hudson had been to the crime scene, they engaged the services of Paulette Weibel, a canine handler with "Search Dog

South", a non-profit organization which "looks for lost and missing people." [T. 451-52]. Trial counsel's objection to Ms. Weibel's opinion evidence was overruled. [T. 455].

Mr. Weibel said her hound Hadley was a purebred bloodhound acquired from Canada. [T. 452-53]. However, there was no mention of any AKC registration or other certification. Ms. Weibel described some of Hadley's training and said Hadley was "reliable". [T. 454-59]. There was no testimony that Ms. Weibel had ever testified in court nor whether Hadley's work had been presented in a court of law nor whether Hadley had done criminal work, that is, something other than search and rescue.

In *Harris v. State*, 143 Miss. 102, 108 So. 446, 446-47 (Miss. 1926), the court held that testimony about bloodhound tracking "is admissible only after preliminary proof that the bloodhound which tracked to the accused is pure bred, has been well trained to track human beings, has been well tested by tracking other men and found reliable, and that the track from which the bloodhound tracked to the accused was made by the person who committed the crime." In *Harris* the court found that the bloodhound testimony did not satisfy these requirements, because dogs there were not shown to be purebred bloodhounds nor had they been shown to be reliable trackers. *Id.*

In *Hinton v. State*, 175 Miss. 308, 166 So. 762, 763-64 (Miss. 1936), the defense challenged the competency of bloodhound evidence on grounds that there were no documentation or purebred pedigree, nor that the dogs were tested and reliable. However the court found that there was testimony as to purebred registration that the dogs were

"English bloodhounds ... registered by the American Kennel Club" and that the dogs shown to be reliable as to tracking particular persons without losing the track or going off on another track. *Id.*

Here in Prater's case there was no showing here that Hadley was a registered purebred bloodhound by testimony or documentation. The defect of the trial is akin to a DUI conviction being obtained without certification that an intoxilyzer was not properly calibrated and certified. See. *Johnston v. State*, 567 So.2d 237(Miss.1990), and *McIlwain v. State* 700.So.2d 586 (Miss. 1997).

Prater was prejudiced by this corroborative canine testimony as it constituted admission of improper expert opinion, interfering with Prater's right to a fair trial. *Goodson v. State*, 566 So. 2d 1142, 1153 (Miss. 1990), Rule 103(a) Miss. R. Evid.

Also, since the proper predicate was not established, the authentification requirements of Miss. R. Evid. 901 were not met. The evidence was not shown to be what it was purported to be, the product of purebred bloodhounds.

Authenticity is a condition precedent to admission of evidence. *Middlebrook v. State*, 555 So.2d 1009, 1012 (Miss. 1990). If the evidence is not authentic it is irrelevant according to the comments to the rule.

As shown in *Walker v. State,* 878 So.2d 913, 914-15 (Miss.2004), where the prosecution failed to connect a semen stained towel scientifically with a crime, the *Walker* court ruled the evidence was not properly authenticated under Miss. R Evid.

901(a). The *Walker* court added that, to admit the unauthenticated evidence "without employing the available scientific means for authentication ... infringed upon Walker's right to a fair trial, and served only to bolster the state's case [which] would tend to mislead, confuse, and incite prejudice in the jury...". *Id.*

For all of the above reasons, the testimony of Mrs. Weibel was improperly admitted requiring a new trial in this case.

ISSUE NO. 5: WHETHER PRATER WAS ENTITLED TO A LESSER INCLUDED OFFENSE INSTRUCTION?

The record shows that there was an arguable separation between the burglary and the arson here which creates the possibility that Mrs. Miller was not murdered until the fires were set thus allowing any of the participants who only engaged in burglary to argue that the murder was a separate crime, or at least that those who fled had abandoned the criminal enterprise prior to the commission of any homicide. It is not known for certain when Mrs. Miller was beaten, whether it was when the entire group was in the house or after when Devail Hudson went back in.

From the time that Bentoire Riley allegedly saw Willie Prater and the others leave the Miller's house until Riley said he saw smoke was about forty-five minutes. [T. 336-37, 346, 350-52, 373]. The length of time the fires burned was about ten minutes.[T. 423-26, 449]. Defense counsel made a verbal request for a burglary instruction as a lesser included offense, which was denied. [T. 720-21]. The instruction should have been

granted especially with Bentoire Riley's statement that, "I think Devail went back into the house to kill the old lady & burn the house down." [Ex. D-1].

In *Perry v. State*, 637 So.2d 871, 877 (Miss. 1994), the defendant was convicted of conspiracy and possession with intent to sell marijuana. In reversing for refusing a lesser included offense instruction for simple possession, the *Perry* court said, "[o]ur law is well-settled that jury instructions are not given unless there is an evidentiary basis in the record for such ... [and], [s]uch instructions 'must be warranted by the evidence.'". [Cites omitted].

In *Harbin v. State*, 478 So.2d 796 (Miss.1985), the court reviewed the test to be used on appeal to decide whether a lesser included offense instruction should have been granted:

> Only if this Court can say, taking the evidence in the light most favorable to the accused, and considering all reasonable favorable inferences which may be drawn in favor of the accused from the evidence, and considering that the jury may not be required to believe any evidence offered by the State, that no hypothetical, reasonable jury could convict ... the defendant of [the lesser-included offense], can it be said that the refusal of the lesser-included offense instruction was proper.

At the trial court level, the test is, as stated in *Brown v. State*, 934 So. 2d 1039, 1042-43 (Miss. Ct. App. 2006), that:

> A lesser-included offense instruction should be granted if a reasonable jury could find the defendant not guilty of the principal offense charged in the indictment but could find him guilty of the lesser.

In *Perry, supra,* the court said:

> "[t]he jury was free to disregard Perry's denial of knowledge of the marijuana, as it most certainly did, but it was also free to disregard his alleged accomplice's testimony that the marijuana was for sale. Looking at the evidence in the light most favorable to Perry, the jury could find [Perry guilty of simple possession]. He was entitled to that instruction and the failure to give it compels reversal." 637 So.2d at 877.

Since there was a factual basis for a burglary instruction in this case and since counsel requested it, a burglary instruction as a lesser offense, should have been granted. A new trial is requested.

ISSUE NO. 6: WHETHER THE EVIDENCE WAS SUFFICIENT FOR A DIRECTED VERDICT TO BE DENIED AND WHETHER THE VERDICT WAS CONTRARY TO THE WEIGHT OF THE EVIDENCE?

A denial of directed verdict is reviewed with the evidence considered in a light most favorable to the State. *Shaw v. State*, 915 So.2d 442, 448(¶ 24) (Miss.2005). If the jury could not have found Prater guilty according all reasonable inferences in favor of the state, the evidence is legally insufficient for a conviction . *Id.*

For the state to meet the burden of proving a temporal nexus between the victim's death and the commission of the underlying felony, there "must be a continuous chain of events." See *Shaw v. State*, 915 So. 2d 442, 449 (Miss. 2005), *Walker v. State*, 671 So. 2d 581, 594-95 (Miss. 1995) and *West v. State*, 553 So.2d 8, 13 (Miss.1989). In both *West* and *Walker*, the defendants asserted that underlying sexual assaults occurred after the

victims' deaths, and in both the court said:

> Mississippi law accepts a "one continuous transaction" rationale in capital cases. In *Pickle v. State*, 345 So.2d 623 (Miss.1977), we construed our capital murder statute and held that "the underlying crime begins where an indictable attempt is reached...." 345 So.2d at 626; (further cites omitted). 671 So. 2nd at 594-95, 553 So. 2d 13.[1]

The record here in Prater's case does not provide this Court with the answer to the question: "Was there a one continuous transaction in this case?". In both *West* and *Walker* , the court found evidence existed by which the juries could conclude either that the victims were alive or that the defendant had *a priori* intent to commit the sexual assault after the victims death as part of a continuing transaction.

> An indictment charging a killing occurring "while engaged in the commission of" one of the enumerated felonies includes the actions of the defendant leading up to the felony, the attempted felony, and flight from the scene of the felony." [cites omitted].

Quoting from 40 *Am. Jur. 2nd Homicide* §73, at 366-67 (1968), the court in *Pickle v. State*, 345 So. 623, 626 (Miss. 1977) said:

> Application of the felony-murder doctrine does not require that the underlying crime shall have been technically completed at the time of the homicide, nor does it matter at what point during the commission of the underlying felony the homicide occurs. When, however, there is a break in the chain of events leading from the initial felony, as by the felon's abandonment of the original criminal activity, a subsequent homicide committed by him is not within the felony-murder statute, and it is a question of fact for the jury whether the original criminal activity did in fact

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The same rational as "one continuous transaction" is used by other courts. See *Florida v. Williams*, 776 So. 2d 1066,1069-72 (Fla. 2001)

terminate prior to the homicide.

This same language was used again recently by the court in *Moody v. State*, 841 So. 2d 1067, 1091-92 (Miss. 2003) Where is this Court to look to determine whether there was a break in the chain of events? According to the *Moody* court:

> The intent to commit a crime or to do an act by a free agent can be determined only by the act itself, surrounding circumstances, and expressions made by the actor with reference to his intent.
> 841 So. 2nd at 1093.

It follows that the state did not prove an unbroken chain of events involving Prater and the death of Mrs. Miller. Even if Prater knowingly participated in a burglary, there was no showing that he knew that Hudson would go back in the house to possibly murder Mrs. Miller and set her house on fire nor aided or assisted Hudson in any homicide.

Weight

In a review of a trial court' s denial of a motion for a new trial challenging the weight of the evidence, an appellate court will not reverse a guilty verdict unless the record shows the verdict "is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." *Herring v. State*, 691 So. 2d 948, 957 (Miss. 1997). The reviewing court is bound to treat as true the evidence which supporting the verdict and only when a trial courts refusal of a new trial is the product of an abuse of discretion. *Id.*

In the present case the verdict is contrary to the evidence because the state did not prove that Prater's confessions were free and voluntary, but more importantly did not prove that the burglary and murder were contemporaneous so that the commission of the burglary by the group was the same burglary committed when Hudson returned to the Miller's house and arguable killed Mrs. Miller.

ISSUE NO. 7: WHETHER PRATER'S STATEMENTS SHOULD HAVE BEEN SUPPRESSED?

Involuntary confessions are inadmissible. *Carley v. State*, 739 So. 2d 1046, 1500 (Miss. Ct. App. 1999), *Neal v. State*, 451 So. 2d 743, 750 (Miss.1984); *Morgan v. State*, 681 So. 2d 82, 87 (Miss.1996), Fifth and Fourteenth Amendments to the U.S. Constitution and Article 3, § 26 of the Mississippi Constitution. The state shoulders a burden to prove voluntariness of a confession beyond reasonable doubt, and may meet this burden "by offering the testimony of those individuals having knowledge of the facts that the confession was given without threats, coercion, or offer of reward." *Carley,* 739 So. 2d 1500 .

The *Carley* the court reiterated that a trial judge is the "fact finder" in the determination of voluntariness and the trial court's decision is reviewed under a standard of clearly erroneous, but added, "[h]owever, our review of the voluntariness of an accused's confession is less constrained where the trial judge fails to make detailed and

specific findings on critical issues." *Id.*

Carley, who was 14 years old, suffered with psychosis and hallucinations. He was diagnosed with post traumatic stress disorder and gave a statement after interrogating officers invoked religious salvation, leniency and hopes of reward. The Supreme Court found his statement involuntary, saying "[w]hile the accused's mental weakness may not be the sole reason to exclude a confession, when coupled with overreaching interrogation tactics, it may become the basis for the exclusion of a confession." 739 So. 2nd 1053.

In *Williamson v. State*, 330 So. 2d 272, 276 (Miss.1976), the court said,

> [a] confession will not ordinarily be excluded merely because the person making the confession is mentally weak. Until it is shown that a weak-minded person has been overreached to the end that he has divulged that which he would not have divulged had he not been overreached, his voluntary confession is admissible.

In the present case, similar to *Carley*, *supra*, Prater had a history of mental illness and had was diagnosed with psychotic disorder with symptoms of catatonia and anxiety, medically resolved, mild mental retardation, unspecified personality disorder with antisocial and histrionic features. [T. 17-18]. Family and friends tried to explain Prater's mental problems to the police when he was arrested. [T. 571-72]. According to psychologists, Prater is functionally illiterate and "would have a hard time comprehending complex information whether it be legal or otherwise ..., [unless] presented to him in a very simple and concrete manner." [T. 34]. Sheriff Bryant knew of

Prater's mental problems .[T. 112, 661].

Prater presented evidence of psychosis, mental retardation and low IQ. [T. 17-18]. Prater could not read, he is "functionally illiterate" and was in "special education". [T. 34, 86-88]. Prater's medications consisted of "Klonopin, Risperdal and Zoloft". [T. 91].

There had been two psychotic episodes in 2002 or 2003 while Prater was incarcerated. *Id.* Prater was given a mental examination in 2003 and was found competent. [T. 14, 44]. When the present case proceeded to trial the first time in January 2005, defendant acted bizarre in front of the jury panel and a mistrial was declared. *Id.* Prater was sent back to Whitfield for further testing and treatment as needed. *Id.* At his most recent evaluation, just before trial, Prater's diagnoses were. Prater's overall function level was 65. *Id.* The trial court recognized that Prater is mentally retarded. [T. 45].

Prater said he could not understand what police read to him. [T.86-88]. Prater testified he did not make the statements as written down by the police and that he was coerced into signing the waivers and confessions by the police telling him he would "get time" for not signing, and he was "scared and real paranoid" and at one point told police he wanted to stop the questioning. [T. 88-89, 95, 99].

According to the *Carley* decision, *supra*, a totality of the circumstances approach mandates that the trial judge perform an evaluation based on the defendant's "age, experience, education, background, and intelligence, and into whether he has the capacity

to understand the warning given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." 739 So. 2d 1053.

As in the present case, the trial judge in *Carley* "failed to make detailed and specific findings" in deciding whether Carley freely and voluntary waived his rights. [T. 122-28]. The trial court's ruling expressed more frustration with the varying degrees of progression of Prater's case through the system than on the affect of Prater's mental problems on his ability to adequately waive his constitutional rights. Therefore, the Court is not now restrained by the usual "clearly erroneous" standard used in its evaluation of the trial court's ruling. *Id* at 154.

Neal v. State, 451 So. 2d 743 (Miss. 1984), is a seminal Mississippi authority on this issue, procedurally and substantively. Neal gave a confession to authorities that he committed capital murder, by kidnaping and killing a young girl. *Id* at 747-49.

During the suppression hearing in *Neal,* evidence was presented that he was mentally retarded, suffered from dementia, and his IQ was measured at 54 placing him at the "low end of the mild mental retardation range." *Id*. p. 752 Expert testimony was offered that Neal could not understand the Miranda warnings "unless they were explained carefully and in extremely simple terms." *Id*. Here in the present case, Dr. Mavaugh said the same things about Prater. [T. 34].

The state in *Neal* put on expert testimony that the defendant's IQ was 60 and that

he had faked the IQ test and that there was no evidence of an organic dementia, and that in the expert's opinion, Neal understood the *Miranda* warnings. *Id.* There was also proof that Neal was married, had a family, and held several jobs, which went to establishing an ability to live interdependently in society. *Id.* p. 752. Prater, on the other hand, did not support family, lived with his mother, he did not work, he spent his days at a day care center, although he did have the ability to drive. [T. 556].

According to *Neal*, regardless of the number of times the Miranda warnings are given, or how "meticulous", inculpatory statement is not automatically admissible. 451 So.2d at 753. The right to counsel and against self-incrimination must, after the giving of the warnings, be "intelligently, knowingly and voluntarily" waived the determination of which "is essentially a factual inquiry to be determined by the trial judge from the totality of the circumstances. *Id.* Even when the trial court record shows the warnings have "been fully and fairly given", the State nevertheless "shoulders a heavy burden to show a knowing and intelligent waiver." *Id.*

The *Neal* court said:

> In his voluntariness determination, the trial judge must first determine whether the accused, prior to the confession, understood (a) the content and substance of the *Miranda* warnings and (b) *the nature of the charges of which he was accused or with respect to which he was under investigation.* *Id.* p. 755.

The *Neal* court explained that Neal's waiver was knowing, voluntary and

intelligent; because, the confession developed over three days of very careful, low-key interrogation and questioning. 451 So. 2d 756. The *Neal* court found a "credible basis for a finding that Neal was capable of understanding -- and intelligently relinquishing -- his constitutional privilege against self-incrimination." *Id.* 756-57.

In the present case, as opposed to *Neal*, there was relatively brief questioning of Prater. [T. 58-61,101-07, 115-19]. Prater was never shown to have understood what he was being charged with or investigated for. Under a totality of circumstances the record does not show that Prater knew he was being charged with capital murder. A new trial is respectfully requested.

In the following cases, the Mississippi Supreme Court determined that confessions were involuntary due to youth, mental weakness or low intelligence: *Ford v. State*, 21 So. 524 (Miss. 1897), *Hamilton v. State*, 27 So. 606 (1900), *Harvey v. State*, 207 So. 2d 108 (Miss. 1968), *Dover v. State*, 227 So. 2d 296 (Miss. 1969).

ISSUE NO. 8: WHETHER PRATER WAS MENTALLY COMPETENT TO STAND TRIAL?

The record shows that the appellant had a history of mental problems. [T. 17-20, 86-91, 95, 99]. Prater presented evidence of psychosis, mental retardation and low IQ. [T. 17-18]. Prater could not read, he is "functionally illiterate" and was in "special education". [T. 34, 86-88]. Prater's medications consisted of "Klonopin, Risperdal and

Zoloft". [T. 91].

Prater's mental health history began in 1993 when he started going to a mental health center. [T. 19]. There was a one to two week psychosis in 1999 serious enough to require hospitalization. [T. 20]. There had been two psychotic episodes in 2002 or 2003 while incarcerated. *Id.* Prater was given a mental examination in 2003 and was found competent. [T. 14, 44]. When the present case proceeded to trial the first time in January 2005, defendant acted bizarre in front of the jury panel and a mistrial declared. *Id.* Prater was sent back to Whitfield for further testing and treatment as needed. *Id.*

At his most recent evaluation, just before trial, Prater's diagnoses were psychotic disorder with symptoms of catatonia and anxiety, medically resolved, mild mental retardation, unspecified personality disorder with antisocial and histrionic features. [T. 17-18]. Prater's overall function level was 65. *Id.*

At a previous trial setting, Prater became uncontrollable in front of a venire filled courtroom and a mistrial was declared. [T.11, 44]. With all due haste, Prater was sent to Whitfield where he was determined to be incompetent. *Id.* He was retested in the interim multiple times and the physicians and psychologists could not agree on an assessment, so Prater's treatments continued. *Id.* The trial court recognized that Prater is mentally retarded. [T. 45].

Finally, after fourteen (14) months all of the physicians at Whitfield agreed that

Prater was competent to stand trial, but according the Dr. McMichael "I'm not sure what he'd going to do under the stress of a trial. My best estimate is that with the medications he's going to do a lot better But I absolutely cannot guarantee that under the stress of a trial he may not decompensate again." [T. 18]

Moreover Dr. Mavaugh, a psychologist, showed the following concern:

> In my clinical opinion, Mr. Prater is currently competent to stand trial, but I specify that because I think that he has borderline competency abilities. That is I have some concern about particular aspects of those abilities ...[T. 37].

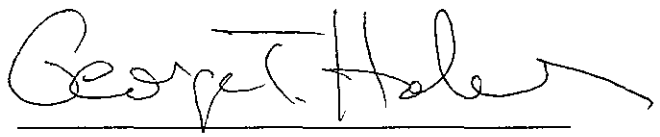
A criminal defendant is competent to stand trial if he has the ability "to perceive and understand the nature of the proceedings", can "rationally communicate with his attorney about the case" and "recall relevant facts", and is able to "testify in his own defense if appropriate" all "commensurate with the severity of the case." *Martin v. State*, 871 So.2d 693, 697 (Miss.2004) (quoting *Howard v. State*, 701 So.2d 274, 280 (Miss.1997)). In a competency hearing, a trial court "must weigh the evidence and be the trier of the facts" and determine whether there is probability or not that the defendant is capable of "conducting a rational defense". *Martin*, 871 So.2d at 698.

Here without an assessment that Prater was competent enough to continuously endure the rigors of trial then there is no factual basis for the court to have determined him probably competent. A new trial is requested with remand for further mental evaluation.

CONCLUSION

Prater is entitled to have his conviction reversed with remand for a new trial.

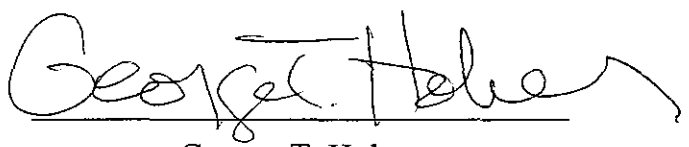
Respectfully submitted,
MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Willie Prater, Appellant

By: 

George T. Holmes, Staff Attorney

CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 17th day of July, 2008, mailed a true and correct copy of the above and foregoing Brief Of Appellant to Hon. Lee. J. Howard, Circuit Judge, P. O. Box 1344, Starkville MS 39760, and to Hon. Forrest Allgood. D. A. , P. O. Box 1044, Columbus MS 39703, and to Hon. Charles Maris, Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid.



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