IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CLINTON WYATT NOLAN — APPELLANT

VS. — NO. 2008-KA-0564

STATE OF MISSISSIPPI — APPELLEE

SUPPLEMENTAL BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CLINTON WYATT NOLAN **APPELLANT**

vs. **CAUSE No. 2008-KA-00564-COA**

THE STATE OF MISSISSIPPI **APPELLEE**

SUPPLEMENTAL BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

COMES NOW the State of Mississippi, by and through Her Attorney General, and in response to that certain Order of this Honorable Court dated 1 October 2009 in the above styled and numbered cause, in which the parties to this cause were instructed to brief certain questions propounded by the Court, files Her response as ordered by the Court.

1. THAT ASSUMING THAT THE COURT FINDS THE EVIDENCE INSUFFICIENT TO SUPPORT A CONVICTION FOR HEAT-OF-PASSION MANSLAUGHTER UNDER MISSISSIPPI CODE ANNOTATED SECTION 97-3-35 (REV. 2007), IS THERE ANY LEGAL IMPEDIMENT TO A FINDING THAT THE EVIDENCE IS SUFFICIENT TO SUPPORT A MANSLAUGHTER CONVICTION UNDER MISSISSIPPI CODE ANNOTATED SECTION 97-3-47 (REV. 2007)?

Miss. Code Ann. Section 97-3-47 (Rev. 2006), commonly referred to as culpable negligence manslaughter, is as follows:

> Every other killing of a human being, by the act, procurement, or culpable negligence of another, and without authority of law, not provided for in this title, shall be manslaughter

The indictment exhibited against the Appellant charged him with the commission of "heat - of - passion manslaughter, as defined by Miss. Code Ann. Section 97-3-35 (Rev. 2006). That form of manslaughter is as follows:

> The 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, shall be manslaughter.

The penalty for these forms of manslaughter is the same. Miss. Code Ann. Section 97-3-25 (Rev. 2006).

Section 97-3-47 codifies the form of manslaughter known to the common law as involuntary manslaughter. It includes those homicides committed through criminal, or culpable, negligence and those committed while in the course of the commission of a criminal act not felonious in nature, where the killing was not intended and where the death would not be expected to occur in the ordinary course of events. *Miller v. State*, 733 So.2d 846, 849 - 850 (Miss. Ct. App. 1998).

Miller further states that the "heat - of - passion" form of manslaughter is a codification of the common law crime of voluntary manslaughter. Voluntary manslaughter consists of the purposeful taking of human life without premeditation but upon a sudden provocation sufficient to incite the passions. *Id.*, at 849.

In considering whether the evidence in this case would be sufficient to support a verdict under Section 97-3-47, there is a more fundamental issue to consider first. Manslaughter is, of course, a lesser - included crime to murder. *State v. Shaw*, 880 So.2d 296 (Miss. 2004). But, in the case at bar, the indictment against the Appellant did not charge him with murder. It did charge him with "heat - of - passion" manslaughter. The initial question, then, is whether involuntary manslaughter was necessarily charged in the indictment that alleged "heat - of -

passion" manslaughter against the Appellant. We have found no decisions on the point in this State's jurisprudence.

It is not to our mind an idle or academic consideration. It is a basic rule of criminal law, constitutional in nature, that an accused has the right to be informed of the charge made against him. Miss. Const. Section 3, Art. 27 (1890). It is well established law that, where an accused stands charged with a particular crime, he also stands charged, as a matter of law, with all crimes inferior to the one charged that are necessarily included in the greater charge. Miss. Code Ann. Section 99-19-5 (Rev. 2007). So it is against this backdrop that the Court should first consider to what extent, if any, that involuntary manslaughter is necessarily included in voluntary manslaughter, utilizing the usual test for determining whether an offense is necessarily included in another, *Downs v. State*, 962 So.2d 1255, 1261 (Miss. 2007)[1]. If involuntary manslaughter is not lesser - included to voluntary manslaughter, then it is difficult to see the point in considering whether the evidence would support a conviction under Section 97-3-47 since, should that be so, the Appellant was never charged with the commission of that offense. While the Court has on occasion reversed convictions of a greater offense while affirming on a lesser - included offense, *e.g. Jefferson v. State*, 977 So.2d 431 (Miss. Ct. App. 2008), those decisions involved lesser-

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[1] A lesser - included offense is one in which all the essential ingredients are contained in the offense for which the accused is indicted.

We are aware that the Mississippi Supreme Court has adopted a theory in a line of cases that lesser related offenses can somehow be charged in an indictment, limited only by a "common nucleus of operative fact" test. *Griffin v. State*, 533 So.2d 444 (Miss. 1988). We do not consider this suspect line of cases here since: (1) it has operated only in favor of an accused, meaning that only an accused may attempt to utilize it; (2) its constitutional legitimacy is highly questionable, for the reasons set out most recently in our brief in *Williams v. State*, No. 2008-KA-0695-COA (Not Yet Decided), at pages 14 - 16; and (3) that to allow the State to propose lesser related offenses under the common nucleus of operative fact notion might well present troublesome issues concerning an accused's right to notice of the charge against himself.

included offenses.

While Section 97-3-47 is usually thought of as "the" culpable negligence statute, it actually encompasses more than causing the death of a human being in a culpably negligent way. *Miller v. State*, 733 So.2d 846 (Miss. Ct. App. 1998). Any non-felonious act committed without authority of law and without intention to cause death but which does cause the death of a human being presents a violation of this statute as well.

"Heat of passion" manslaughter is the purposeful taking of human life, without premeditation, but upon a sudden provocation sufficient to incite the accused's passion. *Miller*, at 849. However, the statutory form of the crime goes further and includes "in a cruel and unusual manner, or by use of a dangerous weapon, without authority of law, and not in necessary self defense".

It is possible to commit a voluntary manslaughter without thereby also committing involuntary manslaughter, if for no other reason because voluntary manslaughter involves intent, while involuntary manslaughter does not. Intent negates theories of accident or negligence. It does not appear that this question has been often squarely addressed, but where it has, the holding has been that involuntary manslaughter is not lesser - included to voluntary manslaughter. *People v. Orr*, 22 Cal. App. 4th 780, 22 Cal. Rptr. 2nd 553 (Cal. App. 1994). Since it is possible to commit "heat of passion" manslaughter without necessarily committing manslaughter under Section 97-3-47, the form of manslaughter set out in Section 97-3-47 is not lesser - included to "heat of passion" manslaughter. Both forms of manslaughter are lesser - included to murder, but not as to each other. In view of this, it is unnecessary to address the question of whether the evidence would support a conviction under Section 97-3-47.

If it could be said that involuntary manslaughter is included in voluntary manslaughter,

then it would be necessary to consider whether involuntary manslaughter is "lesser" to voluntary manslaughter. Were this question determined solely in light of the punishment to be imposed, we could not say that involuntary manslaughter is "lesser" for the simple reason that all manslaughters in this State's law carry the same potential punishment. Miss. Code Ann. Section 97-3-25 (Rev. 2006). Some jurisdictions, though, analyze this question not so much in terms of whether the punishments are different but whether the crime said to be lesser is in law a less culpable offense. We think, though, that it is unnecessary to consider this issue in light of our conclusion that "culpable negligence" manslaughter is not a necessarily included offense as to "heat of passion" manslaughter.

2. THAT ASSUMING THAT THE COURT FINDS THAT THE EVIDENCE IS SUFFICIENT TO SUPPORT THE CIRCUIT COURT'S FINDING THAT [THE APPELLANT] WAS SANE AT THE TIME OF THE KILLING BUT INSUFFICIENT TO SUPPORT THE FINDING THAT THE KILLING OCCURRED IN THE HEAT OF PASSION, WHAT SHOULD BE THE PROPER RESOLUTION OF THE CASE, CONSIDERING THE FACT THAT THERE IS NO EVIDENCE TO SUPPORT A FINDING THAT THE KILLING WAS ACCIDENTAL OR OCCURRED EITHER IN SELF -DEFENSE OR IN DEFENSE OF ANOTHER?

There was no claim raised or evidence introduced to attempt to show that the homicide in the case at bar was accidental or that it occurred in the course of self - defense or defense of another.

If the Circuit Court did not err in finding that the Appellant failed to meet the *M'Naghten* standard, it was nonetheless the State's burden to prove that the Appellant was guilty of manslaughter as alleged in the indictment. It would not have been sufficient for the State to prove simply that the Appellant was not insane, as defined by the *M'Naghten* standard, at the time of the killing, with the idea that if the Appellant was not insane that he was then necessarily

guilty of manslaughter.[2]

As for the second question posited by the Court, it seems to us to answer itself: Should the Court find that the evidence of the Appellant's guilt for manslaughter was insufficient, then the proper resolution of the case would be no different than in any other case in which it was determined that the evidence was insufficient to support the verdict. For the reasons we have set out above, it is our view that this case cannot be analyzed in terms of whether the evidence was sufficient to support manslaughter under Section 97-3-47. Having said this, though, we do not intend to be understood to say that we confess error on the part of the Circuit Court in finding the evidence against the Appellant to be sufficient to permit a verdict of guilty. We rest upon the arguments previously made in this case as to the sufficiency of the State's evidence.

CONCLUSION

The Court should affirm this conviction.

Respectfully submitted,

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[2] A different result would obtain, however, had the Appellant been charged with murder. In a prosecution for murder, malice may be inferred from the use of a deadly weapon. *E.g. Higgins v. State*, 725 So.2d 220 (Miss. Ct. App. 1998). We think the evidence would have supported a verdict of murder. It would not seem, though, that this rule would apply in a "heat of passion" manslaughter case, since manslaughter, by definition, does not include malice aforethought as an element.

CERTIFICATE OF SERVICE

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

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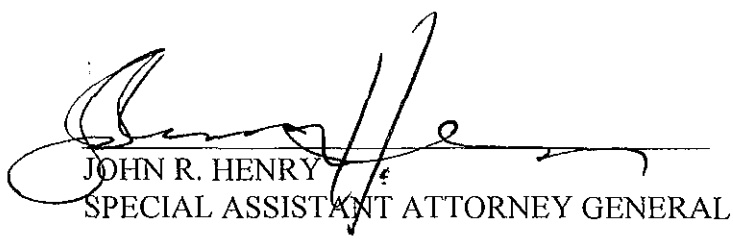
This the 2nd day of November, 2009.



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