2008 KA 564-COAT

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 the Supreme Court and/or the Court of Appeals may evaluate possible disqualification or recusal:

1.	Clinton Wyatt Nolan	Appellant/Defendant
2.	Honorable James D. Franks	Attorney of Record for Appellant/Defendant
3.	Honorable Susan Brewer	Assistant District Attorney
4.	Honorable John Champion	District Attorney
5.	Honorable Robert P. Chamberlin	Desoto County Circuit Court Judge

JAMES D. FRANKS, Attorney for Appellant/Defendant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF ISSUES

ISSUE I: Did the Trial Court err in failing to grant the Defendant's Motion for Directed Verdict based upon the State's failure to prove each of the elements of the crime of manslaughter in its case in chief, specifically "heat of passion"?

ISSUE II: Was the Trial Court's finding that the State met its burden of showing, beyond a reasonable doubt, that the Appellant/Defendant was sane at the time of the shooting against the overwhelming weight of the evidence?

ISSUE III. Is the *M'Naghten* standard antiquated and simplistic, and does it fail to accomplish its intended purpose of exempting from criminal responsibility those defendants who are unable to form the requisite intent for a particular crime due to mental illness?

STATEMENT OF THE CASE

This cause originated in the Circuit Court of Desoto County, Mississippi wherein Desoto County Circuit Court Judge, Honorable Robert P. Chamberlin, found the Appellant/Defendant guilty of manslaughter, and accepted the State's proposed Findings of Fact as its own, on January 7, 2008. (R. 166-167; R.E. 5-17). On March 5, 2008, Judge Chamberlin sentenced the Appellant/Defendant to a term of seven (7) years in the custody of the Mississippi Department of Corrections, followed by thirteen (13) years of post-release supervision. (R. 184-187, R.E. 18-21). The Appellant/Defendant's Motion for J.N.O.V. or New Trial was overruled. (R. 188; R.E. 22-24). The Appellant/Defendant, Clinton Wyatt Nolan, herein appeals the judgment and sentence of the Desoto County Circuit Court.

STATEMENT OF FACTS

The Appellant/Defendant, Clinton Wyatt Nolan (hereinafter referred to as "Nolan"), was indicted by the November 2006 Grand Jury of Desoto County, Mississippi for the crime of manslaughter. (R. 8). Nolan waived his right to a jury trial (R. 74), and the bench trial of this matter was held on December 11, 2007, wherein Nolan asserted an insanity defense. (T. 1).

At the beginning of the trial, the parties stipulated that, on May 26, 2006, in DeSoto County, Mississippi, Nolan did shoot and kill his father, Donald Nolan, with a handgun. The parties further stipulated to the authenticity and admission of certain evidence, as specified below. (R. 128).

First, the parties stipulated to the authenticity and admission of the copy of the tape recorded 911 call made by Nolan to the Desoto County Sheriff's Department and the transcript of said call. On May 26, 2006 at 2:45 A.M., Nolan made a 911 call from the Nolan residence advising that he had shot his father. Although Nolan is able to tell the dispatcher what type of gun he shot his father with and appears able to follow the dispatcher's instructions, it is clear that Nolan is confused about

what happened. Nolan states, "I can't believe I did that." (Transcript of 911 Call, Page 1 of 8).

During the course of the 911 call, the dispatcher asks the victim, Nolan's father, what happened:

Dispatch:	Why did he shoot you?
Nolan's father:	He was having [medicine] *or* [medical] *or* [mental] problems.*

(Transcript of 911 Call, Page 3 of 8).

Dispatch:	OK. Tell him to take off his shirt and go outside with his hands up.
Nolan's father:	Listen to me, OK? He is having an episode because the medicine's messed up.
Dispatch:	Ok, Sir. Is he there with you?
Nolan's father:	Yea. [He's in his own little world right now] *or* [He's the only one in the room right now].*

(Transcript of 911 Call, Page 5 of 8).

[* *The State and the Defense were not able to determine which words were being spoken, and the Trial Court made no specific finding.*]

The parties also stipulated to the authenticity and admission of copy of the tape recorded interview with Nolan conducted by Commander Mark Blackson of the Desoto County Sheriff's Department at 7:27 A.M. on May 26, 2006, approximately 4.75 hours after the shooting, as well as the transcript of said interview. During the interview, Nolan states that his medicine "make[s] me feel funny." (Transcript of Interview, Page 4 of 11). However, it is clear that Nolan is not lucid through much of the interview, as he answers questions inappropriately and makes incoherent and confused statements, including but not limited to, the following:

Nolan:	I'm learning to deal with the new me. (UNTRANSCRIBABLE).
Blackson:	Dealing with the new you?
Nolan:	(UNTRANSCRIBABLE) I'd know if this is going to require a lawyer or not.
Blackson:	You mean dealing with the new you?
Nolan:	Yea. (UNTRANSCRIBABLE) requesting the one that was all ready there that's going away to get a new one comes.
Blackson:	Ok.

Nolan: (UNTRANSCRIBABLE) I guess that's what happened. I don't know. Anything specific about it. Lawyer, I know that.

(Transcript of Interview, Page 2 of 11).

Nolan: Well I had something that resembled sleep last night. A little but, uh. When I got (UNTRANSCRIBABLE). Poof, (UNTRANSCRIBABLE) truth serum.
Blackson: Who give you some truth serum?
Nolan: I think they must have.
Blackson: Who did?
Nolan: Somebody did. I felt funny (UNTRANSCRIBABLE). I think that, I think they did; I don't know. That's what (UNTRANSCRIBABLE).
Blackson: Do you remember who it was that give it to you?
Nolan: No, but I'm sure it was somebody in my room.
Blackson: In you're?
Nolan: Bedroom.
Blackson: In you're bedroom?
Nolan: Yea (UNTRANSCRIBABLE). What.
Blackson: Uhu. How did they do it? How did they give it to you?
Nolan: I don't really remember, (UNTRANSCRIBABLE) pill or liquid. Vaguely remember. (UNTRANSCRIBABLE).
Blackson: Was somebody asking you questions?
Nolan: They must have, (UNTRANSCRIBABLE) what are they, uh.
Blackson: Let me back up a little. When did this happen
Nolan: Today, or must have been (UNTRANSCRIBABLE).
Blackson: You're not too sure when it occurred. You know what today is? What day it is?
Nolan: (UNTRANSCRIBABLE) watch.
Blackson: If you had to guess what day of the week it is, what day would you guess it?
Blackson: Clinton are you?
Nolan: (UNTRANSCRIBABLE) weekday or weekend. I don't know, I don't even know.
Blackson: You don't know what day of the week it is.
Nolan: Sure, tired and groggy.
Blackson: You're tired and groggy. Clinton what's going through you're mind right now? What are you thinking.
Nolan: Nothing real, frustrated in my mind. Not sure what to think. I, terrible, I mean,
Blackson: You feel terrible physically terrible.
Nolan: I guess I should, but I don't know, I don't know, I mean. I really should eh, lawyer,
Blackson: You want a lawyer?
Nolan: Yea, not that I don't feel any remorse (UNTRANSCRIBABLE) I did after I du, I shot him. I just felt so horrible. I didn't run away.

(Transcript of Interview, Pages 4-5 of 11).

The parties also stipulated to the authenticity and admission of Nolan's Lakeside medical/psychiatric records, where Nolan was placed immediately upon his release on bond. Among other proof, these records indicate that Nolan was admitted to Lakeside on June 8, 2006 (approximately 13 days after the shooting and immediately following his release from the Desoto County Jail) and was discharged on August 7, 2006 after therapy and treatment with psychotropic medications for approximately two (2) months. These records further indicate that, on admission and shortly thereafter, Nolan reported that, when he shot his father, he was responding to internal voices and that "they (the voices) are stronger than God". He further indicated that "the UN might have had a hand in this. . . the United Nations might have been involved."

Next, the parties stipulated to the authenticity and admission of Nolan's school records from Northwest Mississippi Community College and Crichton College. The school records indicated that while Nolan was a good student in many ways, he suffered significant psychological and social problems. (R. 78-118).

Lastly, the parties stipulated to the authenticity and admission of the autopsy report of Nolan's father, Don Nolan, indicating that he died as a result of a gunshot wound to the chest. (R. 29-54).

After the stipulations were submitted to the Court, the State rested its case in chief. (T. 10, L. 18-20). Nolan made a Motion for Directed or Judgment on the Facts and Law, which was denied by the Trial Court. (T. 10, L. 29 - T. 11, L. 14).

In support of his insanity defense, Nolan called Dr. Robert M. Hoehn, M.D. to testify. Dr. Hoehn testified that he had treated Nolan for ten (10) years for Asperger's Syndrome related symptoms, depression, and A.D.D.. He stated that Asperger's Syndrome is a disorder within the Autism spectrum subjecting the patient to inflexible and restricted, routine, and stereotyped behavior

patterns and interests, plus significant social impairments. While Nolan was of above average intelligence (T. 30, L. 11-14), he is also likely unable to empathize with others and unable to communicate socially. He testified that Nolan had exhibited no previous indicators for psychosis. (T.15, L. 27 - T. 16, L. 4).

Dr. Hoehn testified that Nolan had been having problems with increased depression for two (2) months previous to the shooting, and his medication was switched from Paxil to Zoloft during that time. He testified that he was contacted by Nolan's parents two (2) days prior to the shooting. They advised that Nolan was having problems which they believed necessitated a doctor's visit (mild agitation, preoccupation with guilt, and sleep problems). Dr. Hoehn was unable to see Nolan at that time, but placed Nolan on Klonopin, which he advised can be "disinhibiting", within approximately 24 hours prior to the shooting. (T. 16, L. 5 - T. 17, L. 6).

Dr. Hoehn testified that he learned of the shooting through a newspaper report, and immediately contacted Nolan's family. He stated that he was contacted by the nursing staff at the Desoto County Jail on May 28, 2006, who informed him that Nolan was having auditory and visual hallucinations and injuring himself and others while in his cell, a fact confirmed by the testimony of Jail Nurse, Margaret Cashion. Dr. Hoehn then prescribed Seroquel and took Nolan off of the Klonopin and Focalin he had been on. Dr. Hoehn also testified that he went to see Nolan at the jail within 2-3 days of the shooting. At that time, he confirmed the jail nursing staff's report of Nolan's psychosis with auditory and visual hallucinations. He testified that Nolan was "seeing people in his cell" when no one was there, was hearing voices, was "unable to distinguish what was real and what wasn't", and was agitated and "tangential in his thought process, which means he was confused." (T.18,L. 2 - T. 19, L. 17).

Dr. Hoehn testified that Nolan was released from the jail on June 8, 2006, thirteen (13) days

after the shooting, and immediately placed at Lakeside Hospital where Dr. Hoehn was his treating physician. While at Lakeside, Nolan was diagnosed with schizoaffective disorder, depressive type, which Dr. Hoehn described as a cross between schizophrenia and bipolar disorder. (T. 20, L. 27 - T. 21, L. 6).

Dr. Hoehn testified that Nolan was apparently becoming psychotic the week prior to the shooting, and that, based on his conversations with the Nolan family prior to the shooting and his evaluations of Nolan at the jail and at Lakeside, it was his professional opinion that Nolan was not able to appreciate the nature and quality of his actions on the night he fatally shot his father, and that Nolan suffered from a psychotic break from reality on that night. (T. 25, L. 13 -24). He stated that, during periods of psychosis, a schizoaffective person would become very irrational, respond to stimulus, not think in their normal clear state, and make decisions based on psychosis. (T. 22, L. 25-29). He further testified that Nolan's Asperger's Syndrome would exacerbate his schizoaffective disorder symptoms and make him even less likely than a normal person to comprehend that he was having a psychotic break. (T. 19, L. 18 - T. 20, L.5; T. 25, L. 10-24).

Dr. Hoehn further testified that Nolan was treated with medications and therapy over his two (2) month stay at Lakeside, that Nolan has improved significantly since his admission, and that Nolan continues his medications and therapy with Dr. Hoehn on a regular basis. Dr. Hoehn further testified that, in his professional opinion, Nolan was no longer a danger to himself or others. (T. 26, L. 10 - T. 28. L. 28).

Nolan then called Dr. Joseph C. Angelillo, Ph.D. to testify. He stated that he performed a *M'Naghten* evaluation on Nolan on June 30, 2006, approximately one (1) month after the shooting. He spent one-half (½) day interviewing Nolan, reviewed Nolan's social history, as well as the records of Dr. Hoehn and Dr. Robert Serino, Ph.D., who also tested Nolan, and also spoke to Dr.

Hoehn during the course of his evaluation. (T. 38, L. 17 - T. 39, L. 5).

He testified that he has performed hundreds of *M'Naghten* evaluations for both the prosecution and the defense as a regular part of his practice. He further testified that ninety-eight percent (98%) of the people that he evaluates are sane within the meaning of *M'Naghten.* Dr. Angelillo stated that, based on his interview of Nolan and review of the pertinent documentation, not only was Nolan not able to understand the nature and quality of his actions at the time of the shooting, but that this is "not even a close call". (T. 44, L. 20 - T. 45, L. 8). He stated that, in his expert medical opinion, Nolan experienced a "break" from reality and was definitely not able to appreciate the nature and quality of his actions at the time he fatally shot his father. He testified that, at the time of the incident, Nolan was highly disturbed as to his thinking and emotional processes, exhibiting paranoid, confused, ruminative, and idiosyncratic thinking, and experiencing auditory command hallucinations and depression. His opinion was thus, due to the combination of Nolan's psychosis (including chaotic and ruminative thoughts and hallucinations) and Nolan's Asperger's (which caused Nolan to have very limited empathy skills, making it difficult for Nolan to step outside himself to understand how things impact others, and making everything appear to Nolan to be equally important). He stated that schizoaffective disorder would be much worse for an Asperger's patient, because the poor coping skills present in an Asperger's patient would exacerbate the consequences of the psychosis, and make it harder for him to handle command hallucinations than a normal person. (T. 43, L. 12 - T. 44, L. 19; T. 45, L. 28 - T. 46, L. 2).

Regarding Dr. Hoehn's statement that Nolan had shown no previous indicators of psychosis, Dr. Angelillo testified that although the onset of psychosis is normally insidious and slow developing, due to the nature of Nolan's Asperger's, even if his psychosis had been "brewing" for a period of time, he would have been unlikely to notice it and/or understand it, much less

communicate it to another. (T. 49, L. 25 - T. 50, L. 29). Furthermore, he acknowledged that symptoms and effects of psychosis can dramatically change from moment to moment, noting that Nolan's affect shortly after the shooting was reported to be labile, defined as "up and down, easily influenced, . . . one can be calm one second and then begin to act out or get very emotional." (T. 41, L. 5-17).

Lay witness, Lynn Ford, next testified that she had known the Nolan family for years from church, and had always know Nolan and his father to have a very special and close relationship. (T. 52, L. 10 - T. 53, L. 9). She testified that she visited Nolan in jail a few days after the shooting, and that, at that time, Nolan was confused and talking to the wall during the visit, stating "No, I'm not going to do that. No, I don't want to do that." When she asked him what he was saying, he said, "Do you hear them?" and "I don't want to hurt you." He also asked her once if she knew that his father had died. When she told him "yes", he said, "They said I did it." (T. 54, L. 12 - T. 56, L. 21). Ford further testified she has had repeated contact with Nolan since his release from Lakeside, and that she is not now afraid of Nolan and did not feel that he was currently a danger to her or the community. (T. 56, L. 25-29).

Lay witness, Ron Donahoo, testified that he has known Nolan's family for years, and he had also always known the relationship between Nolan and his father to be good. (T. 62, L. 13-21). He stated that he had a telephone conversation with Nolan's father within a few days prior to the shooting. He testified that Nolan's father told him that Nolan was having problems sleeping and asked for prayers for Nolan and the family. (T. 62, L. 26 - T. 63, L. 11). Donahoo further testified that he visited Nolan at Lakeside Hospital within a few weeks of the shooting and that Nolan acted agitated and frustrated and "just different" than he had ever seen him act before. (T. 63, L. 12-27). He testified that he had seen Nolan since his release from Lakeside and found his behavior to be

"nothing like it was at Lakeside" and more like "the [Nolan] he always knew". He testified that he did not feel that Nolan was a danger, and would live in the same house with him and trust him with his children. (T. 64, L. 11 - T. 65, L. 6).

Lay witness, J. Hickman, testified that he had also known the Nolan family for many years and that Nolan and his father had a "tight father/son relationship" that was "closer than most". (T. 66, L. 23 - T. 67, L. 2). He testified that he spoke to the victim, Nolan's father, on the telephone the day of the shooting. Nolan's father told him that every four (4) to six (6) years, Nolan develops a tolerance to his behavioral medications which requires changing them. Nolan's father told him that this transition had been going remarkably well until a week before when things began to deteriorate steadily and quickly to the point that Nolan has not slept for at least two(2) nights – maybe three (3), was agitated, and "not really himself" . Nolan's parents were staying up in shifts with Nolan and were extremely concerned and tired. Nolan's father asked for prayers for the family. (T. 67, L. 27 - T.69, L. 1).

He testified that he saw Nolan in jail a day or so after the shooting and found him to be fidgety, agitated, incoherent, confused, and "like [he'd] never seen him before". Although Nolan expressed remorse for the death of his father, he did not express knowledge about what had happened. (T. 70, L. 8 - T. 71, L. 22). Hickman also testified that he had repeated contact with Nolan since his release from Lakeside, and that he was not afraid of Nolan, nor did he feel that Nolan was a danger to him, his children, or the community. (T. 69, L. 18 - T. 70, L. 4).

Next, lay witness, Wendell Sanders, also testified to the close relationship between Nolan and his father. He further testified that he had lunch with Nolan and his father on the day of the shooting. He testified that Nolan was different that day than he had ever seen him before in the years he had known him. He testified that Nolan was normally friendly and talkative, but that day, he was

withdrawn, almost non-responsive, seemed disturbed, had a defensive posture, and grunted in response to questions. When Nolan left the table, his father advised Sanders that he was very concerned because there was a problem with Nolan's medications, that he had not slept for 3-4 days, that Nolan's condition was getting worse, and that they currently had a call in to the doctor to address the issue. (T. 73, L. 19 - T. 75, L. 24)

Lastly, lay witness, Margaret Cashion, a nurse at the Desoto County Jail during Nolan's incarceration, was called to testify. She testified that she was called to Defendant's holding cell on May 29, 2006, three (3) days after the shooting, to evaluate him. He was agitated and had hit an officer in the nose. She observed that he continued to be very aggressive, agitated, and confused, and that he was hitting his head on the concrete wall. She also testified that Nolan appeared to be responding to internal stimuli, as he was talking to the wall. He asked her, "What am I doing in here? I haven't done anything." (T. 78, L. 14 - T. 79, L. 22). At her direction, the medical unit called Dr. Hoehn, Nolan's doctor, to obtain psychotropic medications for him, and his behavior became more normal after he began taking those medications. (T. 81, L. 5 - T. 82, L. 2).

At the close of Margaret Cashion's testimony, Nolan rested his case. The State then proceeded to call witnesses in rebuttal. First, the State called Commander Mark Blackson with the Desoto County Sheriff's Department who conducted the aforementioned police interview with Nolan. He testified that, at one point in the interview, he turned off the tape recorder and Nolan suddenly asked what "How is my dad?" Blackson advised Nolan that his father was dead, and Nolan began to cry in response. Blackson further testified that Nolan would talk about the incident with the tape recorder off, then looked at the tape recorder and stop talking about what had happened when it was turned back on. (T.84, L. 9 - T. 86, L. 5).

The State then called Detective Candace Scott with the Desoto County Sheriff's Department in rebuttal. She testified that she investigated the shooting and found several books regarding

forensics and crime scene investigations. However, on cross examination, she did admit that there were other scientific books and/or textbooks there as well. (T. 90, L. 2 - T. 92, L.29).

Lastly, the State called Dr. W. Criss Lott, Ph.D., to testify in rebuttal. He testified that he performed a sanity evaluation on Nolan, as well, on December 5, 2007, approximately one and a half (1½) years after the shooting. He testified that, during the course of his evaluation, he reviewed the evaluations of the other doctors, Nolan's medical records, the 911 transcript, and performed an interview with Nolan. (T. 94, L. 21 - T. 95, L. 2; T. 116, L. 14-17). Although he admitted that Nolan was "acutely mentally ill" (T. 101, L. 21) and "psychotic" (T. 101, L. 23-24) at the time he fatally shot his father, he stated that, in his opinion, Nolan did understand the nature and quality of this actions, and stated that, the fact that Nolan recognized that he had a gun in his hand and that he had shot his father indicates that Nolan understood the nature and quality of his actions. (T. 96, L. 28 - T. 97, L. 12). He defined "nature" as "if I recognize that this is a weapon and I discharge it, it's potentially fatal." (T. 98, L. 13-14). He defined "quality" as "consequences". (T. 116, L. 4-13).

He further testified that, in his opinion, Nolan recognized the wrongfulness of his actions. He based this opinion upon the fact that Nolan cried and made statements of remorse during the 911 call and police interview and to Dr. Hoehn two (2) days later . (T. 99, L. 7 - T. 100, L. 12).

At first, Dr. Lott denied the existence of any documentation that Nolan was having command hallucinations to kill his father (T. 104, L. 7-9), but opined that what he heard instead, due to his Asperger's Syndrome, was his own obsessive thoughts and ruminations that his father had accused him of being a pervert or sexual deviant. (T. 101, L. 24 - T. 102, L. 6). Dr. Lott stated that, even if he were hearing voices saying he should kill his father because his father thought he was a pervert or sexual deviant, that delusion still would not justify the act of killing his father, therefore Nolan was not *M'Naghten* insane. (T. 103. L. 4 - T. 104, L. 16) .

However, Dr. Lott later admitted that Asperger's Syndrome could likely have affected Nolan's ability or propensity to report any hallucinations or other psychotic symptoms he might have been having prior to the shooting. (T. 104, L. 21 - T. 105, L. 15), because Asperger's patients often internalize and do not communicate their thoughts, feelings and emotions. (T. 106, L. 1- 11). Later, Dr. Lott even admitted that the record does, in fact, indicate that Nolan was, hearing voices telling him to kill his father. (T. 107, L. 2-15). He further admitted that he did not know exactly what these voices were saying to Nolan and that "it's unclear as to exactly what he heard when." (T. 107, L. 5-6). He also admitted that voices that speak to people with psychosis are not rational. (T. 114, L. 22 - T. 115, L. 4), and that psychosis tends to "wax and wane" and can be triggered by some event. He further admitted that both the 911 call and the interview include periods of unresponsiveness and/or incoherence and hallucinations by Nolan, stating that Nolan appears "very disturbed". (T. 109, L. 16 - T. 113, L. 18). On cross-examination, Dr. Lott testified that he was not aware that Dr. Angelillo's evaluation and report was originally prepared at the request of the District Attorney. (T.119, L. 10-21).

The State completed its rebuttal, and the parties agreed to present closing arguments in the form of Findings of Fact and Conclusions of Law. The parties did so, and on January 7, 2008, Court reconvened in this cause for the ruling of the Court. The Court adopted the State's statement of facts, and found that Nolan knew the nature and quality of his act, in that he knew he had a gun and was firing it at his father, and that he knew the potential consequences of said act. (T. 136, L. 16-24). Further, the Court found that among Nolan's delusions were that his father was accusing him of being a sexual deviant, but even if these delusions were true, they would not justify his actions. (T. 139, L. 4-12). As to whether Nolan knew what he was doing was right or wrong, the Court found that he did, and in doing so, relied upon the fact that Nolan called 911 and expressed remorse for his actions during the 911 call, police interview, and evaluations. He noted that there was no testimony

regarding any voices telling Nolan to do anything prior to the shooting and no evidence regarding any voices on the 911 tape or during the police interview. The Court found that, based on the totality of the circumstances, Nolan was legally sane beyond a reasonable doubt at the time of the shooting– that he knew the nature and quality of his actions and knew what he was doing was wrong. The Court found that he acted in the "heat of passion", and was guilty of manslaughter. (T. 139, L. 13 - T. 148, L. 13).

On March 5, 2008, the Court sentenced Nolan to seven (7) years in the custody of the Mississippi Department of Corrections, followed by thirteen (13) years of post-release supervision, with a recommendation that Nolan be placed in a facility most appropriate to deal with his mental status. (T. 194, L. 13 - T. 195, L. 9). Nolan herein appeals said conviction and sentence.

SUMMARY OF THE ARGUMENT

The Trial Court erred in failing to direct a verdict in favor of the Defendant in this matter, as the State presented no evidence of "heat of passion" in its case in chief. Furthermore, after the Defendant introduced sufficient evidence of the Nolan's insanity at the time of the shooting to shift the burden of proof to the State, the Trial Court's finding that the State met its burden of showing, beyond a reasonable doubt, that Nolan was sane at the time of the shooting was against the overwhelming weight of the evidence. As a result of the errors made by the Trial Court in this cause, the Defendant was unfairly prejudiced. Therefore, the judgment of the Trial Court should be reversed and Nolan's conviction and sentence vacated, or in the alternative, this cause should be remanded to the original Trial Court for a new trial on the merits and/or for re-sentencing.

ARGUMENT

ISSUE I: The Trial Court erred in failing to grant the Defendant's Motion for Directed Verdict based upon the State's failure to prove each of the elements of the crime of manslaughter in its case in chief, specifically "heat of passion".

To determine whether the evidence is sufficient to overcome a motion for directed verdict,

the critical inquiry is whether the evidence shows "beyond a reasonable doubt that the accused committed the act charged, and that he did so under such circumstances that ***every element of the offense existed***, and where the evidence fails to meet this test, it is insufficient to support a conviction." Massey v. State, 2008 WL 4664721 (Miss. 2008)(citing Carr v. State, 208 So.2d 886, 889 (Miss.1968)). The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Id. (citing Jackson v. Virginia, 443 U.S. 307, 315 (1979)).

In order to prove the crime of manslaughter as charged in the indictment in this cause, the State must prove the accused committed "[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." Johnson v. State, 876 So.2d 387, 393 (Miss. App. 2003)(citing Mississippi Code Annotated (1972) as amended § 97-3-35). "Heat of passion" has been defined in Mississippi law 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 an emotional state of mind characterized by anger, rage, hatred, furious resentment or terror." McLendon v. State, 748 So.2d 814, 817 (Miss. App. 1999)(citing Underwood v. State, 708 So.2d 18, 36 (Miss.1998)). The passion felt by the person committing the act "should be superinduced by some insult, provocation, or injury, which would naturally and instantly produce, in the minds of ordinarily constituted men, the highest degree of exasperation." Id. (citing Graham v. State, 582 So.2d 1014, 1018 (Miss.1991)).

In the case at bar, the parties stipulated that, on May 26, 2006, in DeSoto County, Mississippi, Nolan did shoot and kill his father, Donald Nolan, with a handgun. The parties further stipulated to the authenticity and admission of the tape recorded 911 call Nolan made to police after

the shooting, the tape recorded police interview of Nolan conducted several hours after the shooting, Nolan's Lakeside Hospital medical/psychiatric records, Nolan's school records, and the autopsy report on Mr. Don Nolan. After these stipulations, the State rested its case in chief, providing no testimony of "heat of passion" as an element of the crime of manslaughter which Nolan was charged with. Furthermore, none of the stipulated evidence contained any indication of any "immediate and reasonable provocation, by words or acts" of his father toward Nolan at the time of the shooting. Nor was there any evidence of Nolan's "state of mind [being] characterized by anger, rage, hatred, furious resentment or terror."

The Trial Court noted that the parties did not stipulate to the "heat of passion" element of the crime. The Trial Court stated:

> It was my understanding that there was no stipulation on that because obviously that would go to the state of mind, which was the issue that was being decided by the Court during the hearing. . . . On all issues other than Mr. Nolan's mental state or claim of insanity, which goes, of course, to the heat of passion element of the crime, that on each and every other element by stipulation and be finding of the Court, the State has proven those elements beyond a reasonable doubt."

(T. 133, L. 4-18).

Although it is not clear, it appears that the Trial Court was indicating that the State was not required to prove "heat of passion" because the Court's determination as to insanity would address that issue as well . . . it appears that the Court is equating insanity and "heat of passion". However, there is no case law in this State which states, or even implies, such. Although the two (2) concepts are admittedly related, the definition of "heat of passion" pursuant to Mississippi law as stated supra is far from the definition of "insanity" pursuant to Mississippi law. They are two (2) distinct concepts and two (2) distinct elements of the crime of manslaughter.

As a result of the State's failure to prove "heat of passion", a necessary element of the crime

of manslaughter, in its case in chief, Nolan's motion for directed verdict should have been granted. The Trial Court erred in failing to direct a verdict in Nolan's favor at that time.

ISSUE II: The Trial Court's finding that the State met its burden of proving, beyond a reasonable doubt, that the Appellant/Defendant was sane at the time of the shooting was against the overwhelming weight of the evidence.

On appeal, the factfinder's determination that the accused is insane will be overturned if the appellate Court is convinced that the verdict is so contrary to the overwhelming weight of the evidence that allowing it to stand would create an unconscionable injustice. Hawthorne v. State, 883 So.2d 86, 89 (Miss. 2004)(citing Tyler v. State, 618 So.2d 1306, 1309 (Miss.1993)).

A defendant's sanity is always an element of the offense charged, as it is necessary for a defendant to have sufficient mental understanding in order to form criminal intent. Smith v. State, 220 So.2d 313, 314 (Miss. 1969). Every defendant is presumed to be sane. However, if facts and/or testimony are presented by either party which raises a reasonable doubt as to the defendant's sanity, the burden of proof shifts to the State who must then prove beyond all reasonable doubt that the defendant was sane at the time of the offense. Holloway v. State, 312 So.2d 700 (Miss. 1975); Lee v. State, 837 So.2d 781, 784 (Miss. 2003)(citing White v. State, 542 So.2d 250, 252 (Miss.1989)).

Mississippi follows the *M'Naghten* rule to determine whether a defendant is criminally responsible for the crime committed. Under the *M'Naghten* rule, a defendant is not criminally responsible for his actions, if, at the time of the offense, he was because of diminished or impaired mental functioning, unable to appreciate the nature and quality of the act he was doing, or, if he did know it, that he did not know that what he was doing was wrong. Edwards v. State, 441 So.2d 84, 86 (Miss, 1983); Woodham v. State, 800 So.2d 1148, 1158 (Miss. 2001)(citing Roundtree v. State, 568 So.2d 1173, 1181 (Miss. 1990); McLaughlin v. State, 789 So.2d 113, 115 (Miss. App. 2001). Essentially, the test is whether the accused knew right from wrong at the time of the offense. Clemons v. State, 952 So.2d 314, 317 (Miss. App. 2003)(citing Woodham v. State, 800 So.2d at

1158). Irresistible impulse is a defense only if it is shown that said impulse arose from mental disease existing to such a high degree as to overwhelm the reason and conscience of the defendant so that he is unable to distinguish between right and wrong. Herron v. State, 287 So.2d 759, 765 (Miss. 1975)(citing Eatman v. State, 153 So. 381 (1934)).

The finder of fact may consider both expert testimony and lay testimony based upon personal observation of the defendant in making a determination of sanity. Frost v. State, 453 So.2d 695 (Miss. 1984). Admissible into evidence is testimony regarding every act of the defendant's life which is relevant to the issue of sanity. McLeod v. State, 317 So.2d 389, 391 (Miss. 1975). It is the prerogative and duty of the fact finder to consider evidence as to a defendant's conduct before, at the time of, and subsequent to the offense. The fact finder should use common sense and apply the lessons of human experience in resolving the question of whether the defendant appreciated the nature and consequences of his act and knew that it was wrong. Expert opinions are not conclusive upon that issue. Herron at 763.

The factfinder is not bound to accept the conclusions of any expert. Edwards at 87. "Conclusions of an expert witness are not infallible. His opinion must be based upon his study and his own experience and if either is lacking, deficient, or immature, his conclusions may fall short of the accuracy essential to a true verdict." Herron at 762.

Mississippi Code Annotated (1972) as amended §99-13-7 states that when a defendant has been acquitted on the ground of insanity, the finder of fact shall also make a determination as to whether said defendant has since been restored to reason, and whether he is dangerous to the community. If the finder of fact determines that the defendant is still insane and dangerous, the judge shall order him confined to the states insane asylum. *Mississippi Code Annotated (1972) as amended §99-13-7.*

In Clemons v. State, the Court of Appeals affirmed a ruling that the defendant was sane under

M'Naghten where he presented no evidence of a mental disease at trial, and the State's expert testified that the defendant's actions prior to and after the murder supported his opinion that the defendant knew the nature and consequences of his actions and knew the act was wrong. In Clemons, the defendant purchased a gun and forged the victim's name on a life insurance policy prior to the act, wore gloves during the act, and disposed of the gun and other evidence, cleaned the scene, and attempted to establish an alibi after the act. Clemons at 318.

Likewise, in Tyler v. State, this Court affirmed a determination of *M'Naghten* sanity, stating that the expert's opinion was justified because there were strong indications that the defendant knew right from wrong at the time of the killing. For example: the defendant engaged in deceptive acts immediately after the murder in an attempt to hide the crime, the defendant hid the murder weapon, and police officers had no problem communicating with him during his confession/statement or their other dealings with him. Tyler v. State, 618 So.2d 1306, 1312 (Miss. 1993).

In this case, however, there is an abundance of evidence regarding Nolan's mental status before, during, and after the shooting and that he was *M'Naghten* insane at the time. There is no evidence of any prior planning by Nolan or any attempt to hide his actions, dispose of evidence, or establish an alibi. Rather, once Nolan was aware of what had happened, he immediately called 911 in an attempt to help his father, attempted to render first aid to his father, and complied with police instructions from that point on.

Nolan presented two (2) expert witnesses, Dr. Hoehn and Dr. Angellilo, who evaluated him within one (1) month of the shooting who testified that he was *M'Naghten* insane at the time of the shooting. Furthermore, Dr. Hoehn also testified that he had treated Nolan for ten (10) years prior to the incident and had continued to treat him since then. Furthermore, Nolan presented five (5) lay persons who testified to their knowledge that Nolan had, just prior to and/or just after the shooting, started acting strangely, become agitated, and been having hallucinations or delusions.

On the other hand, the State presented only one (1) expert witness, Dr. Lott, who testified that Nolan was not insane under *M'Naghten* standards. Dr. Lott, however, did not conduct his evaluation of Nolan until nearly 1½ years after the shooting occurred. Furthermore, medical records indicate that Nolan had been aggressively treated and medicated for his condition during the1½ year period from the date of his release on bond until the date of Dr. Lott's evaluation. Therefore, it stands to reason that, by the time of Lott's evaluation, Nolan's condition would be drastically improved and radically different from what it was on the date of the shooting and even from what it was at the time of Dr. Hoehn's and Dr. Angellilo's evaluations.

The 911 call clearly indicates that, although Nolan realized at some point that he had shot his father, his ability to understand the nature and quality of what had happened waxed and wanted. In fact, Nolan's father, himself, also acknowledged the existence of Nolan's extremely altered mental status at this time.

At trial, the State attempted to imply, through Detective Blackson's testimony and the admission of his taped interview of Nolan which occurred approximately five (5) hours after the shooting, that Nolan was not insane. However, the transcript of the interview, in fact, makes it very clear that Nolan was incoherent about what had occurred. The transcript also indicates that Nolan experienced hallucinations on that very night.

The State also made much of the fact that Nolan later expressed remorse for his actions at trial in an attempt to prove his sanity. Although expressions of remorse are relevant to the issue of sanity, Dr. Angellilo testified that symptoms and effects of psychosis can dramatically change from moment to moment, and the State's own expert acknowledged that psychosis such as Nolan's tends to "wax and wane" and can be triggered by some event. He further admitted that both the 911 call and the interview include periods of unresponsiveness and/or incoherence and hallucinations by Nolan, stating that Nolan appears "very disturbed".

Nolan's medical/psychiatric records from Lakeside Hospital indicate that Nolan reported that, he was responding to internal voices that were "stronger than God" when he shot his father and that he continued to be delusional regarding what had occurred. Likewise, Nolan's school records indicate that Nolan suffered significant psychological and social problems due to Asperger's Syndrome which were confirmed by all three (3) expert witnesses.

Furthermore, Nolan was hearing voices telling him to kill his father, and these voices were "stronger than God". Whether God was, in fact, commanding Nolan to kill his father is irrelevant . . . Nolan, in the midst of his schizoaffective hallucinations/delusions and Asperger's Syndrome, believed that God was telling him to kill his father. We'd all like to think that when God speaks to us and tells us to, we will act. Furthermore, it is difficult to imagine a scenario in which one, believing that God is speaking to him/her, would question whether what God tells him/her to do is right or wrong. God is always right.

Due to these voices, Nolan had an irresistible impulse to shoot his father. The impulse arose from mental deficiency existing to such a high degree as to overwhelm his reason and conscience, rendering him unable to distinguish between right and wrong.

The Trial Court's determination that the State proved beyond a reasonable doubt that Nolan was sane at the time of the shooting was against the overwhelming weight of the evidence, and allowing such a determination to stand would, in effect, sanction an unconscionable injustice.

ISSUE III. The *M'Naghten* standard is antiquated, simplistic, and fails to accomplish its intended purpose of exempting from criminal responsibility those Defendants who are unable to form the requisite intent for a particular crime due to mental illness.

The *M'Naghten* case was heard in 1843, over 150 years ago, in England. It is clear from a reading of the case that the intended purpose of its holding was to distinguish those cases in which a defendant is so mentally deficient, or insane, so as not to have the ability to form the requisite intent to commit a criminal act, and to find that, in such cases, the defendant should not be criminally

responsible.

Since the time of *M'Naghten*, we have come a long way in understanding the nature of mental illness however, we still have far to go. As Justice Hawkins so eloquently stated in his Gill v. State dissent, "We have not begun to fully understand this affliction [of schizophrenia], what really causes it, or its cure." Gill v. State, 488 So.2d 801, 803 (Miss. 1986).

As Justice Hawkins further noted, the *M'Naghten* standard is too simplistic. In its first prong, it requires that, in order to be legally insane, the defendant must be unable to determine the difference between right and wrong. However, sane persons – those who are not dealing with delusions, hallucinations, and documented thought disorders – have a difficult time determining what is right and wrong. Id. at 806. Furthermore, a schizophrenic may abstractly know that injuring or killing another person is wrong, however, "in his freak mind he has done a proper thing in injuring or killing." Id. In fact, in the paranoid schizophrenic's mind he is frequently acting upon direct instruction from the Lord. Id. at 806-807.

Alternatively, in its second prong, the *M'Naghten* standard requires that the defendant not understand the nature and consequences of his act in order to be determined legally insane. As Justice Hawkins stated, this standard "hardly suffices. While he may very well know he is hurting another, his delusion compels a mind-set [. . .] he acts from an absolute necessity." Id. at 807.

In fact, the *M'Naghten* standard makes no sense to the medical experts who testify as to sanity. The word "insanity" does not have any medical definition, only a legal one. Therefore, we have experts testifying on issues in which they are laypersons. These medical experts have no specialized training whatsoever qualifying them to determine whether a defendant knows the difference between right and wrong. Id. "What is right or wrong depends upon the circumstances existing at the time, and is a legal and moral question, not medical." Id.

For the reasons stated in his dissent in Groseclose v. State, Justice Robertson has also agreed

that the *M'Naghten* rule is "rationally irrelevant" to the determination of criminal responsibility. Id. at 809. Groseclose v. State, 440 So.2d 297, 302-306 (Miss. 1983).

The current standard requires that the fact finder determine that the defendant was not able to understand what he was doing, and that what he was doing was wrong. This standard assumes that we are dealing with a logical mind which is able to reason, when we know that those persons diagnosed with schizophrenia are not thinking correctly (having delusions/hallucinations).

The *M'Naghten* standard is particularly absurd in a case such as the one at bar. Nolan was hearing voices "stronger than God" telling him to kill his father. It is absurd to expect a schizoaffective person, especially one also suffering from Asperger's Syndrome, when faced with a direct command from God, to question the right or wrongfulness of the act or to stop and reason whether the delusion he is faced with (which he believes is true) would constitute a valid legal defense. Most of us would like to think that when and if God speaks to us, we would act. Consider Abraham. He heard God speaking to him and telling him to sacrifice his son, Isaac. Abraham intended to do so would have, had God not stopped him moments before the act. If Abraham had, in fact, completed the sacrifice, and we learned that the voice he heard was not, in fact, that of God, would we have held him criminally responsible?

There is no question that Nolan was "insane." All three (3) experts in this case testified that he was insane or "grossly psychotic." The State's only expert, Dr. Lott, testified that Nolan was insane, he just did not meet the *M'Naghten* standard. Again, whether God was, in fact, telling Nolan to kill his father is irrelevant . . . Nolan believed that God was telling him to kill his father.

The *M'Naghten* standard is particularly unfair where the defendant, Nolan, was not only dealing with schizoaffective disorder causing delusions and hallucinations, but also dealing with the effects of Asperger's Syndrome causing his coping skills and reasoning abilities to be further compromised. As a result, the intended purpose of *M'Maghten* is not accomplished by its

application to these types of cases.

Given the totality of the circumstances, an affirmation of the Trial Court's finding of sanity would constitute an "unconscionable injustice".

CONCLUSION

The Trial Court erred in failing to direct a verdict in favor of Nolan in this matter, as the State failed to prove "heat of passion", an essential element of manslaughter, in its case in chief. Furthermore, the Trial Court's finding that the State proved, beyond a reasonable doubt, that Nolan was sane at the time of the shooting was against the weight of the evidence. As a result of the errors made by the Trial Court in this cause, the Defendant was unfairly prejudiced and an unconscionable injustice occurred. Therefore, the judgment of the Trial Court should be reversed and Nolan's conviction and sentence vacated, or in the alternative, this cause should be remanded to the original Trial Court for a new trial on the merits or for re-sentencing.

Respectfully submitted,

JAMES D. FRANKS, MB NO. [redacted]
2584 HIGHWAY 51 SOUTH
POST OFFICE BOX 545
HERNANDO, MS 38632
PHONE (662) 429-5914
FAX (662) 429-1591
Attorney for the Appellant/Defendant

CERTIFICATE OF SERVICE

I, James D. Franks, do hereby certify that I have this day mailed, via U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing *Brief of Appellant* to the following individuals at their regular mailing addresses:

Ms. Betty Sephton
Mississippi Supreme Court Clerk
P.O. Box 249
Jackson, MS 39205-0249

Honorable Robert P. Chamberlin
Desoto County Circuit Court Judge
2535 Highway 51 South
Hernando, MS 38632

Honorable John Champion, District Attorney
Honorable Susan Brewer, Assistant District Attorney
Office of the District Attorney
365 Losher Street, Suite 210
Hernando, MS 38632

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

This the 4 day of November, 2008.

JAMES D. FRANKS, MB NO [redacted]
2584 HIGHWAY 51 SOUTH
POST OFFICE BOX 545
HERNANDO, MS 38632
PHONE (662) 429-5914
FAX (662) 429-1591
Attorney for the Appellant/Defendant