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STATEMENT OF ISSUES

ISSUE I: Assuming the Court finds the evidence insufficient to support a conviction of “heat of passion” manslaughter under M.C.A. §97-3-35, is there any legal impediment to finding the evidence is sufficient to support a conviction of manslaughter under M.C.A. §97-3-47?

ISSUE II: Assuming the Court finds the evidence is sufficient to find the Defendant sane, but insufficient to find “heat of passion”, accident, self-defense, or defense of another, what is the proper resolution of this case?

ISSUE III: Does Tait v. State provide an answer to the questions presented by the Court of Appeals, or any guidance whatsoever?

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, appealed the judgment and sentence of the Desoto County Circuit Court. After both parties filed briefs and/or reply briefs, this Court entered an *Order* on October 1, 2009 directing the parties to respond to three (3) specific issues in supplemental briefing. Appellant herein files his Supplement Brief of Appellant pursuant to this Court's *Order*.

SUMMARY OF THE ARGUMENT

The conviction of Defendant Nolan under M.C.A. §97-3-35 (heat of passion manslaughter) is against the overwhelming weight of the evidence, as the State failed to prove an essential element of the offense – “heat of passion”. Furthermore, this Court has no authority to affirm a conviction of Defendant Nolan under M.C.A. §97-3-47 (culpable negligence manslaughter), because Defendant was not indicted under said statute and it is not a lesser included offense of M.C.A. §97-3-35 (heat of passion manslaughter) which he was indicted for. Any other interpretation of Mississippi law would deprive Defendant of his constitutional rights. Therefore, this Court must reverse Nolan's conviction and vacate his sentence in this cause.

ARGUMENT

ISSUE I: ASSUMING THE COURT FINDS THE EVIDENCE INSUFFICIENT TO SUPPORT A CONVICTION OF “HEAT OF PASSION” MANSLAUGHTER UNDER M.C.A. §97-3-35, IS THERE ANY LEGAL IMPEDIMENT TO FINDING THE EVIDENCE IS SUFFICIENT TO SUPPORT A CONVICTION OF MANSLAUGHTER UNDER M.C.A. §97-3-47?

Nolan was charged with manslaughter under MCA §97-3-35 (heat of passion manslaughter) which provides: “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.” *Mississippi Code Annotated (1972) as amended §97-3-35*. At the trial of this matter, there was no evidence presented to support the element of “heat of passion”. Therefore, a necessary element of the crime of manslaughter as charged was not proven. As such, the Trial Judge erred in denying Nolan’s motion for directed verdict as to this issue.

This Court now questions whether, although Nolan was not indicted for such, there is any legal impediment to finding that the evidence supports a conviction under MCA §97-3-47, commonly known as the culpable negligence manslaughter statute, and which provides: “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.” *Mississippi Code Annotated (1972) as amended §97-3-47*.

MCA §99-19-5 states that, “on an indictment for any offense the jury may find the defendant guilty of the offense as charged, . . . or may find him guilty of an inferior offense . . . , the commission of which is necessarily included in the offense with which he is charged in the indictment, whether the same be a felony or misdemeanor, without any additional count in the

indictment for that purpose.” *Mississippi Code Annotated (1972) as amended §99-19-5*. This Court has consistently interpreted this section to apply only to inferior offenses “necessarily included within the more serious offense.” Hailey v. State, 537 So.2d 411, 414 (Miss. 1988)(citing Sanders v. State, 479 So.2d 1097, 1105 (Miss. 1985)). Therefore, due to the fact that Nolan was not indicted for §97-3-47 manslaughter, the only way that he may be convicted under that statute is if it is a lesser-included offense of MCA §97-3-35.

“A lesser included offense by definition is one in which all its essential ingredients are contained in the offense for which the accused is indicted, but not all of the essential ingredients of the indicted offense. An accused could not be guilty of the offense for which he is indicted without at the same time being guilty of the lesser-included offense.” Brazzle v. State, 13 So.3d 810, 815 (Miss. 2009)(quoting Byrom v. State, 863 So.2d 836, 874 (Miss. 2003)). A key consideration as to whether a crime is a lesser-included offense of a superior crime is whether the indictment put the defendant on sufficient notice of the charges pending against him. In other words, the superior offense cannot be committed without the lesser-included offense also being committed. Downs v. State, 962 So.2d 1255, 1261 (Miss.2007) (citing Harper v. State, 478 So.2d 1017, 1021 (Miss. 1985)).

This Court has held that, “[l]esser included offense instructions should be given if there is an evidentiary basis in the record that would permit a jury rationally to find the defendant guilty of the lesser offense and to acquit him of the greater offense.” Welch v. State, 566 So.2d 680, 684 (Miss.1990). “[A] lesser-included offense instruction should be granted unless the trial judge and ultimately this Court can say, taking the evidence in the light most favorable to the accused and considering all the reasonable inferences which may be drawn in favor of the accused from the

evidence, that no reasonable jury could find the defendant guilty of the lesser-included offense (conversely, not guilty of at least one element of the principal charge). Id. (citing McGowan v. State, 541 So.2d 1027, 1028 (Miss.1989)).

Both the Sixth Amendment of the U.S. Constitution and Article 3, Section 6 of the Mississippi Constitution guarantee that all defendants enjoy the right to be informed of the nature and cause of the accusation against him. “If, under the facts as alleged in the indictment, a lesser offense is necessarily included, then a conviction of the lesser offense may be proper. The indictment must sufficiently allege the lesser crime so that the defendant is notified of the lesser charge, however.” Hailey v. State, 537 So.2d 411, 416 (Miss. 1988).

The English language meaning of the word “lesser” is “of less size, quality, degree, or significance” *Merriam-Webster Online Dictionary*. In addition, Black’s Law Dictionary, MCA §99-19-5, and much Mississippi case law, recognize a “lesser included offense” as an offense that is less serious than or inferior to the indicted offense. *Black’s Law Dictionary; Mississippi Code Annotated (1972) as amended §99-19-5; Hailey v. State*, 537 So.2d 411 (Miss. 1988); etc..

However, §97-3-47 manslaughter is not of less degree or significance, less serious than, or inferior to §97-3-35 manslaughter. Rather, they are the same offense . . . manslaughter. The statutes simply provide equal offenses with different elements. The penalty for violation of both offenses is identical. Simply put, manslaughter is manslaughter and no one specific version of it is more serious than another.

Furthermore, Manslaughter under MCA §97-3-47 requires proof of an element not required under MCA §97-3-35 with which Nolan was charged . . . that of the “act, procurement, or culpable negligence” of the defendant. A rational trier of fact could not reasonably have found Nolan guilty

of §97-3-47 manslaughter and acquit him of §97-3-35 manslaughter, because the State did not allege any “act, procurement, or culpable negligence” of the Nolan in the indictment against him. A finding that Nolan is guilty of §97-3-35 manslaughter does not necessarily require a finding that he is guilty of §97-3-47 manslaughter.

Due to the State’s failure to allege any “act, procurement, or culpable negligence” of Nolan, but rather that Nolan “acted in the heat of passion”, the indictment failed to provide Nolan with notice that he was to defend against a §97-3-47 manslaughter charge.

There is no authority for this Court to allow the conviction of Nolan under §97-3-47 because it is not a lesser-included offense of §97-3-35 manslaughter with which Nolan was charged, and because the State failed to indict Nolan under §97-3-47. Any other interpretation of Mississippi law would violate Nolan’s constitutional right to due process and notice of the charge against him.

ISSUE II: ASSUMING THAT THE COURT FINDS THE EVIDENCE IS SUFFICIENT TO FIND THE DEFENDANT SANE, BUT INSUFFICIENT TO FIND “HEAT OF PASSION”, ACCIDENT, SELF-DEFENSE, OR DEFENSE OF ANOTHER, WHAT IS THE PROPER RESOLUTION OF THIS CASE?

The State failed to prove the necessary “heat of passion” element of MCA §97-3-35 manslaughter for which Nolan was indicted. Therefore, his conviction under MCA §97-3-35 is against the overwhelming weight of the evidence, and must be overturned. Furthermore, since Nolan was not indicted for §97-3-47 manslaughter and §97-3-47 is not a lesser-included offense of §97-3-35, he cannot be convicted under that statute. Therefore, this Court must reverse and vacate Nolan’s conviction and sentence in this cause.

ISSUE III: DOES TAIT V. STATE PROVIDE AN ANSWER TO THE QUESTIONS PRESENTED BY THE COURT OF APPEALS, OR ANY GUIDANCE WHATSOEVER?

Tait v. State does not give this Court guidance regarding the issues in this case. In Tait v. State, the defendant was indicted and convicted of depraved heart murder under MCA §97-3-

19(1)(b) which provides: “the killing of a human being shall be murder when done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual.” Tait v. State, 669 So.d 85, 988 (Miss. 1996)(citing *Mississippi Code Annotated (1972) as amended §97-3-19(1)(b)*). On appeal, the Mississippi Supreme found that the evidence did not support Tait’s conviction for depraved heart murder, but did support his conviction for culpable negligence manslaughter under MCA §97-3-47, which provides: ““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.” Id. at 89. (citing *Mississippi Code Annotated (1972) as amended §97-3-47*).

The Court found that the evidence supported a finding that, although Tait’s actions showed a “conscious, wanton, and reckless disregard of the likely fatal consequences of his willful act which created an unreasonable risk”, it did not support a finding of “a reckless and eminently dangerous act directed toward a single individual” as required by the depraved heart murder statute. Id. at 90.

Although the defendant did not request an instruction as to §97-3-47 manslaughter at trial, the Mississippi Supreme Court found that such was appropriate. Rather than returning the case to the Trial Court for a new trial, the Court found that, because there was proof of culpable negligence manslaughter beyond a reasonable doubt, it was more reasonable to simply affirm Tait’s conviction on the charge of culpable negligence manslaughter, which it specifically termed a “lesser offense” of depraved heart murder, and remand the matter for re-sentencing on that charge. Id. at 91.

The case at bar can be distinguished from Tait v. State because, although culpable negligence manslaughter may be a lesser-included offense of depraved heart murder, it is not a lesser-included

offense of heat of passion manslaughter. First, depraved heart murder is a more serious offense than culpable negligence manslaughter . . . there is no question that manslaughter is of less size, quality, degree, or significance than murder. Due to this, murder also carries a greater penalty than manslaughter.

Second, as stated inter alia, §97-3-47 manslaughter requires proof of an element not required under MCA §97-3-35 with which Nolan was charged . . . that of the “act, procurement, or culpable negligence” of the defendant. A rational trier of fact could not reasonably have found Nolan guilty of §97-3-47 manslaughter and acquit him of §97-3-35 manslaughter, because the State did not allege any “act, procurement, or culpable negligence” of the Nolan in the indictment against him. A finding that Nolan is guilty of §97-3-35 manslaughter does not necessarily require a finding that he is guilty of §97-3-47 manslaughter.

Third, in Tait v. State, the indicted charge of depraved heart murder and the unindicted charge of culpable negligence manslaughter, which the Court held was a proper lesser included offense, both addressed situations wherein the defendant’s actions were intentional, but the outcome was not. The jury, in Tait, therefore, would simply determine the degree of the Defendant’s culpability – depraved heart or culpable negligence. However, in the case at bar, we are faced with a situation wherein Nolan was charged with “heat of passion” manslaughter, and the Court questions whether he could be appropriately convicted under the §97-3-47 culpable negligence manslaughter statute. A conviction under §97-3-47 requires proof unrelated to the proof required under §97-3-35, therefore, this case can further be distinguished from Tait.

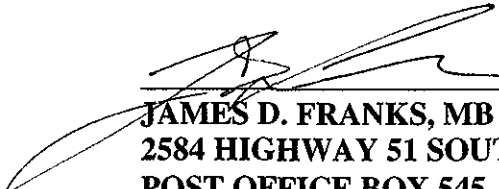
In this case, in order to determine that a conviction under §97-3-47 is proper, this Court must find a lesser included situation despite the fact that neither charge is lesser to the other and despite the fact that §97-3-47 contains an element not contained in §97-3-35. This is simply not

appropriate. For the reasons stated herein, Tait v. State can be distinguished from the case at bar and fails to provide this Court with any guidance as to this issue or authorize this Court to affirm Nolan's conviction under MCA §97-3-47.

CONCLUSION

The conviction of Defendant Nolan under M.C.A. §97-3-35 (heat of passion manslaughter) is against the overwhelming weight of the evidence, as the State failed to prove an essential element of the offense – “heat of passion”. Furthermore, this Court has no authority to affirm a conviction of Defendant Nolan under M.C.A. §97-3-47 (culpable negligence manslaughter), because Defendant was not indicted under said statute and it is not a lesser included offense of M.C.A. §97-3-35 (heat of passion manslaughter) which he was indicted for. Any other interpretation of Mississippi law would deprive Defendant of his constitutional right to notice of the charge against him. Therefore, the judgment of the Trial Court should be reversed and Nolan's conviction and sentence vacated.

Respectfully submitted,



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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 *Supplemental Brief of Appellant* to the following individuals at their regular mailing addresses:

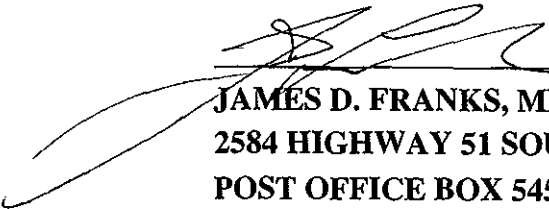
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