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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CAVIN EARL REED

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APPELLANT

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V.

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SUPREME COURT
COURT OF APPEALS

NO. 2008-KA-00573-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF THE APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
Hunter Aikens, M. [REDACTED]
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201
Telephone: 601-576-4200

Counsel for Cavin Earl Reed

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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. Cavin Earl Reed, Appellant
3. Honorable Cono Caranna, District Attorney
4. Honorable Jerry O. Terry, Circuit Court Judge

This the 21 day of August, 2008.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:


HUNTER AIKENS
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39205
Telephone: 601-576-4200

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STATEMENT OF THE ISSUES

- I. REED'S CONVICTION FOR MURDER WAS BASED ON INSUFFICIENT EVIDENCE AND WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.**
 - A. THE STATE FAILED TO PROVE THAT REED DID NOT ACT IN SELF-DEFENSE; THEREFORE, THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION FOR EITHER MURDER OR MANSLAUGHTER.**
 - B. ALTERNATIVELY, THE STATE PRESENTED INSUFFICIENT EVIDENCE TO PROVE THAT REED ACTED WITH DELIBERATE DESIGN, AND REED WAS GUILTY, AT MOST, OF MANSLAUGHTER.**
- II. THE TRIAL COURT ERRED IN SENTENCING REED AS A HABITUAL OFFENDER UNDER MISSISSIPPI CODE ANNOTATED SECTION 99-19-83, AS THE STATE FAILED TO PROVE THAT REED HAD BEEN SENTENCED TO *AND ACTUALLY SERVED* SEPARATE TERMS OF ONE YEAR OR MORE ON EACH OF HIS PRIOR FELONY CONVICTIONS.**
- III. REED'S CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL WAS VIOLATED.**

STATEMENT OF THE CASE

Cavin Earl Reed (Reed) was convicted by a jury in the Circuit Court of Harrison County for the murder of his girlfriend, Angeline Lawanna Combs (Combs), under Mississippi Code Annotated section 97-3-19(1)(a) (Rev. 2006). (Tr. 342, C.P. 99, 101-02). The trial court sentenced Reed to a term of life imprisonment without the possibility of parole as a habitual offender pursuant to Mississippi Code Annotated section 99-19-83 (Rev. 2007). (Tr. 344-45, C.P. 101-02, R.E. 7-8, 13-14). Reed is presently incarcerated under the supervision of the Mississippi Department of Corrections and now seeks relief from this honorable Court.

FACTS

Reed and Combs were involved in a two-month long romantic relationship that ended in the early morning hours of August 3, 2006, when Combs was shot and fatally wounded by Reed during a confrontation between the two at Combs' apartment. (Tr. 110, Ex. S-2, S-12). Carrissia Martin, an acquaintance of Reed and Combs, allegedly spoke with Reed two days before, and Reed told her that he was sick of Combs messing around on him, and he was going to kill her. (Tr. 192-94). However, Martin did not think Reed was serious. (Tr. 192-94). On a prior occasion, Combs attacked Reed with a butcher knife and threatened to kill him. (Ex. S-2, S-12).

At approximately 4:12 a.m. on August 3, 2006, Combs' neighbor, Aisha Carson (Carson), contacted the Biloxi Police Department (BPD) after she heard a commotion in Combs' apartment that she described as follows: "It was like they was going from wall to wall, like they was tussling." (Tr. 111-12, 119). Carson allegedly saw Combs being "pushed in and out" of her third-story bedroom window and allegedly heard Combs say "she give in." (Tr. 111-12, 143). However, on cross examination, Carson admitted that she heard no words whatsoever. (Tr. 120). After Carson got off the phone, she noticed a blue Chevrolet Lumina speed out of the parking lot.¹ (Tr. 117).

The responding officers discovered what appeared to be droplets of blood on the first floor of the stairwell; the droplets led to Combs' apartment. (Tr. 146). Combs' bedroom window was broken and shards of glass as well as droplets and puddles of blood were scattered about. (Tr. 149-151). Also, three shell casings and two bullets, later identified in caliber as Winchester .380, were recovered from Combs' bedroom: one from the floor near the window, the other from the bedroom wall. (Tr. 232-33, 242). A third bullet was found lodged in the back of the front door of the

1. It appears from the record that the Chevrolet Lumina belonged to Combs.

apartment. (Tr. 232-33, 242). At approximately 5:17 a.m., Combs' car was found parked on the shoulder of interstate 110; Combs' lifeless body was slumped backwards in the front passenger seat. (Tr. 164-65).

The investigation focused on Reed.² At approximately 8:00 a.m., Michael Brown, an investigator with the BPD, went to the home of Reed's mother, Pearlie Mae Reed. (Tr. 175). There, Investigator Brown spoke with Reed on the phone, and Reed requested that Investigator Brown come pick him up from a relative's house. (Tr. 176-77). However, as Reed was giving directions, other officers arrived at Reed's location and took him to police headquarters for questioning. (Tr. 178). At approximately 11:25 a.m., Investigator Brown and another officer procured from Reed a signed explanation and waiver of rights and took a video recorded statement. (Tr. 181-82, Ex. S-2, S-12).

In his statement, Reed explained that he and Combs had been seeing each other for about two months, and Combs had attacked him with a butcher knife and threatened to kill him on a prior occasion. (Ex. S-2, S-12). Reed knew that Combs kept two guns in a shoebox in her closet, a fact of great significance, as will be seen below. (Ex. S-2, S-12). The following is Reed's account of the events leading to Combs' death..

On the evening on August 2, 2006, Reed was at Combs' apartment. (Ex. S-2, S-12). Reed told Combs that he was going to leave her, and Combs told Reed, "the only way we are going to separate is by death." (Ex. S-2, S-12). Combs also asked Reed if he remembered that she had two guns and asked "why do you think I (sic) got two of them?" (Ex. S-2, S-12). Reed and Combs watched television until approximately 3:00 a.m., when they went to bed. (Ex. S-2, S-12). Combs

2. The record is unclear as to exactly how Reed became a possible suspect. Apparently, Carson identified Reed as Combs' boyfriend as the attacker to police; however she testified that did not actually see Reed on the night in question.

began “teasing” Reed in sexual manner; this unnerved him because he knew that Combs would not have sex with him. (Ex. S-2, S-12). Reed then left the bedroom and went into the living room; however, he forgot his cigarettes. (Ex. S-2, S-12). Reed returned to the bedroom to retrieve his cigarettes and discovered that Combs had locked the bedroom door. (Ex. S-2, S-12). Reed asked Combs to slide his cigarettes under the door; but she refused. (Ex. S-2, S-12). Reed then got a screwdriver, and dismantled the doorknob. (Ex. S-2, S-12).

When Reed entered the bedroom, he told Combs that he was “about to smoke [him] a cigarette and leave her ass.” (Ex. S-2, S-12). At this point the encounter became confrontational. Combs, who had since grabbed the screwdriver, swung it at Reed and cut his finger. (Ex. S-2, S-12). Reed started to leave, and Combs retrieved one gun from the shoebox in her closet, set it on the bed, and said, “You ain’t going nowhere,” “You remember what I told you, we (sic) gonna leave together?” (Ex. S-2, S-12). Combs then reached inside the closet again (so as to get the other gun) and turned toward Reed with one hand behind her back and the screwdriver in her other hand. (Ex. S-2, S-12). Sensing danger, Reed grabbed the other gun from the bed. (Ex. S-2, S-12). Combs then quickly drew her hand from behind her back toward Reed while loudly saying “BOOM!” (Ex. S-2, S-12). Reed instinctively threw his hands up and fired a shot that hit Combs as she and Reed “tussled.” (Ex. S-2, S-12). Notwithstanding that Combs had been shot, she continued to attack Reed; whereupon, Reed “snapped” and fired at least one more shot as the struggle continued. (Ex. S-2, S-12). As it were, Combs did not actually have the other gun; however, Reed believed that she did. (Ex. S-2, S-12). Significantly, a .9mm handgun was later discovered by police in the shoebox in Combs’ closet. (Tr. 246).

According to Reed, Combs then attempted to break out of her bedroom window, and he pulled her back inside so he could take her to the hospital. (Ex. S-2, S-12). Reed helped Combs into

her car and began driving to the hospital, but the car broke down on the interstate where it was later discovered. (Ex. S-2, S-12). Reed then hitchhiked to a relative's house where he was later apprehended. (Ex. S-2, S-12).

Dr. Paul McGary, who performed an autopsy of Combs' body, testified that Combs died from two gunshot wounds, fired at close range—up to two feet. (Tr. 205-06, 221-23). He could not determine which wound Combs received first. (Tr. 221). One wound (referred to in the record and hereinafter as “wound A”) entered Combs' right cheek, traveling upward and slightly rightward, and exited at the base of Combs' right ear. (Tr. 206-07). This wound was not fatal. (Tr. 207). Dr. McGary testified that wound A was consistent with a shot fired while two persons were facing each other. (Tr. 208).

The bullet causing the other wound (referred to in the record and hereinafter as “wound B”) entered the back of Combs' right shoulder at an upward angle, exited the top of her right shoulder, (re)entered her neck, passed through her neck, and came out of her mouth. (Tr. 209). Wound B was much more serious. (Tr. 213). When asked whether wound B was consistent with a shot fired while two people were facing each other, Dr. McGary explained: “[Combs] would be in a turned position where her left shoulder was going away from the shooter, her right shoulder was coming toward the shooter.” (Tr. 211).

The jury was instructed on self-defense, deliberate design murder, and manslaughter. (C.P. 75-81). After deliberation, the jury found Reed guilty of murder. (C.P. 99, Tr. 342). The trial judge determined that Reed was a habitual offender under Mississippi Code Annotated section 99-19-83 and sentenced Reed to life imprisonment. (Tr. 344-45, C.P. 101-02, R.E. 7-8, 13-14). Reed's motion for a new trial or, in the alternative for JNOV was denied. (C.P. 107, R.E. 9-12).

SUMMARY OF THE ARGUMENT

Reed's conviction for murder was based on insufficient evidence and was against the overwhelming weight of the evidence. The State failed to prove that Reed did not act in self-defense. Therefore, a judgment of acquittal was the only proper verdict, and the trial court erred in denying Reed's motion for judgment notwithstanding the verdict (JNOV). Also, such a finding was against the overwhelming weight of the evidence, and the trial court erred in denying Reed's motion for a new trial.

Alternatively, the State failed to establish that Reed killed Combs with deliberate design, and such a finding was against the overwhelming weight of the evidence. The evidence established that Reed was guilty, at most, of heat of passion manslaughter or imperfect self-defense manslaughter. Therefore, Reed requests this Court to reverse and remand this case for a new trial or, alternatively, to remand this case for re-sentencing for manslaughter under "the direct remand rule." *See, Wade v. State*, 748 So. 2d 771, 777 (¶20) (Miss. 1999).

Further, the trial court erred in sentencing Reed as an habitual offender under Mississippi Code Annotated section 99-19-83 (Rev. 2007), as the State failed to establish that Reed *actually served* one year or more on each previous felony sentence. Therefore, if this Court determines that this case should be remanded for re-sentencing for manslaughter, Reed requests that he be sentenced on remand under Mississippi Code Annotated section 99-19-81 (Rev. 2007), instead of section 99-19-83.

Beyond all this, Reed's constitutional right to a speedy trial was violated because the State allowed at least four hundred and eighty-four (484) days to pass between the time of Reed's arrest and the time of trial. Consequently, this Court should dismiss the charges against Reed.

ARGUMENT

I. REED’S CONVICTION FOR MURDER WAS BASED ON INSUFFICIENT EVIDENCE AND WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

In reviewing the sufficiency of the evidence, the relevant inquiry is whether, “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.” *Bush v. State*, 895 So. 2d 836, 843 (Miss. 2005) (quoting *Jackson v. Virginia*, 443 U.S. 307, 315, 99 S.Ct. 2781, (1979)). The verdict will not be disturbed where the evidence so reviewed is such that “reasonable fair-minded men in the exercise of impartial judgment might reach different conclusions on every element of the offense.” *Id.* (citing *Edwards v. State*, 469 So.2d 68, 70 (Miss.1985)). However, the proper remedy is to reverse and render where the evidence “point[s] in favor of the defendant on any element of the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty[.]” *Id.*

In reviewing a challenge to the weight of the evidence, the evidence is viewed in the light most favorable to the verdict. *Id.* at 844 (citing *Herring v. State*, 691 So.2d 948, 957 (Miss.1997)). On appeal, the verdict will be only be disturbed “when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice.” *Id.* at 844.

A. THE STATE FAILED TO PROVE THAT REED DID NOT ACT IN SELF-DEFENSE; THEREFORE, THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION FOR EITHER MURDER OR MANSLAUGHTER.

Mississippi Code Annotated section 97-3-15(1)(f) (Rev. 2006), provides that the killing of another is justifiable for the reason of self defense:

(f) When committed in the lawful defense of one's own person or any other human being, where there shall be reasonable ground to apprehend a design to commit a

felony or to do some great personal injury, and there shall be imminent danger of such design being accomplished[.]

Miss. Code Ann. § 97-3-15(1)(f) (Rev. 2006). Under the “stand his ground” principle, “a defendant is not deprived of the right to claim self-defense in a slaying even if he could have avoided the threat to his safety by fleeing.” *Haynes v. State*, 451 So.2d 227, 229 (Miss.1984). This principal holds that one faced with a reasonable apprehension of great personal injury has no duty to flee so long as:

he is in a place where he has a right to be, and is neither engaged in an unlawful, nor the provoker of, nor the aggressor in, the combat. In such case, he may stand his ground and resist force by force, taking care that his resistance be not disproportioned to the attack.

Wade v. State, 724 So. 2d 1007, 1010 (Miss. 1998) (quoting *Cook v. State*, 467 So.2d 203, 210-11 (Miss.1985)).

Reed was the only eyewitness to Combs’ death; therefore, “[his] version, if reasonable, must be accepted as true, unless *substantially* contradicted in *material* particulars by a *credible* witness or witnesses for the state, or by the physical facts or by the facts of common knowledge.” *Weathersby v. State*, 165 Miss. 207, 147 So. 481, 482 (1933) (emphasis added).

The points of contradiction between Reed’s version of Combs’ death and the remaining evidence that warrant discussion are (1) Carson’s testimony that she heard Combs say “she give in,” (2) Carson’s testimony that she saw Combs being “pushed in and out” of the window, and (3) the fact that wound B entered the back of Combs’ right shoulder.

Carson was not a *credible* witness, and her testimony did not *substantially* contradict Reed’s version in any *material* particular. Although Carson claimed that she heard Combs say “she give in[.]” Carson, directly contradicted this when she admitted on cross-examination that she heard no words whatsoever. (T. 120). Additionally, while Carson alleged that she saw Combs being “pushed in and out” of her bedroom window, it is undisputed that the blinds in Combs’ window were drawn.

(T. 124, Ex. S-9). Thus, her view was obviously obstructed to some extent. Further, Carson's testimony is not substantially at odds with Reed's explanation that Combs tried to break through the window and he pulled her back inside, especially in light of the fact that it was dark outside and the blinds were drawn.

Although the bullet causing wound B did enter the back of Combs' right shoulder, Dr. McGary clarified that "[Combs] would be in a turned position where her left shoulder was going away from the shooter, her right shoulder was coming toward the shooter." (Tr. 211). It is a necessary inference that Combs turned her torso as she swung the screwdriver at Reed. Thus, if Reed fired while Combs was turned ready to strike, the bullet would naturally follow the path of wound B. This evidence actually supports Reed's version; it does not *substantially* contradict it in any *material* particular. Thus, the *Weathersby* rule applies, and Reed's version of the incident must be accepted as true.

Reed's account of the incident establishes that he acted in self-defense. Combs had previously threatened to kill Reed and attacked him with a butcher knife. (Ex. S-2, S-12). Reed entered Combs' bedroom to retrieve his cigarettes without incident until he told Combs that he was leaving. At that point, Combs became angry and swung a screwdriver at Reed; therefore, Reed was not the aggressor, Combs was. As Reed began to leave, Combs said "You ain't going nowhere" and "You remember what I told you, we (sic) gonna leave together?" (Ex. S-2, S-12). This establishes that Combs wanted Reed to be in her apartment; thus, Reed was in a place where he had a right to be. Additionally, Combs' statements were suggestive of death. As Combs turned toward Reed with her hand behind her back and the screwdriver in her other hand, Reed grabbed the gun from the bed. He did not fire a shot until Combs quickly drew her hand from behind her back and loudly said "BOOM." Combs then continued to attack Reed with the screwdriver, and Reed "snapped" and fired

at least one more shot as the struggle continued. (Ex. S-2, S-12).

These facts establish that Reed had reasonable grounds to apprehend that Combs was about to inflict some great personal injury upon him, and the danger of the risk was imminent. Significantly, a gun was discovered in a shoebox in Combs' closet, exactly as Reed said. (Tr. 246). Although Martin testified that Reed told her that he was going to kill Combs, this Court has acknowledged that "a homicide may result from a wilful act or deliberate design without being murder if the killing occurs in necessary self-defense or results from an act committed in the heat of passion without malice aforethought." *Bradford v. State*, 910 So. 2d 1232, 1233 (¶7) (Miss. Ct. App. 2005).

Accordingly, the State failed to prove beyond a reasonable doubt that Reed did not act in self-defense when he shot Combs. Reed is guilty of neither murder nor manslaughter, and a judgment of acquittal is proper.

B. ALTERNATIVELY, THE STATE PRESENTED INSUFFICIENT EVIDENCE TO PROVE THAT REED ACTED WITH DELIBERATE DESIGN, AND REED WAS GUILTY, AT MOST, OF MANSLAUGHTER.

Reed was convicted of deliberate design murder under Mississippi Code Annotated section 97-3-19(1)(a) (Rev. 2006), which provides in pertinent part: (1) The killing of a human being without the authority of law by any means or in any manner shall be murder. . . (a) [w]hen done with deliberate design to effect the death of the person killed" Miss. Code Ann. § 97-3-19(1)(a) (Rev. 2006). The Mississippi Supreme Court has defined deliberate design as follows:

[D]eliberate always indicates full awareness of what one is doing, and generally implies careful and unhurried consideration of the consequences. "Design" means to calculate, plan, contemplate ... deliberate design to kill a person may be formed very quickly, and perhaps only moments before the act of consummating the intent.

Gossett v. State, 660 So.2d 1285, 1293 (Miss.1995) (quoting *Windham v. State*, 520 So.2d 123, 127

(Miss.1988)). “[T]he main distinction between murder and manslaughter is that malice is present in murder and absent in manslaughter.” *McCain v. State*, 971 So. 2d 608 (¶18) (Miss. Ct. App. 2007) (citing *Moody v. State*, 841 So.2d 1067, 1096 (¶96) (Miss.2003)). Malice and deliberate design are synonymous. *Tran v. State*, 681 So. 2d 514, 517 (Miss. 1996) (citations omitted).

Although the use of a deadly weapon permits the inference that the defendant acted with deliberate design, *Carter v. State*, 722 So. 2d 1258, 1263 (Miss. 1998) (citations omitted), the Mississippi Supreme Court has explained that “a killing with a deadly weapon may be . . . justified as having been committed by the accused acting in lawful self-defense, or mitigated manslaughter.” *Nicolaou v. State*, 534 So. 2d 168, 172 (Miss. 1988). As stated above, this Court has also acknowledged that “a homicide may result from a wilful act or deliberate design without being murder if the killing occurs in necessary self-defense or results from an act committed in the heat of passion without malice aforethought.” *Bradford*, 910 So. 2d at 1233 (¶7).

In the instant case, the evidence presented by the State failed to establish beyond a reasonable doubt that Reed acted with deliberate design, and such a finding was against the overwhelming weight of the evidence. The evidence established that Reed was guilty, at most, of heat of passion manslaughter or imperfect self-defense manslaughter.

Manslaughter is defined by Mississippi Code Annotated Section 97-3-35 (Rev.2006), which provides: “[t]he killing of a human being, without malice, in the heat of passion, but in a cruel or unusual manner, or by the use of a dangerous weapon, without authority of law, and not in necessary self-defense.” Miss. Code Ann. § 97-3-35 (Rev. 2006). Heat of passion is defined 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.

Phillips v. State, 794 So.2d 1034, 1037 (¶9) (Miss.2001). In order to mitigate murder to manslaughter based on heat of passion “there must be such circumstances as would indicate that a normal mind would be roused to the extent that reason is overthrown and passion usurps the mind destroying judgment.” *Agnew v. State*, 783 So. 2d 699, 703-04 (¶14) (Miss. 2001) (citing *Graham v. State*, 582 So.2d 1014, 1018 (Miss.1991)).

Imperfect self-defense manslaughter is contemplated under our manslaughter statute, section 97-3-35. See, *Wade*, 724 So. 2d at 1011 (¶12). Imperfect self-defense is the theory “that [the defendant] killed the deceased without malice, under the bona fide belief, but without reasonable cause therefor, that it was necessary for him so to do in order to prevent the appellant from inflicting death or great bodily harm upon him . . .” *Lanier v. State*, 684 So. 2d 93, 97 (Miss. 1996).

In *Wade*, the defendant (Wade), had previously been assaulted by her boyfriend, Simpson. *Wade*, 748 So. 2d 771, 773 (¶5) (Miss. 1999). One night Wade was standing outside a bar when Simpson fired a gunshot to get her attention. *Id.* Wade entered the bar, the two began arguing, and Simpson assaulted her by pulling her hair and banging her head on a table. *Id.* Wade left the bar and returned with a gun. *Id.* at (¶6). Simpson came toward her from behind the bar, and Wade shot and killed him. *Id.* As in the instant case, the jury in *Wade* was instructed on murder, manslaughter, and self-defense. *Id.* at 774 (¶9). As in the instant case, the jury in *Wade* returned a guilty verdict for murder. *Id.*

Wade’s appeal was assigned to this Court, which reversed and remanded for re-sentencing for manslaughter. *Wade*, 724 So. 2d 1007, 1011 (¶13) (Miss. Ct. App. 1998). In so holding, this

Court, citing *Harrell v. State*, 218 So.2d 883, 886 (Miss.1969),³ determined that “this clearly was a killing in the heat of passion and arguably also a case of imperfect self-defense and as such, manslaughter was the appropriate verdict.” *Id.*

On certiorari review, the Mississippi Supreme Court affirmed: “the facts of the case are better suited for imperfect self defense or heat of passion manslaughter.” *Wade*, 748 So. 2d at 777 (¶19).

The court stressed the following facts, which weighed heavily in the court’s decision:

Noteworthy are the two severe beatings of her head against tables administered upon Wade by Simpson shortly before this killing occurred. Simpson was known to carry a gun, and had exhibited and fired his gun inside the bar shortly before this killing. Simpson had previously threatened to kill Wade. Wade knew he carried the gun and thought that he still had it at the time of the killing, even though it had, in fact, been taken from him in her absence.

Id. at 776 (¶15).

In the instant case, Combs attacked Reed with a screwdriver shortly before the killing occurred. Reed knew that Combs kept two guns in a shoebox in her closet. She placed one gun on the bed and made statements suggestive of death. Combs reached back into the closet, leading Reed to reasonably believe that she was retrieving the other gun. Combs then turned toward Reed with one hand behind her back and the screwdriver (that she had just attacked him with) in the other hand.

3. In *Wade*, This Court cited *Harrell* for the following rule:

A person may be guilty only of manslaughter or justifiable homicide when slaying another even though the accused is mad and is bearing ill will toward his adversary at the time of the killing, if the act is done while resisting an attempt of the latter “to do any unlawful act, or after such attempt shall have failed,” if such anger or ill will is engendered by the particular circumstances of the unlawful act then being attempted, or the commission of which is then thwarted, and is nonexistent prior thereto. Each case must depend upon its own facts and circumstances.

Wade, 724 So. 2d at 1011 (¶13) (citing *Harrell*, 218 So.2d at 886).

As Combs quickly drew her hand from behind her back and loudly said “BOOM,” Reed shot her under the impression that she had a gun. The Court in *Wade* found similar (less favorable) facts noteworthy to its decision that the evidence therein supported only heat of passion manslaughter or imperfect self-defense manslaughter. *Wade*, 748 So. 2d at 776 (¶15).

The circumstances in the instant case are such “as would indicate that a normal mind would be roused to the extent that reason is overthrown and passion usurps the mind destroying judgment[,]” *Agnew*, 783 So. 2d at 703-04 (¶14) (citation omitted), and these circumstances are patently insufficient to establish beyond a reasonable doubt that Reed acted with an “unhurried consideration of the consequences” or a “calculation,” “plan,” or “contemplation,” as the State was required to prove in order to establish that Reed acted with deliberate design.

Accordingly, the State failed to present sufficient evidence to support Reed’s conviction for murder. As in *Wade*, the evidence in the instant case established only a case of heat of passion manslaughter or imperfect self-defense manslaughter. Where, as here, the evidence is insufficient to support a conviction for murder, yet sufficient to support a conviction for manslaughter, “the direct remand rule” provides that the proper remedy is to remand the case re-sentencing for manslaughter. *Wade*, 748 So. 2d at 777 (¶20) (citing *Shields v. State*, 722 So.2d 584, 587 (Miss.1998)).

II. THE TRIAL COURT ERRED IN SENTENCING REED AS A HABITUAL OFFENDER UNDER MISSISSIPPI CODE ANNOTATED SECTION 99-19-83, AS THE STATE FAILED TO PROVE THAT REED HAD BEEN SENTENCED TO AND ACTUALLY SERVED SEPARATE TERMS OF ONE YEAR OR MORE ON EACH OF HIS PRIOR FELONY CONVICTIONS.

At Reed’s very abbreviated sentencing hearing, the State sought to establish that Reed was a habitual offender under Mississippi Code Annotated section 99-19-83 (Rev. 2007). (Tr. 344-45,

R.E. 13-14). To accomplish this, the State offered two prior judgments of conviction: one for felony possession of a controlled substance, representing that Reed received a three-year sentence, and one for the felony of simple assault on a law enforcement officer, representing that Reed was sentenced to three years suspended for three years probation. (Tr. 345, C.P. 47-52, R.E. 13-20). The State also produced an order revoking Reed's probation on the assault charge and ordering Reed to serve a term of five years. (Tr. 345, C.P. 47-52, R.E. 13-20).

The State orally represented that Reed served sixteen months and fifteen days on the possession charge; however, aside from the prosecutor's bare assertion, the State presented no actual evidence to support this. (Tr. 345, R.E. 13-14). To establish how much time, if any, Reed actually served for the assault conviction, the State offered nothing beyond the judgment of conviction and the order revoking Reed's probation and imposing a five-year sentence. (Tr. 345, R.E. 13-14). Nevertheless, the trial court adjudged Reed a habitual offender under section 99-19-83 and sentenced him to life imprisonment without the possibility of probation or parole. (Tr. 344-45, C.P. 101-02, R.E. 13-14). This was error, because the State failed to prove that Reed *actually served* one year or more on each previous felony sentence.

Although, no challenge or objection was made by Reed's trial counsel, this Court may review issues as plain error where a fundamental right of the defendant has been impacted. *Jefferson v. State*, 958 So. 2d 1276, 1281 (¶15) (Miss. Ct. App. 2007) (citing *Moore v. State*, 755 So.2d 1276, 1279 (¶ 9) (Miss.Ct.App.2000)). A defendant has "a fundamental right to be free from an illegal sentence." *Clark v. State*, 960 So. 2d 521, 524 (¶9) (Miss. Ct. App. 2006) (citing *Sneed v. State*, 722 So.2d 1255, 1257 (¶11) (Miss.1998)). The Mississippi Supreme Court has, on at least one occasion, squarely held that the issue of whether a defendant has been erroneously sentenced under section 99-19-83 is subject to plain error review. *See Smith v. State*, 477 So. 2d 191, 195-96 (Miss. 1985).

In order to sentence a defendant as a habitual offender under section 99-19-83,⁴ the State bears the burden of proving all of the section's elements beyond a reasonable doubt. *Ellis v. State*, 485 So.2d 1062, 1063 (Miss.1986) (citing *Wilson v. State*, 395 So.2d 957, 960 (Miss.1981)). "An essential ingredient of [section 99-19-83] is that the defendant shall have served at least one year under each sentence." *Ellis*, 485 So.2d at 1063. Accordingly, the Mississippi Supreme Court has repeatedly held that a defendant's sentence as a habitual offender pursuant to section 99-19-83 must be vacated where the State fails to prove that the defendant was convicted of *and actually served* separate terms of one year or more. See, e.g., *Armstrong v. State*, 618 So. 2d 88, 89 (Miss. 1993); *Ellis*, 485 So.2d at 1063-64; *Taylor v. State*, 426 So. 2d 775, 779 (Miss. 1983). Precedent holds that in such a circumstance this Court should remand for re-sentencing under Mississippi Code Annotated section 99-19-81 (Rev. 2007), instead of section 99-19-83. *Smith*, 477 So. 2d at 196.

In *Ellis*, as in the instant case, the State presented copies of the defendant's judgments of conviction for the two prior felonies on which habitual offender status was based, namely, (1) assault with intent to rape and (2) burglary and larceny. *Ellis*, 485 So. 2d at 1062-63. The judgments of conviction demonstrated that the defendant received a five-year sentence for the assault with intent to rape charge and a three-year sentence for the burglary and larceny charge. *Id.* The trial court

⁴ Mississippi Code Annotated Section 99-19-83 provides:

Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to and served separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere, and where any one (1) of such felonies shall have been a crime of violence shall be sentenced to life imprisonment, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation.

accepted the judgments of conviction as proof that the defendant was a habitual offender under section 99-19-83. *Id.* at 1063. However, on appeal the Mississippi Supreme Court held that the judgments of conviction were insufficient to establish that the defendant *actually served* one year or more under each sentence; thus the trial court erred in sentencing the defendant under section 99-19-83. *Id.* at 1064.

The instant case is virtually indistinguishable from *Ellis*. As in *Ellis*, the documents offered by the State in the instant case established only that Reed *received* two sentences over one year. These documents in no way demonstrated how much time, if any, Reed *actually served* on either sentence. Further, the trial court made no specific finding (neither from the bench nor in the sentencing order) that Reed had actually served one year or more on the two prior felony convictions.

Therefore, the State failed to establish that Reed's habitual offender status under section 99-19-83, and the trial court erred in sentencing Reed as a habitual offender under that section. If this Court determines that this case should be remanded for re-sentencing for manslaughter then, on remand, Reed should be re-sentenced under section 99-19-81. Thereby, Reed will receive a mandatory sentence of twenty years for manslaughter—a conviction and sentence arguably supported by the evidence—as opposed to a mandatory life sentence for murder—a conviction and sentence both clearly unsupported by the evidence.

III. REED'S CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL WAS VIOLATED BECAUSE, THROUGH NO FAULT OF REED'S, THE STATE ALLOWED OVER TWENTY MONTHS TO PASS BETWEEN THE TIME OF REED'S ARREST AND HIS TRIAL.

In reviewing a speedy trial claim, the critical inquiry is “whether the trial delay arose from good cause.” *Flora v. State*, 925 So. 2d 797, 814 (¶58) (Miss. 2006) (citing *Deloach v. State*, 722 So. 2d 512, 516 (¶12) (Miss. 1998)). A trial court's finding will be upheld only if it is supported by

substantial credible evidence. *Id.* (citing *Folk v. State*, 576 So.2d 1243, 1247 (Miss.1991)). “[T]he sole remedy for denial of a defendant's right to a speedy trial is dismissal of the charges against him.” *Smith v. State*, 550 So. 2d 406, 409 (Miss. 1989) (citation omitted).

A defendant’s constitutional right to a speedy trial “is protected by the Sixth and Fourteenth Amendments to the United States Constitution and Article 3, Section 26 of the Mississippi Constitution of 1890.” *Thorson v. State*, 653 So. 2d 876, 889 (Miss. 1994). The United States Supreme Court has provided the following four factors to be considered in judging the merits of a constitutional speedy trial claim: (1) length of the delay; (2) reason for the delay; (3) defendant's timely assertion of his right to a speedy trial; and (4) resulting prejudice to the defendant.” *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192 (1972). In evaluating a speedy trial claim, the proper approach “is a balancing test, in which the conduct of both the prosecution and the defendant are weighed.” *Id.* None of the four factors are “a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant.” *Barker*, 407 U.S. at 533, 92 S.Ct. at 2193. “No one factor is dispositive, and the balancing test is not restricted to the *Barker* factors, so other factors may be considered.” *Poole v. State*, 826 So. 2d 1222, 129-29 (¶18) (Miss. 2002) (emphasis added).

For this Court’s convenience, the following is a time-line of the relevant events transpiring between Reed’s arrest and trial:

SPEEDY TRIAL TIME-LINE

| <u>EVENT</u> | <u>DATE</u> | <u>TIME ELAPSED</u> |
|---|-----------------|-----------------------|
| Reed is arrested | August 3, 2006 | 0 days (clock begins) |
| 1 st Demand for Speedy Trial | August 14, 2006 | 11 days |

(C.P. 11, R.E. 21).

| | | |
|--|-------------------|----------|
| Motion for Psychiatric Evaluation (C.P. 13-16, R.E. 22-25). | November 9, 2007 | 463 days |
| Order Granting Motion for Psychiatric Evaluation (C.P. 17-19, R.E. 26-28). | December 11, 2007 | 494 days |
| Psychiatric Evaluation Performed (Tr. 3-5). | February 26, 2008 | 572 days |
| 2 nd Demand for Speedy Trial in Motion to Dismiss (C.P. 30-42, R.E. 29). | March 11, 2008 | 586 days |
| Trial | March 18, 2008 | 593 days |

1. Length of the delay

Reed's constitutional right to a speedy trial began to run on August 3, 2006, the date of his arrest. *See Johnson v. State*, 885 So. 2d 72, 77 (¶16) (Miss. Ct. App. 2004) (constitutional right to a speedy trial attaches immediately upon arrest.) (citation omitted). Reed's trial began on March 18, 2008; therefore, approximately five hundred ninety-three (593) days passed between Reed's arrest and his trial—over eighteen (18) months. Any delay of over eight months is presumptively prejudicial and triggers the balancing of the other three *Barker* factors. *State v. Woodall*, 801 So. 2d 679, 681-82 (¶¶11-13) (Miss. 2001). This factor weighs in Reed's favor.

2. Reason for the delay

Once a delay is determined to be presumptively prejudicial, "the burden shifts to the prosecution to produce evidence justifying the delay and to persuade the trier of fact of the legitimacy of these reasons." *State v. Ferguson*, 576 So. 2d 1252, 1254 (Miss. 1991). There is little indication in the record as to the reason for the delay. Reed requested no continuances. Aside from ordinary motions necessary to form a defense (such as motions for discovery, for criminal records, and to suppress statement, etc. . .), the only delay apparently attributable to Reed stems from his

motion for a psychiatric evaluation. Under Mississippi law, the time set aside for a psychiatric evaluation is not counted against the State. *See Elder v. State*, 750 So. 2d 540, 544 (¶16) (Miss. Ct. App. 1999) (citing *Giles v. State*, 650 So.2d 846, 851 (Miss.1995)). At most, the psychiatric evaluation Reed requested tolled the running of the “speedy trial clock” for one hundred and nine (109) days (from November 9, 2007 to February 26, 2008).

Therefore, there still exists a delay of at least four hundred and eighty-four (484) days that is not attributable to Reed. “Where [,as here,] the defendant has not caused the delay, and where the prosecution has declined to show good cause for the delay, we must weigh this factor against the prosecution.” *Perry v. State*, 419 So. 2d 194, 199 (Miss. 1982). This factor weighs in Reed’s favor.

3. Defendant's timely assertion of his right to a speedy trial

Although the State bears the burden to bring a defendant to trial, the defendant “has some responsibility to assert his right to a speedy trial.” *Wiley v. State*, 582 So. 2d 1008, 1012 (Miss. 1991) (citing *Flores v. State*, 574 So.2d 1314, 1323 (Miss.1990)). Reed was more than diligent in asserting his right to trial in a timely manner. He first asserted his right to a speedy trial on August 14, 2006, less than two weeks after his arrest. (C.P. 11, R.E. 21). He also asserted his right again in a motion to dismiss filed on March 11, 2008. (C.P. 30-42, R.E. 29). This factor weighs in Reed’s favor.

4. Prejudice to the defendant

“[P]rejudice is assessed in the speedy trial context (1) to protect against oppressive pretrial incarceration, (2) for the minimization of anxiety and concern of the accused, and (3) for the limitation of the possibility of impairment of the defense.” *Johnson*, 885 So. 2d at 80 (¶30) (quoting *Elder*, 750 So.2d at 545 (¶19)). As alluded to above, “a delay of more than eight months before trial is presumptively prejudicial to the defendant, and violative of his right to a speedy trial.” *Id.* at 77

(¶16) (citing *Elder*, 750 So. 2d at 545 (¶10)).

The Mississippi Supreme Court explained that “*Barker v. Wingo* expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy trial.” *Ferguson*, 576 So. 2d at 1255 (quoting *Moore v. Arizona*, 414 U.S. 25, 26, 94 S.Ct. 188, 189 (1973)). As to the impairment of a defendant’s [Reed’s] defense, the United States Supreme Court has instructed that “the speedy trial enquiry must weigh the effect of delay on the accused’s defense just as it has to weigh any other form of prejudice.” *Doggett v. United States*, 505 U.S. 647, 655, 112 S.Ct. 2686, 2692 (1992); *but see Johnson*, 885 So. 2d at 80 (¶30) (“The possibility of impairment of the defense is the most serious consideration in determining whether the defendant has suffered prejudice as a result of delay.”) (citation omitted).

The facts of this case show that Reed did suffer prejudice. Of the three interests sought to be protected under the prejudice factor, two clearly weigh in Reed’s favor, namely, protection against oppressive pretrial incarceration and the minimization of anxiety and concern of the accused. *See Jasso v. State*, 655 So. 2d 30, 35 (Miss. 1995) (a defendant is presumed to have suffered anxiety, which is “inevitably present.”) (citing *Jaco v. State*, 574 So. 2d 625, 632 (Miss. 1990)). Reed’s defense was inherently prejudiced, at least to some extent, by the fact that he was incarcerated. *See Barker*, 407 U.S. at 533, 92 S.Ct. at 2193 (“[I]f a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense. Imposing those consequences on anyone who has not yet been convicted is serious.”)

Balancing the four *Barker* factors, it is clear that Reed’s constitutional right to a speedy trial was violated. The first three factors (length of the delay, reason for the delay, and defendant’s timely assertion of the right) weigh in Reed’s favor. As to prejudice, two of the three sub-factors weigh in Reed’s favor, and his defense was inherently impaired, to some extent, by his incarceration. In sum,

three and two-thirds (and some portion of the remaining one-third) of the four *Barker* factors weigh in Reed's favor. Therefore, Reed's constitutional right to a speedy trial was violated, and the charges against him should be dismissed.

CONCLUSION

Reed respectfully requests this Court to reverse the trial court's judgment of conviction for murder, render a judgment of acquittal, and enter an order for Reed's immediate release. If this Court determines that acquittal is not proper, Reed requests that this Court reverse the judgement of conviction for murder and remand this case for re-sentencing for manslaughter under section 99-19-81 or, alternatively, reverse and remand this case for a new trial. Additionally, Reed requests that this Court acknowledge that his constitutional right to a speedy trial was violated and dismiss the charges against him.

CERTIFICATE OF SERVICE

I, HUNTER AIKENS, Counsel for Cavin Earl Reed, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

Honorable Jerry O. Terry
Circuit Court Judge
P O Drawer CC
Biloxi, MS 39531

Honorable Cono Caranna
District Attorney, District 2
Post Office Box 1180
Gulfport, MS 39502

Honorable Jim Hood
Attorney General
Post Office Box 220
Jackson, MS 39205-0220

This the 21 day of August, 2008.



HUNTER AIKENS
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201
Telephone: 601-576-4200