DAVID JACKSON WILLIAMS APPELLANT

VS. NO. 2008-KA-0695

STATE OF MISSISSIPPI APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATE CASES

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saying that the victim's father did not like having his telephone number given out. Smith then asked the Appellant to call the victim's father and to let her speak with the father in a three - way telephone call. The call was made, and Smith spoke to the victim. The victim was upset. Later, though, Smith found out that the victim was not at her father's home at the time of the call and that her father was not ill at the time. Smith was told that the victim had been missing the next day. The victim never mentioned suicide to Smith. (R. Vol. 3, pp. 118 - 139).

On 15 November 2005 Lieutenant Wes Hatcher of the Oxford police department went to the Appellant's apartment to investigate a report of a suicide. No one was present, so he secured entry from a "key holder." Upon entry into the apartment, he looked everywhere a person could be. When he went to a back bedroom, he detected a strong, foul odor. He opened a closet and saw a pile of clothes. He pulled some of the clothes back and saw a foot. He pulled some other clothes away and discovered the body of the victim, Demetria Bracey. He then notified his supervisor and secured the area.

Hatcher noticed a knife in a box in the back bedroom, which appeared to have blood stains on it. There was some blood on the wall of the closet in the room in which the victim's body lay. (R. Vol. 3, pp. 140 - 150).

John Marsh was employed by the Oxford police department in November 2005. He was sent to the Appellant's apartment to assist in the investigation of Bracey's death. In the attempt to find the Appellant, March traveled to Olive Branch to the Appellant's parents' house.

Upon meeting the Appellant, who had his attorney present at the time, the Appellant told Marsh and other officers that Bracey met her death in consequence of a "suicide pact" between

tried to stab himself but passed out from the pain. The Appellant showed the officers a small cut on his chest. He also showed them a small cut on his throat, which he claimed he inflicted.

The Appellant claimed that he became unconscious after having failed to stab himself. When he regained consciousness, he saw that Bracey was dead, so he pulled the knife out of her. The Appellant claimed that he used a difference knife on himself. The Appellant said he covered the body up because he had received a notice that his apartment was to be inspected. He did not want the inspectors to find the body. After covering the body up, the Appellant stayed in the apartment for several days and slept in another closet that adjoined the closet in which Bracey's body lay.

The Appellant claimed that he had begun drinking on a Thursday night. The following Sunday was when he covered the body. He stayed in the apartment some three or four days after Bracey died and drank. He claimed that he did this to give him more time to find courage to kill himself. (R. Vol. 4, pp. 156 - 170).

Jimmy Marlin Williams, an investigator with the Oxford police department, went to the Appellant's apartment. He saw Bracey's body lying beneath clothes and boxes. He pulled a comforter away and saw what appeared to be a stab wound below her left breast. He found two black handled knives behind a computer monitor that was located very close to the closet door. Part of the handle of one of the knives was broken off, which part was also found. There was blood on one of the blades. There were blood stains in the bedroom as well as the closet. There was a knife sticking in a box located on the other side of the room from the closet. It was a wooden handled knife and did not appear to have blood upon it.

There were pill bottles found in that room as well.

Williams also spoke with the Appellant. The Appellant told him that Bracey stabbed herself and that he had tried to kill himself. According to the Appellant, Bracey and he laid down together in the closet in which Bracey's body was found, each of them having a knife. The Appellant claimed that he took ten pills of Klonopin and that Bracey took ten after having consumed alcohol. As they laid in the closet, they spoke for a little while. The Appellant said he told Bracey that he loved her. At that she stabbed herself and he tried to stab himself. He awoke some two hours later. He said this occurred on Thursday night or Friday morning. When he awoke, he tried to kill himself again but could not bring himself to do so. He saw the knife in Bracey's side; he pulled it out and threw it across the room. There was blood throughout the apartment.

The victim's purse was inside the apartment. It contained some three hundred dollars. The Appellant said that he was with the victim when she withdrew the sum from her bank. The Appellant had a small cut on his chest.

After being brought back to Oxford, Williams told the Appellant that he was under arrest for Bracey's murder. The Appellant looked at Williams and told him that he was sorry, that he was the only one there and the only one who could have done it.

The Appellant told Williams that the three - way call was a ruse. Bracey supposedly did not want to communicate with her friends at the time. Because her friend Jessica was so insistent, he got Bracey to cooperate in the ruse. There were bloodstains throughout the apartment, and very large pool of blood beneath the victim's body. (R. Vol. 4, pp. 171 - 216).

had been dead for three or four days prior to autopsy. There were no "hesitation marks" about the wound. There was an abrasion to the back of one hand, which was consistent with a defensive posturing injury.

There were bruises of muscles of the neck which measured up to three inches in length. There was soft tissue hemorrhage in the neck, and bruising to the larynx and upper part of the trachea. The pathologist thought that it would have required about ten to fifteen pounds of pressure to cause these injuries. This amount of pressure would have been sufficient to constrict arterial blood flow to the brain. These bruises were not self - inflicted, and the victim was alive when they were inflicted

It was the pathologist's opinion that Bracey's death was a homicide and not suicide. This opinion was based upon the angle of the stab wound, the depth of the stab wound, the injuries to the neck, and the absence of hesitation marks at the site of the wound or at different locations. (R. Vol. 4, pp. 217 - 239).

Dywana Broughton, an employee with the Mississippi Bureau of Investigation Crime Scene Unit, identified a number of items of physical evidence, including a burgundy colored bath towel that was found in a bathtub in the Appellant's apartment which bore what appeared to be blood. The bathtub and floor of the bathtub also had stains that appeared to be bloodstains. There were, in the end, some twenty-three bloodstains scattered about the apartment. (R. Vol. 4, pp. 250 - 268).

One Glenda Hill, the victim's mother, was then called by the State. She testified that she last spoke with her daughter on 8 November 2005. At that time, her daughter was sniffling and

told her where she was keeping her money. That struck her mother as odd because the victim never told people where she was keeping her money.

Bracey had many friends. Hill identified a pair of glasses found in the Appellant's apartment as being her daughter's glass. She said that her daughter could not see well without them. She did not think her daughter was suicidal. (R. Vol. 4, 274 - 287).

Enjoli Elizabeth Canankamp was an optician at Wal-Mart. She knew the Appellant. She dated the Appellant for awhile, but became interested in someone else. The Appellant, though he did not appear to be jealous, talked a lot about the other man and did not like him. Canankamp did not know much about the Appellant's relationship with Bracey. The Appellant did at one point tell Canankamp that he wished she would choose him over her other friend. The Appellant spent a lot of time with Canankamp at her house from spring to November of 2005, and she at his apartment.

Canankamp learned that the Appellant is manic - depressive. The Appellant also drank a lot of alcohol and became "mellow" when he did so. Except on one occasion when he got mad at himself and beat himself up, which left cuts above one of his eyes. There were also holes in the walls of his apartment.

In March, of 2006, apparently, this witness said she asked the Appellant about the suicide pact he claimed he made with the victim. According to this witness, the Appellant told her that the pact included drinking and the use of drugs, and that the victim was to kill herself and that he was to kill himself. The Appellant supposedly showed this witness several self - inflicted wounds. He told her that the victim and he were going to use knives.

understanding that the witness would testify that the plan between the victim and the Appellant was that they would stab each other and that, while the Appellant performed his part of the plan, the victim failed to accomplish her end of the pact.

On cross - examination, the witness indicated that the Appellant said that the victim was a "cutter" – someone who "self - destructs their selves with a knife" or someone who mutilates himself.

On re-direct, the prosecutor asked the witness if she remembered a conversation she had with him and an investigator the Saturday prior to trial. She admitted that she told them at that time that the Appellant told her that the victim and he held knives on each other. However, she said, at trial, that she had not told them everything. She admitted that the prosecutor made efforts to be sure that she meant what she told them, but at trial she tried to say that the events related by the Appellant were sketchy. She finally stated that the Appellant did tell her that the victim and he held knives on each other, but that she never said that that was how the killing occurred. She then tried to say that the Appellant never said that but said that the victim and he were going to stab themselves. (R. Vol. 4, pp. 287 - 300; Vol. 5, pp. 301 - 328).

The victim's blood was tested. She was negative for the presence of drugs. It was likely that the victim had alcohol to drink. (R. Vol. 5, pp. 329 - 330).

The defense presented a case - in - chief. It began with an expert witness in blood testing and typing and DNA. He tested some of the twenty - three stain samples sent to him by the district attorney's office. Stain group numbers 1, 5, 7, 8, 14 matched the Appellant's blood. These groups came from the bedroom used by the Appellant, the bathroom floor and tub, the left

bedroom two was a mixture from at least two donors. While the victim could not be excluded as a donor, the expert was more positive that the Appellant was a donor.

On the blade of wooden handled knife, there was a mixture of blood from at least two people. The major contributor was consistent with the victim and minor contributor was consistent with the Appellant. On the handle of the knife, there was also a mixture, and neither the victim nor the Appellant could be excluded as donors. (R. Vol. 5, pp. 353 - 370).

Father Ollie Rencher, an Episcopalian priest, testified that he knew the victim and that he was her spiritual advisor. The defense made a record outside the presence of the jury. Out of the presence of the jury, Fr. Rencher testified that on Good Friday in 2005 the victim appeared to be stressed. He told her that he hoped she would seek medication. The victim also appeared to have low self - esteem. and appeared to be in a "controlling situation." (R. Vol. 5, pp. 382 - 388).

A Dr. Arthur Copeland was brought round to testify in the field of pathology. He reviewed the State's pathologist's autopsy report. Copeland felt that there was a basic failure in the correlation of the autopsy findings with the scene circumstances. He felt that Dr. Hayne's findings with respect to the injuries to the victim's neck or throat were untrustworthy because Dr. Hayne did not dissect that region and photograph the injuries. He stated that, in the case of a decomposing body, it is difficult to assess whether there had been hemorrhaging or whether the area was decomposed. No petechia was documented. Dr. Hayne was said not to have contacted family members, reviewed medical records, whether the victim was in alcoholic anonymous and so forth. He thought Dr. Hayne jumped to a conclusion of homicide without having reviewed

with suicide. Lack of hesitation wounds would not eliminate a finding of suicide. He did not think the mark on the victim's hand was a defensive wound. He would have expected to wounds on the palms of the hand had the victim attempted to defend herself from a knife. The alcohol test results were consistent with the victim having drunk forty 12 ounce cans of beer.

There were scars of an indeterminate age on the victim's arms. They were consistent with her having been a "cutter." On the other hand, they could have been from anything..

The small cut on the Appellant's chest was a superficial injury. Copeland admitted that Hayne had examined the neck area; Copeland's complaint was simply that in his opinion the examination should have been more meticulous and that photographs should have been made so that others trained in the field could examine them. He admitted that stab wounds, in suicide cases, are rare. He admitted that suicide is rare among non - whites. (R. Vol. 5, pp. 403 - 441).

STATEMENT OF ISSUES

1. DID THE TRIAL COURT ERR IN REFUSING AN INSTRUCTION ON THE FELONY OF ASSISTING SUICIDE; DID THE TRIAL COURT ERR IN GRANTING AN INSTRUCTION ON MANSLAUGHTER?

2. DID THE TRIAL COURT ERR IN PERMITTING AN EPISCOPAL PRIEST TO ASSERT THE PRIEST - PENITENT PRIVILEGE AS TO CERTAIN STATEMENTS MADE TO HIM BY THE VICTIM?

3. DID THE TRIAL COURT ERR IN ADMITTING DR. STEVEN HAYNE'S TESTIMONY INTO EVIDENCE?

4. WAS THE APPELLANT DENIED EFFECTIVE ASSISTANCE OF COUNSEL?

5. DID THE TRIAL COURT ERR IN REFUSING TO DISMISS THE INDICTMENT EXHIBITED AGAINST THE APPELLANT ON ACCOUNT OF AN ALLEGED VIOLATION BY THE STATE OF THE "270 DAY RULE"?

GRANTING AN INSTRUCTION ON MANSLAUGHTER

2. THAT THE TRIAL COURT DID NOT ERR IN HOLDING THAT FATHER OLLIE RENCHER COULD NOT WAIVE THE PRIEST - PENITENT PRIVILEGE

3. THAT THE TRIAL COURT DID NOT ERR IN PERMITTING DR. HAYNE TO TESTIFY

4. THAT THE APPELLANT WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL

5. THAT THE TRIAL COURT DID NOT ERR IN DENYING RELIEF ON THE APPELLANT'S MOTION TO DISMISS

ARGUMENT

1. THAT THE TRIAL COURT DID NOT ERR IN REFUSING AN INSTRUCTION ON ASSISTED SUICIDE; THAT IT DID NOT COMMIT REVERSIBLE ERROR IN GRANTING AN INSTRUCTION ON MANSLAUGHTER

AIDING SUICIDE

The Appellant requested an instruction on aiding suicide, as that felony is defined in Miss. Code Ann. Section 97-3-49 (Rev. 2006). (R. Vol. 1, pg. 72). The trial court questioned whether aiding suicide is a lesser - include offense of murder. The defense responded that it believed that aiding suicide was a lesser - included offense to murder and further asserted that, even if not, case law held that if an accused requests and instruction that fits factually with the version of the facts that have been presented to the jury then the court should grant that instruction. The trial court requested that the defense present its authority on the point. (R. Vol. 5, pp. 391 - 392; 398).

At some point after this exchange, the defense apparently presented the trial court with

trial court was of the view that aiding suicide is not a lesser - included felony of murder and for that reason refused the instruction. The trial court was not convinced otherwise by whatever *Hopson* decision the defense provided to it, noting that this *Hopson* concerned a request for a manslaughter instruction in a murder case. While the trial court did not explicitly note that manslaughter is a lesser - included felony of murder, or at least treated as such in the State, it is clear from its comments that it was for that reason that it did not find it to be useful in considering whether a lesser offense instruction was to be granted if the facts of the case supported it. (R. Vol. 5, pp. 448 - 450; Vol. 6, pg. 451).

Here, the Appellant, relying heavily upon *Hester v. State*, 602 So.2d 869 (Miss. 1992), asserts that the trial court erred in denying the instruction because it effectively eliminated his defense. In *Hester*, the defense was abandonment or withdrawal from a conspiracy. The trial court apparently refused the instruction on the ground that there was no evidence to support the instruction. The Mississippi Supreme Court found otherwise and reversed the case, noting that an accused has the right to have his theories of defense to be considered by the jury where there is evidence to support those theories. The other decisions cited by the Appellant involve lesser - included offenses or defenses such as defense of self, accident and so forth.

We do not consider *Hester* to be dispositive of the issue. The question in *Hester* was simply whether there was sufficient evidence in support of the defense of withdrawal from a conspiracy to allow an instruction. There was no issue raised as to whether he was entitled to the instruction at all, regardless of whether there was evidence to support it. In the case at bar, the issue is not simply whether there was evidence to support an aiding suicide instruction. Since

evidence for it.

However, the Appellant, when he presented authority to the trial court to demonstrate that a lesser instruction could be granted, did not present a decision regarding the propriety of granting a lesser offense instruction. Instead, as explained by the trial court, the Appellant presented a decision which discussed the propriety of a manslaughter instruction in the context of a murder case. Manslaughter, however, is a lesser - included offense to murder. *State v. Shaw*. 880 So.2d 296, 303 (Miss. 2004). Because the Appellant did not present authority concerning lesser offense instructions to the trial court, he may not do so here. *Holland v. State*, 587 So.2d 848, 868 fn 18 (Miss. 1991). The Appellant made no attempt in the trial court to show that aiding suicide is a lesser - included offense to murder.

Nor do we find that the Appellant, in this Court, had made any attempt to demonstrate that he was entitled to an aiding suicide instruction, either as a lesser or lesser - included offense to murder. He rests his argument entirely upon the notion that, regardless of any other consideration, he had the right to have the jury instructed on aiding suicide because that was his defense and because, allegedly, he presented sufficient evidence for the defense. He does not address the question of whether or how aiding suicide was available as a lesser or lesser - included offense.

Assuming for argument, however, that the Appellant did properly preserve the issue in the trial court, and he has somehow here attempted to demonstrate that he was entitled to the instruction at all, the trial court did not err in refusing an instruction on aiding suicide.

aiding suicide is a lesser - included offense to murder.

"A 'lesser-included offense' is defined as 'one composed of some, but not all, of the elements of the greater crime, and which does not have any element not included in the greater offense.' *Smith v. State*, 880 So.2d 1094, 1100 (Miss. Ct. App. 2004)(citing *Cannaday v. State*, 455 So.2d 713 (Miss. 1984). Murder, in this State, as relevant to the facts of the case at bar, is the killing of any human being without authority of law by any means or in any manner when done with deliberate design to effect the death or the person killed, or of any human being. Miss. Code Ann. Section 97-3-19(1)(a) (Rev. 2006). Aiding suicide is the felony of wilfully, or in any manner, advising, encouraging, abetting or assisting another person to take, or in taking, the latter's life, or in attempting to take the latter's life. Miss. Code Ann. Section 97-3-49 (Rev. 2006).

While the legislature has not seen fit to create or define a crime of suicide, *Nicholson ex rel Gollott*, 672 So.2d 744, 753 fn 3 (Miss. 1996), suicide is a common law crime in this State. *Boutwell v. State*, 181 Miss. 509, 178 So. 585 (1938).[1] Section 97-3-49 makes it a criminal act to aid, encourage or assist another in taking that other's life; in other words, the statute makes it a crime to aid and abet a suicide, or to be an accessory before the fact of a suicide. The acts of aiding and abetting a crime or being an accessory before the fact of a crime are, in terms of elements and proof, separate and distinct from the criminal object of those acts. A prosecution

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[1] The crime of suicide at the common law has been defined elsewhere as the deliberate and intentional destruction of his own life by a person of years of discretion and of sound mind. *Wackwitz v. Roy*, 244 Va. 60, 418 S.E.2d 861, 865 (1992).

suicide (at least in those States that have defined them) appear to be different from the elements of murder. Aiding a suicide is thus not a lesser - included offense of murder.[2] The trial court was correct in finding that aiding suicide is not a lesser - included offense to murder.

B. WAS THE APPELLANT ENTITLED TO THE AIDING SUICIDE INSTRUCTION AS A LESSER OFFENSE INSTRUCTION

While the trial court refused the instruction for the reason that only lesser - included instructions, where supported by the evidence, could be given, it did not consider whether the instruction should have been given under *Griffin v. State*, 533 So.2d 444 (Miss. 1988) and progeny. In this, though, the trial court should not be faulted. That line of decisions was not presented to the court.

In that decision, the Mississippi Supreme Court, though the pen of Justice James Robertson, took it upon itself to decide that instructions on lesser offenses should be granted upon request where they are suggested by the "common nucleus of operative facts" and have an evidentiary basis. This novelty in the law, one which is in direct conflict with the State

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[2] Assuming for argument only the truth of the Appellant's assertion – that being that he entered into a suicide pact with the victim, that he aided or encouraged her in obtaining the object of that pact, and that she did in truth kill herself – then it might be said that the victim committed murder and that the Appellant aided and abetted murder. Under Section 97-3-19(a)(1), nothing in the language of the statute limits murder to malice aforethought killings of other human beings, but not the killer himself. While, obviously, a person who has committed suicide will not be prosecuted for murder, one who aids and abets suicide could be seen as being guilty of murder, the statute concerning aiding suicide notwithstanding.

The Appellant, by his theory, perhaps made himself an aider and abettor or accessory before the fact of murder. As such, he was indictable and triable as a principal. Miss. Code Ann. Section 97-1-3 (Rev. 2006). Aiding and abetting a felony is not a lesser - included offense to the felony committed; the aider and abettor is equally guilty as the one who actually committed the felony.

decision by the Mississippi Supreme Court, we respectfully submit that *Griffin* was wrongly decided and that it and its progeny should be overruled.

In *Griffin*, the Court found that it was error to refuse a simple assault instruction, sought by the defense, in a prosecution for rape. The Court acknowledged that simple assault was, at best, a lesser offense to rape, rather than lesser - include to rape. As to the jurisdictional question concerning whether a lesser offense, as opposed to a lesser included offense, could be considered by the trial court, the Supreme Court, in a two - sentence footnote, merely stated, without citation of authority, that the request for a lesser offense instruction, waived any inadequacy in the indictment. *Griffin*, at 448 fn 2.

Now, at the time of the decision in *Griffin*, the law was that, without an indictment, a Circuit Court acquired no jurisdiction over an accused – that it was the indictment that gave the court jurisdiction in a particular case. *Box v. State*, 241 So.2d 158 (Miss. 1970). In *Box*, the accused in that case was indicted for "attempted armed robbery," but entered a plea to accessory after the fact of "attempted armed robbery." The Court found that the felony to which the accused pled was not lesser - included to armed robbery, and that since the accused had not been indicted as an accessory the Circuit Court had no jurisdiction to accept a plea to it. This rule was neither discussed nor even mentioned by the Court in *Griffin*. Nor did Justice Robertson even mention a fundamental rule about jurisdiction, that rule being that where a court is in want of subject matter jurisdiction, that want cannot be cured by waiver or by agreement of the parties. *In Re Adoption of RMPC*, 512 So.2d 702, 707 (Miss. 1987); *Goodman v. Rhodes*, 375 So.2d 991, 992 (Miss. 1979).

Jefferson v. State, 556 So.2d 1016 (Miss. 1989). The Court instead decided that once an indictment has been served upon an accused, the court having jurisdiction to obtain is "empowered to proceed." That the accused may subsequently enter a plea to a crime that is not lesser - included to the charge of the indictment, according to Justice Robertson, is a fact without consequence. The result of this decision was to make the whole of the State's criminal code effectively charged by charging one crime, subject only to the "common nucleus of operative fact" language in *Griffin*.

The decisions in *Griffin* and progeny run afoul of Art. 3, Section 27 (Miss. Const. 1890). That provision, as relevant here, states that no person shall be proceeded against for an indictable offense by information except in cases in which while represented by counsel he executes a sworn waiver of indictment. Article 3, Section 27 clearly mandates that no person is to be proceeded against except by indictment, unless he with benefit of counsel and by sworn waiver of indictment agrees to be proceeded against by information. Waiver of indictment in this State may only occur consistent with Section 27. Justice Robertson, on the other hand, somehow found in *Jefferson* that an accused may waive or abrogate Section 27 itself. He confounded the distinction between waiving a right secured by a provision of the constitution and merely ignoring that provision. It should be unnecessary to point out that, while one may waive a right guaranteed him by a provision of the constitution, he may not effectively abrogate that provision. In this State, it is constitutionally required that criminal prosecutions commence by way of indictment unless the accused, while represented by counsel, executes a sworn waiver of indictment and agrees to be proceeded against by information. Neither the prosecution, the

The *Griffin* court simply ignored the provisions of Miss. Code Ann. Section 99-19-5 (Rev. 2007). Under that statute, an accused may only be convicted of inferior offenses that are necessarily included in the offense for which he is charged. That statute does not permit conviction of offenses that are not so included but may or may not be suggested by a "common nucleus of operative fact." A Circuit Court in this State simply has no jurisdiction over nuclei of common fact; it has jurisdiction only over the crime charged in the indictment and all offenses necessarily included in that crime.

C. THAT, IN THE EVENT THAT THE COURT WILL CONTINUE TO RECOGNIZE *GRIFFIN*, IT SHOULD ADOPT JUDGE SOUTHWICK'S APPROACH IN HIS DISSENT IN *BARBER V. STATE*, 743 So.2d 1054 (Miss. Ct. App. 1999)

In the event that the Court should determine that *Griffin* and progeny would have potentially allowed the granting of the aiding suicide instruction, then we urge the Court to adopt Judge Southwick's analysis of the circumstances under which a lesser offense instruction should be granted. *Barber v. State*, 743 So.2d 1054, 1057 - 1059 (Miss. Ct. App. 1999); *See also Brooks v. State*, 2007-KA-00828-COA (Miss. Ct. App., Decided 12 November 2008, Not Yet Officially Reported)(Carlton, J., Dissenting).

The evidence demonstrating murder was strong, unlike the evidence in support of rape in *Griffin*. The penalty for aiding suicide is a maximum of ten years imprisonment. Murder carries a life term. The disparity in sentences in the case at bar is not enormous, certainly not close to the difference between simple assault and rape.

was presented in support of the theory that the victim killed herself, and that was what was argued to the jury in summation. The instructions given to the jury informed them that if they did not find that the Appellant murdered the victim, it was to acquit him of the charge of murder. (R. Vol. 1, pg. 65). Thus, the defense was not deprived of its theory of defense. It simply did not need an instruction to make that defense. While the defense did claim that the victim committed suicide, the essential claim was that the Appellant simply did not kill her. The State's instruction covered this, stating that if the jury did not believe beyond a reasonable doubt that the Appellant committed the crime of murder they were to acquit him. If anything, the refusal of the instruction tended to benefit the defense in that the jury did not have the ability to come to a compromise verdict. A specific instruction on suicide was not necessary.

In the decisions in which a case has been reversed on account of a refusal of a lesser offense instruction, the refusal of the instruction acted so as to prevent the jury from considering a certain defense. Here that is not the case: the jury certainly was able to consider whether the victim died by her own hand.

Beyond this, since the jury convicted the Appellant of murder, there is no reason to suppose that the result would have been different had the aiding suicide instruction been given. There was proof that the victim had been strangled, while she was alive. There was proof, contrary to the assertions made by the Appellant, that the victim had no drugs in her system. There was proof that it would have taken a fairly considerable amount of force to put the knife in as far as it was. The body was hidden, with the Appellant staying in the apartment with it for several days, eating pizza and drinking. The Appellant did not report this so called suicide as

Since there was no prejudice to the defense, no error made be predicated on the refusal of the instruction. *Nicholson ex rel Gollott v. State*, 672 So.2d 744 (Miss. 1996).

E. THERE WAS NO EVIDENCE IN SUPPORT OF THE INSTRUCTION

The Appellant's story was that the victim and he entered into a suicide pact. They were together; the victim killed herself and the Appellant lost his courage. However, the Appellant did not indicate that he did a single thing to assist the victim in her said - to - be act of suicide. By his story, he was simply with her. He did not say that he advised, encouraged, abetted or assisted the victim in her passing. Merely agreeing to enter a suicide pact does not constitute aiding another's suicide. There was insufficient evidence to support the granting of the instruction.

MANSLAUGHTER

The trial court gave an instruction on manslaughter, which was drafted by the State. (R. Vol. 1, pg. 66). The defense requested an instruction on manslaughter, which was refused. (R. Vol. 1, pg. 71). It appears to us that the instruction granted and the instruction refused charged the same form of manslaughter.

Here, the Appellant complains that the form of manslaughter charged was not tied to the facts of the case. Since the Appellant did not object on this ground in the trial court, he may not complain of it here. *Colburn v. State*, 990 So.2d 206 (Miss. Ct. App. 2008). Since the Appellant appears to have requested in essence the very same charge of manslaughter, which was no more "tied to the facts of the defense" than was the State's instruction, to the extent that the granting of this instruction was error (and we do not concede that it was) he may not complain of it for that

manslaughter. Whether the instruction should have been granted is moot.

The First Assignment of Error is without merit.

2. THAT THE TRIAL COURT DID NOT ERR IN HOLDING THAT FATHER OLLIE RENCHER COULD NOT WAIVE THE PRIEST - PENITENT PRIVILEGE

In the Second Assignment of Error, the Appellant complains that Father Ollie Rencher was not permitted to testify as to certain statements made to him by the victim. While the Appellant acknowledges that Father Rencher could not be required to testify to confidential statements made to him by the victim while Father Rencher was acting in his capacity as a spiritual adviser to her, M.R.E. 505(b), he asserts that the victim's statements were not made under such a circumstance.

In a hearing in chambers, it was disclosed by the defense that Father Rencher, upon hearing of the death of the victim, took it upon himself to visit the Oxford Police Department to tell the officers there what he knew of the victim. He told the officers that the victim had contemplated suicide and that he advised her to seek medication. He further stated that the victim often seemed in a state of significant anxiety such that he again advised her to seek medical treatment. His first thought when he heard that the victim had been found dead was that she had committed suicide. The defense had been provided with a transcript of this Episcopal priest's statement. The defense asserted that the priest had waived the priest - penitent privilege by speaking to law enforcement. (R. Vol. 5, pp. 373 - 375).

Mr. Wayne Drinkwater, Esq., who was also the vice chancellor of the Episcopal Diocese of Mississippi, responded that Father Rencher had no authority to waive the priest - penitent

discussion with the police, that discussion did not amount to a waiver of the victim's privilege, Father Rencher having no authority to do any such thing.

Mr. Drinkwater further opined that most of the matters Father Rencher told him that he told the police were matters he got from other sources or from the victim when he was not acting as her spiritual counselor. Mr. Drinkwater's view was that Father Rencher could testify to such things; the only matters he could not testify to were those statements made to him by the victim while he was acting in his capacity as her spiritual counselor. (R. Vol. 5, pp. 375 - 377).

This did not satisfy the defense. It was the defense position that Father Rencher could invoke the privilege anytime he wished, if the court accepted Mr. Drinkwater's argument. It then renewed the argument that Rencher waived the privilege by talking to the police. It further asserted that the entire purpose of the privilege had been made meaningless by Rencher's statements – that the statements were no longer confidential. (R. Vol. 5, pp. 377 - 378). With this, Mr. Drinkwater disagreed.

The trial court ruled that the privilege belonged to the victim's personal representatives or estate and that it would not permit into evidence any statements made by the victim to the priest while he was acting in his capacity as her spiritual counselor. The defense then made proffer of the transcript of the statement. (R. Vol. 5, pp. 379 - 380).

Father Rencher was then called by the defense to testify. He stated that he was Bracey's spiritual advisor, but not "personal friends" with her. He acknowledged that also spoke with her on occasions when he was not acting in his capacity as her advisor.

The defense then attempted to steer the priest's testimony to an event on Good Friday in

priest whether he believed that the answer to the question would be something that fell within the privilege; the priest stated that he did believe that, yet also stated that he did not have a confidential conversation with the victim on that day. Rencher went on to say that he saw the victim in passing, saw that she was very anxious and asked her whether she was seeing a counselor. The victim stated that she was seeing a counselor, and Rencher told her that he hoped that she would improve.

The trial court then asked the priest whether the conversation occurred at his church. Rencher stated that it occurred in a hallway. Upon that answer, the trial court ruled that the defense would not be permitted to enquire into the Good Friday conversation because it fell within the "confidential relationship"

The court then directed the defense to run through the rest of the questions it wished to put to the priest. The defense asked Rencher whether the victim ever told him that she was considering suicide, in conversations that did not involve religious counseling. The priest replied that she did not. He was then asked whether the victim had at any time told him that she was considering suicide. He stated that under the privilege he could not divulge that. The court ruled again that it would not permit the defense to put those questions to the priest.

The defense then asked whether Rencher advised the victim to go to counseling sessions. He responded that he had done so. There were several other questions put to the witness, again relating to the conversation that occurred on Good Friday at the church. If we understand the court, it again ruled that the conversation between Rencher and the victim that occurred on Good Friday would not be admitted to evidence. There was then a question about low self - esteem on

those that were asked. Noting that only one or two had been "cleared," it stated that it did not intend to ask those questions before the jury, and in fact it was not going to ask those. The jury was returned to the courtroom and the defense announced that it had no further questions of the witness. (R. Vol. 5, pp. 382 - 388).

Father Rencher was undoubtedly a clergyman as defined by M.R.E. 505(a)(1). Under M.R.E. 505(b), a person has a privilege to refuse to disclose and prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual advisor. Under 505(c), the privilege may be claimed by the person, by his guardian or conservator, or by his personal representative, if he is deceased. The clergyman shall claim the privilege on behalf of the person unless the privilege is waived.

A communication is confidential if made privately and not intended for further disclosure except in furtherance of the purpose of the communication. M.R.E. 505(a)(2).

Preliminarily, to the extent that the Appellant was of the view that Fr. Rencher's statements to the police operated as a waiver of the privilege, this was incorrect. Under 505(b), (c), it is very clear that the privilege exists in favor of the penitent, and it is he, not the priest, who has the right to refuse to disclose confidential communications made to the priest, or to permit disclosure. An overtalking priest who violates this privilege cannot effectively waive the privilege. That would destroy the meaning and purpose of the privilege. It would be directly contrary to the rule that it is the penitent, not the verbally incontinent priest, who may waive the privilege. If the priest violated the privilege by talking about matters he would have best kept to himself, this would not have prevented the invocation of the privilege at trial – by the priest.

whether he did or might have violated it previously.

We must say that the trial court's ruling concerning the conversation had on Good Friday is puzzling. While the priest stated that he was "uncomfortable" with the question, he also stated that he did not have a "confidential conversation" with the victim on that day. And he further stated that the conversation occurred in a hallway of his church. The court apparently considered the fact that the conversation occurred inside the church as a dispositive fact. If so, we cannot agree that this fact alone determined the issue, especially in light of the fact that the priest denied having had a "confidential conversation" with the victim. That the conversation occurred in a hallway, rather than in a confessional or private office, would be some evidence that it was not confidential or intended to be so.

Having said this, however, any error in this was surely harmless. Whether the victim was advised to seek medication on Good Friday, 2005, a period of roughly six months prior to the time of her death was remote. Whether she was anxious in the Spring of 2005 was of little importance. The exclusion of this testimony cannot possibly be seen to have made a difference in the case.

The priest denied that the victim told him, in meetings that were not religious counseling sessions, that she was considering suicide. He declined to say whether she told him at any time that she had considered suicide, citing the privilege. However, there were no follow - up questions to designed to determine whether the privilege was available. (R. Vol. 5, pg. 386) Since the defense did not enquire further into the matter, it is not possible to find error in the court's ruling on this much. The priest clearly indicated that, if there had been references to

the priest was not right in invoking the privilege.

In the end, the defense chose not present further testimony from the priest to the jury. Consequently, the parts of the statement to the police that most likely would have been non - privileged were not admitted on account of the rulings by the trial court but on account of the fact that the defense did not wish to put them into evidence. The trial court cannot be faulted for this. As for the priest's comment to the effect that he wondered whether the victim might have killed herself, once he heard news of her death, that was mere speculation on his part, and inadmissible for that reason. In any event, most of the statement had to do with some alleged threat or effort on the part of the Appellant to kill himself. We perceive nothing in all of that of benefit to the defense.

The Second Assignment of Error should be denied.

3. THAT THE TRIAL COURT DID NOT ERR IN PERMITTING DR. HAYNE TO TESTIFY

In the Third Assignment of Error, the Appellant alleges that the pathologist who testified on behalf of the State, Dr. Steven Hayne, should not have been permitted to testify because he was not certified by the American Board of Pathology. He also alleges that Hayne's finding of trauma consistent with strangulation was a "major mistake."

There was no objection to Hayne's qualification as an expert in forensic pathology. The issue may not be raised here. *Dixon v. State*, 953 So.2d 1108, 1116 (Miss. 2007). The Third Assignment of Error may not be considered under the doctrine of "plain error" because the admission of Hayne's testimony did not seriously affect the fairness, integrity or public

Pathology, the short and sufficient answer is that he was not required to be. Dr. Hayne never testified that he was the State Medical Examiner. Only the State Medical Examiner is required to be so certified. Miss. Code Section 41-61-55 (Rev. 2005). On the other hand, other pathologists under the supervision of the Commissioner of Public Safety are not required to possess such a certification. Miss. Code Ann. Section 41-61-77(3) (Rev. 2005)

The Mississippi Supreme Court has stated that Dr. Hayne is "unquestionably" qualified to testify in the courts of this State in the field of forensic pathology. *Duplantis v. State*, 708 So.2d 1327, 1329 (Miss. 1998). And, while the Appellant makes much of Justice Diaz' special concurrence in *Edmonds v. State*, 955 So.2d 787, 799 - 811 (Miss. 2007), joined only by one other justice, the majority in *Edmonds* stated that Hayne ". . . is qualified to proffer expert opinions in forensic pathology. . . ." *Edmonds*, at 792. Justice Diaz's special concurrence, it need hardly be said, is no precedent.

The Appellant then refers the Court to some publication or another. The Court may not consider this since it forms no part of the record in this case. It is to be ignored. *Mason v. State*, 440 So.2d 318 (Miss. 1983).

As for the claim that Dr. Hayne may have made a "major mistake," it is true that the defense forensic pathologist complained about Hayne's procedures. He did indicate that what Hayne observed might have been a consequence of decomposition of the body. But he did not state as an unequivocal opinion that Hayne was simply wrong. The conflict in the testimony about the cause of the neck or throat injuries was a matter for the jury to resolve. That experts disagree is hardly an uncommon thing, but it is no reason at all to find that one or the other is

field in forensic pathology, and in view of the fact that he was under no obligation to be certified by the American Board of Pathology, there was no "plain error" in admitting his testimony.

The Third Assignment of Error is without merit.

4. THAT THE APPELLANT WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL

In the Appellant's supplemental motion for a new trial, he asserted that his attorney was ineffective in his representation. A number of grounds were raised, including a claim that there should have been a motion to change venue, that the attorney failed to establish a factual basis for the defense, and quite a few other quibbles and complaints. (R. Vol. 2, pp. 88 - 90).

The trial court held a hearing on this motion, and the Appellant's original attorney was brought in to testify.

CHANGE OF VENUE

The attorney testified that he had considered filing a motion to change venue. He discussed the matter with the Appellant and his family. He stated that he told the Appellant and his family that he did not want to change venue, that he wanted to try the case in Lafayette County for number of reasons. Among those reasons were that jury panels are better educated in Oxford, that they tend to be more "liberal," and that he thought there would be less likelihood of a judgment against the Appellant for having dated a black female. He stated that he discussed those reasons with the Appellant and his family and that they had no objection to having the case tried in Lafayette County. (R. Vol. 6, pp. 488 - 489).

defense was to permit the Appellant to make a statement to law enforcement concerning how the victim came to her death, and to use that statement through the trial. He was of the view that the statement was sufficient to provide a basis for the aiding suicide instruction. Another reason for relying upon the statement was that that would eliminate the risk of conflicting stories by the Appellant.

The attorney preferred to rely upon the statement because by doing so that eliminated risks associated with cross - examination. The attorney stated that he had prepared the Appellant to testify. He discussed the question of whether the Appellant should testify with the Appellant and his father, and he told them that he did not think it was appropriate that the Appellant testify. The Appellant did not want to testify and was relieved that the attorney thought that he should not testify.

The attorney further stated that, in his opinion, the Appellant would have made a terrible witness. He thought that the Appellant was very malleable and would be easily led to agree with whatever questions were put to him. (R. Vol. 6, pp. 490 - 491).

FAILURE TO CALL WITNESS

This issue concerns a Michael Presnell, who gave a statement to the University police department. In that statement, he claimed that the victim told him that she had contemplated committing suicide. (R. Vol. 2, pp. 139 - 140). The claim of ineffectiveness was that counsel failed to present Presnell as a witness at trial, even though he was in Oxford.

The attorney stated that he knew that Presnell had given a statement, one that he though was antagonistic toward the Appellant. He knew that the victim told Presnell some two years

He stated that he was unable to find Presnell. He did an internet search, without success. On the Thursday prior to trial, the Appellant's father contacted him and said that there were some statements on a 911 tape in Olive Branch that had been made about a month prior to the victim's death that might be of use. So the attorney and another person went to Olive Branch, listened to the tape, and found nothing of value except a telephone number registered to Presnell.

The attorney rang that number but got no response and was unable to leave a voicemail

At trial, the first witness indicated that Presnell was back in school, in the engineering department. The Appellant's attorney discussed this revelation with the Appellant's father, who said he knew a deputy sheriff and that between he and the deputy they should be able to track Presnell down that night. However, the following morning, the Appellant's father told the attorney that Presnell would not be needed as a witness. The lawyer thought that it was odd that the Appellant's father would say such a thing, but he concluded that Presnell had been found and found to be of no use to the defense. (R. Vol. 6, pp.492 - 493).

Subpoenas had been issued for Presnell, but the sheriff's department had been unable to find him. (R. Vol. 6, pg. 503).

COMPUTER EVIDENCE OF ON - LINE CHAT BETWEEN THE APPELLANT AND THE VICTIM

This complaint concerns the transcript of an on - line session, supposedly between the Appellant and the victim.

They were apparently talking about the Appellant's actual or threatened attempt to kill himself. The victim apparently notified law enforcement about the matter. The victim explained

replied that should could not do so. She then wrote that she "wanted to do it to myself when I thought you had." The Appellant then observe that "they" had taken his knife and that he had only twelve left. (R. Vol. 2, pg. 141).

It was alleged that the Appellant's attorney told the Appellant's parents that he forgot about this email exchange, that some things just fall through the cracks. The attorney denied having said that. He stated that the reason he did not introduce the transcript was because the victim indicated in it that she could not kill herself. While the exchange implied that there had been a discussion about suicide in the past, it appeared the victim had decided against such a thing. As such, the email was a double - edged sword, one that cut more against the Appellant than the State.

The attorney did admit that some things can fall through the cracks, but he denied having told the Appellant's parents that the email was one of those things. (R. Vol. 6, pp 493 - 495).

LACK OF OBJECTION TO THE VENIRE/LACK OF MOTION FOR A CONTINUANCE/LACK OF MOTION FOR CHANGE OF VENUE

The attorney stated that he thought the right thing to do was to try the case in Lafayette County and still thought that it was the right decision. As to the claim that the case was well known, he and his associate compared the notes they made during jury selection. Of eighty-seven veniremen, five stated that they knew about the case.

He did not believe that a motion for a change of venue would have been successful at that time. (R. Vol. 6, pp. 495 - 496).

that he did not move for a mistrial once the trial court determined that the meddlesome priest would be permitted to invoke the priest - penitent privilege.

The lawyer stated that he considered asking for a continuance, and even thought of seeking an interlocutory appeal. But he preferred to remain with the jury he had. He believed that, in the event of a conviction, the case would be reversed on appeal if the trial court erred in its ruling. In any event, he stated that he was not aware that a motion for a mistrial would be granted for a putatively erroneous evidentiary ruling.

This matter was discussed with the Appellant and his family. No one suggested a continuance. (R. Vol. 6, pp. 496 - 497).

LACK OF MOTION FOR A MISTRIAL WHEN ALTERNATE JURORS HUGGED THE VICTIM'S MOTHER

As the case was being submitted to the jury, the alternates were dismissed. They went to the jury room, collected their things and then began to leave. They went to the victim's mother and hugged her. The twelve who decided the case did not see this occur.

Nor did the twelve see the two alternates sitting with the mother until they came back into the courtroom, verdict in hand.

The attorney did not see what ground he had for a motion for a mistrial. The alternates were expressing sympathy for the mother, who, as he pointed out, was a victim whether her daughter died at the hand of the Appellant or by her own hand. (R. Vol. 6, pp. 497 - 498).

no indication that she had been under psychiatric treatment. The Appellant himself told the lawyer that he had no knowledge of such treatment. The victim was not on medication, according the Appellant.

The lawyer believed that money was better spent on seeking a forensic pathologist who could throw Dr. Hayne's testimony into doubt. This was discussed with the Appellant and his family, and they concurred in the lawyer's opinion. (R. Vol. 6, pp. 498 - 499).

LACK OF OBJECTION TO INTRODUCTION OF DEATH CERTIFICATE

The lawyer did not find that a death certificate had been introduced into evidence, and did not recall that one had been. (R. Vol. 6, pg. 499).

FAILURE TO DEVELOP APPELLANT'S MEDICAL HISTORY TO SUPPORT SUICIDE DEFENSE

The attorney did not see how the Appellant's five prior suicide attempts would have been useful in the attempt to establish that the victim killed herself. Insanity was not the defense; his medical history was entirely separate from the victim's history. (R. Vol. 6, pp. 499 - 500).

The Appellant's father testified. He stated that, with respect to the email, his construction of what the victim meant was that she could not join the Appellant in Olive Branch because she had no means of transportation. He did not think that she meant that she would not or could not commit suicide.

With respect to Presnell, he stated that he repeatedly asked whether Presnell had been located. Two weeks after the trial, he found Presnell and had dinner with him in Oxford. Presnell told him that an attorney had interviewed him. He did not know or recall the attorney's

attorney that there was no need to present Presnell's testimony.

The Appellant's father stated that he met with the attorney after trial, discussed, among other things the email, and that the attorney stated that some things just fall through the cracks.

He agreed that his son had a malleable nature, but no evidence of that was presented to the jury. (R. Vol. 6, pp. 512 - 517).

Here, the Appellant urges six instances of ineffective assistance of counsel. In considering these claims, we bear in mind the familiar standard by which such claims are assessed. *Muise v. State*, 997 So.2d 248 (Miss. Ct. App. 2008).

With respect to the change of venue issue, the attorney gave specific reasons why he considered moving for such relief and then deciding against it. He further stated that he consulted the family of the Appellant and that they concurred in that decision. There was no testimony by the Appellant's father to contradict the attorney. The decision to seek – or not seek – a change of venue is a strategic decision and is beyond the appellate courts' review. *Brawner v. State*, 947 So.2d 254, 262 (Miss. 2006). Clearly, though, the decision was carefully thought out. There simply could not be prejudice to the Appellant where only five of eighty-seven veniremen had heard about the case. The Appellant's claim that a motion for a change of venue would have been granted is merely his speculation. Beyond that, the claim misses the point. There is nothing here to show that the defense attorney's representation was deficient, and nothing to show prejudice to the Appellant.

The next claim is that the defense attorney should have called Presnell to the witness stand. According to the attorney, the Appellant's father located Presnell in the course of trial but

favor of the attorney. There is nothing here to show that that resolution was not supported by the testimony. This finding of fact, therefore, should be granted the same deference as any other finding of fact by a trial court. *Meeks v. State*, 781 So.2d 109, 113 (Miss. 2001). It cannot be reasonably contended that this finding was clearly erroneous. The trial court heard the witnesses and observed their demeanor; it was in the best position to determine weight and worth to give to the testimony. That the attorney had difficulty in locating Presnell was certainly corroborated by the fact that Presnell could not be found for service of a subpoena.

We would also point out that Presnell's statement made a passing reference to the victim's having mentioned committing suicide some two years prior to the time of the statement. Presnell also stated that "it had not been a topic in quite some time" (R. Vol. 2, pg. 139). The defense attorney was rightly concerned about the remoteness issue about this passing statement. The Appellant's comment that Presnell would have significantly aided the defense is, again, mere speculation. Presnell's reference to a thing that was not a topic anymore certainly would have weakened the slight benefit that his statement would have otherwise had for the defense.

As for the remainder of the complains, these are simply noted counsel here, without any argument or authority offered in support. The defense attorney explained his actions with respect to each complaint. His decisions were not unreasonable.

The decision not to introduce the on-line chat transcript was sensible. While it may be that the Appellant's father put a different construction on what the victim meant, it would not have been proper to attempt to offer opinion evidence in support of his construction. The jury might well have reasonably concluded that the victim meant that she could not commit suicide.

no indication that anything would have turned up of use to the defense.

A death certificate does not appear to have been introduced; in any event, had one been introduced, the Appellant points to nothing in the way of prejudice on account of any such introduction.

There is no indication that the Appellant's medical history would have aided his theory that the victim killed herself. The Appellant wholly fails to demonstrate how this would have been useful, or even relevant.

There is a strong presumption that counsel's conduct fell within a wide range of reasonable professional assistance. *Starks v. State*, 992 So.2d 1245 (Miss. Ct. App. 2008). This presumption has not been rebutted in the case at bar. The attorney clearly carefully considered his decisions, explained them to the Appellant and his family. His decisions were reasonable decisions. The Appellant and his family concurred with them.

The Fourth Assignment of Error is without merit.

5. THAT THE TRIAL COURT DID NOT ERR IN DENYING RELIEF ON THE APPELLANT'S MOTION TO DISMISS

In the Fifth Assignment of Error, the Appellant contends that the trial court erred in denying relief on his motion to dismiss, which was based upon a claim that the State had violated Miss. Code Ann. Section 99-17-1 (Rev. 2007) – the source of the "270 day rule" – and that the State violated his constitutional right to a speedy trial.

The Appellant, in the trial court, filed a "Motion to Dismiss for Violation of 270 Day Rule" on 19 September 2007. A review of that motion clearly demonstrates that the Appellant

and constitutional speedy trial provisions. Since a violation of the constitutional right was not raised in the trial court, it may not be asserted here. *Bell v. State,* 733 So.2d 372 (Miss. Ct. App. 1999). The invocation of Section 99-17-1 in the trial court does not amount to an invocation of the constitutional right to a speedy trial: the analyses are different. Moreover, the Appellant did not attempt a demonstration of the *Barker*[3] factors, and does not do so here. Consequently, to the extent that the Appellant urges a violation of the constitutional right to a speedy trial, that claim is not before the Court.

The Appellant was indicted on 2 March 2006 and he waived arraignment on that same day. (R. Vol. 1, pp. 1 - 2; 6). There were orders setting cases for trial for the April, July and October 2006 terms of court, but whether any of these included the Appellant's case cannot be determined from the record. (R. Vol. 1, pp. 7 - 9). Likewise, there were orders setting cases for trial in the January, 2007 term of court, but again it is not possible to say from the record whether the Appellant's case was included in that order. (R. Vol. 1, pg. 10). However, on 24 July 2007, this case was set for trial on 24 September 2007. (R. Vol. 1, pg. 18). Trial began on that day. (R. Vol. 3, pg.1). Thus, a period of approximately 564 days expired between the time of arraignment and trial.

During that time, there was no demand for trial by the Appellant. We do not find in the record that there were continuances granted. We do find, though, that on 19 September 2007, five days before trial began, that the Appellant filed his motion to dismiss on the basis of an

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[3] *Barker v. Wingo*, 407 U.S. 514 (1972).

The State responded on the day of trial, pointing out that the Appellant had alleged no prejudice to his defense. The Appellant had not been incarcerated during this time. The State further stated that, because of the Appellant's failure to complain about delay during the 270-day period, the Appellant waived the protection of the statute. (R. Vol. 1, pg. 35). The trial court denied relief on the Appellant's motion. (R. Vol. 3, pg. 59).

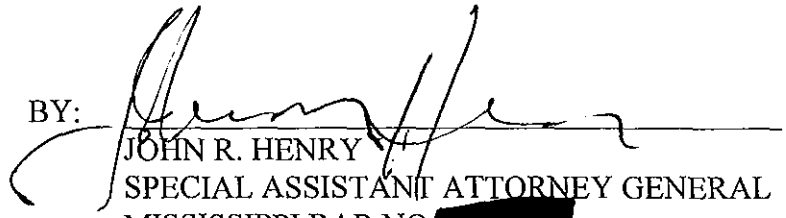
The Appellant's motion was filed well after the expiration of the 270-day period. That being so, the Appellant waived the right to complain about the alleged violation of the statute. *Guice v. State*, 952 So.2d 129, 140 (Miss. 2007); *Walton v. State*, 678 So.2d 645, 650 (Miss. 1996). The Appellant made no demand for trial, so he must be seen as having acquiesced in the delay. *Roach v. State*, 938 So.2d 863, 867 (Miss. Ct. App. 2007). As for prejudice, the only matter alleged was anxiety. The Appellant was not incarcerated and there was no evidence of extraordinary anxiety.

The Appellant's motion, as we have said above, did not raise a claim of a constitutional violation. There was no attempt to discuss the delay in terms of the *Barker* factors. The trial court made no finding on the *Barker* factors. This being so, there is nothing for the Court to review.

The Fifth Assignment of Error should be denied.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 9th day of February, 2009.

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