IN THE COURT APPEALS FOR THE STATE OF MISSISSIPPI

CASE NO. 2008-KA-00695-COA

DAVID JACKSON WILLIAM
DEFENDANT/APPELLANT

VS.

STATE OF MISSISSIPPI
APPELLEE

APPEAL FROM THE CIRCUIT COURT
OF
LAFAYETTE COUNTY, MISSISSIPPI

APPELLANT'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

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2008 KA 00695 COA RT

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Appellant does feel that oral argument will be helpful and beneficial in this case.

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FOCUS OF THE REPLY BRIEF

Appellant David Williams stands on the matters and arguments asserted within his initial appellant brief excepting those issues immediately set out below for which he believes further discussion is required to best aid this Court in rendering a decision.

V.

STATEMENT OF ISSUES DISCUSSED

A. The lower court committed reversible error by denying the defendant an instruction on his theory of the case.

B. The lower court committed reversible error by allowing Father Ollie Rencher to claim the priest-penitent privilege regarding the information contained in his statement given to the Oxford Police Department.

VI.

ARGUMENT IN REPLY

A. THE LOWER COURT COMMITTED REVERSIBLE ERROR BY DENYING THE DEFENDANT AN INSTRUCTION ON HIS THEORY OF THE CASE, AND, THEEFORE, FAILING TO PROPERLY INSTRUCT THE JURY.

The issue at hand is whether the lower court erred in refusing then-defendant David Williams' proposed Aiding Suicide Jury Instruction D-3 (RE 3) on the basis that aiding suicide is not a lesser-included offense to murder. [1] Williams stands on his brief as to the manslaughter instruction and focuses this portion of his reply solely to Instruction D-3. Out of an abundance of caution, Williams reasserts that which he thought was plainly obvious both at trial and within

[1] At trial, defense counsel argued that the crime of assisted suicide constituted a lesser-included offense to murder; Williams does not re-urge this issue within the instant appeal.

his initial brief -- Instruction D-3 constitutes a lesser offense to the charge of murder and his theory of the case, or, stated another way, his defense to the murder charge.[2]

The State urges several points in regard to Instruction D-3, specifically: (1) that David Williams is procedurally barred from raising any issue concerning Instruction D-3 excepting arguments relating to its inclusion as a lesser-included offense; (2) that David Williams erroneously asserts that he is entitled to a reversal on this issue because instruction D-3 was merely his defense; (3) that the question is not whether evidence supported the inclusion of Instruction D-3 but whether Williams was entitled to the instruction; and (4) that this honorable Court should ignore Griffin v. State, 533 So.2d 444 (Miss. 1988), and progeny despite the clear applicability to the instant appeal.

i. Williams' Claims Are Not Procedurally Barred.

The State contends that Williams is procedurally barred from seeking relief as to Instruction D-3 because trial counsel failed to provide case law to the lower court except for a case dealing with a lesser-included offense jury instruction. In support, the State cites to dicta in footnote 18 of Holland v. State, 587 So.2d 848, 868 fn 18 (Miss. 1991), which states in whole:

> Holland also raises several related sub-issues and cites "critical occasions" when error were allegedly committed. Holland's discussion of these issues comprises only several sentences. Appellant's Brief at 36. Holland is procedurally barred from raising these issues because he either cites support for his contention which is different from the support he cited at the trial level or he failed to raise the issue at trial. "A trial judge cannot be put in error on a matter which was not presented to him for decision." Pruett v. Thigpen, 665 F.Supp. 1254, 1262 (N.D. Miss. 1986); see Read v. State, 430 So.2d 832, 838 (Miss. 1983); Ponder v. State, 335 So.2d 885, 886 (Miss. 1976); Stringer v. State, 279 So.2d 156-58 (Miss. 1973).

Holland, 587 So.2d at 868 fn 18.

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[2] The arguments that aiding suicide constitutes a lesser offense and Williams' theory of defense are so inextricably intertwined, as is often the case when a lesser offense instruction is proffered, that the two are frequently argued as one.

On appeal, an appellant is required to cite relevant authority, and an appellant failing to do so may face imposition of a procedural bar. Williams v. State, 708 So.2d 1358, 1361 (Miss. 1988); Citizens Nat'l Bank v. Dixieland Forest Prods., LLC, 935 So.2d 1004, 1013 (¶35) (Miss. 2006). A party also risks procedural bar on appeal where he failed to contemporaneously object to matters at trial that he then asserts as grounds for his appeal. Livingston v. State, 943 So.2d 66, 70 (¶ 8) (Miss. Ct. App. 2006). The State seems to have melded these two commonly-understood rules into a requirement that a party issue a brief-worthy recitation of case law while at trial as to each and every objection; however, there is simply no authority to support this assertion and would be an impossible, and thus unconstitutional, burden to meet. The vast majority of appeals demonstrate that appellate courts base reversal of trial court decisions on then-existing authority not disclosed or considered by the at trial judge. See, e.g., Spencer v. State, 348 So.2d 1030 (Miss. 1977) (stating "[t]he trial judge was without the benefit of the Jackson holding during the trial of the case, but should follow its ruling and instruct the jury as to lesser included offenses . . . .")

It is clear from reading footnote 18 in Holland that the Supreme Court employed the phrase "support he cited at trial" to mean the basis or reasons for trial counsel's objections. More importantly, the authority cited therein puts the footnote into context as these cases stand for the general proposition that a party must object or assert his grounds for error at trial or risk imposition of a procedural bar. Pruett, 665 F.Supp. at 1262 (failing to object to venue during trial barred appellant from raising issue for first time on appeal); Read, 430 So.2d at 838 (failing to assign error may not be urged as grounds for reversal; failing to timely present issue to trial court may not be argued on appeal); Ponder, 335 So.2d at 886; (failing to assert ground within motion for a new trial barred that ground from being raised on appeal); Stringer, 279 So.2d at 156-58 (failing to make specific objections bars the matter on appeal).

Again, the record demonstrates that defense counsel argued on the grounds that Instruction D-3 should have been received because it was a lesser offense, a lesser-included offense, and, even if neither, because the instruction embodied the defense's theory of the case which was supported by the evidence. (R. Vol. 5, pp. 391-392, 398). There exists no requirement that trial counsel proffer authority as to each and every objection. Notably, the standard in determining the applicability of a lesser [non-included] offense is the precise standard utilized in assessing a lesser-included offense, and the trial court understood the underlying reasons that defense sought to include Instruction D-3. See, e.g., Griffin, 533 So.2d 444 (Miss. 1988) (discussed infra).

Even were these matters at risk of being procedurally barred, the interest of judicial efficiency is not meant to override constitutional rights. Brooks v. State, 46 So.2d 94, 97 (Miss. 1950). "Constitutional rights in serious cases rise above mere rules of procedure." Id. Errors rising to this level of egregiousness have been decided by the Mississippi Supreme Court even where appellant failed to submit the issue on appeal. See Welch v. State, 566 So.2d, 680, 684 (Miss. 1990) (stating, "[t]he following [jury instruction contrary to law] issue was not submitted to this Court on appeal but it constitutes such an egregious error that it must be addressed.") For all of these reasons, this issue is ripe for determination by this honorable Court.

ii. The Lower Court Committed Reversible Error When It Precluded Williams From Submitting His Theory Of The Case To The Jury

The State's brief argues that David Williams "rests his argument entirely upon the notion that, regardless of any other consideration, he had the right to have a jury instructed on aiding suicide because that was his defense." (Appellee Br. 12). Even were it true that Williams rests his argument on the sole "notion" that aiding suicide constituted his defense, which he does not, the lower court's refusal on that basis constitutes reversible error. The State counters that the

authority cited in Appellant's initial brief is inapplicable because those opinions deal with jury instructions regarding lesser-included offenses or justification defenses. (Appellee Br. 11). The reasoning cited in those opinions, including Hester v. State, 602 So.2d 869, 872 (Miss. 1992), does not limit itself to those particular applications (e.g., withdrawal from conspiracy) and demonstrate a consistency within Mississippi jurisprudence championing a defendant's right to put his defense before the jury. (Appellant Br. 9-10).

Nonetheless, Murphy v. State demonstrates a defendant's right to a jury instruction putting nothing more than his theory of defense before the jury. 566 So.2d 1201 (Miss. 1990). Murphy, who was found guilty of burglary as to two power saws, appealed the trial court's refusal to allow his proposed instruction,[3] which states: [t]he Court further instructs the jury that if you find from the evidence that the Defendant, Granville Murphy, Jr., did not break and enter a certain building . . . but that Granville Murphy, Jr. found said chain saws at a garbage dumping site in Choctaw County, Mississippi, then you shall find the defendant not guilty of burglary." Id. at 1206. Certainly this jury instruction does not constitute a justification defense, a lesser [non-included] offense, or a lesser offense jury instruction. This instruction merely represents Murphy's theory of his case. The Mississippi Supreme Court found as follows:

> A defendant is entitled to have an instruction on his theory of the case. Young v. State, 451 So.2d 208, 210 (Miss. 1984); see also U.S. v. Conroy, 589 F.2d 1258, 1273 (5th Cir.1979), cert. denied, 444 U.S. 831, 100 S.Ct. 60, 62 L.Ed.2d 40 (1979). There is a limitation, however, because a trial judge may refuse an instruction which incorrectly states the law, is without foundation in the evidence, or is stated elsewhere in the instructions. U.S. v. Robinson, 700 F.2d 205, 211 (5th Cir.1983), appeal after remand 713 F.2d 110, reh. den. 719 F.2d 404, cert. den. 465 U.S. 1008, 104 S.Ct. 1003, 79 L.Ed.2d 235 (1984).
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> Instruction D-4 properly states the law, and there is a sufficient foundation for it in the evidence. In addition, contrary to what the state argues, the instructions that were provided to the jury do not incorporate Murphy's theory of the case (ie., his theory is not stated elsewhere in the instructions). Even when the instructions are

[3] Murphy also appealed the lower court's refusal to grant him a judgment notwithstanding the verdict. Murphy, 566 So.2d at 1202.

> read as a whole, Murphy's theory of the case remains unrevealed. Moreover, the latitude allowed by the instruction on the exclusion of every reasonable hypothesis is not enough to strike Murphy's proposed instruction on his theory of the case. Simply put, when a defendant's instruction is the proper statement of the law and is the only instruction that presents his theory of the case, it should be granted. Sayles v. State, 552 So.2d 1383, 1390 (Miss. 1989).

Id. at 1206-1207.

Murphy and the authority cited in the initial brief together demonstrate the fundamental principle that a defendant is entitled to present his theory of the case to the jury. See, e.g., Miller v. State, 733 So.2d 846, 848 (Miss. Ct. App. 1998) (declaring a basic tenet of criminal law is that defendant is entitled to have jury instructed on his theory of the case where there is some supporting evidence); Manuel v. State, 667 So.2d 590, 591 (Miss. 1995); Chinn v. State, 958 So.2d 1223, 1225 (Miss. 2007) (stating "[e]very accused has a fundamental right to have [his] theory presented to a jury, even if the evidence is minimal.").

Moreover, the evidentiary principles utilized in those previously cited decisions concerning lesser-included offense and justification defenses are equally applicable to instructions which present nothing more than the accused's defense as those evidentiary standards are built upon the right to present one's theory to the jury.[4] For instance, the Mississippi Supreme Court held in Welch v. State that it was error for the trial court not to allow Welch's instruction relating to his theory of defense. 566 So.2d 680, 684 (Miss. 1990) (seeking lesser-included offense jury instruction). The Court weighed whether Welch presented evidence sufficient to present his theory via the proffered jury instruction by the following: "[d]efendants are entitled to have instructions on their theory of the case presented to the jury for which there is foundation in the evidence, even though the evidence might be weak insufficient, inconsistent, or

[4] Furthermore, logic dictates that requested lesser offense jury instructions typically constitute a defendant's theory of the case; thus, these decisions embrace not only the idea that the instruction reflects a lesser offense but also the greater fundamental principle that a defendant put his theory to the jury for consideration.

of doubtful credibility, and even though the sole testimony in support of the defense is the defendant's own testimony." Id. (citing U. S. v. Young, 464 F.2d 160, appeal after remand 482 F2d 993 (5th Cir. 1973); Gandy v. State, 355 So.2d 19096 (Miss. 1978)); see also, Ealy v. State, 757 So.2d 1053, 1059 (Miss. Ct. App. 2000); Giles v. State, 650 So.2d 846, 849 (Miss. 1995); Hester, 602 So.2d at 872. Clearly the courts routinely apply low-threshold evidentiary standards in order to preserve a defendant's fundamental right to present his theory to the jury.

The State's brief argues that the issue at bar is whether Williams is entitled to Instruction D-3 regardless of the evidence. However, this query misses the mark. Williams is entitled as of right to a jury instruction demonstrating his theory of the case where evidence tends to support his theory. Thus, the germane questions are whether Williams' theory of the case was presented elsewhere within the jury instructions, whether the instruction was a correct statement of the law, and whether evidence – even weak evidence – was introduced that tended to support his theory.

The manslaughter jury instruction effectively negated his theory of the case given its language "Williams . . . did kill Demetria Bracey . . . " when his theory of defense is that Ms. Bracey killed herself. (TR Vol. 1 p. 66). Cleary his aiding-suicide theory does not exist within the instructions. Furthermore, Instruction D-3 properly stated the applicable law as it precisely reflects Section 97-3-49 of the Mississippi Code. The testimony from Investigators John Marsh and Jimmy Williams – without even considering the inferences that can be made in favor of the suicide-pact theory -- provides evidences sufficient to require the instruction. (TR Vol. 4 p. 158, 191-192). For these reasons and in light of the highly protected right to present one's defense to the jury, this Court should find that the lower court committed reversible error when it denied Williams his right to present his theory of the case to the jury in the form of Instruction D-3.

iii. Griffin and Progeny Entitle Appellant to Instruction D-3 as a Lesser Offense Instruction.

The State contemporaneously demonstrates that Griffin and progeny apply to the issue of whether Williams was entitled to Instruction D-3 as a lesser offense instruction, which would result in a reversal, while inferentially urging this Court to wholly ignore precedent from its own bench and the Mississippi Supreme Court. Alternatively, the State requests the Court to follow a 1999 dissent that undercuts the very essence of the Griffin rule. Recalling that this Court reaffirmed the Griffin rule as late as November of 2008,[5] neither option argued by the State should be considered, and this Court should apply the Griffin rule to the instant appeal.

a. Griffin v. State

Defendant Griffin was charged with rape, and Griffin's defense of the State's rape prosecution was that he and the alleged victim had engaged in consensual intercourse but that, prior to being discovered by the police, he had struck the victim. Griffin v. State, 533 So.2d 444 (Miss. 1988). Consequently, Griffin requested a jury instruction as to simple assault, which was denied and then appealed. Id. In its introduction, the opinion states, "[i]f the evidence be such that a reasonable jury might have found the facts as the defense suggests them to have been, the accused of right is entitled to have the jury consider that option and be instructed to that effect. Where, as here, the lesser offense instruction has been denied, we have no alternative but to reverse." Id. at 445.

The opinion reasons that it is irrelevant whether assault is a lesser or a lesser-included offense and applies the same standard utilized in determining the inclusion of a lesser-included offense instruction. Id. at 447. Specifically, the Mississippi Supreme Court held that the instruction must be granted where no reasonable jury could find the defendant guilty of the lesser

[5] Brooks v. State, 2007-KA-00828-COA (Miss. Ct. App., Decided 12 November 2008, Not Yet Officially Reported).

offense taking the evidence in the light most favorable to the defendant and considering all favorable inference that may be drawn in favor of him. Id. In declaring the error to be of reversible proportions, the opinion considers the enormous disparity between the maximum punishments for assault and rape. Id. at 448.

b. Longevity of the Griffin Rule

The Mississippi Supreme Court has reaffirmed the Griffin rule multiple times with its most recent affirmation in October of 2008 in Delashmit v. State, 991 So.2d 1215 (Miss. 2008).[6] Citing to Green, Griffin and Harper, the Mississippi Supreme Court held that a defendant is "entitled" to a jury instruction where the lesser offense arises out of the common nucleus of operative facts giving rise to a charge set forth in the indictment when there is an evidentiary basis for the instruction considering the evidence in the light most favorable to the accused and drawing all reasonable inferences in his favor.[7] Id. at 1221-22 (¶ 18) (citing Green v. State, 884 So.2d 733, 737 (Miss. 2004); Griffin v. State, 533 So.2d 444 (Miss. 1988); Harper v. State, 478 So.2d 1017, 1021 (Miss. 1985)).

This Court recently considered like circumstances in Brooks v. State, 2007-KA-00828-COA (Miss. Ct. App., Decided 12 November 2008, Not Yet Officially Reported). This Court stated "'[i]f a lesser [non-included] offense . . . arises from the same operative facts and has an evidentiary basis,' the Mississippi Supreme Court held that 'the defendant is entitled to an instruction for the lesser [non-included] charge the same as if it were a lesser-included charge.'" Id. at (¶ 24.) (quoting Moore v. State, 799 So.2d 89, 91 (¶ 7) (Miss. 2001). Relying on the same

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[6] Delashmit was convicted of enticement of a child for sexual purposes (Id. at 1216 (¶ 1)) and argued on appeal that he was entitled to an indecent exposure jury instruction as a lesser offense. Id. at 1221 (¶ 18).

[7] Because Delashmit had confessed to the law enforcement that he had shown his penis to the victim and offered her Fifty Dollars to have sex in addition to the victim's own testimony on the matter, the Court found the issue was without merit. Id. at 1222 (¶ 19).

standards set forth in Griffin, the Brooks opinion requires that the evidence be considered in the light most favorable to the defendant. Id. at (¶ 15) "In fact, proposed instructions should generally be granted if they are correct statements of law, are supported by the evidence, and are not repetitious." Id. at (¶ 24) (citing Green v. State, 884 So.2d 733, 737 (¶ 13) (Miss. 2004). [8]

c. Application of Griffin Rule to Instant Facts

The State asserts that the present issue is not whether evidence supports the inclusion of instruction D-3 but "whether the defense was entitled to such an instruction, even assuming that there was evidence for it." (Appellee Brief 12) Again, this characterization of the issue misses the applicable standard. "The standard simply is that a criminal defendant is entitled to a lesser offense instruction where there is an evidentiary basis for it in the record." Brooks, 2007-KA-00828-COA at (¶24.) (quoting Moore v. State, 799 So.2d 89, 91 (¶ 7) (Miss. 2001). The Griffin rule is predicated upon the defendant's right to have the jury instructed on his theory of defense, and the requisite evidence is slight in order to preserve this right. The fact that the instant appeal pertains to a lesser offense magnifies the error because, as stated in Mease, "[w]here one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction. Mease v. State, 539 So.2d 1324, 1328 (Miss. 1989) (citing Keeble v. United States, 412 U.S. 205, 208 (1973)).

The record reflects that Williams satisfied each and every criterion considered in the Griffin line of cases. First, Williams' defense that he aided suicide arose from the same common nucleus of operative facts giving rise to the murder charge and constituted his theory of defense.

[8] The Brooks opinion further announces the general applicability of Griffin to appeals regarding lesser offenses and specifically finds "Griffin not to be an anomaly." Id. at (¶ 25). Quoting from Williams v. State, 797 So.2d 372, 379 (¶ 23) (Miss. Crt. App. 2001), the decision reasons that the Griffin rule is founded upon weighing the "'defendant's right to have the jury instructed on his theory of defense and the State's interest in prohibiting the jury from returning what the State perceives as being a compromised verdict" but that "between these two competing interests, it is clear the defendant should prevail.'" Id. (emphasis added).

Second, the testimony of the investigators in addition to the other inferences – viewed in a light most favorable to Williams – provided the requisite evidentiary basis to trigger an automatic right to have Instruction D-3 presented to the jury. Third, Williams' theory was not presented elsewhere in the jury instructions[9] and, thus, Instruction D-3 was not repetitive. Fourth, Instruction D-3 was an accurate reflection of the applicable law. Finally, though a factor and not a requirement, the great disparity between the maximum punishment for aiding suicide -- imprisonment in the penitentiary not exceeding ten years, or by fine not exceeding one thousand dollars, and imprisonment in the county jail not exceeding one year – and murder further evinces the egregiousness of this error.[10] For all of these reasons, Williams was entitled to Instruction D-3, and the lower court committed reversible error by denying him this right.[11]

B. THE LOWER COURT COMMITTED REVERSIBLE ERROR BY ALLOWING FATHER OLLIE RENCHER TO CLAIM THE PRIEST-PENITENT PRIVILIEGE REGARDING THE INFORMATION CONTAINED IN HIS STATEMENT GIVEN TO THE OXFORD POLICE DEPARTMENT (R 10).

Conversations, observations and opinions stemming from contact between Father Ollie Rencher and Demetria Bracey (and found within Father Rencher's nine-page statement to Oxford Police) were facts essential to Williams' defense as they demonstrated the high probability that Ms. Bracey took her own life. The lower court erroneously ruled that the priest-penitent privilege applied to substantive information clearly outside of the bounds of this very

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[9] Again, the manslaughter jury instruction effectively negated Williams' theory as it required a finding that he killed Ms. Bracey when his theory of defense is that Ms. Bracey killed herself. (TR Vol. 1 p. 66.)

[10] Miss. Code Ann. § 97-3-49.

[11] The State asserts that Williams was not prejudiced by the denial of instruction D-3 because the jury could have simply acquitted him of murder. This logic is totally unsound and clearly discounted by the very existence of decisions like Griffin, Brooks, and Delashmit.

limited privilege. The record reveals that confusion ran abound as to the privilege issue.[12] Even the State submits its confusion as to how the lower court ruled that the mere location of a conversation alone determined the application of the privilege. (Appellee Br. 24.)

The State's brief faults defense for not asking more follow-up questions. However, defense counsel properly objected and made his proffer of Father Rencher's nine-page statement into the record. (R. Vol. 5, pp. 379-380.) Defense counsel was effectively shut down by the lower court's rulings such that, had he vainly pursued the issue further, counsel would have surely done so to the peril of himself and his client.[13] Due to the high evidentiary value of the testimony that should have been elicited from Mr. Rencher as to those matters contained within his police statement, the errors complained require reversal.

i. The Privilege

Rule 505 of the Mississippi Rules of Evidence plainly requires four elements in order for the priest-penitent privilege to attach: the matter must be a (1) communication (2) confidentially made (3) to a clergyman (4) in his role as a spiritual advisor. Because Father Rencher clearly constitutes a member of the clergy, only the remaining three elements will be discussed, bearing in mind that, because privileges oppose the fundamental principal that any evidence tending to render a consequential fact more or less probable should be admitted, this privilege must be strictly construed. See Trammel v. United States, 455 U.S. 40, 50 (1980); Univ. of Penn. v. Equal Emp. Opp. Comm'n., 493 U.S. 182, 189 (1990).

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[12] Williams submits that the trial court correctly ruled that the priest-penitent privilege cannot, when applicable, be waived by the priest, and Williams also submits that the priest can invoke the privilege on the penitent's behalf.

[13] Even were it true that trial counsel failed to properly preserve the issue, Williams' right to present evidence negating the offense charged outweigh the importance of judicial economy such that a procedural bar in this instance would be unconstitutional. See Brooks v. State, 46 So.2d 94, 97 (Miss. 1950); see also, Rogers v. State, 928 So.2d 831, 837 (¶ 22) (Miss. 2006) (considering, without waiving bar, propriety of priest-penitent privilege though the matter could have been procedurally barred due to failure to object at trial).

a. Communication

Again, "communication" is not defined by Rule 505 or the scant case law in Mississippi regarding this privilege but can be readily understood as not including observations and opinions but only statements themselves or, in very extraordinary instances, non-verbal conduct intended to communicate a statement. As set out in Appellant's initial brief, sister states have clearly held that observations and opinions do not constitute "communication" in the priest-penitent privilege context. See, e.g., Jones v. Dep't of Human Res., 310 S.E.2d 753 (1983); State v. Orfi, 511 N.W.2d 464 (Minn. Ct. App. 1994); Snyder v. Poplett, 424 N.E.2d 396 (Ill. App. 4 Dist. 1981).

b. Confidentiality

A communication is confidential if made privately and not intended for further disclosure except in furtherance of the purpose of the communication. Miss. R. Evd. 505(a)(2). In Rogers v. State, defendant Reverend Rogers had been found guilty of raping a seventeen-year-old girl and appealed on various grounds, including a priest-penitent privilege issue. Rogers v. State, 928 So.2d 831 (Miss. 2006). Specifically, Reverend Rogers argued that the testimony given by Reverend Franklin regarding a conversation between Reverend Franklin and Pastor Hankins, the substance of which amounted to an admission by Reverend Rogers that he had sex with the victim, should have been excluded at trial. Rogers, 928 So.2d at 837 (¶ 20). The Mississippi Supreme Court determined the communication was made in the presence of third parties and, thus, was not confidential and not privileged. Rogers, 928 So.2d at 838 (¶ 24).

c. Role as spiritual advisor

The priest-penitent privilege requires that the communication be made to a clergyman "in his professional character as a spiritual advisor." Miss. R. Evd. 505(b). In Roman Catholic Diocese of Jackson v. Morrison, the Church sought to retain documents concerning child abuse and sexual abuse pursuant to the priest-penitent privilege, which the Mississippi Supreme Court

denied on the basis that these documents were "clearly not directed to anyone in their 'professional character as a spiritual advisor,'" except limited documents "such as letters seeking spiritual guidance or intercessory prayer." 905 So.2d 1213, 1246 (¶ 117) (Miss. 2005).

In the Rogers opinion discussed supra, the Mississippi Supreme Court also examined the purpose of the communication itself and found that Reverend Rogers had disclosed his affair to Reverend Franklin for the purpose of consoling, not spiritual advice. Rogers, 928 So.2d at 838 (¶ 25). Reverend Franklin did not consider Reverend Rogers to be a penitent at the time he made the disclosure and also stated that the conversation was not any type of confession to a preacher. Id. at 837 (¶ 22). Thus, the purpose which motivated Ms. Bracey to speak with Father Rencher and Father Taylor Moore must be considered.

ii. Application to Matters Contained in Father Rencher's Police Statement

Williams provides the following basic breakdown of the events giving rise to Father Rencher's statement and, consequently, the information defense attempted to solicit at trial:

a. The Good Friday Conversation, April, 2005

On this date, Ms. Bracey admitted that she was suffering terrible anxiety and had considered committing suicide; Father Rencher claimed at trial that this was not a confidential conversation. (RE 10); (TR Vol. 2 p. 146). Because the priest acknowledges that this conversation failed to meet the threshold burden of confidentiality, no privilege can attach to this conversation and Ms. Bracey's statement regarding suicide. Furthermore, the privilege only applies to communications; thus, his observation and opinion of her mental state are not privileged as neither amounts to a communication or non-verbal action tantamount to and intended to be a communication. Finally, no information was presented which demonstrates that Father Rencher was acting in his role as a spiritual advisor when this conversation took place. The purpose of Ms. Bracey's conversation was, at best, a cry for emotional help, not spiritual

aid. For each of these reasons taken alone, Father Rencher should have been directed to answer questions stemming from this conversation.

b. Frantic Phone Call, September 24, 2005

Ms. Bracey and Michael Presnell telephonically conferred with Father Taylor Moore approximately 1:00 A.M. regarding Ms. Bracey's distraught state over Williams, who Ms. Bracey believed was attempting to commit suicide. (TR Vol. 2, p. 146). Father Moore advised Ms. Bracey to obtain medical treatment and suggested she either go to the emergency room or speak with a counseling service hotline. (Id.) Father Moore notified Father Rencher of her situation. (TR Vol. 2, p. 148). All of the information and communications stemming from this phone call are not privileged due to the fact that Michael Presnell, a mere third party and non-clergy individual, was present when Ms. Bracey spoke with Father Moore, which crushes the requisite confidentiality component of the privilege.

Even were Presnell not present and confidentiality maintained intact, the privilege remains unavailable due to the fact that this conversation does not constitute a spiritual advisement and was not made to Father Moore and re-communicated to Father Rencher while either was acting in his spiritual capacity toward her. Ms. Bracey and Mr. Presnell instituted this conversation for the purpose of acquiring Ms. Bracey immediate mental health attention, not spiritual aid. Moreover, any opinion or observations stemming from this phone call does not a constitute a "communication" pursuant to Rule 505 and ,thus, not subject to the privilege.

c. Follow-up Phone Call, September, 2005

Father Rencher speaks with Ms. Bracey telephonically and advises her to seek counseling. (TR pp. 146, 150). First, Father Rencher's advice was based upon information he received in an unconfidential manner, as described immediately supra. Second, Father Rencher was not acting in a spiritual capacity at this point; he was merely continuing the pursuit of

acquiring Ms. Bracey immediate mental health attention. Finally, his advice was rendered upon his own observations of Ms. Bracey and her mental health. Consequently, all information – communication or otherwise -- stemming from this conversation is not privileged.

d. Statement that Ms. Bracey Committed Suicide, November 2005

Father Rencher stated to Oxford Police that he believed Ms. Bracey committed suicide upon learning of her death. (TR Vol. 2 p. 150). Father Rencher's belief is an opinion of his own making, not a communication from Ms. Bracey. Furthermore, this opinion could have been cultivated solely from his observation of her. Even were this opinion based on direct communication from Ms. Bracey, all known communications between Ms. Bracey and the priests fails to meet the necessary elements of the privilege. Consequently, his opinion regarding Ms. Bracey's suicide was not privileged.

iii. Conclusion as to Privilege

None of the testimony sought from Father Rencher and found within his police statement constituted matters pertaining to either Father Moore or Father Rencher's role as a spiritual advisor to Ms. Bracey. Ms. Bracey's communications – at least those mentioned within Father Rencher's statement -- were made for the purpose of acquiring mental help, not spiritual guidance. Father Rencher's observations and opinions of Ms. Bracey do not constitute a communication as embraced by Rule 505. Moreover, at no point in the events set out in Father Rencher's statement did Ms. Bracey speak in confidentially with either priest except perhaps her late November, 2005, telephone conversation with Father Rencher, the substance of which stemmed from non-confidential communication and his own opinions. All of this information tends to prove that Ms. Bracey had considered suicide for some time, that she was in a mental state capable of producing suicidal tendencies, and that she did in fact take her own life just as

the defense argued. The probative value of this evidence is so extraordinary that it constitutes reversible error.

VII.

CONCLUSION IN REPLY

The lower court committed reversible error by not allowing Williams to present his theory of the case, which also constituted a lesser offense to the murder charge, within the jury instructions. Mississippi jurisprudence favors the basic tenet of criminal law that a defendant is entitled as of right to place his theory of defense within the jury instructions upon meeting a low-threshold of evidentiary standards. In the instant case, Williams satisfied every criterion for the grant of Instruction D-3 on the basis that aiding suicide constituted his theory of the case and on the basis that it constituted a lesser offense, both of which arose from the same nucleus of facts giving rise to the murder charge. The extraordinary prejudice is plain.

Furthermore, the lower court erred by allowing Father Rencher to claim the priest-penitent privilege as to information falling outside Rule 505 of the Mississippi Rules of Evidence. The testimony sought clearly impacts the likelihood that Ms. Bracey committed suicide to such a great degree that the error must be reversed. For these reasons and those issues asserted in his initial appellant brief, Williams prays that this honorable Court will reverse the jury decision and sentence of the lower court.

DATED this the 30th day of March, 2009.

RESPECTFULLY SUBMITTED,

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VIII.

CERTIFICATE OF SERVICE

I, David G. Hill, of Hill & Minyard, P.A., do hereby certify that I have this day served a true and correct copy of the above and foregoing Appellant's Reply Brief by first class United States mail, postage prepaid, on the following:

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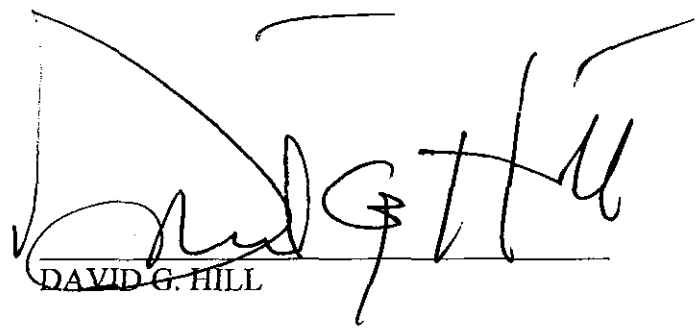
DATED this the 30th day of March, 2009.



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