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 OPENING BRIEF

ORAL ARGUMENT REQUESTED

DAVID G. HILL, MS BAR NO [redacted]
HILL & MINYARD, P.A.
1210 Office Park Drive, 3rd Floor
P.O. BOX 429
OXFORD, MS 38655-0429
(662) 234-4315

I.

CERTIFICATE OF INTERESTED PERSONS

This undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this Court may evaluate possible disqualification or recusal.

Honorable Andrew K. Howorth, trial judge
Mr. Ben Creekmore, district attorney/prosecutor
Mr. Lon Stallings, ADA/prosecutor
Ms. Glenda Hill, Mother to Demetria Bracey, deceased
Mr. Charlie Williams and Ms. Judy Williams/parents of David Jackson Williams
Mr. David Jackson Williams, defendant/appellant
Mr. Jim Franks, Esq., trial counsel
Mr. David G. Hill, Esq., appellant's appeal counsel
Ms. Alicia M. Ainsworth, Esq., appellant's appeal counsel

DATED this the 6th day of November, 2008.

David G. Hill by permission
Paul Chinich [redacted]

David G. Hill, [redacted]
Attorney of Record for Appellant

II.

TABLE OF CONTENTS

III.

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

Cases

Statutes

Other Authorities

IV.

STATEMENT REGARDING ORAL ARGUMENT

Defendant believes that oral argument would assist the Court in reaching a just decision in this case because of the specific facts of this case and the issues presented in this appeal. Accordingly, Defendant requests that oral argument be granted.

V.

STATEMENT OF THE ISSUES

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

II. 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. (RE 10).

III. The lower court committed plain error by allowing the expert testimony of Dr. Steven Hayne.

IV. David Williams was denied effective assistance of trial counsel during his prosecution for the death of Demetria Bracey.

V. The lower court committed reversible error by not granting David Williams' motion to dismiss based on the violation of the 270 day rule.

VI.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

This appeal proceeds from the Circuit Court of Lafayette County, Mississippi. On February 16, 2006, the grand jury returned an indictment against appellant, David Jackson Williams, charging him with the murder of Demetria Bracey, in violation of Mississippi Code §97-3-19(a)(1). (RE 2); (TR Vol. 1 p. 1). After Williams' trial by jury commencing on

September 24, 2007, with the Honorable Andrew K. Howorth presiding, the jury found Williams guilty of the charge of murder. (TR Vol. 1 p. 77). The conviction resulted in a sentence of life imprisonment, filed on September 27, 2007. (RE 4); (TR Vol. 1 p. 79, 80). Post trial motions were timely filed, (RE 5, 6, 7), heard and an order overruling the motions entered on April 17, 2008. (RE 8); (TR Vol. 2 p. 156).Williams timely filed his notice of appeal on April 22, 2008. (RE 9); (TR Vol. 2 p. 157).

B. STATEMENT OF THE FACTS

On November 15, 2005, investigators were called to David Williams' apartment at Old Taylor Place apartments in reference to a possible suicide. (TR Vol. 3 p. 140-141). Once inside, Lieutenant Wes Hatcher discovered the body of deceased Demetria Bracey in the closet of a back bedroom. (TR Vol. 3 p. 141). On November 16, 2005, after being released from the Baptist DeSoto Hospital in Southaven, Williams was questioned by police officers and he admitted that he and Bracey had agreed to a suicide pact and that a few days prior, they had both consumed a large amount of prescription pills and alcohol. (TR Vol. 4 p. 158, 164). Williams said they lay down in a closet in his bedroom, he told her he loved her and they attempted to complete their pact by stabbing themselves. (TR Vol. 4 p. 192). Williams, unsuccessful in his attempt to commit suicide, regained consciousness a couple hours afterwards and that is when he realized Bracey had successfully committed suicide. (TR Vol. 4 p. 158).

A friend of Bracey's, Michael Presnell, came forward on November 16, 2005, and told police Bracey had contemplated suicide at one point and that she seemed stressed over Williams' recent suicide attempt. (RE 11); (TR Vol. 2 p. 139). Presnell was not contacted by Williams' trial attorney to testify on his behalf. Also, on November 17, 2005, after learning of Bracey's death, Father Ollie Rencher, an Episcopalian chaplain at Ole Miss, came forward and gave a statement

to the Oxford Police Department concerning some information about Bracey to which he had knowledge. (RE 10); (TR Vol. 2 p. 145-154). Among other things, Father Rencher told police that during a conversation with Bracey a few months prior, she had admitted to him that she had thought about committing suicide and when Father Rencher heard of her death, he thought she may have done so. (TR Vol. 2 p. 146, 151). Williams' trial attorney called Father Rencher to the stand; however, the trial court allowed him to claim the priest-penitent privilege in regards to any information he felt fell within the privilege. (TR Vol. 5 p. 384-386). Both Rencher's and Presnell's statements allude to the fact that Williams had tried to commit suicide in September 2005 and Bracey was extremely upset of the situation. (RE 10, 11); (TR Vol. 2 p. 139, 146).

On November 16, 2005, Dr. Steven Hayne performed the autopsy on Bracey's body and determined that the manner of death was homicide. (TR Vol. 4 p. 239). Dr. Hayne testifies at trial that he excluded suicide as the manner of death because of the angle and depth of the stab wound, injuries on her neck that he testified were caused by manual strangulation, the absence of hesitation marks on Bracey's body, and the presence of what he called a defensive posturing wound on the back of her hand. (TR Vol. 4 p. 239). Dr. Arthur Copeland, Williams' expert medical legal consultant, challenged Dr. Hayne's conclusions and testified among other things, that Dr. Hayne failed to correlate the autopsy findings with the circumstances of the scene, as is required in forensic pathology. (TR Vol. 5 p. 407) Dr. Copeland also states that before Dr. Hayne concluded that the "injuries" on Bracey's neck were a result of manual strangulation, he should have done a more meticulous dissection of the area, taken more photographs of the area and shown his findings to another expert outside of the office for a second opinion. (TR Vol. 5. p. 407, 428).

At trial, during the instructions conference, Williams' trial attorney proposed Instruction D-3, an instruction on assisted suicide, which was aligned with Williams' defense. (RE 3). The State argued that in order to be granted an instruction, the crime must be a lesser-included offense of the indicted charge. (TR Vol. 5 p. 449). The trial court then refused the instruction holding that assisted suicide is not a lesser-included offense of murder, therefore Williams should not be granted the instruction. (RE 3) (TR Vol. 5 p. 449). Also, the defense counsel offered a manslaughter instruction, D-2, which used language "DAVID JACKSON WILLIAMS without authority of law and without malice aforethought did kill DEMETRIA BRACEY". (TR Vol. 1 p. 71). The trial court denied this instruction in favor of the State's manslaughter instruction which substituted the language "malice aforethought" with "deliberate design". (TR Vol. 1 p. 66).

David Williams was indicted on March 2, 2006. He was brought to trial on September 24, 2007, a lapse of 570 days from the date of his indictment. All of this delay was attributable to the State. David Williams sought no continuances during this period.

VII.

SUMMARY OF THE ARGUMENT

The defendant, David Williams, assigns four errors that necessitate the reversal of his murder conviction.

First, the trial court failed to properly instruct the jury. The lower court committed reversible error by denying his proposed jury instruction on assisted suicide when such instruction constituted his theory of defense. (RE 3). Criminal defendants are entitled to fully develop their theory of the case, whether it is a defense, excuse, or justification, and to have the jury instructed as to the law on his theory. The court must grant the defendant an instruction on

their theory of defense as long as the instruction correctly states the law, is not repetitious, and has an evidentiary foundation. This right to an instruction exists regardless of whether the evidence is weak, inconsistent, of doubtful credibility, and even if the sole testimony in favor of the defendant's theory is his own testimony.

The lower court denied David Williams' instruction on assisted suicide, his theory of defense, which left the jury with no instructions that would allow them to find in favor of Williams' theory. (RE 3). The lower court's denial of Williams' instruction was erroneous because the instruction was a correct statement of the law of assisted suicide, the content was not found in any other instructions, and there was an adequate foundation in evidence for the instruction. RE 3). Additionally, the trial court did not give the jury a manslaughter instruction which was tied to Williams' version of the facts. If the Court were not going to give an assisted suicide instruction, the Court should have given a manslaughter instruction tied to the Defendant's version of the facts. The manslaughter instruction given by the Court was meaningless in terms of Defendant's defense. This error denied Williams of his basic right to have the jury instructed on his theory of defense and warrants reversal of his conviction.

Williams' second assignment error is that the lower court improperly allowed Father Ollie Rencher to claim the priest-penitent privilege during his direct examination by the defense. Mississippi's priest-penitent privilege protects communications between a person and a priest or minister, which are confidential and which take place when the priest is acting in his professional capacity as spiritual advisor. The privilege should be construed narrowly in light of its purpose to protect priests from having to disclose information in violation of their religious vows.

Father Ollie Rencher and Bracey knew each other through their associations with the Ole Miss Episcopalian church community. After hearing about Bracey's death, Father Rencher

voluntarily went to the Oxford Police Department and gave a nine page statement disclosing information about Bracey, including, among other things, the fact that she had mentioned "in passing" and "not in the context of a confession" that she had thought about suicide. (RE 10). Rencher stated several times in his statement and again during his testimony that this particular conversation with Bracey did not take place in the context of a confession and was not a confidential conversation. The substance of the testimony that the defense sought from Father Rencher was derived from his statement to police, the content of which was not privileged because Father Rencher all but explicitly says it is not. However, when Rencher took the stand, the trial judge allowed him to claim the privilege regarding that very same conversation as well as to matters of Rencher's own observations, which would not be privileged at all.

The information concerning Bracey's suicidal thoughts in particular was extremely important to Williams' defense and gave significant support to his theory that she had committed suicide. Father Rencher's testimony was not at all privileged, as it consisted of either his opinions on Bracey's emotional state (not a privileged communication), or communications between them that he explicitly stated were not in confessional or confidential. Therefore the trial court committed reversible error by allowing him to claim the privilege.

Next, the trial court committed plain error by allowing the expert testimony of Dr. Steven Hayne. If a defendant fails to preserve an issue for appeal by failing to make a contemporaneous objection at trial, the defendant must rely on the plain error doctrine for appellate review. The plain error doctrine involves errors that affect the substantive rights of a defendant and covers anything that affects the fairness, integrity or public reputation of judicial proceedings.

The trial judge committed plain error by allowing Dr. Steven Hayne, the state medical examiner who performed the autopsy on Bracey, to testify as an expert at Williams' trial. Hayne

is not qualified. Dr. Hayne is not certified by the American Board of Pathology which is the required certifying board for position as Mississippi state medical examiner and the boards that have certified him are of questionable credibility. Hayne has also previously admitted that he performs over 1,000 autopsies a year, when the National Association of Medical Examiners advises that once a medical examiner performs more than 250 autopsies, they are at risk for error. The likelihood that Hayne's committed mistakes in Bracey's case is supported by Williams' medical expert who testified that several aspects of Hayne's performance of Bracey's autopsy were problematic. Because juries perceive experts to have such high credibility, trial courts should be scrupulous in their determination as to who to qualify as experts, and in Williams' case, the trial court failed to do so, warranting a reversal of his conviction.

Last, Williams was denied effective assistance of counsel during his trial. Ineffective assistance necessitates a two-prong inquiry. First, the defendant must show that counsel's performance was defective, and second, how this defective performance prejudiced the defense. The second prong requires a showing that but for the trial counsel's ineffectiveness, the result of the proceeding would have been different.

Williams' trial counsel's performance was ineffective because he failed to make a motion for a change of venue. There was substantial pretrial publicity relating to Williams case and had counsel tried to change the venue, he probably would have been allowed to do so. (RE 13). Williams' trial counsel also failed to call an available local witness who could have supported his theory of defense by testifying that Bracey had at one point admitted to him that she had thoughts of suicide.

Williams' was also denied effective assistance because his trial counsel failed to introduce into evidence an online chat session that took place between Williams and Bracey

shortly before her death where Bracey admitted she had thought about suicide. (RE 12). In addition to failing to develop evidence of Williams' own medical history in support of his theory he and Bracey had a suicide pact, he also failed to obtain any of Bracey's medical records or records of her medical history. Williams' trial counsel failed to object to the admission of Bracey's death certificate into evidence when the certificate concluded Bracey's death was a homicide, thereby invading the jury's duties as the fact finders.

Last, Defendant David Williams' case should be dismissed due to the lower court's error by not granting Williams' motion to dismiss based on the violation of the 270 day rule from the date of arraignment, March 2, 2006, to the trial which began on September 24, 2007, totaling 570 days. The Defendant sought no continuances during this period and the delay was all attributable to the State of Mississippi.

The defendant, David Williams, respectfully submits to this honorable Court that all five assignments of error warrant reversal of Williams' conviction. However, when considering each error in light of the other errors, it is clear Williams was denied a fair trial and prays the Court will reverse his conviction.

VIII.

ARGUMENT

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

According to Mississippi law, jury instructions are to be read together, taken as a whole, with no one taken out of context. Roberson v. State, 838 So.2d 298, 304 (Miss. App. 2002) (*quoting* Humphrey v. State, 759 So.2d 368 (Miss. 2000)). With respect to the instructions, the main focus is whether the jury understood each party's theory of the case and was fairly

instructed. Wortham v. State, 883 So.2d 599, 604 (Miss. App. 2004) (quoting McGee v. State, 820 So.2d 700, 705 (Miss. App. 2000)).

"It is a basic tenet of our criminal system that a defendant is entitled to fully develop his theory of the defense and, so long as there is some supporting evidence in the record, to have the jury instructed as to the law on that theory." Miller v. State, 733 So.2d 846, 848 (Miss. App. 1998) (*citing* Manuel v. State, 667 So.2d 590, 591 (Miss. 1995)); *See also* Chinn v. State, 958 So.2d 1223, 1225 (Miss. 2007) ("[E]very accused has a fundamental right to have [his] theory of the case presented to a jury, even if the evidence is minimal."); Grant v. State, 788 So.2d 815 (Miss. App. 2001). The quality of the evidence in support of Defendant's theory does not have to be credible, nor does some minimum quantum of proof have to be developed. Miller at 849 (*citing* Manuel at 593). A defendant is entitled to have the jury instructed on his theory of the case, "even though the evidence might be weak, insufficient, inconsistent, or of doubtful credibility, and even though the sole testimony in support of the defense is the defendant's own testimony". Ealy v. State, 757 So.2d 1053, 1059 (Miss. App. 2000); *See also* Miller v. State, 733 So.2d 846, 849 (Miss. App. 1998); Giles v. State, 650 So.2d 846, 849 (Miss. 1995); Hester v. State, 602 So.2d 869, 872 (Miss. 1992).

The court in Hester v. State stated that in a homicide case, as well as other criminal cases, "the court should instruct the jury as to theories and grounds of defense, justification, or excuse supported by the evidence, and a failure to do so is error requiring reversal". Hester, 602 So.2d 869, 872 (Miss. 1992). However, a trial court may refuse to grant an instruction which incorrectly states the law, is repetitious, or is without foundation in evidence. Fairley v. State, 871 So.2d 1282, 1285 (Miss. 2003). But a trial court considering an instruction, "should err on the side of inclusion rather than exclusion". Booze v. State, 964 So.2d 1218 (Miss. App. 2007)

(*quoting* Jones v. State, 798 So.2d 1241 (Miss. 2001) (in reference to instructions on lesser-included offenses) (*See also* Lenard v. State, 552 So.2d 93 (Miss. 1989) (involving an instruction on self-defense)).

In the case at bar, the trial court refused David Williams' proposed instruction D-3, an instruction on assisted suicide, which read (RE 3):

> If you find from the evidence in this case that the defendant, DAVID JACKSON WILLIAMS, is not guilty of the crime of murder, then you should continue with your deliberations to consider the elements of the lesser crime of assisting suicide. Assisting suicide is the willful, or in any manner, advising, encouraging, abetting, or assisting of another person to take, or in taking, the latter's life, or in attempting to take the latter's life.
>
> If you find from the evidence in this case beyond a reasonable doubt that:
>
> 1. On or about November 13, 2007 in Lafayette County, Mississippi;
> 2. That DEMETRIA BRACEY was a human being; and
> 3. That DAVID JACKSON WILLIAMS did willfully or in any manner, advise, encourage, abet or assist DEMETRIA BRACEY in taking her life;
>
> then you shall find the defendant guilty of assisting suicide.
>
> If the State has failed to prove any one or more of the above listed elements beyond a reasonable doubt, then you shall find DAVID JACKSON WILLIAMS not guilty of assisting suicide.
> (TR Vol. 1 p. 72).

This instruction fits Williams' version of the facts that Bracey had committed suicide. Investigators John Marsh and Jimmy Williams testified that Williams told them he and Bracey had spent several days drinking and taking pills and they had agreed that they would both commit suicide together. (TR Vol. 4 p. 158, 191-192). Williams stated that they both sat in the closet and talked for a few minutes and they then stabbed themselves as planned. (TR Vol. 4 p. 192). Bracey had successfully committed suicide; however, Williams woke up a few hours later, having been unsuccessful in his attempt. (TR Vol. 4 p. 192).

Because the trial court refused the assisted suicide instruction, (RE 3), the jury was not properly instructed because they were not instructed on his version of the facts and theory of defense. The trial court ruled against allowing the assisted suicide instruction because the Court stated the defendant is only allowed an instruction on his theory of the case if it involves a lesser-included offense. (TR Vol. 5 p. 449). This ruling is incorrect because the defendant's right to an instruction presenting his theory of the case is not limited to an instruction on lesser-included offenses, but also encompasses his theory of defense, justification and/or excuse, as stated in Hester. Assisted suicide was Williams' theory of defense and the jury should have received an instruction reflecting the same, allowing the jury to reach such a conclusion as an option.

Additionally, since proposed instruction D-3 was a correct statement of the law, had an evidentiary foundation, and was not found anywhere else in the instructions, it was improper for the trial court to deny the instruction. First, the proposed instruction was an accurate recitation of the law on assisted suicide. Section 97-3-49 of the Mississippi Code, entitled "Assisting Suicide" states: "A person who willfully, or in any manner, advises, encourages, abets, or assists another person to take, or in taking, the latter's life, or in attempting to take the latter's life, is guilty of [a] felony[.]" Miss. Code. Ann. §97-3-49. Since instruction D-3 accurately reflected the language of this Code section, it was a correct statement of the law on assisted suicide. (RE 3).

Next, Williams' theory of assisted suicide was not found anywhere else in the instructions. The jury was given instructions on murder and without deliberate design manslaughter. (TR Vol. 1 p. 65-67). Therefore, the instruction on assisted suicide would not have been repetitive. Both of those instructions include the premise that David Williams killed Bracey. Neither is based on his version of the facts, which is that he encouraged her to affect her own death, but that he did not kill her.

Last, instruction D-3 had a foundation in evidence. (RE 3). Detective Williams and Marsh testified to David Williams' statement that he and Bracey had a suicide pact, that she completed her part of the pact and committed suicide, and he did not, as he passed out from the pain. This testimony constitutes a sufficient evidentiary foundation because, according to Ealy, the evidence is sufficient to support an instruction even if the sole testimony in support of the defense is the defendant's own testimony. Also, Father Ollie Rencher's testimony would have added to Williams' evidentiary basis for the instruction, had Rencher been required to testify (discussed in the issue regarding the priest-penitent privilege, infra).

It should also be noted that the court should have granted some kind of manslaughter instruction which was tied to the facts of Williams' defense, especially since the court refused his assisted suicide instruction. The trial court gave a manslaughter instruction which used the language, "If you find from the evidence...that David Jackson Williams, without authority of law and without deliberate design, did kill Demetria Bracey, then you shall find the defendant guilty of manslaughter". (TR Vol. 1 p. 66). Since Williams' defense was that he did not in fact kill Bracey, that she killed herself, this manslaughter instruction is not tied to the facts of Williams' defense either. The trial Court failed to give a proper manslaughter instruction even after inquiring of counsel if encouraging a person to commit suicide would be manslaughter to which counsel replied yes (TR Vol. 5 pp. 396-397). The manslaughter instruction given was meaningless to the defense in terms of Defendant's version of the events leading up to Ms. Bracey's death.

In conclusion, the trial court did not properly instruct the jury in light of the evidence and Williams' theory of the case. Since the trial court denied Williams' instruction on assisted suicide, (RE 3), nor was a proper manslaughter instruction given, his right to put his theory of the

case in front of the jury was violated. This failure of the trial court to properly instruct the jury warrants reversal of Williams' conviction.

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 TO THE POLICE.

1. FACTUAL BACKGROUND

Father Ollie Rencher, an Episcopalian Chaplain to Ole Miss, became acquainted with Demetria Bracey through her involvement in the Episcopalian community on campus. (TR Vol. 2 p. 145). On November 17, 2005, after learning of Bracey's death, Father Rencher contacted the Oxford Police Department and voluntarily provided a statement in which he disclosed additional information concerning Demetria Bracey that he considered relevant to the investigation of her death. (RE 10); (TR Vol. 2 p. 145-154). In this statement, he explained that the nature of his pastoral relationship with Bracey essentially involved sporadic meetings over a cup of coffee or brief emails "just to check in," but that they had discussed her personal life on a few occasions. (TR Vol. 2 p. 145, 146). He also indicated that when he heard of Bracey's death, his first thought was that she had committed suicide. (TR Vol. 2 p. 151).

Father Rencher identified one particular occasion which occurred on Good Friday in April, 2005, when Bracey acknowledged during their conversation, that she was experiencing terrible anxiety and had thought about committing suicide. (TR Vol. 2 p. 146). He asserted the source of her anxiety was the demands of student life, such as exams, relationships, plans for a summer abroad and preparations for her future in general. (RE 10); (TR Vol. 2 p. 149). He also revealed that Bracey was not taking any medication at that time for her anxiety, but that he advised her to look into it. (TR Vol. 2 p. 153). Although he emphasized this was clearly an

emotionally disturbing time for Bracey, he points out that her situation was not unusual for young women at Ole Miss, so he "didn't dwell on it". (TR Vol. 2 p. 153).

In his statement, Father Rencher also described an occurrence on September 24, 2005, when Bracey and Michael Presnell called Father Taylor Moore at 1:00 in the morning, asking if he could meet them at the church. (RE 10); (TR Vol. 2 p. 146). Apparently, Bracey was very distraught because her boyfriend, David Williams, the defendant, who was in Olive Branch at the time, was trying to commit suicide. (TR Vol. 2 p. 146). Consequently, Father Moore advised her to obtain medical treatment to help her calm down, either by calling a counseling services number, or by Presnell accompanying her to the emergency room. (TR Vol. 2 p. 146). The next day, Father Moore sent an email to Father Rencher notifying him of the situation. (TR Vol. 2 p. 148). Father Rencher said he called Bracey a few days later to check on her and once again suggested that she attend counseling to get some help. (TR pgs. 146, 150). He also admitted that upon learning of Bracey's death and in light of his knowledge of her previous emotional issues, his first thought was that it was possible she committed suicide. (TR Vol. 2 p. 151).

During discovery for the trial of the present case, the defense counsel received a copy of Father Rencher's nine page statement to the police and sought to call him to the stand to testify regarding the information he provided in his statement. (RE 10); (TR Vol. 5 p. 371). Specifically, the defense wanted to elicit testimony regarding Bracey's demeanor during the six months prior to her death, that she had contemplated suicide, that Rencher had advised her more than once to seek medical treatment, and that upon learning of her death, he thought it was a possibility she had committed suicide. (TR Vol. 5 p. 374).

Before Father Rencher was called to the stand, a meeting took place in chambers where his attorney argued that the priest-penitent privilege should apply if a question requires

disclosure of protected information. (TR Vol. 5 p. 377). The defense countered with the argument that by voluntarily disclosing certain information in a statement to the police, (RE 10), Father Rencher waived the right to claim the privilege for that particular information. (TR Vol. 5 p. 374, 375, 378). The focus of the issue then became whether Father Rencher has the right to waive the privilege and, if so, whether he waived it by voluntarily disclosing the content of the communications with Bracey. (TR Vol. 5 p. 375-380).

The trial court ruled first, that Father Rencher could not waive the privilege because it may only be waived by the penitent and her personal representative, and second, that he could claim the privilege on a question-by-question basis as to any information he learned in a "priest-penitent context". (TR Vol. 5 p. 380). The defense then introduced a copy of Father Rencher's statement to the police as a proffer of his testimony if he had been required to testify. (RE 10); (TR Vol. 5 p. 380). Once Father Rencher took the stand, the trial court permitted him to claim the privilege regarding most of the information that the defense specifically sought to elicit from him, which essentially defeated the purpose of calling him as a witness. (TR Vol. 5 p. 385, 386, 387). The communications the Court ruled were covered by the privilege included (1) whether Father Rencher advised Bracey to seek medication on Good Friday, 2005, and (2) whether Bracey had ever mentioned that she had considered suicide. (TR Vol. 5 p. 385, 386).

2. LEGAL ANALYSIS

Generally speaking, the priest-penitent privilege is a rule of evidence which prevents disclosure of certain confidential information provided to clergymen during the scope of their religious duties. The privilege is reflected in Mississippi Rule of Evidence 505 and provides, in part:

(a) Definitions. As used in this rule:
(1) A *"clergyman"* is a minister, priest, rabbi or other similar functionary of a church, religious organization, or religious denomination.
(2) A communication is *"confidential"* if made privately and not intended for further disclosure except in furtherance of the purpose of the communication.
(b) General Rule of Privilege. 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.
(c) Who May Claim the Privilege. 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."
M.R.E. 505.

When determining the proper scope of the priest-penitent privilege, bear in mind that evidentiary privileges are not favored. Com v. Stewart, 547 Pa. 277, 282, 690 A.2d 195, 197 (Pa. 1997)[1]. Like other testimonial privileges, the priest-penitent privilege contradicts the basic principle that "'the public... has a right to every man's evidence'". Trammel v. United States, 45 U.S. 40, 50, 100 S.Ct. 906, 912, 63 L.Ed.2d 186, 5 Fed. R. Evid. Serv. 737 (1980) (quoting United States v. Bryan, 339 U.S. 323, 331, 70 S.Ct. 724, 730, 94 L.Ed. 884 (1950)). Therefore, it "must be strictly construed and accepted 'only to the very limited extent that permitting a refusal to testify ... has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth'". Trammel at 50 (*quoting* Elkins v. United States, 364 U.S. 206, 234, 80 S.Ct. 1437, 1454, 4 L.Ed.2d 1669 (1960)).

The public policy behind the priest-penitent privilege recognizes "the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return". Trammel at 51. However, the rationale of the privilege was not concern for the penitent, but instead, concern that the priest would be required to disclose confidential communications in violation of his religious vows. State v. Szemple, 135 N.J. 406 (N.J. 1994).

[1] Since there is very little reported case law in Mississippi relating to the priest-penitent privilege, examination of the law in other jurisdictions is beneficial to the development of a complete analysis.

Because the privilege is narrowly construed in light of its policy considerations, it follows that not every communication between a priest and penitent justifies the protection of the privilege. *See* People v. Carmona, 627 N.E.2d 959 (N.Y. 1993) ("[T]he privilege may not be invoked to enshroud conversations with wholly secular purposes solely because one of the parties to the conversation happened to be a religious minister."). The plain language of M.R.E. 505 reveals a few basic conditions that must be present in order for the privilege to protect a communication from disclosure.

First, the privilege only applies to communications from the penitent to the clergyman. *See* M.R.E. 505(b) (protecting "a communication by the person to a clergyman"). Thus, the privilege does not protect the clergyman's own observations or knowledge of facts that were not received as part of the priest-penitent relationship. *See* Jones v. Department of Human Resources, 168 Ga. App. 915, 310 S.E.2d 753 (1983) (the privilege did not prevent parents' pastor from testifying as to his observations of the child's condition and the parents' conduct with respect to him); State v. Orfi, 511 N.W.2d 464 (Minn. Ct. App. 1994) (hospital chaplain's testimony concerning defendant's general demeanor, observable by all at the hospital, was admissible as unprotected by the privilege); Snyder v. Poplett, 424 N.E.2d 396 (Ill.App.4.Dist. 1981) (testimony regarding decedent's speech, hearing, sight, and writing was not barred by the privilege).

Next, to justify application of the privilege, the communication must have been confidential, i.e. "made privately and not intended for further disclosure". M.R.E. 505(a)(2). The test for determining the existence of confidentiality is intent. Cmt. M.R.E. 502 (Lawyer-Client Privilege). Thus, a communication made in public or disclosed in the presence of third parties should not be considered confidential. Rogers v. State, 928 So.2d 831, 837 (Miss. 2006) (*citing*

Hewes v. Langston, 853 So.2d 1237, 1264 (Miss. 2003)); Cmt. M.R.E. 502.

Finally, the priest-penitent privilege does not protect a communication unless it was made to the clergyman while he was serving in his "professional character as spiritual advisor". Rogers at 837 (privilege does not apply where priest testifies he did not consider himself to be defendant's spiritual advisor). The phrase, "in the clergyman's professional capacity," was recently interpreted by the Alabama Supreme Court as requiring the communication to be made to a priest while he is serving in his role as a provider of spiritual care, guidance or consolation to penitent. Ex parte Zoghby, 958 So. 2d 314, 322 (Ala. 2006). Moreover, confidential communications to clergymen, even those seeking counseling or solace, are not protected by the privilege unless motivated by spiritual or penitential considerations. Com v. Stewart, 547 Pa. 277, 288, 690 A.2d 195, 200 (Pa. 1997).

In the present case, it was reversible error for the trial court to allow Father Ollie Rencher to invoke the priest-penitent privilege to protect certain information relating to Demetria Bracey. In fact, the information Father Rencher disclosed in his statement to the police should have been open to examination; not because his statement should have constituted a waiver of the privilege, but because the privilege simply is not applicable to any of his disclosures in the first place. (RE 10). The privilege does not apply because the communications disclosed in Father Rencher's statement failed to satisfy the basic requirements discussed above: (1) a communication from the penitent to the priest, (2) confidentiality, and (3) a communication made to priest in his professional character as spiritual advisor.

First, the privilege does not cover the conversation that took place on Good Friday in 2005 between Father Rencher and Bracey, when she expressed her anxiety and thoughts of suicide. In his statement to police, he admits the conversation on Good Friday did not take place

"in the context of a confession[,] but just a conversation in passing". (RE 10); (TR Vol. 2 p. 146). In addition, during direct examination at trial when Father Rencher was asked whether he had advised Bracey to seek medication on that Good Friday – information he had disclosed in his police statement – Father Rencher claimed he was not comfortable answering the question, but then expressly admits that the conversation did not take place in the context of a confession and that the conversation was not confidential. (RE 10); (TR Vol. 5 p. 384).

Father Rencher's admissions alone should have stripped that specific conversation of the protection of the privilege. The privilege does not cover conversations that take place "in passing" or communications that are not received as part of a priest-penitent relationship, as was the case with the conversation on Good Friday of 2005. (RE 10). Rencher also says the conversation took place in the hallway of the church after others had come to make their confessions, which is an indication the conversation was not confessional in nature and not confidential. Since the conversation did not take place while Father Rencher was serving in his professional character as spiritual advisor and was not confidential, the privilege does not apply to protect the conversation from disclosure. Otherwise, the purpose of the privilege would be frustrated and every communication made to a priest would be prevented from disclosure just because it was made to a priest.

Father Rencher's refusal to answer whether or not he had advised Bracey to seek medication on Good Friday of 2005 was also not privileged because it was a communication made by Father Rencher to Bracey and not vice versa. In addition, his advisement was based on an observation he made of Bracey's emotional state; an observation not derived from information received as a result of any privileged relationship, as discussed above.

Next, the information Father Rencher disclosed regarding the situation on September 24, 2005, is not covered by the privilege because the communications were not confidential, including the fact that Bracey was suffering from extreme distress over the situation and that she was advised by both Father Moore and Father Rencher to seek medical treatment and counseling services. No aspect of that occurrence evidences intent on Bracey's part that the communications made should be confidential, including her emotional state. None of the communications were made privately and several people, including Michael Presnell, Father Moore and Father Rencher, knew of the incident and that Bracey was suffering from anxiety as a result. The fact that Father Moore emailed Father Rencher the details of the incident, and Father Rencher, in turn, disclosed them to the police, (RE 10), further illustrates the fact that none of the communications regarding the September 24 incident were intended to be confidential. The protection of the privilege does not cover any information or communications relating to this incident as a result of this lack of confidentiality.

Finally, the privilege does not apply to protect Father Rencher's statement made to police that when he found out about Bracey's death, his first thought was the possibility she committed suicide. This statement by Father Rencher constitutes his opinion based on his conversation with Bracey on Good Friday and his knowledge of her emotional state after the September 24 incident, neither of which concern facts learned through a priest-penitent relationship with Bracey (RE 10). As stated above, opinions and observations are not considered protected by the privilege, therefore Father Rencher should have been required to testify regarding his statement to police that he thought it was possible that Bracey had committed suicide.

None of the information contained in Father Rencher's statement to police should have been protected by the priest-penitent privilege because the privilege was inapplicable to all the

communications which the defense sought to elicit from Rencher on the stand. While it is true he is protected from disclosing any information to which the privilege is properly applicable, the subject matter of the defense's examination of Father Rencher was derived solely from the statement he gave to the Oxford Police Department and the privilege does not cover any of that disclosed information (RE 10). Moreover, the trial court's improper application of the privilege resulted in Father Rencher voluntarily disclosing significant and relevant information concerning the case in a nine page statement to police, but subsequently refusing to disclose that same pertinent information at trial (RE 10).

In conclusion, the trial court erred by allowing Father Rencher to claim the priest-penitent privilege for communications that do not fall under the umbrella of protection provided by the privilege. Father Rencher's testimony was vital to Williams' theory that Bracey committed suicide and would have also bolstered Williams' factual basis for his proposed instruction on assisted suicide (RE 3). The trial court's error caused such significant damage to Williams' defense that reversal is appropriate.

C. THE LOWER COURT COMMITTED PLAIN ERROR BY ALLOWING THE EXPERT TESTIMONY OF DR. STEVEN HAYNE.

The state's chief pathologist, Dr. Steven Hayne, conducted the autopsy on Bracey's body and testified at trial as to the cause and manner of her death. The trial court should not have allowed Hayne to testify as an expert because he does not meet the qualifications necessary to provide expert testimony. However, Williams' trial lawyer made no objection to Hayne as an expert witness, so Williams now relies on the plain error doctrine for appellate review.

When a defendant fails to preserve an issue by making a contemporaneous objection or some how bringing it to the Court's attention, the defendant must rely on the plain error doctrine

to raise the issue on appeal. Flora v. State, 925 So.2d 797 (Miss. 2006). Plain error is defined as error that affects the substantive rights of the defendant. Taylor v. State, 754 So.2d 598, 603 (Miss. App. 2000) (*citing* Grubb v. State, 584 So.2d 786, 789 (Miss. 1991). The doctrine covers anything that "seriously affects the fairness, integrity or public reputation of judicial proceedings". Porter v. State, 749 So.2d 250, 261 (Miss. App. 1999) (*citing* United States v. Olano, 507 U.S. 725, 732-735, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993).

Allowing Hayne to testify as an expert significantly affected David Williams' substantive rights to a fair trial because Hayne's qualifications are questionable at best. During the State's examination of Dr. Hayne's qualifications, the State asked:

Q. Is there a certification process like board certified?

A. Yes, sir. There are three boards: anatomic pathology and clinical pathology by the College of Medical Pathology, forensic pathology for the American Board of Forensic Pathologists, and also forensic medicine by a third board.

Q. And you are board certified by those?

A. Yes, sir, in four areas.

(TR Vol. 4 p. 220).

Under Mississippi law, the state medical examiner is required to "be certified in forensic pathology by the American Board of Pathology", which is considered the standard certifying organization in the forensic pathology profession. Miss. Code. Ann. §41-61-55. However, according to Justice Diaz's concurring opinion in Edmonds v. State, Hayne has admitted he is not certified in forensic pathology by the American Board of Pathology because he walked out of the examination. Edmonds v. State, 955 So.2d 787, 802 (Miss. 2007). Additionally, the boards that Hayne does cite for his certification do not reach the level of credibility of the American

Board of Pathology, so states Justice Diaz, citing a magazine article which discusses Hayne's lack of qualifications:

> "Hayne testified at Maye's trial that he is 'board certified' in forensic pathology, but he isn't certified by the American Board of Pathology, the only organization recognized by the National Association of Medical Examiners and the American Board of Medical Specialties as capable of certifying forensic pathologists. According to depositions from other cases, Hayne failed the American Board of Pathology exams when he left halfway through, deeming the questions "absurd." Instead, his C.V. indicates that he's certified by two organizations, one of which (the American Board of Forensic Pathology) isn't recognized by the American Board of Medical Specialties. The other (the American Academy of Forensic Examiners) doesn't seem to exist. Judging from his testimony in other depositions, it's likely Hayne meant to list the American College of Forensic Examiners. According to Hayne, the group certified him through the mail based on "life experience," with no examination at all. Several forensics experts described the American College of Forensic Examiners to me as a "pay your money, get your certification" organization. A February 2000 article in the *American Bar Association Journal* makes similar allegations, with one psychologist who was certified through the group saying, "Everything was negotiable-for a fee."
>
> Id. at 803 (*citing* Radley Balko, The Case of Corey Maye, Reason (Oct.2006) (*citing* Mark Hansen, Expertise to Go, 86 A.B.A.J. 44-52 (Feb.2000)).

In addition to Dr. Hayne's lack of sufficient qualifying board certifications, he has admitted to performing more than 1,500 autopsies per year, when the National Association of Medical Examiners states that a medical examiner should not perform more than 250 autopsies a year. Radley Balko, CSI: Mississippi: A case study in expert testimony gone horribly wrong, Reason, Nov. 2007, *available at* 2007 WLNR 25960084. Once a medical examiner has reached 325 autopsies a year, the National Association of Medical Examiners considers them to have a "'Phase II deficiency'; at that point, it will not accredit a practice, regardless of any other criteria". Id. Radley Balko also states in his article:

> Vincent DiMaio, author of *Forensic Pathology*, widely considered the profession's guiding textbook, says of Hayne's remarkable annual output: "You can't do it. After 250 [forensic] autopsies, you start making small mistakes. At 300, you're going to get mental and physical strains on your body. Over 350, and you're talking about major fatigue and major mistakes." That isn't even a quarter of the number of forensic autopsies Hayne has

said he performs each year.
Id.

The very real possibility that Dr. Hayne's conclusions constitute a "major mistake" is apparent in Williams' case. As Dr. Arthur Copeland (Williams' expert) testified, Dr. Hayne failed to correlate the autopsy with the circumstances at the scene by failing to investigate Bracey's circumstances. (TR Vol. 5 p. 406, 408). He did not contact her relatives or attempt to locate her medical records or find out whether Bracey had any previous suicide attempts. (TR Vol. 5 p. 408). Dr. Copeland also states that since this case was so complicated, Hayne should have shown his findings to another expert, outside Hayne's office for another opinion. (TR Vol. 5 p. 407). Dr. Copeland claims Hayne should have kept the death certificate pending until he was able to conduct an adequate investigation of Bracey's circumstances. (TR Vol. 5 p. 409).

In addition, Hayne cites the injuries on Bracey's neck, which he concludes was a result of manual strangulation, as one of the basis for his conclusion that Bracey's manner of death was a homicide. (TR Vol. 4 p. 239). However, Dr. Copeland testifies that Hayne should have not have concluded these marks were a result of manual strangulation unless he performed a "step side or layered dissection" of her neck and made internal photographs, in order to distinguish between a case of strangulation and body decomposition. (TR Vol. 5 p. 407). Dr. Copeland testified that the injuries to Bracey's neck were probably just decomposition and supports his conclusion by also stating that there were no other areas of trauma on Bracey's body, as would be typical in cases of strangulation. (TR. Vol. 5 p. 408).

Hayne's omissions are likely a product of his massive work load and dubious qualifications. The trial court should not have allowed him to testify as an expert without the proper qualifications. As the Mississippi Supreme Court states in Edmonds, "[j]uries are often in awe of expert witnesses because, when the expert is qualified by the court, they hear impressive

lists of honors, educations and experience... Therefore, juries usually place greater weight on the testimony of an expert witness than that of a lay witness". 955 So.2d 787, 792 (Miss. 2007). Just by Hayne testifying that Bracey was strangled and making a rash conclusion that her death was a homicide, whether or not he is truly qualified to give such opinion, the jury is likely to give his testimony considerable weight. Indeed, Hayne was the primary witness to testify that Ms. Bracey's death was in fact a homicide. Therefore the trial court committed plain error by allowing Hayne as an expert witness, which affected David Williams' substantive right to a fair trial, and his conviction should be reversed as a result.

D. DAVID WILLIAMS WAS DENIED EFFECTIVE ASSISTANCE OF TRIAL COUNSEL DURING HIS PROSECUTION FOR THE DEATH OF DEMETRIA BRACEY.

Mississippi follows the Strickland test for ineffective assistance of counsel claims. Mohr v. State, 584 So.2d 426, 430 (Miss. 1991). According to Strickland v. Washington, ineffective assistance of counsel claims must satisfy two components: first, the defendant must show the court that counsel's assistance was deficient, and second, the defendant must show how he was prejudiced by this deficiency. Strickland, 466 U.S. 668, 687 (1984) (*See also* Stringer v. State, 454 So.2d 468, 466 (Miss. 1984). The first prong requires the Court to ask "whether counsel's assistance was reasonable considering all the circumstances". Strickland at 688. The second prong requires a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different". Id. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Mohr v. State, 584 So.2d at 430 (*citing* Handley v. State, 574 So.2d 671 (Miss. 1990)).

David Williams' trial counsel was deficient in several ways, which but for such deficiency, the verdict would have been different.

First, trial counsel failed to move for change of venue despite the abundance of pretrial publicity regarding the case (RE 13). Both the federal and state constitutions guarantee the right to a fair trial by an impartial jury. Johnson v. State, 476 So.2d 1195, 1208 (Miss. 1985). "The accused has a right to a change of venue when it is doubtful that an impartial jury can be obtained." Howell v. State, 860 So.2d 704 (Miss. 2003) (*citing* Davis v. State, 767 So.2d 986, 993 (Miss. 2000). There was an inordinate amount of articles in the local newspapers concerning Williams' case, both before and during the trial. (RE 13); (TR Vol. 2 p. 92-138). Given the fact that Oxford and its surrounding areas have such a small population, there is no doubt that most, if not all, of the venire persons had read about the case. Had Williams' trial lawyer made a motion for change of venue, it would have likely been granted; therefore, it was unreasonable for him to not make such a motion given the significant amount of pretrial publicity of the case.

Second, Williams' trial counsel's performance was deficient because he failed to call on available local witness, Michael Presnell, in support of the facts constituting Williams' defense. Presnell told police in a statement that he believed Bracey had been treated for depression and that she had told him at one point that she had thought about committing suicide. (RE 11); (TR Vol. 2 p. 139-140). Williams' trial counsel told his parents that he could not locate Presnell; however, Presnell was present in Oxford, Mississippi prior to and during the trial and available to testify on Williams' behalf. Presnell's testimony would have significantly aided Williams' theory of defense had he testified and counsel was ineffective for failing to secure his presence at trial.

Other deficiencies in Williams' trial lawyer's performance include:

(1) failure to introduce evidence of an online chat between Williams and Bracey during which Bracey talks about wanting to commit suicide, (RE 12),

(2) failure to obtain Bracey's mental health records or medication/prescription records,

(3) failure to object to the admission of the death certificate into evidence when the document prematurely concluded Bracey's death was a homicide, and

(4) failure to develop evidence of Williams' own extensive medical history in support of Williams' suicide defense.

Williams' defense was significantly prejudiced by his trial counsel's deficient performance because counsel did not adequately and effectively develop a factual basis for Williams' defense. Because of his lawyer's deficient performance, as described above, and the lack of instruction on assisted suicide (RE 3), the jury had little reason to find for Williams. Had Williams' defense been sufficiently developed and put before the jury, the result of the proceedings would have been different because the jury would have had the actual option of accepting Williams' side of the story. In a case as serious as a murder prosecution, Williams' lack of effective assistance of counsel was significant and prejudicial to him; therefore, reversal of his conviction is appropriate.

E. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY NOT GRANTING WILLIAMS' MOTION TO DISMISS BASED ON A VIOLATION OF THE 270 DAY RULE.

David Williams was arrested on November 17, 2005 and he waived arraignment on March 2, 2006. Williams trial was set for September 24, 2007. On September 19, 2007, a total of 564 days after his arraignment, Williams filed a Motion to Dismiss for Violation of 270 Day Rule. (RE-14); (TR Vol. 1 p. 30). The Court made a verbal ruling on the record denying Defendant's Motion to Dismiss for Violation of the 270 Day Rule. (TR Vol. 3 p. 59).

A defendant is guaranteed the right to a speedy trial according to the Sixth Amendment of the United States Constitution, as well the Mississippi State Constitution. U.S. Const. Amend.

VI; Miss. Const., Art. 3, §26. Mississippi Code Annotated §99-17-1 provides that "unless good cause be shown, and a continuance duly granted by the court, all offenses for which indictments are presented to the court shall be tried no later than two hundred seventy (270) days after the accused has been arraigned". Miss. Code. Ann §99-17-1. Additionally, the defendant is under no duty to bring himself to trial. *See* Barker v. Wingo, 407 U.S. 514, 527 (1972); Nations v. State, 481 So.2d 760, 761 (Miss. 1985); McGhee v. State, 657 So.2d 799 (Miss. 1995).

Williams' right to a speedy trial and his statutory right to have a trial within 270 days of arraignment were violated in this case and the trial court should have granted his Motion to Dismiss. (RE-14). The 564 day delay between the arraignment and the filing of the Motion to Dismiss is a violation of the statute's 270 day time limitation on its face. Moreover, the Defendant never sought a continuance of this case. Additionally, nor did the Court ever excuse the State from going forward within the 270 day period by granting a continuance upon good cause shown. For these reasons alone, the trial court should have dismissed the indictment against Williams. Additionally, however, Williams suffered extensive anxiety as a result of the delay and his family was also the object of public disrepute.

For all of these reasons combined, the trial court erred by not dismissing the indictment against Williams for such a violation of his statutory rights to a speedy trial. Therefore, Williams respectfully requests this honorable Court to declare such a delay between his arraignment and trial a violation of his constitutional and statutory rights and reverse his judgment accordingly.

IX.

CONCLUSION

David Williams respectfully submits that based on the authorities submitted herein, this Court should vacate the judgment entered below (RE 4). Williams was denied his right as a

criminal defendant to have the jury instructed on his theory of defense, which was that Bracey committed suicide. His proposed instruction on assisted suicide, which reflected his version of the facts, was erroneously denied by the lower court and the manslaughter instruction that was granted, did not reflect Williams' version of the facts (RE 3). Consequently, the jury received no instruction allowing them to render a verdict consistent with his theory of the case.

The lower court also committed error by allowing Father Ollie Rencher to claim the priest-penitent privilege for information which did not properly fall under the privilege's umbrella of protection. Not only had Father Rencher already disclosed the information to which he was expected to testify in a statement to the police (RE 10), he had admitted during his statement that information was not in the context of a confession and that it was not confidential; therefore, the communications were not privileged and it was error for the trial court to allow him to claim the privilege.

The court also committed error by allowing Dr. Steven Hayne to testify as an expert. The state medical examiner must be certified by the American Board of Pathology, and although Hayne does not officially hold the position of state medical examiner, he is the state's "chief" pathologist and he is not certified by the proper board. In addition, the number of autopsies Hayne performs is several times that of the amount that the National Association of Medical Examiners recommends. Therefore, Hayne is not qualified as a medical examiner and it was error for the court to allow him to testify as such.

Williams was denied effective assistance of counsel during his trial. His trial lawyer failed to move for a change of venue, which was defective because of the vast amount of pretrial publicity concerning Williams' case (RE 13). Also, his counsel failed to contact a local witness who would have testified on behalf of Williams, he failed to introduce an online chat between

Williams and Bracey which would have benefited Williams' theory of defense (RE 12), he failed to obtain Bracey's mental health records or medication records, he failed to object to the admission of the death certificate into evidence when it prematurely concluded Bracey's death was a homicide, and his counsel failed to develop Williams' own extensive medical history in support of his defense.

Finally, the Defendant argues that the Court committed reversible error by failing to dismiss the indictment against David Williams for flagrant violation of his right to a speedy trial pursuant to Mississippi's 270 day rule, and pursuant to the Mississippi and United States Constitutions.

DATED this the 7th day of November, 2008.

RESPECTFULLY SUBMITTED,

DAVID JACKSON WILLIAMS,
Appellant/Defendant

By: _____

DAVID G. HILL, [redacted]
HILL & MINYARD, P.A.
Post Office Box 429
Oxford, Mississippi 38655
(662) 234-4315

ALICIA M. AINSWORTH [redacted]
HILL & MINYARD, P.A.
Post Office Box 429
Oxford, Mississippi 38655
(662) 234-4315

Williams and Bracey which would have benefited Williams' theory of defense (RE 12), he failed to obtain Bracey's mental health records or medication records, he failed to object to the admission of the death certificate into evidence when it prematurely concluded Bracey's death was a homicide, and his counsel failed to develop Williams' own extensive medical history in support of his defense.

Finally, the Defendant argues that the Court committed reversible error by failing to dismiss the indictment against David Williams for flagrant violation of his right to a speedy trial pursuant to Mississippi's 270 day rule, and pursuant to the Mississippi and United States Constitutions.

DATED this the 6th day of November, 2008.

RESPECTFULLY SUBMITTED,

DAVID JACKSON WILLIAMS,
Appellant/Defendant

David G. Hill, by permission
Paul Chiniche

By: _____

DAVID G. HILL, [redacted]
HILL & MINYARD, P.A.
Post Office Box 429
Oxford, Mississippi 38655
(662) 234-4315

ALICIA M. AINSWORTH, [redacted]
HILL & MINYARD, P.A.
Post Office Box 429
Oxford, Mississippi 38655
(662) 234-4315

X.

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 Opening Brief by first class United States mail, postage prepaid, on the following:

Mr. Jim Hood, Esq.
Attorney General Office
Post Office Box 220
Jackson, MS 39205-0220

Honorable Andrew K. Howorth
Lafayette County Circuit Court Judge
One Courthouse Square
Oxford, MS 38655

Mr. Ben Creekmore, DA
District Attorney's Office
Post Office Box 1478
Oxford, MS 38655

Mr. Lon Stallings, ADA
District Attorney's Office
Post Office Box 429
Oxford, MS 38655

DATED this the 6th day of November, 2008.

David G. Hill, by permission
Paul Chinich, [redacted]

DAVID G. HILL