


I. CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for the Appellant hereby certifies
That the following persons have an interest in the outcome of this appeal.
This representation is made in order that the justices of the Supreme Court
May evaluate possible disqualification or recusal:

1. Pedro Lima, Parchman, Ms.
2. David L. Walker, Batesville, Ms.
3. Jessica Houck, Independence, Ms.
4. John Champion, Hernando, Ms.
5. Rhonda Amis, Hernando, Ms.

Respectfully submitted,

This the 13th day of August 2008.


David L. Walker MBI [REDACTED]
Counsel for Appellant

II. TABLE OF CONTENTS

I.	Certificate of Interested Persons.....	i
II.	Table of Contents.....	ii
III.	Table of Authorities.....	iii
IV.	Statement of Issues.....	1
V.	Statement of the Case.....	2-12
VI.	Summary of Argument.....	13
VII.	Argument.....	14-18
VIII.	Conclusion.....	18
IX.	Certificate of Service.....	18

III. TABLE OF AUTHORITIES

1. Bessent v. State, 808 So. 2d 979 (Miss. Ct. App. 2001).....	17
2. Crawford v. State, 754 So. 2d 1211, 1215 (Miss. 2000).....	15
3. Fears v. State, 779 So. 2d 1125, 1127 (Miss. 2004).....	14
4. Middleton v. State, 2007-KA-01023-COA, decided April 22, 2008.....	16
5. Williams v. State, 970 So. 2d 727 (Miss. Ct. App. 2007).....	17
6. <i>The Clarion-Ledger</i>	15

IV. STATEMENT OF THE ISSUES

A. WHETHER THE TRIAL COURT ERRED IN FINDING DR. STEVEN HAYNE TO BE AN EXPERT WITNESS PURSUANT TO MRE 702.

B. WHETHER THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR A NEW TRIAL AND IN THE ALTERNATIVE JUDGMENT NOTWITHSTANDING THE EVIDENCE.

V. STATEMENT OF THE CASE

PROCEDURAL HISTORY

Pedro Lima was indicted by the grand jury of Tate County, Mississippi on October 24th, 2006 for the capital murder of Daniel Houck while engaged in the crime of robbery in direct violation of section 97-3-19 (2) (e) MCA 1972. Clerk's record at 4. He proceeded to trial on February 4th, 2008 and the petit Jury returned a verdict of guilty of capital murder. R. at 318. A poll of the petit jury pursuant to URCCCP 3.10 indicated that the verdict was unanimous. R. at 318-319. The trial court sentenced the Appellant to life in prison without the possibility of parole. R. at 322. The Appellant filed a motion for a new trial and in the alternative for a judgment notwithstanding the verdict and the trial court denied the same. Clerk's record at 43-45. The Appellant then filed a notice of appeal of his conviction. R. at. 46.

APPELLANT'S TRIAL WITNESSES

MARCELO MENDEZ

Marcelo Mendez lived in a barn by Danny Houck's house and had known Mr. Houck for approximately six years. R. at 17. He was working part-time helping Mr. Houck fix a restaurant. R. at 18. He knew the Appellant, who also worked for Mr. Houck at the restaurant. R. at 19. He worked at the restaurant on the day before Mr. Houck was found dead. He thought that the Appellant was suppose to work also, but he did not. R. at 20.

Mr. Houck was mad at the Appellant for not coming to work. Id. The Appellant was living in Mr. Houck's house. Id. The before he and Mr. Houck left work, Mr. Houck received a call and someone asked him to bring toilet tissue to the house. R. at 21. On the way home, Mr. Houck told him that he was not mad at the Appellant, but was going to ask him to leave the house because he did not show up for work. Id. Mr. Houck dropped him off at the barn and told him that he was going to the house. R. at 22.

On cross examination Mr. Mendez testified that Mr. Houck was kind of mad that day. R. at 25. Mr. Houck paid his workers at the restaurant in case or traded out services. R. at 26.

JESSICA HOUCK

Jessica Houck was the daughter of Danny Houck. R. at 28. She Went to her father's house on March 26th 2006 and found and found a man laying on the floor. R. at 32. She could not identify him because of the way the body was positioned. R. at 33. She then ran and told her mother what she had discovered. Id. She later realized that this person was her father. R. at 34. He was found in the family room. R. at 37. Her father primarily traveled in a green car. Id. This car was not at the house at which she found her father. R. at 39. He kept cash, cards photographs and identification a money clip that he carried in a shirt pocket. R. at 40. He also had a cell telephone that he carried with him. Id.

On cross examination Ms. Houck testified that her father was a large man. R. at 41. She did not notice any broken glass, broken furniture near her father's body. R. at 42. Her father had an in-charge personality. R. at 44.

DAVID FREEMAN

On March 26th, 2006 David Freeman was a patrolman with the Tate County Sheriff's Department. R. at 45. He was dispatched to an address on Barr Road. Id. He entered the room where the deceased body was located and saw blood splattered on the wall and Mr. Houck laying on the floor. R. at 47. He saw blood on the floor with a footprint in it. R. 49.

On cross examination Patrolman Freeman testified that he did not search the house for any type of weapons, knives, guns, clubs, hatchets. R. at 52.

ASHLEY BRIDGES

At the time of the trial Ashley Bridges was nineteen years old and had been charged as an accessory after the fact in this case. R. at 54. She testified that the district attorney had not promised her anything nor made any kind of plea bargain with her. Id. He had asked her to tell the truth about what happened. Id. At one point in time the Appellant was her boyfriend. R. at 56. She had two children with him. Id. They were boyfriend and girlfriend in March of 2006. Id. At that time they were living on Barr Road. Id. The Appellant was working at Mr. Houck's restaurant at the time and they were living rent-free at the Barr Road house. Id. Mr. Houck provided household necessities for them. R. at 57. In exchange for these items, the Appellant

worked at the restaurant. R. at 57. However, the Appellant thought that he should be paid as well as being able to live in the house free of rent and being supplied food and diapers. Id.

According to Ms. Bridges the Appellant was mad on March 25th, 2006 because he wanted to be paid for his work. R. at 57. The Appellant did not go to work that day. He was drinking beer, tequila and maybe rum. R. at 58. He asked her to call Mr. Houck twice that day to make sure that he was coming to the house. R. at 58-59. During the first telephone call Mr. Houck advised her that he was mad at the Appellant. R. at 59. During the second telephone call she requested Mr. Houck to bring over some toilet paper. She found this odd because there was toilet paper in the house. R. at 60.

Mr. Houck came to the house at approximately 11:00-11:30. However, she did not know that he had come into the house. R. at 61. She was in her room and heard a sound like something hitting up against the wall like a thump. R. at 63. She then heard the Appellant scream Mr. Houck's name and Mr. Houck scream "Please, God, help me." Id. She then departed her room and walked toward the living room and saw the Appellant with blood on the side of one of his arms. Id. The Appellant then made her go into the living room and she saw Mr. Houck laying in a corner and bloody. R. at 64. The Appellant then started throwing things at Mr. Houck. Id. The Appellant threw an old-timey iron at Mr. Houck. R. at 64-65. She saw the Appellant go through Mr. Houck's pocket and get out credit cards and papers, but no money. R. at 65. He also took his car keys and his cell phone. R. at 66. She saw the Appellant with a knife.

However, she did not see him with a knife when she saw him with blood on one of his arms. There was a toolbox in the living room with knives in it. R. at 69. Eventually, she got into Mr. Houck's car with the Appellant and departed. R. at 69-70. The Appellant threw a knife and Mr. Houck's cell telephone out of the car. R. at 70. They drove to Missouri and then to Mexico. R. at 70-71. Her family eventually helped return from Mexico. R. at 76. Both the Appellant and Mr. Houck were mad on the day in question. R. at 79. She denied that she had anything to do with the death of Mr. Houck. R. at 80.

On cross examination Ms. Bridges testified that she did not see the fight between the Appellant and Mr. Houck. R. at 81. The district attorney went over this in detail with her. Id. She gave two statements concerning this case. R. at 82. She admitted that there was nothing in a statement that she had given to law enforcement officers that the Appellant told her to tell that a "Shorty" had anything to do with the death of Mr. Houck. R. at 89. She admitted that her statements to law enforcement officials were not the same. R. at 90. She did not know what her sentence would be in this case, but she did not expect to go to jail. Id. The Appellant and Mr. Houck got crossways about buying expensive items. Id. Mr. Houck was taller and weighed more than the Appellant. R. at 92. Mr. Houck spent some nights at the Barr Road house and thus knew where things were kept. R. at 96. She did not hear the conversations between the Appellant and Mr. Houck on the day in question. R. at 98. On redirect examination, she admitted that she lied to law enforcement officers. R. at 104.

CHUCK POE

Chuck Poe testified that he was an agent with the Mississippi Bureau of Investigation. R. at 112. He investigated the death of Mr. Houck. Id. He went to the house on Barr Road. R. at 116. He interviewed Ms. Bridges, who initially gave an untruthful statement surrounding the events that occurred on Barr Road. R. at

118. He also interviewed the Appellant. To his knowledge, the Houck vehicle was never recovered. Id. The Appellant advised Investigator Poe in this statement that Marcelo Mendez had killed Mr. Houck. R. at 122. Mr. Mendez then made the Appellant go to Mexico with him. R. at 123. Investigator Poe advised the Appellant this could not be true. R. at 124. He then recanted his statement and admitted that he killed Mr. Houck with a knife and an iron. R. at 124. He admitted to going through the pockets of Mr. Houck. R. at 125. A video was made of this statement, but something happened to it. R. at 125. A video of this statement does not exist. R. at 126. According to Investigator Poe's recollection, the Appellant did not claim self-defense in this statement. R. at 127.

On cross examination, Investigator Poe testified that on March 25 or 26 2006 there were two angry men at the house on Barr Road. R. at 128. The Appellant's statement to him was not under oath. R. at 129. There was nothing in Investigator Poe's notes about the Appellant being asked if he acted in self-defense when he fought with Mr. Houck. R. at 130. Ms. Bridges advised Investigator Poe that she was in the back room when the events between the Appellant and Mr. Houck occurred. R. at 131.

OSCAR BLYTHE

At the time of the trial Oscar Blythe worked for the United States Marshal's Service in Memphis, Tn. R. at 135. He helped to apprehend the Appellant. R. at 136. He recovered a black and silver lock-blade knife from the vehicle that the Appellant had been traveling in. R. at 140.

On cross examination Deputy Marshal Blythe testified that he did not find any items that could be used to secure a person or kidnap a person in the room in which the Appellant had been staying. R. at 147. Self defense is a defense to a homicide charge. R. at 148.

BRAD LANCE

Brad Lance was sheriff of Tate County, Mississippi at the time of the trial and before that he had served as chief deputy sheriff. R. at 150. He did a walk-through of the house at which Mr. Houck's body was found. R. at 151. He was with Investigator Poe when Ms. Bridges was interviewed. R. at 155. He interviewed the Appellant on September 6th, 2006. R. at 157. This interview was video-taped. R. at 160. The Appellant originally implicated Marcelo as the person who killed Mr. Houck. Id. After being told that Marcelo was not a suspect in the death of Mr. Houck and playing a tape of Ms. Bridges' statement, the Appellant admitted to killing Mr. Houck. R. at 161. He agreed with Ms. Bridges version of events. Id. He killed Mr. Houck with a knife and an iron. He was angry. R. at 162. Mr. Houck was angry at the Appellant for buying more expensive items for his family. Id. He, Ms. Bridges and their child left the house in

Mr. Houck's vehicle. R. at 163. The Appellant did not assert self defense in the initial interview. Id. He did not claim that Mr. Houck attacked him nor that there was a physical struggle with Mr. Houck. Id. There is nothing on the tape made of the interview with the Appellant. R. at 164.

On January 31st, 2007 the Appellant requested an interview with Mr. Lance. The Appellant had heard that Ms. Bridges had been locked up when she came to visit him. R. at 166-167. He wanted her released. R. at 168. He told Mr. Lance that only he knew the real reason that he killed Mr. Houck. R. at 169. On March 9th, 2007 the Appellant sent Mr. Lance another request to talk with him. Id. He gave Mr. Lance a video-taped-statement. R. at 172.

On cross examination Mr. Lance testified that Ms. Bridges gave two statements that differed in the role that Shorty played in the death of Mr. Houck. R. at 179. Ms. Bridges never told him that she actually witnesses the incident between the Appellant and Mr. Houck. R. at 180. He did not recall asking the Appellant whether he acted in self-defense in the statement given on September 6th, 2006. R. at 181. According to the Appellant's personal information sheet, he was five foot three and weighed 140 pounds. Id. In his last statement given to Mr. Lance, the Appellant claimed that Mr. Houck grabbed a knife and grabbed him by the hair. R. at 182.

DR. STEVEN HAYNE

Dr. Steven Hayne testified that he worked as the chief state pathologist for the Department of Public Safety Medical Examiner's office, State of Mississippi.

R. at 194. He conceded that he is not the chief medical examiner for the state. R. at 197. He was asked by the Tate County coroner to perform an autopsy on the body of Mr. Houck. R. at 206. Mr. Houck had injuries consistent with having his throat slashed. R. at 209. He identified thirteen slash wounds on the body of Mr. Houck. R. at 210. The carotid arteries of Mr. Houck were slashed. R. at 214. He found wounds on Mr. Houck consistent with defensive posturing injuries. R. at 216. Mr. Houck's body contained five stab wounds. R. at 218. The cause of Mr. Houck's death was two lethal slash wounds to the neck resulting in slash wounds of the right and left common carotid arteries and the larynx. R. at 219. The manner of death was homicide. Id.

On cross examination, Dr. Hayne testified that the blows to the head of Mr. Houck were not lethal. Id. Mr. Houck was six feet tall and weighed two hundred pounds. Id. He could not testify as to whether the homicide was justifiable or non-justifiable. R. at 220. The number of wounds on the body of Mr. Houck would indicate a struggle with someone. R. at 222.

ARTHUR STEVEN CHANCELLOR

In 2006 Arthur Steven Chancellor was employed by the Mississippi Bureau of Investigation as a senior crime scene analyst. R. at 227. He went to the Barr Road house to perform a crime scene investigation. Id. He found an unopened package of toilet paper sitting on an island in the kitchen. R. at 231. He found an old fashioned iron next to the head of Mr. Houck. R. at 235. In the room where the body of Mr. was found, there were some items that had been moved over, such as a small table. R. at 245.

On cross examination Mr. Chancellor testified that he did not think that a man would let his throat be cut without a fight. R. at 252. Mr. Houck's body was located in the middle of the room. R. at 254.

APPELLANT TRIAL WITNESS

PEDRO LIMA

Pedro Lima was born in Mexico. He came to Tate County, Ms. to work for Mr. Houck at the Rio Linda restaurant doing general construction work. R. at 257-258. Mr. Houck promised him a job and a place to live. R. at 259. He moved into a house owned by Mr. Houck with Ashley Bridges on Barr Road. Id. Mr. Houck stayed at the house sometimes. R. at 260. Mr. Houck did not come and pick up the Appellant for work on the day in question. R. at 261. He argued with Ms. Bridges because Mr. Houck wanted him to work until midnight or later. Id. Mr. Houck did not pick up the Appellant because Mr. Houck was mad at him because he did not want to work late. R. at 262. Mr. Houck came and talked to the Appellant and advised him that he would have to move out of the house if he did not work late. Id. He never asked Ms. Bridges to call Mr. Houck. Id. He did not know if the house need toilet tissue. R. at 263. Mr. Houck came to the house at approximately eleven or twelve. Id. He talked with the Appellant in the living room. Id. Mr. Houck told the Appellant that he would have to leave the house because he would not work late. The Appellant explained to him why he could not work late. Id. Mr. Houck then became mad. Id. When Mr. Houck got up to go, he told the Appellant that he had something for him. That is when he got a knife. Id.

Mr. Houck secured the knife from where he was sitting. It was big and long. R. at 264. Mr. Houck tried to stab the Appellant with this knife. He then ran to the laundry machine and grabbed an iron. Id. He threw the iron at Mr. Houck. Id. He hit Mr. Houck a second time when he was trying to get. He took the knife away from Mr. Houck and stabbed him with it. R. at 265. Mr. Houck made the first move in the fight. Id. The Appellant feared for his life. Id. He cut Mr. Houck's throat because he was afraid that Mr. Houck would get up and kill him. R. at 266. He ran because he was an illegal immigrant and scared. Id. He was not drunk. Mr. Houck was approximately one foot taller than the Appellant. Id.

On cross examination the Appellant testified that he had money. R. at 267. Mr. Houck was not paying the Appellant to work for him. Id. The fight between The Appellant and Mr. Houck was over the Appellant having to work late. R. at 268. He told Mr. Lance that he agreed with Ms. Bridges statement because he was afraid that if he said it was not true, then Ms. Bridges would get into trouble for lying. R. at 270. Mr. Houck wanted the Appellant to leave the house, but did not want to pay him for his work. He cursed the Appellant and got mad at him. R. at 271. The Appellant did not tell law enforcement officers that he acted in self-defense because he did not think that he would be believed on the basis that he was an illegal immigrant. R. at 276-277. Mr. Houck tried to kill the Appellant first, so he had to defend himself. R. at 277. Mr. Houck at one time threatened to kill Ms. Bridges. R. at 287.

VI. SUMMARY OF ARGUMENT

The trial court erred in accepting Dr. Steven Hayne as an expert witness pursuant to MRE 702. Dr. Hayne's work load and reliability raised crucial questions in this case. He is not board certified by the American Board of Forensic Pathology in forensic pathology..

The court erred in failing to grant the Appellant's motion for a new trial and in the alternative for a judgment notwithstanding the verdict. The weight and sufficiency of the evidence presented at the trial favored the Appellant. His testimony that he acted in self-defense in the fight with Mr. Houck was uncontradicted.

VII. ARGUMENT

The Appellant objected to Dr. Steven Hayne being accepted as an expert witness pursuant to Mississippi Rule of Evidence 702. R. at 203. He argued that based upon the voir dire of Dr. Hayne testimony is not the product of reliable principles and methods. R. at 204. The district attorney responded that he did not think that the trial court heard a single question asked of Dr. Hayne concerning his principles and methods. Id. The trial court overruled the Appellant's motion and declared Dr. Hayne an expert witness in the field of forensic pathology. Id.

The Appellant include this issue in his motion for a new trial and in the alternative for a judgment notwithstanding the verdict, thus preserving this issue for review. Fears v. State, 779 So. 2d 1125, 1127 (Miss. 2004). At the hearing on the aforesaid motion the Appellant argued to the trial court that pursuant to Mississippi Transportation Commission v. McLemore, 863 So. 2d 31, 34 (Miss. 2003) and MRE 702 that the trial court should determine that proposed expert testimony is relevant and reliable. R. at 329. The Appellant did not dispute that Dr. Hayne's testimony was relevant. Id. However, the Appellant did dispute the reliability of Dr. Hayne's testimony. R. at 330. Dr. Hayne testified that he performed, in general, one thousand five hundred autopsies a year. R. at 200. Dr. Hayne conceded that a book entitled *Forensic Pathology* recommends that approximately 250 autopsies should be performed a year by a doctor. R. at 199. The National Association of Medical Examiners indicates that a medical examiner should perform no more that 250 autopsies per year. After 325 autopsies that

organization refuses to certify an examiner's practice. Dr. Hayne did not know how many autopsies that he had performed by the end of March 2006. R. at 201. He could have performed more than 350 autopsies or less than 350 autopsies in the first three months of 2006. Id. His work was not peer reviewed in this particular autopsy. R. at 203. He conceded that he is not certified by the American Board of Pathology in forensic pathology. R. at 198. Dr. Hayne testified that he was the chief state pathologist, but did not claim to be chief state medical examiner. R. at 197. He explained his ability to perform the aforesaid number of autopsies with the comment that "Some people can't work like I do." R. at 201. The assistant district attorney responded to the Appellant's argument at the motion for new trial and in the alternative for a JNOV that Dr. Hayne's testimony was relevant and reliable. R. at 335. She also noted Dr. Hayne's extensive history of testifying for years in thousands of cases. R. at 335. She also noted that he was certified in some regards. Id. The trial court ruled that it was proper in admitting Dr. Hayne as an expert witness. R. at 336-337.

The Appellant would note that on August 4th, 2008 that the commissioner of the Mississippi Department of Public Safety removed Dr. Hayne from a list of state designated pathologists. *The Clarion-Ledger*, August 5th, 2008. He barred county coroners from using Dr. Hayne to perform autopsies. *The Clarion-Ledger*, August 6th, 2008.

The admission of evidence is within the discretion of the trial court. **Crawford v. State**, 754 So. 2d 1211, 1215 (Miss. 2000). In **Middleton v. State**, 2007-KA-01023-

COA, decided April 22, 2008 the Court of Appeals that some factors to consider in evaluating the qualifications of a medical doctor in criminal case include the knowledge, and experience. Additionally, the Court noted that peer review of the work of an expert witness would be helpful in evaluating the qualifications of an expert witness. Id. The Appellant would concede that the Court did hold that the lack of peer review does not constitute automatic inadmissibility. Id.

If the trial court exercises its discretion on the issue of the admission of expert testimony in a manner that is clear wrong, then reversal of that decision is proper. Williams v. State, 970 So. 2d 727 (Miss. Ct. App. 2007). The method used by Dr. Hayne concerning the number of autopsies that he performed each year raises doubt about the reliability of the results of the autopsies performed, his lack of board certification in the field of forensic pathology by the American Board of Pathology and the lack of a peer review of his work in this case requires the Court to hold that the trial court abused its discretion in admitting the testimony of Dr. Hayne based upon the facts and circumstances of this case as noted herein.

The trial court denied the Appellant's motion for a new trial and in the alternative for a JNOV. R. at 45. A motion for a new trial seeks to vacate the judgment on grounds related to the weight of the evidence. Williams, supra. A motion for a JNOV tests the sufficiency of the evidence. Id. Each of these motions is addressed to the discretion of the trial court. Id. A reviewing court may only reverse the trial court's decision if the trial court abused its discretion when it overruled these motions. Id.

The weight of the evidence produced at the trial of this case weighs heavily in favor of the Appellant. There were no eyewitnesses to the fight that occurred between the Appellant and Mr. Houck. Ms. Bridges did not see the fight between the Appellant and Mr. Houck. R. at 81. Mr. Mendez did not see anything that went on at the Barr Road house that day or night between the Appellant and Mr. Houck. R. at 25. The Appellant testified that Mr. Houck made the first move in the fight. R. at 204. The Appellant feared for his life. Id. According to Mr. Lance, Mr. Houck grabbed a knife and grabbed the Appellant by the hair in the fight. The Appellee presented no evidence to contradict these assertions by the Appellant. Thus, the familiar rule that where there is conflicting testimony, the jury is the judge of the credibility of the witnesses is negated. **Bessent v. State**, 808 So. 2d 979 (Miss. Ct. App. 2001).

The evidence presented by the Appellee at the trial of this case is insufficient to prove the Appellant guilty of capital murder beyond a reasonable doubt. In considering a contention that there was insufficient evidence to support the verdict, a reviewing court must consider all of the evidence, not just the evidence that supports the Appellee's case, in the light most favorable to the Appellee. **Williams**, supra. There must be substantial evidence in the record of such quality and weight that, having in mind the beyond a reasonable doubt burden of proof standard, reasonable fair-minded individuals in the exercise of impartial judgment might reach different conclusions regarding the guilt of the Appellant, in order for the trial court's decision to be affirmed. The testimony presented at the trial of this weighs solely in favor of the Appellant as noted herein. His


testimony that he acted in self-defense in the fight with Mr. Houck and that he feared for his life is uncontradicted by any witness for the Appellant. The Appellee did not claim that the Appellant said in any of the various statements that he gave to law enforcement officials that he hid and ambushed Mr. Houck. Both men were mad at the other. Therefore. The trial court abused its discretion in denying the Appellant's motion for a new trial and in the alternative for a judgment notwithstanding the verdict.

VIII. CONCLUSION

In conclusion, the trial court erred in permitting Dr. Steven Hayne to testify as an expert witness at the trial of this case and abused its discretion in overruling the Appellant's motion for a new trial and in the alternative for a JNOV.

Respectfully submitted,

This the 13th day of August 2008.


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IX. CERTIFICATE OF SERVICE

I, David L. Walker, hereby certify that I have this day either mailed or hand-delivered a copy of the Appellant's Brief to Hon. Jim Hood, attorney general, Hon. Jimmy McClure, III, circuit court judge and Hon. John Champion, district attorney, at their usual business addresses.

This the 13th day of August 2008.

