IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

KENNETH MOORE — APPELLANT

VS. — NO. 2008-KA-0946

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

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V. THE APPELLANT IS PROCEDURALLY BARRED FROM ARGUING THAT THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT HIS MURDER CONVICTION; HOWEVER, WITHOUT WAIVING THE PROCEDURAL BAR, THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE APPELLANT'S MURDER CONVICTION.

STATEMENT OF THE FACTS

On the night of August 18, 2007, a fight broke out between Cordarius McChriston and the Appellant, Kenneth Moore, Jr., just outside Club Greasy in Holmes County, Mississippi. (Transcript p. 139-141, 161, 176). After the fight was broken up, the Appellant walked down the driveway away from the club. (Transcript p. 142, 162, 184). Later, the Appellant returned with a gun and shot an unarmed Mr. McChriston. (Transcript p. 144 - 145, 157 - 158, 162 - 163, 177, 184, and 193). Mr. McChriston died as a result of the gunshot wound. (Transcript p. 205). The Appellant did not deny shooting Mr. McChriston. (Exhibit S-3).

The Appellant was arrested, indicted, tried, and convicted of murder. He was sentenced to life in the custody of the Mississippi Department of Corrections.

SUMMARY OF THE ARGUMENT

The Appellant is procedurally barred from arguing that the trial court abused its discretion in denying his motion for continuance as the record does not indicate that the issue was raised in his motion for new trial. Procedural bar notwithstanding, reversal on this issue is not warranted as the Appellate failed to establish that he suffered an injustice as a result of the denial of a continuance.

The trial court did not abuse its discretion in allowing a facial photograph of the victim into evidence. The photograph was not gruesome and was introduced to identify the victim. As long as the introduction of the photograph serves some legitimate, evidentiary purpose, the admission is not an abuse of discretion regardless of the potential for arousing the emotion of the jurors.

The trial court did not abuse its discretion in failing to *sua sponte* grant a mistrial when it learned that Juror Sarah Wade, who was released as a juror prior to the conclusion of the State's case in chief, was related to a potential State's witness, Dewan Magee, who ultimately did not testify asthe Appellant did not establish how he was prejudiced by the trial court's decision.

The trial court did not abuse its discretion with regard to witness Latravis Skinner's testimony on cross-examination. The trial court overruled the first several objections made by defense counsel during Mr. Skinner's cross-examination, but sustained the objection after the witness testified that he did not know the Appellant's weight nor was he able to compare the size of the Appellant with the size of the victim. Prior to that point in the testimony, the trial court did not know whether or not the witness had the requisite personal knowledge to answer the questions. As such, it was not an abuse of discretion to allow the questions up to that point. Additionally, the Appellant failed to show how the questions and testimony prejudiced his case. Furthermore, once the trial court sustained the objection, the Appellant failed to request that the trial court admonish the jury to disregard the questions and testimony at issue.

The Appellant is procedurally barred from arguing that there was insufficient evidence to support his murder conviction. While he did move for directed verdict at the close of the State's case in chief, the Appellant failed to renew the motion at the close of his case. Additionally, the record does not indicate that he presented a peremptory instruction to the trial court or that he filed a motion for judgment notwithstanding the verdict. Without waiving the procedural bar, there was sufficient evidence to support his conviction of murder. The jury was presented with the evidence and with instructions regarding both murder and heat of passion manslaughter and did not find sufficient evidence that the Appellant was acting in the heat of passion. This Court's appellate authority is limited where there is credible evidence in the record from which the jury could have found or reasonably inferred each element of the offense.

ARGUMENT

I. THE APPELLANT IS PROCEDURALLY BARRED FROM ARGUING THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING HIS MOTION FOR CONTINUANCE.

The Appellant first asserts that the trial court abused its discretion in denying his motion for continuance. However, the Appellant is procedurally barred from raising this issue on appeal as the record does not indicate whether the issue was raised in his motion for new trial. If a motion for new trial was filed, the record does not contain a copy of the motion nor does it contain a copy of the trial court's order with regard to the motion. It is the Appellant's duty to present a complete record. *Acker v. State,* 797 So.2d 966, 971 (Miss. 2001). This motion is necessary to complete the record as Mississippi law is clear that "the denial of a continuance in the trial court is not reviewable unless the party whose motion for continuance was denied makes a motion for a new trial on this ground." *Metcalf v. State,* 629 So.2d 558, 562 (Miss.1993). *See also Morgan v. State,* 741 So.2d 246, 255 (Miss. 1999), and *Jackson v. State,* 423 So.2d 129, 131-32 (Miss.1982). As such, the issue is procedurally barred.[1]

Without waiving the bar, the trial court did not abuse its discretion in denying the continuance. The record indicates that the Appellant moved for a mistrial because his counsel needed additional time to prepare for the case. With regard to these type issues, the Court of Appeals has stated:

"The decision whether to grant or deny a continuance is a matter left to the sound

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[1]While the Appellant's first issue is set forth as "whether the court erred when it failed to grant defendant's motion for continuance," the Appellant also argues that "in wake of the discovery violations it was error for the court to deny the motion for continuance and motion to disallow statement." (Appellant's Brief p. 4 and 5). However, this "sub-issue" regarding the Appellant's motion to disallow statement is also procedurally barred as the Appellant cites to no legal authority to support his claim that the trial court erred in denying the motion to disallow statement. *See Walker v. State,* 913 So.2d 198, 222 (Miss. 2005).

> discretion of the trial court. Unless manifest injustice is evident from the denial of a continuance, this Court will not reverse." *Strohm v. State*, 845 So.2d 691, 695(¶ 8) (Miss. Ct. App.2003). The defendant bears the burden of presenting concrete facts that show how the denial of a continuance caused particular prejudice to his case. *Stack v. State*, 860 So.2d 687, 691-92(¶ 7) (Miss.2003). When a motion for continuance is filed because an attorney has not had enough time to adequately prepare for trial, it "is subject to proof and also as to facts as they may appear from that which is known from the trial court." *McCormick v. State*, 802 So.2d 157, 160(¶ 13) (Miss.Ct.App.2001).

Tarver v. State, 15 So.3d 446, 456 (Miss. Ct. App. 2009) (*emphasis added*). In the case at hand, the record illustrates that the trial court believed defense counsel had adequate time to prepare for trial as she had notice of the trial being set for four months prior to the trial date. (Transcript p. 40 and 43). Moreover, as noted by the *Tarver* Court, the Court of Appeals "has upheld numerous denials of motions for continuances where the defense counsel had a limited amount of time to prepare for trial." *Id.* at 457.

Furthermore and most importantly, on appeal the Appellant wholly failed to show how this denial substantially prejudiced his case. As Mississippi law is clear that "the decision to grant or deny a motion for continuance will not be grounds for reversal unless it is shown to have resulted in an injustice," reversal is not warranted regardless of the procedural bar. *Hill v. State,* 4 So.3d 1063, 1067 (Miss. Ct. App. 2009)(citing Miss. Code Ann. § 99-15-29 (Rev.2007) and *Coleman v. State*, 697 So.2d 777, 780 (Miss.1997)).

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING A PHOTOGRAPH OF THE VICTIM'S FACE INTO EVIDENCE.

The Appellant next questions "whether the court erred when it allowed a prejudicial photograph to be admitted for identification purposes." (Appellant's Brief p. 5). The photograph at issue is a facial photograph of the victim after he died. (Exhibits Record p. 29). The photograph is not gruesome and shows no blood or other injuries. It was introduced in part to identify the

victim. (Transcript p. 210).

The "admissibility of photographs rests within the trial court's sound discretion and their admissibility will be upheld absent a showing of abuse of discretion." *Jordan v. State,* 995 So.2d 94, 110 (Miss. 2008) (quoting *Sharp v. State*, 446 So.2d 1008, 1009 (Miss.1984)). The Appellant, however, argues that the photograph was prejudicial. (Appellant's Brief p. 6). This Court has previously held that "the fact that a photograph of the deceased might arouse the emotions of jurors does not of itself render it incompetent in evidence so long as introduction of the photograph serves some legitimate, evidentiary purpose." *Stevens v. State,* 808 So.2d 908, 926 (Miss. 2002) (citing *May v. State*, 199 So.2d 635, 640 (Miss.1967)). This Court has also held that "[a] photograph of a victim may be admitted for purposes of identification." *Id. See also Havard v. State,* 928 So.2d 771, 797 (Miss. 2006). "As long as a photograph has an evidentiary purpose, it may be admitted despite its potential to affect the emotions of jurors." *Jordan*, 995 So.2d at 110. (citing *Spann v. State*, 771 So.2d 883, 895 (Miss.2000)). Acordingly, the trial court did not abuse its discretion in allowing the photograph into evidence as it had an evidentiary purpose.

III. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN FAILING TO *SUA SPONTE* ORDER A MISTRIAL BECAUSE OF ALLEGED JUROR MISCONDUCT.

The Appellant also questions "whether a mistrial should have been declared in light of juror misconduct." (Appellant's Brief p. 7). The Appellant asserts that the jury was not fair and impartial in light of the fact that Juror Sarah Wade, who was released as a juror prior to the conclusion of the State's case in chief, was related to a potential State's witness, Dewan Magee, who ultimately did not testify. During voir dire the following exchange took place:

> Q: Dewan Magee, who lives on Wade Road? Anybody know Mr. Magee? Mr. Newman? Okay, Mr. Newman and Ms. Wade. Anything about, Ms. Wade, anything about your knowledge of Mr. Magee, if he was called as a witness,

you could not be fair and impartial?
A: No.

(Transcript p. 81). After being aware of Ms. Wade knowing Mr. Magee, there were no objections to her serving as a juror. At the beginning of the second day of trial prior to the jury being brought in, the following transpired:

THE COURT: You are Sarah Wade?
MS. WADE: Yes, ma'am.
THE COURT: You are juror number 10?
MS. WADE: Yes, ma'am.
THE COURT: Okay. Ms. Wade, do you have a cousin that is a witness in this case?
MS. WADE: Yes, ma'am, and I told them when I was out there yesterday, I raised my card, but he said if I could be fair about it, and I could, you know, wouldn't hold it, and that's what I did.
THE COURT: Now, what witness is your cousin?
MS. WADE: Dewan Magee.
THE COURT: Dewan?
MS. WADE: Yeah, he just rode over here with me.
THE COURT: Okay, Dewan Magee. He didn't testify, did he?
MS. WADE: No, ma'am.
THE COURT: So he was riding with you?
MS. WADE: Yes, ma'am. He didn't have no way over here.
THE COURT: Okay. Did he ride back with you today?
MS. WADE: Yes, ma'am.
THE COURT: Okay. Did you all discuss this case?
MS. WADE: No, ma'am.
THE COURT: His testimony or anything like that?
MS. WADE: No, ma'am. We went to the - -
THE COURT: What degree of cousin is he?
MS. WADE: My nephew.
THE COURT: He's your nephew.
MS. WADE: Yes, ma'am.
THE COURT: Have you ever discussed this case with him?
MS. WADE: No, ma'am.
THE COURT: Did he try to talk to you about it?
MS. WADE: No, ma'am. We went straight to the baccalaureate at Durant Baptist.
THE COURT: It was yesterday?
MS. WADE: Yes, ma'am.
THE COURT: I hate I missed it. Now, you said you raised your right hand, I mean you raised your card?

MS. WADE:	I raised my card, yes, ma'am.
THE COURT:	When they asked that question? Was that the DA that asked the question, or was it the defense attorney? Was it a man or a woman?
MS. WADE:	Mr. James Powell.
THE COURT:	Okay. And when he said if it wouldn't affect your ability to be fair and impartial, you didn't raise your card, because you felt that wouldn't affect it?
MS. WADE:	It wouldn't affect it.
THE COURT:	Okay. And I guess he never asked the question "is anybody related to you."
MS. WADE:	No, ma'am, he did not. He did not.
THE COURT:	I'm going to send you back into the jury room. Do not discuss what you just went over.
MS. WADE:	Oh, no, ma'am.

(Transcript p. 230 - 232). Before proceedings began that day, Ms. Wade was dismissed as a juror because, as the trial judge noted, "the appearance of impropriety is violated." (Transcript p. 243). Mr. Magee was never called as a witness (Transcript p. 246) and the Appellant never moved for a mistrial based upon Ms. Wade's brief service as a juror. Nonetheless, the Appellant argues that the trial court should have *sua sponte* granted a mistrial. (Appellant's Brief p. 7).

"This Court has held that it is within the trial court's discretion whether or not to grant a mistrial and this Court will not find error absent an abuse of discretion." *Jordan v. State*, 995 So.2d 94, 104 (Miss. 2008). "The Uniform Rules of Circuit and County Court Practice, Rule 3.12 allows the judge to declare a mistrial only when the harm done would render the defendant without hope of receiving a fair trial." *Reed v. State*, 764 So.2d 511, 513 (Miss. Ct. App. 2000) (citing *Roundtree v. State*, 568 So.2d 1173, 1178 (Miss. 1990)) (*emphasis added*). There is nothing in the record indicating that a juror who was ultimately dismissed from service prior to the start of deliberations being kin to a potential witness who never testified caused any harm whatsoever, much less such harm that would leave the Appellant without hope of receiving a fair trial.

First, Ms. Wade indicated during voir dire that her relationship with Mr. Magee would not

affect her ability to be fair and impartial. (Transcript p. 81). "Despite circumstances that tend to indicate a potential for bias on the part of a juror, a juror's promise that he will be able to be fair and impartial is entitled to considerable deference." *Smith v. State*, 989 So.2d 973, 982 (Miss. Ct. App. 2008) (citing *Toyota Motor Corp. v. McLaurin*, 642 So.2d 351, 356-57 (Miss. 1994)).

Secondly, even though the Appellant argues that there is no way to know "whether Wade discussed the case with [her fellow jurors] or her relationship with to Magee" (Appellant's Brief p. 7), the record indicates that the trial judge ordered the jurors as follows:

> It is only after the closing arguments that this case will be presented to you for deliberations. Therefore, at no time before deliberations can you discuss this case among yourselves or with anyone else. If you do so, you will find yourself in contempt of this court, which is punishable by jail time or a fine. So it's very important that you do not discuss any aspects of this case until this case has been presented to you for deliberations.

(Transcript p. 127). This Court "presumes that juror follow the instructions of the court. To presume otherwise would be to render the jury system inoperable." *Neal v. State*, 15 So.3d 388, 402 (Miss. 2009) (quoting *Moore v. State*, 787 So.2d 1282, 1291 (Miss. 2001)).

Lastly, the Appellant fails to prove how the failure to grant a mistrial prejudiced his case. "To warrant reversal on an issue, a party must show both error and a resulting injury." *Vardaman v. State,* 966 So.2d 885, 891 (Miss. Ct. App. 2007) (citing *Catholic Diocese of Natchez-Jackson v. Jaquith*, 224 So.2d 216, 221 (Miss.1969)). "An error is only grounds for reversal if it affects the final result of the case." *Id.* Simply speculating that the jury may have been tainted is not sufficient. This is especially true when the complained of juror was removed prior to deliberations and the complained of witness never testified. As such, the trial court did not abuse its discretion in failing to *sua sponte* grant a mistrial.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WITH REGARD TO WITNESS LATRAVIS SKINNER'S TESTIMONY ON CROSS-EXAMINATION.

The Appellant next questions "whether the court erred in allowing speculative testimony." (Appellant's Brief p. 8). The admissibility of evidence rests within the trial court's discretion. *Herring v. State*, 938 So.2d 1251, 1252 -1253 (Miss. Ct. App. 2006)(citing *Jefferson v. State*, 818 So.2d 1099, 1104(¶ 6) (Miss.2002)). The specific testimony of which the Appellant complains occurred during the cross-examination of Latravis Skinner, the Appellant's brother, and is set forth below:

Q: Do you know what your brother weighs?
A: No.
Q: Do you know what Cardarius weighed?
A: No.
Q: Cardarius weight was five feet - -

DEFENSE COUNSEL: Your Honor, I object. He testified that he did not know how much this. How much Cord or whoever weighed. And at this point, for him to ask him, that would only be speculation on his part.

THE COURT: Overruled.

Q: And Cardarius was 5 feet 9 and weighed 150 pounds. Would your brother be bigger or littler than him?
A: Can you repeat that, please?
Q: If Cardarius was 5 feet, 9 inches tall and weighed 150 pounds, would your brother be bigger or littler than him?

DEFENSE COUNSEL: And I object to that question, Your Honor, because that calls for speculation.

THE COURT: Overruled.

A: I don't know.
Q: Do you don't know if your brother is over 5 feet 9 tall and weighs 150 pounds?

DEFENSE COUNSEL: Your Honor, that's a mischaracterization of the question and his response. He's already answered that he doesn't know.

THE COURT: Overruled.

Q: Is your brother over 5 feet 9 inches tall?
A: I don't know him really to just eat. I don't know.
* * *
A: I said I don't know, because all we do is just cook meat, no fat, none of that.
Q: All right. But all of your other cousins who was out there watching this fight, none of them felt it was serious enough or he was getting hurt bad enough that they needed to intervene and pull anybody off of him, did they?

DEFENSE COUNSEL: Your Honor, that calls for speculation.
THE COURT: Sustained.

(Transcript p. 323 - 325). In this line of questioning the prosecutor was attempting to elicit testimony regarding whether the Appellant was bigger in stature than the victim. The trial court overruled the first several objections by defense counsel, but sustained the objection after the witness testified that he did not know the Appellant's weight nor was he able to compare the sizes of the Appellant and the victim. Clearly at this point, any response would have been speculation; however, prior to that point, the trial court did not know whether or not the witness had the personal knowledge to answer the questions. Thus, the trial court did not abuse its discretion.

Additionally, "even if erroneous, the admission of evidence does not require reversal unless it produces unfair prejudice." *Shipp v. State*, 749 So.2d 300, 303 (Miss. Ct. App. 1999). The Appellant simply alleges that this line of questioning and the testimony elicited were prejudicial but does not state how it prejudiced his case. The State would assert that it did not prejudice the case in any way. Simply questioning a witness about the size difference between the victim and the Appellant did not affect the outcome of the trial. Thus, if it were error to allow this line of questioning and testimony, the error would not be reversible.

Moreover, once the trial court became convinced that the witness was unable to answer the questions based upon personal knowledge, it sustained the objection. The Appellant did not request that the jury be admonished to disregard the previous questions and testimony. "It is the rule in this

State that where an objection is sustained, and no request is made that the jury be told to disregard the objectionable matter, there is no error." *Williams v. State,* 919 So.2d 250, 255 (Miss. Ct. App. 2005) (quoting *Marks v. State*, 532 So.2d 976, 981 (Miss.1988)). Accordingly, this issue is without merit.

V. THE APPELLANT IS PROCEDURALLY BARRED FROM ARGUING THAT THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT HIS MURDER CONVICTION; HOWEVER, WITHOUT WAIVING THE PROCEDURAL BAR, THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE APPELLANT'S MURDER CONVICTION.

Lastly, the Appellant raises the issue of "whether the evidence supports a verdict of manslaughter rather than murder." (Appellant's Brief p. 9). The Appellant specifically argues that "the sufficiency of the evidence conclusively shows that the killing was done in the heat of passion mitigating the killing to manslaughter." (Appellant's Brief p. 9). However, the Appellant is procedurally barred from challenging the sufficiency of the evidence. While he did raise a motion for directed verdict at the close of the State's case in chief, the Appellant did not renew the motion at the close of the defense's case in chief nor does the record indicate that he presented a peremptory instruction to the trial court or file a motion for judgment notwithstanding the verdict. "It is elemental that after a motion for directed verdict is overruled at the conclusion of the State's evidence, and the appellant proceeds to introduce evidence in his own behalf, the point is waived. In order to preserve it, the appellant must renew his motion for a directed verdict at the conclusion of all the evidence." *Turner v. State,* 721 So.2d 642, 647 (Miss. 1998) (quoting *Wright v. State*, 540 So.2d 1, 3 (Miss.1989). *See also Green v. State,* 631 So.2d 167, 171 (Miss. 1994) (holding that because the defendant "neither renewed his motion for directed verdict at the conclusion of his case nor requested a peremptory instruction" the sufficiency of the evidence issue was procedurally barred).

Without waiving the procedural bar, there was sufficient evidence to support the Appellant's murder conviction. When presented with a claim that the evidence is insufficient to sustain a conviction, the appellate court must review the record in "a light most favorable to the State" and "must accept as true all evidence consistent with the defendant's guilt, together with all favorable inferences that may be reasonably drawn from the evidence, and disregard the evidence favorable to the defendant." *Fair v. State,* 25 So.3d 380, 382 (Miss. Ct. App. 2009)(quoting *Robinson v. State*, 940 So.2d 235, 239-40 (Miss.2006)). "If the evidence is 'of such quality and weight that, having in mind the beyond a reasonable doubt burden of proof standard, reasonable fair-minded persons in the exercise of impartial judgment might reach different conclusions on every element of the offense, the evidence will be deemed to have been sufficient.'" *Id.* (quoting *Bush v. State*, 895 So.2d 836, 843(¶ 16) (Miss.2005)).

As noted above, the Appellant contends that the evidence could only support a conviction of manslaughter and not murder specifically arguing that "the argument, fighting and the surrounding instigation of the fight, were the acts that provoked and fueled the anger that led to the shooting of Mr. McChriston." (Appellant's Brief p. 10). "Whether a homicide is classified as a murder or manslaughter is ordinarily an inquiry to be made by the jury." *Hodge v. State*, 823 So.2d 1162, 1166 (Miss. 2002). "The chief distinction between murder and manslaughter is the presence of deliberation and malice in murder and its absence in manslaughter." *Bradford v. State*, 910 So.2d 1232, 1233 (Miss. Ct. App. 2005) (citing *Berry v. State*, 575 So.2d 1, 10 (Miss. 1990)). "When a deadly weapon is used, malice is implied." *Fair v. State*, 25 So.3d 380, 385 (Miss. Ct. App. 2009) (quoting *Turner v. State*, 773 So.2d 952, 954 (Miss. Ct. App. 2000)). "In order to overcome that malice implication, there must be some evidence in the record from which the jury could determine that the act was not the result of malice but a result of heat of passion." *Id.* at 385-86 (quoting

Wilson v. State, 574 So.2d 1324, 1336 (Miss. 1990)). The Appellant asserts in that regard that "his conduct was in reaction to the spur of the moment" and notes that not much time passed between the fight and the shooting; thus, "the killing in the matter was fueled by anger and embarrassment and in that instance, [the Appellant's] reason was overthrown and his judgment was destroyed." (Appellant's Brief p. 10 - 11). However, Mississippi law is well-settled "that no particular period of deliberation is required to make a killing deliberate, since malice may be suddenly formed, even in an instant." *Howard v. State*, 55 So.2d 436, 438 (Miss. 1951). Simply stated the timing of the shooting is not enough to overcome the malice implication especially since the Appellant left the scene of the fight, retrieved a gun, and returned to the scene of the fight to shoot Mr. McChriston.

Like the case of *Craft v. State*, this is case "presents a classic jury question between deliberate design and heat of passion." 970 So.2d 178, 183 (Miss. Ct. App. 2007). And also like *Craft*, the killing took place after an impromptu, emotional, and violent fight in which the defendant left the scene of the fight and later returned with a weapon. *Id.* This Court should, like the *Craft* Court, find that "there was sufficient evidence for the jury to find that, before [the Appellant shot Mr. McChriston], he had appreciable time to plan, and did in fact plan, to kill [him]. *Id.* at 184.

As this Court noted in *Fairly v. State*, "when a defendant has been found guilty by a jury, appellate authority is limited, and the verdict should not be overturned so long as there is 'credible evidence in the record from which the jury could have found or reasonably inferred each element of the offense.'" 871 So.2d 1282, 1284 (Miss. 2003) (quoting *Davis v. State*, 586 So.2d 817, 819 (Miss. 1991)). In the case at hand there was more than sufficient evidence of each of the elements of murder. The jury was presented with the evidence and with instructions regarding both murder and heat of passion manslaughter and did not find sufficient evidence that the Appellant was acting in the heat of passion. As such, there was sufficient evidence to support the conviction regardless of

the procedural bar.

CONCLUSION

For the foregoing reasons, the State of Mississippi respectfully requests that this Honorable Court affirm Kenneth Moore, Jr.'s conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Stephanie B. Wood, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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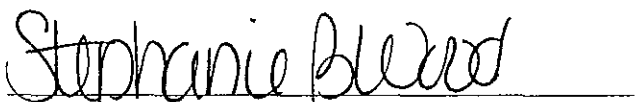
This the 9th day of March, 2010.



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