IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO: 2008-KA-00968-SCT

MALACHY DEHENRE — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The 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 disqualifications or recusal.

1. State of Mississippi
2. Malachy Dehenre
3. David M. Ratcliff
4. John A. Piazza
5. J. Ronald Parrish, Assistant District Attorney
6. Honorable Billy Joe Landrum, Circuit Court Judge

THIS the 5th day of June, 2009.

Respectfully Submitted,
MALACHY DEHENRE

By: David M. Ratcliff
DAVID M. RATCLIFF, Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATEMENT OF ISSUES

I. Whether the lower Court erred in not granting a mistrial and by not dismissing the jury venire.

II. Whether the lower Court erred in allowing the testimony of Dr. Patel.

A. Did Dr. Patel improperly testify as to information protected by the physician patient privilege?

B. Whether Dr. Patel's Testimony involved matters too remote in time.

III. Whether the Court erred in allowing Dr. Hayne to Testify.

IV. Did the Court err in allowing Dr. Baden to testify?

V. Should this case be dismissed as a result of destruction of evidence in violation of the Defendant's right to due process?

VI. Whether the Court erred in allowing the alleged statements of the daughter, Nyasha DeHenre.

A. The alleged statements should not have been admitted due to lack of personal knowledge.

B. The alleged statements by Nyasha DeHenre should not have been admitted since it was a prior inconsistent statement

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of the Second Judicial District of Jones County, Mississippi, where Malachy DeHenre was convicted of Manslaughter in a jury trial conducted on January 28, 29, and 30, 2009, before the Honorable Billy Joe Landrum, Circuit

Court Judge. The indictment in this case alleges that Defendant, Malachy DeHenre (Defendant or DeHenre), with deliberate design murdered his wife Nyasha DeHenre (Nyasha) on January 23, 1997 by shooting her with a gun. Although indicted for murder, the jury convicted DeHenre of manslaughter instead of murder. Defendant was once before tried in a separate cause number for this alleged murder on or about April 6, 7, 8, 1998, ending in a mistrial due to a hung jury, with 11-1 in favor of acquittal. [T. 5-6]

FACTS

In October of 1996, several months prior to the death of Nyasha, B. R. Patel, MD, had a meeting with Malachy DeHenre and Nyasha DeHenre to counsel them. [T.164] Dr. Patel counsels as part of his professional abilities and practice. [T. 165] Dr. Patel utilized his education, training, and experience in counseling Malachy and Nyasha.[T.165-166] Dr. Patel testified, over objection by defense counsel, as to information he allegedly gained while counseling Malachy and Nyasha. [T.159] Dr. Patel claimed that Malachy was banging on a table and shouting at Nyasha and that Malachy told Nyasha that the only way she would leave him was in a body bag. [T.159-160]. At the time of Nyasha's death, she was not married to the Defendant. [T. 501]

On January 23, 1997, Nyasha DeHenre suffered a gunshot wound to her head. [T.24] She was kept on life support for approximately three days before she perished. [T.223] The autopsy of Ms. DeHenre was performed by Dr. Stephen Hayne, on January 27, 1997 and the final report was completed on February 1, 1997. [T. 49-57]. According to Dr. Hayne's autopsy report, Nyasha was received by Dr. Hayne with gauze wrapped around her head.[R.49-57] The location of the entrance

wound was the front right forehead. [R.49-57] Subsequent to the underlying shooting, the hair was shaved around the wound tract. [T. 401].

Dr. DeHenre testified that, just prior to the gun discharging, he was walking by Ms. DeHenre when he saw the gun in her right hand. [T. 497]. He reflexively attempted to pull her right hand down and the gun went off. [T. 497].

Hair samples were taken by Dr. Hayne. [R.49-57] However, these samples were not retained by the State of Mississippi but instead were destroyed. The nightgown of Nyasha DeHenre was also submitted to the crime lab. Tests performed on the nightgown indicated the presence of gunpowder. [T.476-477]. The nightgown was also not retained by the State of Mississippi but was destroyed prior to the present trial. [R.53-61]

Dr. Hayne was a witness on behalf of the State of Mississippi in the 1998 trial and testified that the autopsy was in compliance with national standards. [R.58-88] [See Exhibit "B"-Dr. Hayne Testimony from 1997 Trial -R.58-87]. Dr. Hayne opined, at trial in 1998 trial and at the current trial, that the death of Ms. DeHenre was caused by homicide. [T.231] Dr. Hayne's conclusion as to homicide was based on his opinion that the fatal gunshot was from a distant range. [T. 231-233]. Dr. Michael Baden also testified on behalf of the State of Mississippi, in the present case, and opined that the death of Ms. DeHenre was caused by a distant gunshot wound. [T.375]

Dr. Hayne in his testimony outlined three types of gunshot wounds: distant, near, and contact. [T.224-225] Dr. Hayne defines a distant shot as one occurring no less than eighteen inches. [T-225] In support of his opinion that the shot was "distant", Dr. Hayne claims to have not seen any tattooing or smudging. [T.225-226]

Dr. Hayne testified at trial that he microscopically examined the tissue inside the entrance wound tract but did not microscopically examine outside of the wound tract. [T.230] There is no mention in Dr. Hayne's autopsy report that he microscopically examined the inside tract of the wound. [R.49-57] In fact, Dr. Hayne's autopsy report in a section titled "MICROSCOPIC ANALYSIS" that specifically outlines the tissues that underwent this type of examination does not list the wound tract as being microscopically analyzed. [R.55-56] Dr. Hayne incorrectly noted in his autopsy report and incorrectly testified that the exit wound was located at the left temple. [T. 385-386]

Dora Morgan, who was working as a 911 dispatcher at the Jones County Sheriff's Department, testified at trial that she received a phone call on January 23, 1997 sometime around midnight from a caller that identified herself as Nyasha DeHenre[1], the daughter of Malachy DeHenre and Nyasha DeHenre. [T. 173-178] Ms. Morgan claimed that the caller stated that her father had killed her mother and that her mother and father were arguing and that she heard a gunshot. [T. 178-179] Ms. Morgan further testified that the caller said that she did not witness the shooting. [T. 178-179] Defense Counsel objected to Ms. Morgan's testimony prior to trial in a Motion In Limine and also during trial. [T.177;R.36-38] Nyasha DeHenre's, daughter, also made a statement to the District Attorney's Office that her father had killed her mother. [R.97-98] However, this statement was later recanted. [R.96]

During voir dire, the State inquired as to whether each juror would base his or her decision only on the evidence of the case. [T. 79]. In response to this question, one of the jurors in the venire stated. "[e]very man is entitled to a fair trial, but when DeHenre left here he became an abortionist."

1 The deceased, Nyashsa DeHenre, has a daughter with the same name.

[T. 78]. Defense Counsel immediately moved for a mistrial and moved that the venire be dismissed, which was overruled by the lower court. [T.78-79]

ARGUMENT

I. WHETHER THE LOWER COURT ERRED IN NOT GRANTING A MISTRIAL AND BY NOT DISMISSING THE JURY VENIRE

Both the Sixth Amendment to the Federal Constitution and Section 26 of the Mississippi Constitution of 1890 give the defendant a right to a trial "by an impartial jury." During voir dire in front of the entire venire, one of the jurors of the venire purposefully tainted the jury pool by stating that "[e]very man is entitled to a fair trial, but when DeHenre left here he became an abortionist." [T. 78]. It is axiomatic that the issue of abortion is highly prejudicial and inflammatory. Once the Defendant was framed as an "abortionist" before the entire venire, it was impossible to ensure that an impartial jury could be chosen from that particular venire.

According to the United States Supreme Court, "impartiality" is not a technical conception but is a state of mind and that there is no particular test for determining whether the Constitutional guarantee of an impartial jury has been met. *Dennis v. U.S., 339 U.S. 162 (1950).* Where highly prejudicial statements are made, as in the present case, the court is to strike a jury venire even though the jurors may state that they can be fair and impartial, "no doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but psychological impact requiring such a declaration before one's fellows is often its father." *Irvin v. Dowd, 366 U.S. 717, 728 (1961).*

II. WHETHER THE LOWER COURT ERRED IN ALLOWING THE TESTIMONY OF DR. PATEL

B. R. Patel, MD counseled Malachy DeHenre and Nyasha DeHenre [R.164]. Dr. Patel acts as a counselor as part of his professional abilities and practice as a physician. [R. 165]. Dr.

Patel utilized his education, training, and experience in counseling Malachy and Nyasha. In a motion in limine heard pretrial and in an objection raised at trial, Defense Counsel objected to Dr. Patel testifying with regard to the aforementioned counseling session based on the physician-patient privilege. Dr. Patel nevertheless testified, over objection, as to certain threats and other alleged statements made by Malachy as to Nyasha DeHenre and as to some of the Defendant's actions during the counseling session. Specifically, Dr. Patel claimed that at the meeting Malachy was banging on a table and shouting at Nyasha and that the only way she would leave him was in a body bag. [T. 159-160]

II. A. DID DR. PATEL IMPROPERLY TESTIFY AS TO INFORMATION PROTECTED BY THE PHYSICIAN PATIENT PRIVILEGE?

Pursuant to Mississippi Rule of Evidence 503, a "patient" has a privilege to refuse to disclose and to prevent any other person from disclosing knowledge "derived" by a physician by virtue of his professional relationship with the patient. The Rule further defines "patient" as "a person who consults or is examined or interviewed by a physician or psychotherapist." Moreover, a "physician" is defined as "a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be."

Dr. Patel testified that he counseled Malachy DeHenre and Nyasha DeHenre in August of 1996 [R.159] Patel counsels as part of his professional abilities and practice as a physician. [R164-165] Dr. Patel utilized his education, training, and experience in counseling Malachy and Nyasha. As such, it is clear that Malachy DeHenre was a "patient" at the August 1996 session since he was counseled by Dr. Patel. [R163-167] Moreover, Dr. Patel clearly was acting as "physician" at the aforementioned session since he counsels as part of his profession as a physician licensed in the State

of Mississippi and was using his professional skills and abilities to counsel the Defendant and Ms. DeHenre; therefore, Dr. Patel should have been prevented from testifying as to information he was apprised of at the aforementioned session because it was "knowledge derived by the physician or psychotherapist (i.e. Dr. Patel) by virtue of his professional relationship with the patient (i.e. Małachy DeHenre)." The testimony of Dr. Patel as to the session was clearly irrelevant, inflammatory, and prejudicial. It is obvious that the evidence in this case was strong in favor of the Defendant, since he was not convicted of murder. The inflammatory testimony clearly influenced the jury to vote guilty as to manslaughter.

II. B. WHETHER DR. PATEL'S TESTIMONY INVOLVED MATTERS TOO REMOTE IN TIME

In *Stewart v. State*, 226 So.2d 911 (Miss.1969), the Court held that excluding evidence of previous threats and provocations by the prosecuting witness toward the appellant, which occurred seven months before the shooting was properly excluded as too remote in time. Moreover, In *West v. State*, 463 So.2d 1048 (Miss. 1985), in a homicide prosecution, the Court held that it was prejudicial error for the district attorney to advise the jury in his opening statement that defendant had participated in two prior murders about 36 hours prior to the charged homicide and to allow into evidence during guilt phase of trial portions of defendant's confessions which referred to the prior murders and robbery where, although the charged homicide occurred within a context of the aftermath of the other murders, there was a separation of time and motive which set the events apart.

The alleged threat made by the Defendant while at the aforementioned counseling session occurred approximately four months prior to the death of Nyasha and is therefore too remote in time too be relevant and is furthermore highly prejudicial. *Stewart v. State,* 226 So.2d 911 (Miss.1969);

West v. State, 463 So.2d 1048 (Miss. 1985).

III. WHETHER THE COURT ERRED IN ALLOWING DR. HAYNE TO TESTIFY

To be admissible under Mississippi law, expert testimony must be the product of reliable principles and methods, and the expert witness must apply the principles and methods reliably to the facts of the case. MS Rule of Evidence 702. The courts must serve as "gatekeeper," to ensure that any and all scientific testimony or evidence admitted is reliable. Comment to MRE 702.

Dr. Hayne's methods and conclusions in this case are unreliable. Dr. Hayne is not board certified in forensic pathology by the American Board of Pathology and was therefore not competent under Mississippi law to perform the autopsy as State Medical Examiner, as our law requires that "[e]ach applicant for the position of State Medical Examiner shall, as a minimum, be a physician who is eligible for a license to practice medicine in Mississippi and be certified in forensic pathology by the American Board of Pathology." Miss. Code Ann. § 41-61-55 (Rev.2005).

This unreliability is further evidenced by the autopsy itself. Dr. Hayne testified that the autopsy was performed pursuant to national guidelines. According to the standards set by the National Association of Medical Examiners (NAME), the field's pre-eminent professional organization, a single medical examiner should perform no more than 250 autopsies per year. At 325, the group considers a doctor to have a "Phase II deficiency"; at that point, it will not accredit a practice, regardless of any other criteria. 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. Radley Balko, *CSI: Mississippi*, The Wall Street Journal (Oct. 6-7, 2007)

Hayne has repeatedly testified under oath that he performs more than 1,500 autopsies per year. Radley Balko, *CSI: Mississippi*, The Wall Street Journal (Oct. 6-7, 2007). Moreover, during the time of the autopsy in this case, Hayne held jobs as medical director of the Rankin Medical Center and as director of the Renal Lab, a kidney and dialysis research center. These jobs, he has testified, would take up about 55 hours per week of his time. In addition, Hayne testified in numerous civil and criminal cases during the time period he performed the autopsy in the present case. Therefore, despite Dr. Hayne's testimony, his autopsy was not performed in accordance with national standards. At the time of the autopsy in this case Dr. Hayne was performing autopsies at a level that was likely to result in "major mistakes." V. DiMaio (See Supra).

A major defect in Dr. Hayne's autopsy and opinions in this matter is that he failed to perform any analyses of the hair at and around the entrance wound or take such hair into consideration when forming his opinions. Dr. Hayne testified that the death of Ms. DeHenre was caused by homicide. Dr. Hayne's conclusion as to homicide was based on his opinion that the fatal gunshot was from a distant range. [T. 231-3]. There are three types of gunshot wounds: near, intermediate, and distant. According to Dr. Hayne, a shot of eighteen inches or more is considered distant. The absence of stippling or tattooing around the gunshot wound is indicative of a distant gunshot. [T.225-226]

However, Dr. Hayne's conclusion is fundamentally flawed because he failed to take into consideration the presence of hair. An entry wound without stippling, sooting, or gunshot residue particles cannot be regarded as a distant range shot without considering the presence of any potential intervening object, such as hair, which can completely prevent the deposition of gunshot residue to the scalp and other hair covered areas. *Forensic Science Communications*, Effect of Hair on the

Deposition of Gunshot Residue, Volume 6 – Number 2 (April 2004). Hair acts as an effective filter and will retain gunshot residue. Gunshot-range determinations should always include consideration of the presence of hair as an intervening, shielding object. This is particularly true with gunshots into the face and other areas where long hair strands could have been present when the shot was fired. Bangs or loose hair strands, which may have been in place to shield a portion of a person's face, may no longer be in the same orientation and location when the victim is found. *Id.* In the present case, the hair around the wound was shaved. Moreover, even though the wound was within the hairline or just below the bangs, Dr. Hayne did not analyze or retain the hair around the wound or take it into consideration in concluding that the gunshot was a distant gunshot.

In addition, Dr. Hayne testified that his conclusion as to a distant gunshot wound was also based on his microscopic examination of the tissue inside the entrance wound tract. There is no mention in Dr. Hayne's autopsy report that he microscopically examined the inside tract of the wound. In fact, Dr. Hayne's autopsy report in a section titled "MICROSCOPIC ANALYSIS" that specifically outlines the tissues that underwent this type of examination does not list the wound tract as being microscopically analyzed. As stated above, even assuming Dr. Hayne did microscopically analyze the tract, such an examination would be inadequate to support his conclusion that there was no residue from the shot since Dr. Hayne failed to take into consideration the effect that hair would have had on filtering such residue

Another fact that exemplifies the inadequacy of Dr. Hayne's autopsy it that Dr. Hayne incorrectly noted in his autopsy report and incorrectly testified that the exit wound was located at the left temple. The temple is a region of the head that is in front of the ear and over the zygomatic arch. *Taber's Cyclopedic Medical Dictionary,* pg. 2058. In contrast, the exit wound in

the present case is behind the ear.

IV. DID THE COURT ERR IN ALLOWING DR. BADEN TO TESTIFY?

The State attempted to cure the gross inadequacies of Dr. Hayne's qualifications, reputation, opinions, and methods by having Dr. Michael Baden testify on the exact same matters that Dr. Hayne testified about in this matter. Dr. Baden did not perform the autopsy and his work is completely dependant upon the reliability of the work performed by Dr. Hayne. As stated earlier, the methods and procedures used by Dr. Hayne were unreliable and resulted in destruction of evidence that was integral to this case. No expert in the world could cure these defects or bring back evidence that has been destroyed. Therefore, the opinions of Dr. Baden are likewise unreliable and inadmissible.

For example, the gown worn by the Ms. DeHenre on the night of the shooting was destroyed, even though it had gunpowder residue on it and there was gunpowder residue particle on the right hand of the deceased. [T. 391-2]. The expert opinions in this matter as to the distance of the gunshot wound was based on the spread of particulates. The defense in this case is that Ms. DeHenre had the gun in her hand and that the gun went off when Dr. DeHenre attempted to push Ms. Dehenre's hand down and away from himself, which would result in gunshot particles on Ms. DeHenre's hand and nightgown. However, the defense was unable to effectively demonstrate this because the nightgown was destroyed. The importance of the nightgown was expressed by Dr. Baden when questioned about the gunpowder residue on the nightgown. This testimony further demonstrates the unreliability of Dr. Baden's opinions in absence of this important piece of evidence:

> Defense Counsel: Steve Byrd reported, forensic scientist from the Mississippi Crime Laboratory, that gunpowder particle residue was observed on [the

nightgown worn by Ms. DeHenre on the night of the shooting]. Do you recall reviewing that? You reviewed the crime lab report?

Baden: I couldn't figure that out because I know that there was also a description of a gunshot particle on the right hand that didn't make since. And I don't know..I can't interpret that because it doesn't quite indicate how much the spread, what the particulate matter was

Defense Counsel: That's right. And when you say you can't make sense of that, you can't make sense of it in view of the opinion you've rendered?
Baden: No. I don't know as far as that goes what that means.

[T. 391-2].

The testimony of Dr. Baden was additionally inadmissible as a needless presentation of cumulative evidence under Mississippi Rule of Evidence 403, which provides that relevant evidence may be excluded if it is needless presentation of cumulative evidence. For example, in *Jackson v. State*, 684 So.2d 1213 (Miss. 1996), the Court held that psychiatrist's proposed testimony during the sentencing phase of a capital murder case about his conversation with defendant's high school football coach concerning defendant's head injuries was properly excluded as cumulative, where the psychiatrist was permitted to discuss at length various sources of his diagnosis that defendant suffered from intermittent explosive episodes resulting from multiple episodes of brain trauma. Id.

V. SHOULD THIS CASE BE DISMISSED AS A RESULT OF DESTRUCTION OF EVIDENCE IN VIOLATION OF THE DEFENDANT'S RIGHT TO DUE PROCESS

A violation of due process occurs when the State destroys evidence and (1) the evidence in question possesses an exculpatory value that was apparent before the evidence was destroyed; (2) the evidence was of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means; and (3) the State's destruction of the evidence was

in bad faith. *State v. McGrone*, 798 So.2d 519 (Miss. 2001).

The defendant in *McGrone* was indicted for simple assault on a police officer for allegedly lunging at an officer when the officer was reaching for his gun. The officer shot *McGrone* in the leg out of fear that he would take the gun away from the officer. Police officers obtained the pants worn by *McGrone*; however, this evidence was destroyed. *McGrone* claimed that a gun shot residue test of his pants would have revealed that he was not in close proximity to the officer when the gun was shot. The Mississippi Supreme Court held that the case should be dismissed because the destruction of the evidence was a violation of *McGrone's* right to due process. The McGrone Court also held that "[w]here the State's actions absolutely prevent proof on this issue, we will consider the requirement of bad faith to have been proven." *McGrone*, 798 So.2d at 523 (Miss. 2001).

Hair samples were taken by Dr. Hayne. However, these samples were not retained by the State of Mississippi but were destroyed. The nightgown of Nyasha DeHenre was also submitted to the crime lab. Tests performed on the nightgown indicated that gunpowder was present. The nightgown was also not retained by the State of Mississippi but was destroyed prior to the present trial. Residue tests of the hair around the entrance wound would have revealed that the shot was not a distant shot as claimed by Dr. Hayne. The clothes worn by the deceased would have additionally demonstrated the same. Instead of keeping the aforementioned evidence, the State of Mississippi had it destroyed. As a result, the Defendant is clearly unable to obtain comparable evidence by other means. Since the State knew of the significance of the hair and night gown but had this evidence destroyed anyway, it is clear that the State has acted in bad faith. Moreover, the destruction of the hair and gown absolutely prevents Defendant from presenting evidence

contradicting the State's theory in the case, therefore, the issue of bad faith is considered to have been proven. *McGrone*, 798 So.2d 523 (Miss. 2001).

In addition, Mississippi Rules of Circuit Court require the state to produce "[a]ny physical evidence and photographs relevant." See URCCC 9.04. The State of Mississippi is clearly in violation of this rule by destroying evidence it accumulated in investigating this matter and constitutes a basis for having this case dismissed.

VI. WHETHER THE COURT ERRED IN ALLOWING THE ALLEGED STATEMENTS OF THE DAUGHTER, NYASHA DEHENRE

Dora Morgan, who was working as a 911 dispatcher at the Jones County Sheriff's Department, testified as to certain statements made to her on the night of the shooting. Ms. Morgan testified that she received a phone call on January 23, 1997 sometime around midnight from a caller that identified herself as Nyasha DeHenre, the daughter of Malachy DeHenre and Nyasha DeHenre. Ms. Morgan claimed that the caller stated that her father had killed her mother and that her mother and father were arguing and that she heard a gunshot. Ms. Morgan further testified that the caller said that she did not witness the shooting. Defense Counsel objected to Ms. Morgan's testimony prior to trial in a Motion In Limine and also during trial. Nyasha DeHenre, daughter, also made a statement to the District Attorney's Office that her father had killed her mother. However, this statement was later recanted.

VII. A. THE ALLEGED STATEMENTS SHOULD NOT HAVE BEEN ADMITTED DUE TO LACK OF PERSONAL KNOWLEDGE.

The aforementioned declarant in the present case who identified herself as the daughter of the Defendant admitted that she had no personal knowledge of whether the Defendant actually shot the victim.

Mississippi Rule of Evidence 602 states that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter."

Mississippi Rule of Evidence 701 only permits opinion testimony from lay witnesses when that testimony "is limited to those opinions or inferences which are (a) rationally based on the perception of the witness...." According to the comment to Mississippi Rule of Evidence 701, a lay opinion "must be based on first-hand knowledge." As the Mississippi Supreme Court has stated repeatedly, "[t]he requirement of personal knowledge as a prerequisite to lay opinion testimony is absolute." *Wells v. State*, 604 So.2d 271, 278-279 (Miss.1992).

Moreover, the Mississippi Supreme court has long held that such a statement is inadmissible hearsay and does not fall within the exception to the hearsay rule, since Mississippi requires the witness to have personal knowledge. *Moore v. State*, 859 So.2d 379 (Miss. 2003). The comment to MRE 803(2) states that in order for such a statement to be admissible the declarant must be "an observer of the event which triggered the excitement." *Id.*

In Moore, the transcript of a 911 call was not admissible as present sense exception of the hearsay rule because the caller not was not an eyewitness. The call in Moore was made to 911 by a witness who did not actually see the shooting take place but called 911after the shooting. The witness spoke to the 911 operator about events that transpired just prior to the witness being made aware of the shooting. These facts were made known to him by the defendant. The Court held that this portion of the 911 call was inadmissible hearsay since the caller did not have personal knowledge of the facts and that without personal knowledge the statement could not come under the present since impression exception to the hearsay rules.

In Jones v. State, 763 So.2d 210 (Miss.Ct.App.2000), the State, through double hearsay, attempted to introduce the dying declaration of a shooting victim as to the identity of his assailant through a witness who was told by another witness the identity of a shooter. The witness that had personal knowledge of the statement did not testify at trial. The court held that this was inadmissible because the witness at trial did not have first-hand knowledge of the statement, ie. she heard it from another witness and not from the victim. This was not cured by the fact that the statement was made while the declarant was "excited".

VIII. B. THE ALLEGED STATEMENTS BY NYASHA SHOULD NOT HAVE BEEN ADMITTED SINCE IT WAS A PRIOR INCONSISTENT STATEMENT

Assuming that the caller was Nyasha DeHenre, she later admitted that she was incorrect about the Defendant shooting her mother. [R. 93-98; T. 17]. As such, the statements made to Dora Morgan by Nyasha on the night of the underlying incident are inadmissible as prior inconsistent statements.

In *Bailey v. State*, 952 So.2d 225 (Miss.App.,2006), the Court stated that "[i]t is well-settled that, where a non-party witness admits to having made a prior inconsistent statement, the statement should not be received into evidence for any purpose. Furthermore, it is hornbook law that an unsworn prior inconsistent statement may never be used as substantive evidence".

CONCLUSION

Each of the foregoing issues taken singularly is adequate to reverse this case; taken together they make it mandatory. The very idea of the State of Mississippi trying a person for a murder in 1998 ending with a mistrial in a vote of 11-1 for acquittal, subsequently dismissing the

indictment, losing 16 items of evidence, two of which are key then blandly re-indicting the Defendant and essentially saying "too bad Defendant" is utterly repugnant and inconceivable. Who could blame the Sheriff for destroying the evidence to make room for more in a room too small under these circumstances. If this is the new standard for the State of Mississippi no one should feel safe. Affirmation of this process will encourage laxity, negligence and abuse in the future and lead to unwarranted convictions, which have apparently been fairly widespread as we have discovered through the use of DNA.

Again, it is important to review all of the issues raised by Defendant as all are supported clearly by law and fact. It is even more important to put yourselves in the shoes of the Defendant being put to trial essentially for his life half crippled due to the actions of the State of Mississippi not only destroying exculpatory evidence, but employing an utterly unreliable pathologist not competent under Mississippi law as has been proved repeatedly who utterly botched the autopsy of the deceased. Even Dr. Baden could not rehabilitate a botched autopsy and missing evidence, shaved hair never tested, missing nightgown, the fact that gunpowder residue on the deceased's hand and gown did not make sense according to Dr. Baden.

Beyond a reasonable doubt and to the exclusion of any reasonable hypothesis consistent with innocence was the instruction to the jury. The facts before the jury scream reasonable doubt but more importantly the facts <u>not</u> before the jury compel reversal as a result of the State of Mississippi's failings. No person should be subjected to such an ordeal with both hands tied behind his back. The State made far too many errors all of which singly and cumulatively prevented the Defendant from receiving a fair trial that is, of course, the bedrock principle of our criminal justice system.

CERTIFICATE OF SERVICE

I, JOHN A. PIAZZA and DAVID M. RATCLIFF, Attorneys for the Malachy Dehenre, do hereby certify that we have this day mailed by United States mail, postage prepaid, a true and correct copy of the foregoing Brief of the Appellant, to J. Ronald Parish, Assistant District Attorney at his usual mailing address of Post Office Box 313, Laurel, Mississippi 39441-0313, and Honorable Billy Joe Landrum at his usual address of Post Office Box 685, Laurel, Mississippi 39441-0685.

This the 5th day of June 2009.

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