

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2008-KA-01460-COA

BRIAN KEITH MARTIN

APPELLANT

vs.

STATE OF MISSISSIPPI

APPELLEE

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 disqualification or recusal:

Brian Keith Martin, Appellant;

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Krystal D. Walker, Joshua A. Hill, Leslie Lee, and Phillip W. Broadhead, Esqs.,

Attorneys for the Appellant, Criminal Appeals Clinic, University of Mississippi School of Law;

Alexander C. Martin, District Attorney, **Marty L. Arrington and Terry Wallace, Esqs.**, Assistant District Attorneys, Office of the Copiah County District Attorney;

Jim Hood, Esq. Attorney General, State of Mississippi;

Honorable Judge Lamar Pickard, presiding Circuit Court Judge; and

Hazlehurst Police/Sheriff's Department, investigating/arresting agency.

Respectfully submitted,


PHILLIP W. BROADHEAD
Clinical Professor, Criminal Appeals Clinic

TABLE OF CONTENTS

	<u>PAGE NO.</u>
STATEMENT OF ISSUES	1
STATEMENT OF INCARCERATION	2
STATEMENT OF JURISDICTION	2
STATEMENT IN SUPPORT OF ORAL ARGUMENT	2
STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	8
ARGUMENT	10

ISSUE ONE:

WHETHER THE APPELLANT WAS ENTITLED TO A JUDGMENT OF ACQUITTAL AS A MATTER OF LAW PURSUANT TO THE *WEATHERSBY* DOCTRINE.

10

ISSUE TWO:

WHETHER THE TRIAL COURT ERRED WHEN IT FAILED TO SUSTAIN THE APPELLANT'S MOTION FOR A DIRECTED VERDICT BASED UPON INSUFFICIENCY OF THE STATE'S CASE, OR, IN THE ALTERNATIVE, WHETHER THE JURY'S VERDICT WAS CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE.

22

ISSUE THREE:

WHETHER DEFENSE COUNSEL'S REPRESENTATION CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL PER SE WHEN HE FAILED TO RENEW THE MOTION FOR DIRECTED VERDICT AT THE CONCLUSION OF TRIAL AND THEN ALSO FAILED TO FILE A WRITTEN MOTION FOR JUDGMENT NOT WITHSTANDING THE VERDICT, OR ALTERNATIVELY, FOR A NEW TRIAL.

26

CONCLUSION

CERTIFICATE OF SERVICE

TABLE OF CASES AND AUTHORITIES

CASES:

PAGE NO:

United States Supreme Court Cases

<i>Jackson v. Virginia</i> , 443 US 307 (1979)	23
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	27

Mississippi Cases

<i>Bush v. State</i> , 895 So. 2d 836 (Miss. 2005)	23, 25
<i>Cabello v. State</i> , 524 So. 2d 313 (Miss. 1988)	29
<i>Carr v. State</i> , 208 So.2d 886 (Miss. 1968)	23
<i>Cole v. State</i> , 666 So. 2d 767 (Miss. 1995)	27, 28
<i>Dew v. State</i> , 309 So.2d 857 (Miss. 1975)	11
<i>Epps v. State</i> , 984 So. 2d 1042 (Miss. Ct. App. 2008)	27
<i>Evans v. State</i> , 797 So. 2d 811 (Miss. 2000)	23
<i>Fulks v. State</i> , 944 So. 2d 79 (Miss. Ct. App. 2006)	29, 30, 32
<i>Golden v. State</i> , 968 So.2d 378 (2007)	28, 29
<i>Green v. State</i> , 631 So.2d 167 (Miss. 1994)	12, 13, 21
<i>Harris v. State</i> , 861 So. 2d 1003 (Miss. 2003)	23
<i>Henley v. State</i> , 729 So.2d 232 (Miss.1998)	28, 29
<i>Herring v. State</i> , 691 So.2d 948 (Miss. 1997)	25

<i>Holland v. State</i> , 656 So. 2d 1192 (Miss. 1995)	28, 29, 30, 31, 32, 33, 34
<i>Houston v. State</i> , 78 So. 182, 117 Miss. 311 (Miss. 1918)	20, 21
<i>Jackson v. State</i> , 551 So.2d 132 (Miss. 1989)	12
<i>Johnson v. State</i> , 987 So.2d 420 (Miss. 2008)	11, 12, 13, 14, 15, 20
<i>Nicolaou v. State</i> , 612 So. 2d 1080, 1086 (Miss. 1992)	32
<i>Null v. State</i> , 311 So. 2d 654 (Miss 1975)	12, 21
<i>Read v. State</i> , 430 So. 2d 832 (Miss. 1983)	29
<i>Towner v. State</i> , 812 So. 2d 1109 (Miss. Ct. App. 2002)	31, 32
<i>Weathersby v. State</i> , 147 So. 481, 165 Miss. 207 (Miss. 1933)	9, 11, 20

STATUTES, CODE SECTIONS, AND CONSTITUTIONS

<i>Sixth Amendment United States Constitution</i>	27, 35
<i>Fourteenth Amendment United States Constitution</i>	35
<i>Article 6, Section 146 of the Mississippi Constitution</i>	2
<i>Article 3, Section 26 of the Mississippi Constitution</i>	35
<i>Miss. Code Ann. Section 99-35-101 (Supp. 2001)</i>	2
<i>Miss. Code Ann. Section 97-3-79 (Supp. 2007)</i>	22
<i>Miss. Code Ann. Section 97-3-19(1) (Supp. 2007)</i>	24
<i>Miss. Code Section 97-3-15 (Supp. 2007)</i>	24

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STATEMENT OF INCARCERATION

Brian Keith Martin is presently incarcerated in the Mississippi Department of Corrections.

STATEMENT OF JURISDICTION

This honorable Court has jurisdiction of this case pursuant to *Article 6, Section 146 of the Mississippi Constitution* and *Miss. Code Ann. 99-35-101 (Supp. 2001)*.

STATEMENT IN SUPPORT OF ORAL ARGUMENT

This case is very fact-intensive and the Appellant, through counsel, would respectfully request this Court to grant oral argument to present conflicts in the rulings of the trial court based on the evidence and testimony presented at trial that are alleged by the Appellant to be erroneous.

STATEMENT OF THE CASE

Brian Keith Martin, a paraplegic confined to a wheelchair, lives a life plagued by fear, helplessness, and paranoia. With a broken foot, a broken hip, and no use of his legs, Brian Keith lives with a vulnerability that few can understand. He has no criminal record, no prior history of violence, and candidly admitted to stabbing the decedent in this case. In fact, Brian Keith even called 911 emergency services for help after the incident occurred. This

is not a story about murder, it is a story about survival. This is the story of how Brian Keith Martin challenged overwhelming odds to reasonably defend himself.

On March 9, 2008, Linda Martin, the mother of Brian Keith, left her home around 6:00 p.m. to celebrate her birthday at a local club with her boyfriend, John Welch. Mr. Welch (hereinafter "the decedent") had been living with Linda and Brian Keith for approximately four months at the time. (T. I. 90). The decedent, who stood six feet one inch tall, and weighed two hundred forty pounds, was notably larger than Brian Keith. (See Exh. S-1 and S-9, RE. 18 and 19).

After celebrating at the club, Linda and the decedent arrived home at approximately midnight and proceeded to her bedroom, where they locked the door. Both Linda and the decedent had been drinking alcohol that evening. According to Linda's testimony at trial, she began locking her bedroom door after Brian Keith started coming into her room at night while she was asleep. This behavior had been going on for approximately one month prior to the incident. (T. I. 97).

As the couple prepared for bed, Brian Keith sat in the living room watching television. As was his custom, Brian Keith wore cotton work gloves for rolling his wheelchair, and kept a kitchen knife under his seat cushion for protection. (T. I. 146). Shortly after Linda and the decedent arrived home, Brian Keith heard the decedent yell that he was "...gonna shoot that motherf***er. . ." if he came into the bedroom. (T. I. 147). Concerned for his mother's safety, Brian Keith wheeled himself down the narrow hallway leading to her bedroom and picked the door lock with his knife. Upon opening the door, the decedent immediately arose

from the bed and approached Brian Keith, swinging his fists and demanding that he leave the room. A physical struggle then ensued in the hallway, in which the decedent suffered a single stab wound to the right side of his neck. (T. I. 118).

After the brief altercation, Brian Keith promptly called 911 emergency services and waited for authorities to arrive. (T. I. 148). Hazlehurst police officers arrived at the scene within minutes to find Brian Keith sitting in his wheelchair in a back bedroom, yelling that the decedent had threatened to kill him. (T. I. 74). Brian Keith had not removed his gloves and was still holding the kitchen knife, which he placed on the bed for police. Shortly thereafter, he was taken into custody. In June 2008, the Copiah County Grand Jury indicted Brian Keith Martin for murder. (CP. 7, RE. 11)

The trial convened on July 25, 2008 in the Circuit Court of Copiah County, Mississippi. At trial, the State called five witnesses: Tracy Welch, Michael Stogner, Byron Swilley, Linda Martin, and Dr. Steven Hayne. The State's first witness was Tracy Welch, daughter of the decedent. Tracy testified that her father had been in a car wreck in 2005, which she claimed caused him to lose partial mobility on the left side of his body, although he was still able to walk. (T. I. 66-67). There was no cross-examination by defense counsel.

The State's next witness was Michael Stogner, a patrol officer at the Hazlehurst Police Department who was dispatched to the Martin household on the morning of March 10, 2008, shortly after the stabbing. On direct examination, Officer Stogner testified that upon arriving at the scene he found Brian Keith in the back of the house yelling that Welch had threatened to kill him. (T. I. 72-73). Stogner also testified that Brian Keith stated that he did not want

the decedent in his house or with his mother. (T. I. 73). On cross-examination, Officer Stogner acknowledged that the latter statements allegedly attributable to Brian Keith were never recorded in his official report, but were based solely upon his bare recollection of the events that morning. (T. I. 74-75).

The State then called Byron Swilley, Chief of Police of the Hazlehurst Police Department, who assisted in the investigation at the Martin household on the morning of the stabbing. On direct-examination, Swilley testified that he found Brian Keith sitting in his wheelchair wearing blood-stained gloves and having already placed the knife on the end of the bed. On cross-examination, Swilley acknowledged that Brian Keith never attempted to hide the gloves or knife from police. (T. I. 86).

The State's next witness was Linda Martin, Brian Keith's mother. On direct examination, Linda testified that Brian Keith was paralyzed from the waist down and had lived with her the majority of his life. She also testified that John Welch had been living with her and Brian Keith for approximately four months prior to the incident. On cross-examination, Linda testified that she actually witnessed Brian Keith stab the decedent, thereby contradicting her three previous statements given to police in which she denied witnessing the stabbing altogether. (T. I. 106). Linda also confirmed that Brian Keith called 911 emergency services immediately after the incident.

The State called as its final witness Dr. Steven Hayne (hereinafter "Dr. Hayne"), a forensic pathologist who performed an autopsy on the decedent. Based on the autopsy, Dr. Hayne determined that the decedent died from a single stab wound to the right side of the

neck. (T. I. 118). The stab wound was noted to have traveled downward at approximately eighty degrees, and penetrated five inches into the neck cutting the carotid artery and jugular vein. This produced external hemorrhaging and extensive internal and external bleeding, known in medical terms as "acute internal and external exsanguination." (T. I. 119).

According to Dr. Hayne, because the knife hit no bone tissue while entering the neck, only a "moderate amount of force" would have been required to inflict the wound and would not necessarily incapacitate a victim immediately. (T. I. 122). Dr. Hayne then discussed a series of relatively small slash wounds found on the decedent's hands. Four wounds, measuring from approximately one-fourth up to one-half inch, were found on the palm of the decedent's right hand; two others were located on the decedent's left hand, one on both the palm and thumb. According to Dr. Hayne, these "superficial" wounds were consistent with defensive posturing injuries inflicted on an individual who was attempting to ward off injury to the head, neck, and chest. (T. I. 123).

On cross-examination, Dr. Hayne testified that the decedent stood six foot, one inch in height and had a body weight of two hundred forty pounds. Defense counsel then had Dr. Hayne illustrate to the jury how the decedent's stab wounds could have been inflicted by someone confined to a wheelchair. (T. I. 127-29). Throughout this demonstration, Dr. Hayne acknowledged that the decedent must have been very close to Brian Keith in order to sustain his injuries. (T. I. 128). Dr. Hayne further opined that no defensive wounds at all would have been incurred if the decedent was pushing the wheelchair backwards at the time he was fatally stabbed. (T. I. 130).

When Dr. Hayne was questioned whether the decedent's alleged limited usage of his left hand would affect his injuries, he conceded that in his opinion it would be "more difficult to explain them as defensive posturing" if the decedent was partially paralyzed, as claimed by the decedent's daughter's testimony for the State. (T. I. 129). Moreover, a photograph of the decedent in life, which was presented to the jury by the prosecution, added nothing to the bare allegation that the decedent had been "partially paralyzed" on his left side by a car accident that occurred after the photograph was taken. (Exh. S-1, RE. 18).

Following Dr. Hayne's testimony, the State rested and the defense moved for a directed verdict, alleging that the State failed to meet its burden of proof regarding the indicted charge of murder. (T. I. 131-32). This motion was overruled by the trial judge. The defense then proceeded with its case.

The first defense witness was Linda Martin, the mother of Brian Keith, who testified that her son had been paralyzed in his legs for over sixteen years and confined to a wheelchair during that time. (T. I. 135). On cross-examination, Linda testified that despite his disability, Brian Keith was able to get himself into and out of his wheelchair and still maintained upper body strength. (T. I. 136-37).

As its final witness, the defense called Brian Keith Martin who testified on his own behalf. Brian Keith testified that he often checked on his mother at night because people had been breaking into houses throughout their community. (T. I. 143). For protection, he carried a kitchen knife under the seat cushion on his wheelchair, and always wore gloves to protect his hands. (T. I. 146). Brian Keith also testified that on the morning of the incident he heard

the decedent yell from Linda's bedroom that he would "...shoot that motherf***er..." if he came into the room. (T. I. 147). Upon hearing this, Brian Keith rolled his wheelchair down the hallway and unlocked his mother's bedroom door. Brian Keith testified that once he opened the door, the decedent instantly came out "swinging on him." (T. I. 147). During the struggle that ensued, Brian Keith stabbed the decedent once in the neck. (T. I. 147). Immediately following the altercation, Brian Keith called "911" emergency services for help.

After Brian Keith's testimony, the defense rested and both sides presented closing arguments. At the conclusion of trial, defense counsel failed to preserve his motions. The jury deliberated for thirty-five minutes and returned a verdict of guilty to the lesser-included offense of manslaughter. Following the jury's verdict, Brian Keith Martin was sentenced to twenty years in the custody of the Mississippi Department of Corrections. Feeling aggrieved by the verdict of the jury and the sentence of the trial judge, the Appellant, through counsel, perfected his appeal to this honorable Court. (CP. 60-61, RE. 17).

SUMMARY OF THE ARGUMENT

Brian Keith Martin lives a life distinguished by his continual struggle for survival. On March 10, 2008, Brian Keith was faced with a decision no one should ever have to make: whether to live or be killed. Though Brian Keith narrowly escaped death that morning, his struggle for survival was not over. In his murder prosecution, the State failed to satisfy its burden of proof that Brian Keith did not act in his own reasonable, necessary self-defense, while defense counsel committed egregious errors that substantially prejudiced his case.

Because the Appellant was deprived of his basic right to the due process of law, Brian Keith struggles for survival yet again with this appeal. Today, only this honorable Court can right these injustices and save the life of a man who can do nothing more to save himself.

Brian Keith Martin's version of events, as told to police the morning of the stabbing and testified to at trial, was reasonable under the circumstances of the killing and not "substantially contradicted in material particulars by a credible witness or witnesses for the state, or by the physical facts or by the facts of common knowledge." *Weathersby*, 147 So. at 482. Since this version of events must be accepted as true under the *Weathersby* doctrine, Brian Keith Martin was entitled to "directed verdict of acquittal" as a matter of law. *Id.* Accordingly, the trial court's decision should be reversed and rendered, thereby discharging the Appellant from the custody of the Mississippi Department of Corrections.

In addition satisfying the terms of the *Weathersby* rule, considering the evidence in the light most favorable to the State, there was insufficient evidence to convict Brian Keith Martin of manslaughter because the State failed to show that the killing was not done "without the authority of law" - an essential element to the crime of manslaughter. Moreover, the overwhelming weight of evidence presented at trial did not support a finding of guilt, but rather affirmed that the Appellant acted in his own reasonable self-defense. Consequently, the jury's verdict and the sentence handed down by the trial court should be reversed and this case remanded to the lower court with proper instructions for a new trial.

The Appellant next alternatively argues that defense counsel's representation amounted to ineffective assistance of counsel and he should be granted a new trial. Under

Strickland v. Washington, ineffective assistance occurs when: (1) counsel's representation falls below an objective standard of reasonableness, and (2) such deficient performance prejudices the case. Here, the Appellant asserts that trial counsel's failure to renew the defense motion for directed verdict and file a written motion for a new trial amounted to deficient performance which materially and substantially prejudiced his case. Although counsel has discretion in trial strategy, there is no strategic or tactical advantage in failing to renew or file post-trial motions that preserve a convicted person's right to challenge the outcome of the case on appeal. This failure on defense counsel's part should be held as ineffective assistance of counsel *per se*, and this honorable Court should reverse and remand this case to the lower court with proper instructions for a new trial.

Though bound to a wheelchair for life, Brian Keith Martin continues his struggle for survival today. The Appellant requests that this honorable Court reverse and render this case, thereby ordering his discharge from the custody of the Mississippi Department of Corrections, or, alternatively, to reverse and remand this case to the lower court with proper instructions for a new trial.

ARGUMENT

ISSUE ONE:

WHETHER THE APPELLANT WAS ENTITLED TO A JUDGMENT OF ACQUITTAL AS A MATTER OF LAW PURSUANT TO THE *WEATHERSBY* DOCTRINE.

Brian Keith Martin's continual struggle for survival has been marked by his ability to overcome great adversity when faced with overwhelming jeopardy. With this appeal,

Brian Keith struggles to overcome adversity once again by challenging a verdict which was manifestly improper and unjust under the laws of the State of Mississippi. Though the prosecution failed to prove at trial that Brian Keith Martin did not act reasonably in his own necessary self-defense, a required element of proof, he sits in prison today. Because of this gross injustice and the denial of fundamental due process under the law, Brian Keith asks this court to reverse and render the jury's verdict and grant him the freedom he is entitled to under the law of self-defense.

In the landmark case of *Weathersby v. State*, the Mississippi Supreme Court reiterated the undeviating legal principle that:

[i]t has been for some time the established rule in this state that where the defendant or the defendant's witnesses are the only eyewitnesses to the homicide, their version, if reasonable, must be accepted at true, unless substantially contradicted in material particulars by a credible witness or witnesses for the state, or by the physical facts or by the facts of common knowledge.

Weathersby v. State, 165 Miss. 207, 147 So. 481, 482 (1933).

This longstanding legal doctrine, commonly referred to as the "*Weathersby* rule," is neither unique or novel, encompassing a principle of law that has been and continues to be accepted in Mississippi's jurisprudence for nearly a century. *See generally, Johnson v. State*, 987 So. 2d 420, 422 (Miss. 2008). While the Mississippi Supreme Court has stated that "the *Weathersby* principle is not to be casually applied, . . . when the facts warrant, it becomes efficacious." *Dew v. State*, 309 So. 2d 857, 857 (Miss. 1975). Furthermore, "[w]here the *Weathersby* rule applies and the defendant's version affords an absolute legal defense, the

defendant is entitled to a directed verdict of acquittal.” *Green v. State*, 631 So.2d 167, 174 (Miss. 1994). In determining where the rule applies, the Court has specifically reiterated the standard of review that:

The applicability of the *Weathersby* rule is a determination for the court, not the jury, *see Green*, 631 So. 2d at 175 (citing *Null v. State*, 311 So. 2d 654, 658 (Miss. 1975)), in that “*Weathersby* . . . is nothing more than a particularized version of our general standards according to which courts must decide whether in a criminal prosecution the accused is entitled to a judgment of acquittal as a matter of law.” *Jackson v. State*, 551 So. 2d 132, 136 (Miss. 1989) (citations omitted).

Johnson, *supra*, at 426 (emphasis added).

There are, of course, “circumstances when the defendant and/or the defendant’s witnesses are the only eyewitness to the homicide and the terms of the *Weathersby* rule would not apply” and the accused would not be entitled to a judgment of acquittal as a matter of law. *Johnson*, 987 So. 2d at 425. “For example, if the defendant’s eyewitnesses’ testimony satisfied all the elements of murder or manslaughter” and failed to satisfy the elements of necessary, reasonable self-defense, “the defendant would not be entitled to acquittal, as their testimony alone would be the basis for a valid conviction.” *Id.* “Furthermore, this rule has no application where the defendant’s version is patently unreasonable, or contradicted by physical facts.” *Id.* Finally, application of the *Weathersby* rule is also precluded where the accused, following the slaying, gives conflicting versions of how the killing took place, or initially denies the act leading to the death of another. *Id.*

Having fully considered the situations where the rule is inapplicable, the facts and circumstances of the present case unequivocally establish that Brian Keith Martin was

entitled to a judgment of acquittal as a matter of law after the prosecution rested its case-in-chief. Since Brian Keith was the only eyewitnesses to the homicide, and his version of events was reasonable under the circumstances of the killing and not “substantially contradicted in material particulars by a credible witness or witnesses for the state, or by the physical facts or facts of common knowledge,” the Appellant’s version must be accepted as true, thereby rendering “an absolute legal defense” to a killing of this type. *Johnson, supra*, at 425 (citing *Green v. State*, 631 So. 2d at 174).

First, Brian Keith Martin’s version of the events, as told to police the morning of the incident and testified to at trial, was “reasonable” under the circumstances of the killing. At trial, Brian Keith testified that he always wore gloves to protect his hands and kept a kitchen knife under the seat of his wheelchair for protection. Given the feelings of helplessness, vulnerability, and paranoia that Brian Keith experienced for years as a paraplegic confined to a wheelchair, these explanations for the constant possession of a knife and gloves were not “patently unreasonable” under the circumstances. (T. I. 145-46)

In addition, Brian Keith’s version of events, as told to police, also reasonably explained why he entered his mother’s room on the morning of the incident. According to his trial testimony, Brian Keith entered his mother’s room only after hearing the decedent shout that he was “. . . gonna to shoot that motherf***er . . .” if he came into the room. (T. I. 147). Given that break-ins had recently been occurring throughout the neighborhood, and that Brian Keith routinely checked the house for intruders, it was not “patently unreasonable” for him to check on his mother’s safety in his own home.

Finally, Brian Keith's version of events reasonably explained why he was forced to stab the decedent. At trial, Brian Keith testified that the decedent threatened to kill him and immediately "start[ed] swinging" at him when he entered the bedroom. (T. I-II. 147, 151). According to Brian Keith, it was only in response to this attack that he used the knife to protect himself. (T. I-II. 147, 151). This explanation, which was consistently given by the Appellant immediately after the incident and at trial, was corroborated by Officer Michael Stogner who testified that upon entering the Martin home he heard Brian Keith shouting that Welch had threatened to kill him. (T. I. 74-75) Thus, not only did Brian Keith not "initially den[y] the act leading to the death of another," but he also never gave "conflicting versions of how the killing took place." *Johnson*, 987 So. 2d at 425.

The factually similar case of *Johnson v. State* further supports the reasonableness of Brian Keith's actions that morning. In *Johnson*, the Appellant was tried for murder after stabbing the decedent once with a knife while being attacked. Immediately following the stabbing, the Appellant advised the decedent to "stay down because he was hurt" and then called "911" for help. *Id.* at 424. Based on these facts, along with other "pertinent circumstances" corroborating them, the Mississippi Supreme Court found that Johnson's eyewitness account of the stabbing was "reasonable" under the circumstances and was to be accepted as true, thereby entitling him to a directed verdict of acquittal as a matter of law. *Id.* at 426.

Just as in *Johnson*, the Appellant in the present case offered a reasonable version of events in which he admitted to stabbing the decedent one time in self-defense and called 911

emergency for help. Given that Brian Keith had heard the decedent threaten his life, that the decedent had been drinking alcohol, and that the decedent was notably larger than Brian Keith, not confined to a wheelchair, and coming at the Appellant in an aggressive manner, it was not “patently unreasonable” for Brian Keith to fear imminent threat of death or serious bodily injury and stab the decedent once to thwart his attack. *See Johnson, supra*, at 424.

In addition to Brian Keith’s version of events being reasonable under the terms of the *Weathersby* rule, his version was also not “substantially contradicted in material particulars by a credible witness or witnesses for the State.” At trial, the State called five witnesses: Tracy Welch, Michael Stogner, Byron Swilley, Linda Martin, and Dr. Steven Hayne, none of whom offered testimony substantially contradicting Brian Keith’s version of events or his claim of reasonable, necessary self-defense in the face of grave danger. The State’s first witness, Tracy Welch, testified regarding her father’s alleged physical condition and offered no information substantially contradicting Brian Keith’s version of events.

The State’s next two witnesses, Officer Michael Stogner and Chief of Police Byron Swilley of the Hazelhurst Police Department, also offered no testimony that substantially contradicted Brian Keith’s version of events “in material particulars.” According to Officer Stogner, the only statement in his official report attributable to Brian Keith was the Appellant’s claim that Welch had threatened to kill him if he came into the room. (T. I. 74-75) While Stogner also testified that Brian Keith said that he did not want Welch in his house or with his mother, this alleged statement was never recorded in the officer’s official report, but was based solely upon his bare recollection of that morning’s events. Even if

accepted as true, this testimony certainly does not substantially contradict any of the “material particulars” of the Appellant’s version of events. In addition to Officer Stogner’s testimony, Brian Keith’s version of events was also not substantially contradicted by the testimony of Chief Swilley, who stated that Brian Keith at no time attempted to hide the gloves or knife from police during the course of their investigation that morning. (T. I. 86).

The State’s fourth witness, Linda Martin, Brian Keith Martin’s mother and the girlfriend of the decedent, testified as a witness for both the prosecution and defense. Linda’s testimony, while at times confusing, did not “substantially contradict in material particulars” Brian Keith’s version of events. In essence, Linda’s testimony only established facts that were already not in dispute - that Brian Keith entered her bedroom, that the decedent arose from the bed and quickly approached Brian Keith, and that the decedent received a single stab wound to the neck. It is unclear from the record, however, whether or not Linda actually witnessed the stabbing. Though Linda stated during cross-examination that she actually saw Brian Keith stab the decedent, she also testified that Welch had already been stabbed and was bleeding when she came out of the bathroom. (T. I. 106-08). Regardless of which version is true, the *Weathersby* rule would still apply given that Brian Keith admitted to the stabbing and because neither scenario “substantially contradict[s] in material particulars” his version of events.

Finally, and perhaps most importantly, Brian Keith’s version of events was not “substantially contradicted in material particulars . . . by the physical facts or by the facts of common knowledge.” With regard to the physical forensic facts of the case, the most

important testimony came from the State's final witness, Dr. Steven Hayne, a forensic pathologist who performed an autopsy on the decedent. As evidenced by the record, Dr. Hayne's testimony not only did not contradict the Appellant's version of events, but actually corroborated his claim of reasonable, necessary self-defense in the face of grave danger.

According to Dr. Hayne, the decedent died from a single stab wound to the right side of the neck, which was noted to have traveled downward at approximately eighty degrees. Because the knife hit no bone tissue while entering the neck, Dr. Hayne testified that only a "moderate amount of force" would have been required to inflict the wound and would not necessarily incapacitate a victim immediately. (T. I. 120-22). During his testimony, Dr. Hayne also discussed a series of relatively small slash wounds found on the decedent's hands. Four wounds, measuring from approximately one-fourth up to one-half inch, were found on the palm of the decedent's right hand; two others were located on the decedent's left hand, one on both the palm and thumb. According to Dr. Hayne, these "superficial" wounds were consistent with defensive posturing injuries inflicted on an individual who was attempting to ward off injury to the head, neck, and chest. (T. I. 123).

On cross-examination, Dr. Hayne further testified that the decedent stood six foot, one inch in height and had a body weight of two hundred forty pounds. Defense counsel then had Dr. Hayne illustrate to the jury how the decedent's stab wounds could have been inflicted by someone confined to a wheelchair. (T. I. 126-29). Throughout this demonstration, Dr. Hayne acknowledged that the decedent must have been very close to Brian Keith in order to sustain his injuries. Moreover, when questioned whether the decedent's supposed limited usage of

his left hand would affect his injuries, Dr. Hayne conceded that in his opinion it would be “more difficult” to explain the stance as “defensive posturing” if the decedent was partially paralyzed, as claimed by his daughter’s testimony. (T. I. 129). Finally, Dr. Hayne opined that no defensive wounds at all would have been incurred if the decedent was pushing the wheelchair backwards at the time he was fatally stabbed. (T. I. 130).

Based on this testimony, it is evident that the physical facts of this case not only did not contradict Brian Keith’s version of events, but in fact fully corroborated his claim of reasonable, necessary self-defense in the face of grave danger. First, the physical facts establish, consistent with the Appellant’s claim of self-defense, that the decedent was extremely close to Brian Keith when the stab wound was inflicted. According to Dr. Hayne, the stab wound traveled downward at approximately eighty degrees. With the decedent standing six feet, one inch tall, weighing two hundred-forty pounds, and fully able to walk, and Brian Keith significantly shorter, smaller in stature, and confined to a wheelchair, it would have been almost impossible for Brian Keith to inflict this injury if the decedent was standing up straight or moving away. This fact was recognized by Dr. Hayne himself, who testified that the decedent must have been very close to Brian Keith to be stabbed from such a dramatic angle.

Second, the physical facts establish, consistent with Brian Keith’s claim of self-defense, that the decedent could not have been attempting to push the wheelchair with his hands when his injuries were incurred. Notably, the four small cuts found on the decedent’s hands, referred to as “defense posturing” injuries, were wounds that would not have been

possible if the decedent was pushing the wheelchair. (T. I. 130). Moreover, while it was alleged that the decedent was unable to fully use his left arm due to a handicap, the physical evidence showed that Welch had cuts on his left hand, which, according to Dr. Hayne, would have necessarily been different if the decedent had in fact been handicapped in the way alleged. (T. I. 129).

Given that the decedent was physically superior to Brian Keith and capable of walking away or standing up straight, the physical facts support Brian Keith's claim of reasonable self-defense in the face of grave danger by establishing that the decedent was not attempting to evade danger that morning, but rather to engage in a confrontation. Moreover, the decedent's injuries further establish that while Welch could not have been pushing Brian Keith's wheelchair, he was close enough to Brian Keith to cause him harm and create a reasonable fear of imminent death or serious bodily injury.

Because none of the aforementioned evidence and testimony affronts the commonsense of everyday experience, or contradicts any material facts proven by the State or defense witnesses, Brian Keith's reasonable version of events was also not "substantially contradicted in material particulars . . . by the physical facts or by the facts of common knowledge," thereby satisfying the final requirement of the *Weathersby* rule.

Brian Keith Martin's reasonable eyewitness account, not "substantially contradicted in material particulars," coupled with the "pertinent circumstances which corroborated" his account (*i.e.*, the 911 emergency call Brian Keith made after the stabbing, his consistent statements to police regarding the decedent's threats, and the physical forensic evidence as

established by Dr. Hayne), collectively sustain a sufficient case of self-defense. *Weathersby*, 147 So. at 482. As this version “must be accepted as true,” *Id.* (emphasis added), in the case sub judice, it provides “an absolute legal defense,” to either murder or manslaughter. *Johnson, supra*, at 426. Moreover, “taking the transcript of the evidence by the four corners,” the *Weathersby* rule is clearly applicable in this case, “as the necessary elements for either a murder or manslaughter conviction were lacking.” *Id.* Accordingly, the Appellant contends that under the evidence and testimony presented by the State of Mississippi in its case-in-chief he was “entitled to a directed verdict of acquittal.” See generally, *Id.*

In addition to satisfying the requirements of the *Weathersby* rule, the facts of this case also bear a strikingly similarity to *Houston v. State*, a case relied upon in *Weathersby*, in which the defendant claimed self-defense after stabbing her attacker once with a small kitchen knife. *Houston v. State*, 117 Miss. 311, 78 So. 182 (Miss. 1918). According to the record in *Houston*, there were no previous “threats or difficulty” between the Appellant and decedent, and the Appellant denied that she was mad before the confrontation, or that she had any malice or intention to kill or murder the decedent. *Id.* at 183.

Based on the those facts, the Mississippi Supreme Court determined that the State had failed to meet its burden of proof, and that the record did not show beyond a reasonable doubt and to a moral certainty that the Appellant was guilty. *Id.* In reaching this decision, the Court noted that while “the jury is under no compulsion to implicitly believe all the statements of a party acknowledging the killing of the deceased person . . . there must be

physical facts or circumstances inconsistent with the statements or testimony of the accused.”

Id. Accordingly, the Court found that the defendant’s account was “not upon its face an unreasonable story,” . . . “unless materially contradicted by the physical facts, should not be utterly ignored.” *Id.*

Just as in *Houston*, the Appellant in the present case had no history of previous threats or difficulty with the decedent, denied any malice or intention to kill and murder, and denied that he was angry with the decedent before the confrontation. (T. I. 141, 148, 150) Moreover, just as in *Houston*, the Appellant in the present case defended himself by stabbing the decedent once with a small kitchen knife, and provided a consistent version of events that was neither unreasonable upon its face nor “materially contradicted by the physical facts.” *Id.* Considering Brian Keith Martin’s consistent, reasonable, and corroborated testimony, the Appellant asserts that the facts of this case conclusively establish “that the State failed to meet its burden of proof at trial, and that the record did not show beyond a reasonable doubt and to a moral certainty that the Appellant was guilty of manslaughter.” *Id.*

As a final matter, although a jury verdict which is reversed and rendered pursuant to the *Weathersby*’s rule is often couched in terms of a “directed verdict of acquittal,” it is important to note that these two legal doctrines are fundamentally different. Whereas *Weathersby* focuses on the defendant’s version of events, a traditional motion for a directed verdict focuses on the State’s proof in establishing the elements of the offense. Furthermore, as previously noted, the applicability of the *Weathersby* rule is a determination for the court, not the jury. See *Green*, 631 So. 2d at 175 (citing *Null v. State*, 311 So. 2d 654, 658 (Miss.

1975)). Therefore, the Appellant respectfully moves this honorable Court to reverse and render this case and order the discharge the Appellant from the custody of the Mississippi Department of Corrections under the terms of the *Weathersby* rule.

ISSUE TWO:

WHETHER THE TRIAL COURT ERRED WHEN IT FAILED TO SUSTAIN THE APPELLANT'S MOTION FOR A DIRECTED VERDICT BASED UPON INSUFFICIENCY OF THE STATE'S CASE, OR, IN THE ALTERNATIVE, WHETHER THE JURY'S VERDICT WAS CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Now turning to the different question of whether a directed verdict should have been granted based on the weight or legal insufficiency of the evidence, the Appellant respectfully contends that whether the weight of the evidence presented at trial was supportive of the jury's verdict, or whether the State's case was legally sufficient, are separate issues from the application of the *Weathersby* doctrine, and the Appellant, recognizing that these matters are separate and distinct assignments of error, would present them in this single issue argument.

In order to establish that Brian Keith Martin was guilty of manslaughter the State was required to prove beyond a reasonable doubt to the jury's satisfaction: (1) that Brian Keith Martin did kill and slay John Welch, a human being, (2) without malice, (3) in the heat of passion, and (4) *without authority of law*. *Miss. Code Ann. Section 97-3-79* (Supp. 2007) (emphasis added). The Appellant respectfully submits that the State of Mississippi failed to conclusively establish by legally sufficient evidence each of these elements to support the jury's finding of guilt.

A. The Legal Sufficiency of the Evidence Did Not Establish Each and Every Element of the Offense Charged.

In evaluating a claim of sufficiency of the evidence, the critical inquiry is whether the evidence shows “beyond a reasonable doubt that the accused committed the act charged, and that he did so under such circumstances that every element of the offense existed.” *Carr v. State*, 208 So. 2d 886, 889 (Miss. 1968). In other words, legal sufficiency only exists where “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Bush v. State*, 895 So. 2d 836, 843 (Miss. 2005) (citing *Jackson v. Virginia*, 443 U.S. 307, 315 (1979)). Where the evidence fails to meet this test, it is insufficient to support a conviction. *Carr*, 208 at 889. In making this determination, the Court considers the evidence in the light most favorable to the State and gives the State “the benefit of all favorable inferences that may reasonably be drawn from the evidence.” *Id.* at 837 (emphasis added).

Considering the evidence in the light most favorable to the State, there was not sufficient evidence to convict Brian Keith Martin of manslaughter because the State failed to establish each and every element of the offense beyond a reasonable doubt. Specifically, the State failed to show that in the face of grave danger constituting justifiable homicide, the killing was not done “without the authority of law,” *i.e.* that Brian Keith Martin did not act “reasonably” in his own necessary, self-defense. *See generally, Harris v. State*, 861 So. 2d 1003 (¶¶23-30) (Miss. 2003) (citing *Evans v. State*, 797 So. 2d 811 (Miss. 2000)). In fact, the Appellant contends that the prosecution’s case actually established the self-defense claim,

which then required the State to further negate the “justifiable” nature of the killing.

The pertinent portion of the Mississippi murder statute placing this affirmative burden of proof upon the prosecution reads:

§ 97-3-19. Homicide; murder defined. . .

(1) The killing of a human being *without the authority of law* by any means or in any manner shall be murder in the following cases:

(a) When done with deliberate design to effect the death of the person killed, or of any human being;

(b) When done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual;. . .

Miss. Code Ann. Section 97-3-19(1) (Supp. 2007) (emphasis added).

Further, the Mississippi Code sets out the particulars of exactly what the State of Mississippi shall have the burden to prove in a murder prosecution under the required “without the authority of law” statutory element of proof:

§ 97-3-15. Homicide; justifiable homicide; use of defensive force. . .

(1) The killing of a human being by the act, procurement or omission of another shall be justifiable in the following cases:

. . .

(f) When committed in the lawful defense of one's own person or any other human being, where there shall be reasonable ground to apprehend a design to commit a felony or *to do some great personal injury*, and there shall be *imminent danger of such design being accomplished*; . . .

Miss. Code Ann. Section 97-3-15 (Supp. 2007) (emphasis added).

All of the testimonial and physical evidence presented by the State in its case-in-chief conclusively established that Brian Keith Martin had a reasonable fear of imminent grievous bodily harm or death and that John Welch had the immediate means to accomplish that design when he was stabbed. Based on this evidence, a “rational trier of fact could not have found the essential elements of the crime beyond a reasonable doubt.” *Bush v. State*, 895 So. 2d at 843. Because the State failed to show that the Appellant’s conduct in this case was not in reasonable self-defense and conclusively established that the killing was “justified,” the trial court’s decision should be reversed and rendered, thereby discharging the Appellant from the custody of the Mississippi Department of Corrections.

B. The Weight of the Evidence Did Not Support the Jury’s Finding of Guilt as to the Lesser-Included Offense of Manslaughter.

In the alternative, taking all reasonable inferences in the light most favorable to the jury’s verdict, the overwhelming weight of evidence presented at trial did not support a finding of guilt and allowing the jury’s verdict to stand sanctions an unconscionable injustice. In determining whether a jury verdict is against the overwhelming weight of the evidence, the reviewing court “must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial.” *Herring v. State*, 691 So. 2d 948, 957 (Miss. 1997). Furthermore, the Court will overturn a verdict only when it is “so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice.” *Id.*

Taking all reasonable inferences in the light most favorable to the jury’s verdict, the

overwhelming weight of evidence presented at trial did not support a finding of guilt, but rather a finding that the Brian Keith acted in his own reasonable self-defense. In reaching a verdict of guilt to manslaughter, the jury was obviously carried away by bias, passion, and prejudice in their determination that someone had to pay for the death of John Welch, even if the accused was confined to a wheelchair and was not the first aggressor. All of the testimonial and physical evidence presented by the State in its case-in-chief conclusively established that Brian Keith Martin had a reasonable fear of imminent grievous bodily harm or death, and that the decedent had the immediate means to accomplish that design when he was stabbed. Against this background of evidence, allowing this verdict to stand would sanction “an unconscionable injustice.” *Bush*, 895 So. 2d at 844. Accordingly, the Appellant respectfully contends that the jury’s “compromise” verdict of guilt as to the lesser-included offense of manslaughter and the sentence of twenty years in the custody of the Mississippi Department of Corrections handed down by the trial court should be reversed and this case remanded to the lower court with proper instructions for a new trial.

ISSUE THREE:

WHETHER DEFENSE COUNSEL’S REPRESENTATION CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL PER SE WHEN HE FAILED TO RENEW THE MOTION FOR DIRECTED VERDICT AT THE CONCLUSION OF TRIAL AND THEN ALSO FAILED TO FILE A WRITTEN MOTION FOR JUDGMENT NOT WITHSTANDING THE VERDICT, OR ALTERNATIVELY, FOR A NEW TRIAL.

The Appellant not only struggled to survive against the State during its deficient prosecution, but also against the errors committed by defense counsel at trial. Should this

Court decide to procedurally bar the Appellant's prior arguments as set out hereinabove of entitlement to a verdict of acquittal pursuant to the *Weathersby* rule, or on the separate issues of the legal sufficiency and weight of the evidence, the Appellant would respectfully assert he was denied the effective assistance of counsel as a matter of law in the unfaltering duty of defense counsel to adequately preserve such claims of error for appellate review. While the *Sixth Amendment of the United States Constitution* guarantees all criminal defendants a right to effective counsel for his defense, the Appellant in this case was denied this right when his counsel failed to file essential post-trial motions to raise these claims for the trial court's consideration and a first appellate review as a matter of right. This issue argument raises a critical constitutional question and is subject to a *de novo* review. *Epps v. State*, 984 So. 2d 1042, 1047 (Miss. Ct. App. 2008). The Appellant asks this Court to end his struggle with the system, protect the rights basic to all who are accused, and allow him to survive.

Under *Strickland v. Washington*, a well-established two-prong test for ineffective assistance of counsel is examined under the standards of: (1) whether counsel's performance fell below an objective standard of reasonableness, and (2) whether counsel's deficient performance prejudiced the case. *Strickland v. Washington*, 466 U.S. 668, 694 (1984); see also, *Cole v. State*, 666 So. 2d 767, 775 (Miss. 1995). It is the defendant who shoulders the burden of proving both prongs. *Cole*, 666 So. 2d at 775. Moreover, the question of whether counsel was ineffective must be determined from the "totality of circumstances." *Id.* When evaluating the deficiency of counsel's representation and its prejudice on the case, the Court looks at counsel's overall performance to determine whether or not there was ineffective

assistance. *Henley v. State*, 729 So.2d 232, 241 (Miss.1998).

A. Counsel's Failures to Renew the Motion for Directed Verdict and File a Post-Motion for a New Trial Constitute Deficient Performance.

As to the first prong of *Strickland*, in considering whether counsel's representation fell below an objective standard of reasonableness, there is a strong presumption that counsel's conduct falls within the wide range of "reasonable professional assistance." *Holland*, 656 So. 2d 1192, 1197 (Miss. 1995). Likewise, there is also a presumption that defense counsel's decisions during trial can be characterized as "strategic." *Cole*, 666 So.2d at 775. To prevail on an ineffective assistance of counsel claim, the defendant must overcome both of these presumptions.

Moreover, the Mississippi Supreme Court has noted that the failure to file certain motions, alone, is not enough to trigger ineffective assistance of counsel. *Cole*, 666 So.2d at 777. Reasonable professional assistance encompasses counsel's decisions whether or not to file certain motions, call certain witnesses, and make certain objections. *Id.* As such, these inactions do not necessarily give rise to deficient performance. *Id.* However, the Court has also held that where the State's evidence is insufficient, a failure to move for directed verdict constitutes deficient performance under the *Strickland* standard. *Henley*, 729 So. 2d at 242; see also, *Holland*, 656 So.2d at 1198.

Counsel is given wide discretion in deciding which tactics to use during trial. *Golden v. State*, 968 So.2d 378 (Miss. 2007). No set of rules exists to regulate counsel's conduct, as it would restrict counsel's discretion in making strategic decisions. *Id.* at 386. In *Golden*,

a defendant claimed that his counsel had been ineffective when he failed to give an opening statement. *Id.* at 388. The Court reasoned that the decision of whether or not to present an opening statement was strategic. Counsel has “constitutionally protected independence” in advocating for clients, and the Court is understandably hesitant to restrict the defense’s “trial strategy” as it may negatively impact counsel’s independence. *Id.*

Notably, defendants are entitled to fair trials, which may sometimes be imperfect. *Fulks v. State*, 944 So. 2d 79 (¶11) (Miss. Ct. App. 2006). In the same token, defendants have a right to competent counsel, not “constitutionally errorless” counsel. *Id.*; see also, *Cabello v. State*, 524 So. 2d 313, 315 (Miss. 1988). For this reason, the Court determines whether counsel’s performance was “constitutionally substandard” for purposes of ineffective assistance. *Fulks*, 944 So. 2d at ¶12; see also, *Read v. State*, 430 So. 2d 832, 841 (Miss. 1983).

In the present case, the Appellant’s attorney failed to renew the motion for directed verdict and failed to file a written post-motion for a new trial. While counsel it may be true that counsel is allowed to make strategic decisions during trial, th Appellant respectfully contends that there is never any strategic or tactical advantage in failing to renew a directed verdict motion. The purpose of a motion for directed verdict is to allow the trial judge another chance to reconsider the evidence and to also preserve the record for appeal. *Holland*, 656 So. 2d at 1197. Having not renewed the motion, counsel effectively denied the trial judge a second opportunity to review the evidence as well as procedurally barred the defendant from raising issues critical to the verdict and the State’s case on appeal. Because

the trial judge was not allowed a second opportunity to review the record in a motion for JNOV or a new trial, the Appellant submits that this failure constitutes *per se* deficient performance under the *Strickland* standard. Still, deficient performance is only half of the test. Deficient performance, absent actual prejudice, does not amount to ineffective assistance.

B. Counsel's Deficient Performance Denied The Trial Judge a Second Opportunity to Reconsider the Evidence and Failed to Preserve the Record For Appeal Thereby Prejudicing the Appellant's Case.

As to the second prong, after showing that counsel's representation fell below an objective standard of reasonableness, the defendant must show that his case was actually prejudiced. *Holland*, 656 So. 2d at 1198. In order to establish prejudice, the defendant must prove there is a reasonable probability that, absent counsel's errors, the trial court's decision would have been different. *Id.* Thus, to prove ineffective assistance, the defendant must prove that counsel's substandard performance was so substantial that it deprived the defendant of a fair trial. *Id.* at 1197.

For example, in *Fulks v. State*, the defendant alleged that his trial counsel was ineffective because counsel failed to renew the motion for directed verdict. *Fulks v. State*, 944 So.2d at ¶10. While a failure to move for directed verdict is deficient performance, the court on appellate review reasoned that because trial counsel subsequently filed a motion for a new trial, the original error had been cured. *Id.* The motion for new trial preserved the record for appeal, and as such, there was no actual prejudice. *Id.* However, in *Holland v. State*, trial counsel failed to renew the motion for directed verdict and failed to file a motion

for new trial. **Holland**, 656 So. 2d at 1197. In **Holland**, this Court found that the aggregate effect of counsel's errors amounted to ineffective assistance. *Id.* at 1198. While counsel's individual errors give rise to deficient performance, it is the aggregate effect of counsel's performance that determines "prejudice." *Id.*

Although failure to renew the motion for directed verdict alone is not enough to trigger ineffective assistance *per se*, counsel's combined errors of completely failing to protect the Appellant's rights by filing post-trial motions for a new trial warrant a finding by this honorable Court of not only deficient performance, but also direct prejudicial effect on the Appellant's case. At trial, the judge was not given a second opportunity to reconsider the evidence to determine if the evidence supported the jury's verdict. Defense counsel's failures also prejudiced the Appellant's right to have a review of the trial record, and, therefore, denied the Appellant any appeal as a matter of right on most issues common to appellate review.

The present case is distinguishable from **Towner v. State**, 812 So. 2d 1109 (Miss. Ct. App. 2002). In **Towner**, the defendant alleged his trial counsel was ineffective because he failed to renew the motion for directed verdict. The Court of Appeals found that because there was absolutely no insufficiency in the evidence presented at trial, any motion for directed verdict would have properly been denied. *Id.* at 1115. The Appellant asserts the facts of this case presented insufficient evidence to convict him of murder or manslaughter, and evidence also existed that conclusively established a **Weathersby** defense, which would have exonerated the Appellant completely. Because counsel failed to renew the motion at

the end of his case, the trial judge was not given another chance to re-examine whether the evidence was legally sufficient to support the murder charge before the case was submitted to the jury. Usually, a motion for a new trial cures the failure to renew a directed verdict motion at the end of the case. *Fulks*, 944 So.2d at ¶10. Yet, because defense counsel failed to adequately preserve the record by failing to file these important post-trial motions, the Appellant may be denied a meaningful opportunity for a review of these issues on appeal.

Counsel's deficient performance also effectively waived the Appellant's weight of the evidence issues on appeal. At the conclusion of the State's case, defense counsel moved for a directed verdict, but the motion was overruled. (T. I. 131-33, RE. 14-16). When counsel proceeded with the defense case after the motion was overruled, the Appellant's counsel waived the right to appeal of that denial of a directed verdict. *Holland*, 656 So. 2d at 1197. In failing to raise a post-trial motion challenging the jury's verdict against the weight of the evidence presented at trial, the judge was not given a second opportunity to reconsider whether the evidence supported the jury's verdict. As stated by the Court in *Holland*:

The defendant must also demonstrate a reasonable probability that the result of the trial would have been different but for counsel's deficiencies. *Nicolaou v. State*, 612 So. 2d 1080, 1086 (Miss. 1992). There was more than a reasonable probability in this instance. As discussed *supra*, the evidence was insufficient as a matter of law to support the charge and there was a reasonable probability that the trial judge would have granted the renewed motion for a judgment notwithstanding the verdict or a peremptory instruction had he been afforded a second chance to review the evidence produced at trial. In addition, a reversal would have definitely followed if the error had been properly preserved for appeal.

Id. at 1198 (emphasis added).

In the present case, counsel also failed to file a written post-motion for a new trial to allow the trial judge to review the totality of the evidence and testimony presented to determine if the jury's guilty verdict to the lesser-included offense of manslaughter was supported by the evidence. Without a renewal of the directed verdict or motion for a new trial, defense counsel also constructively waived the Appellant's claims of error as to the legal sufficiency and the weight of the evidence on appeal. **Holland**, 656 So. 2d at 1197.

The ruling in **Holland** is very instructive as to these points of the ineffective assistance issue argument and provides the closest analogy to the Appellant's case. In **Holland**, the defendant was convicted for possession of a controlled substance with the intent to distribute. **Id.** At trial, the State lacked evidence to prove that Holland intended to sell the drugs. **Id.** at 1196-97. When Holland's trial counsel moved for directed verdict at the conclusion of the State's case, the trial judge overruled the motion. **Id.** at 1197. Counsel then proceeded with his defense. At the close of Holland's case, defense counsel did not renew the motion for directed verdict nor did counsel file a motion for a new trial. **Id.** The Mississippi Supreme Court found that the absence of a renewal of the motion for directed verdict and motion for a new trial constituted as a waiver of the sufficiency error on appeal. **Id.** The Court held that because of these errors, Holland was denied the effective assistance of counsel. **Id.** at 1198.

The **Holland** case is remarkably similar to the situation before this honorable Court today. As in **Holland**, there was insufficient evidence to convict Brian Keith Martin on either of the charges of murder or manslaughter. In both cases, defense counsel failed to renew the motion for directed verdict and file a motion for new trial. In neither case was the trial judge

allowed a second opportunity to reevaluate the evidence although there was an insufficiency in the evidence as to both the State's case and the jury's verdict. In both cases, there was a total failure to preserve these errors for the trial court and an appellate review. As this Court found for *Holland*, the Appellant respectfully submits that this honorable Court should also find that he was denied the effective assistance of counsel.

There is more than a reasonable probability that absent counsel's deficiencies, the trial court's ruling would have been different. Here, the State failed to meet its burden of proof and the evidence was not of an overwhelming weight to support the jury's finding of guilt. Consequently, there is a reasonable probability that the trial judge could have granted the renewed motion for directed verdict had he been given another opportunity to review the totality of the evidence. The trial judge was also deprived of the opportunity to consider whether a new trial was warranted in light of the jury's verdict which was in the face of overwhelming proof of necessary, reasonable self-defense on the part of Brian Keith Martin.

Counsel was deficient by failing to preserve any objection to the legal sufficiency or weight of the evidence through the renewal of these critical and essential procedural steps that have only one purpose: to protect the right to due process of law in a criminal prosecution of an accused citizen. *See generally, Id.* at 1198. This deficiency was worsened by the "resulting failure to preserve critical error on appeal." *Id.* Thus, counsel's substandard performance at trial has also deprived the Appellant of any meaningful opportunity of appellate review should this honorable Court choose to procedurally bar any of the issues raised hereinabove. The Appellant contends that the prejudice prong of the *Strickland* test

is, therefore, conclusively established through defense counsel's total failure to allow the trial judge to review the case post-trial and to have a full and complete appellate review of the proceedings in this case.

The Appellant asserts that the State failed to meet its burden of proving the Appellant guilty of murder or manslaughter. Instead, the State put on evidence that revealed the decedent and Appellant were engaged in a brief altercation, which resulted in the decedent's death, and that the State did not negate the fact that the Appellant acted in his own necessary self-defense. (T. I. 98-99). Based on the State's unmet burden and the jury's erroneous verdict, Brian Keith's struggle for survival should have ended at trial, yet, because of counsel's errors, his struggle with the system continues. Therefore, the Appellant would respectfully request this honorable Court to find that he was deprived of his fundamental rights to the due process of law under the *Sixth Amendment to the United States Constitution*, the *Fourteenth Amendment to the United States Constitution* and *Article 3, Section 26 of the Mississippi Constitution*, thereby reversing the verdict of the jury and the resulting sentence handed down by the trial judge and remanding this case to the lower court with proper instructions for a new trial on the merits.

CONCLUSION

The Appellant herein submits that based on the propositions cited and briefed hereinabove, together with any plain error noticed by the Court which has not been specifically raised, the judgment of the trial court and the Appellant's conviction and

sentence should be reversed and vacated, respectively, and the matter remanded to the lower court for a new trial on the merits of the indictment on a charge of murder, with instructions to the lower court. In the alternative, the Appellant herein would submit that the judgment of the trial court and the conviction and sentence as aforesaid should be vacated, this matter rendered, and the Appellant discharged from custody, as set out hereinabove. The claims of error in this case are brought by the Appellant under *Article 3, Sections 14, 23, and 26 of the Mississippi Constitution* and the *Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution*. The Appellant further states to the Court that the individual and cumulative errors as cited hereinabove are fundamental in nature, and, therefore, cannot be harmless.

Respectfully submitted,

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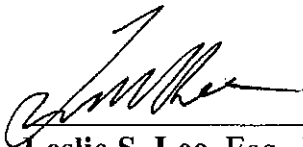
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CERTIFICATE OF SERVICE

I, Phillip W. Broadhead, Criminal Appeals Clinic Professor and attorney for the Appellant herein, do hereby certify that I have this day mailed postage fully pre-paid/hand delivered/faxed, a true and correct copy of the foregoing Record Excerpts to the following interested persons:



Honorable Judge Lamar Pickard, Circuit Court Judge
TWENTY-SECOND JUDICIAL DISTRICT
Post Office Box 310
Hazlehurst, Mississippi 39083;

Alexander C. Martin, Esq., District Attorney
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ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI
Post Office Box 220
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Mr. Brian Keith Martin, Appellant
MISSISSIPPI DEPARTMENT OF CORRECTIONS
Parchman, Mississippi

This the 3RD day of APRIL, 2009.


Phillip W. Broadhead, 
Certifying Attorney