IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JONATHAN BARFIELD — APPELLANT

V. — NO. 2008-KA-1606-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE 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. Jonathan Barfield, Appellant
3. Honorable Cono Caranna, District Attorney
4. Honorable Lisa P. Dodson, Circuit Court Judge

This the 23 day of March, 2009.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

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THE TRIAL COURT ERRED IN DENYING BARFIELD'S MOTION FOR A NEW TRIAL BECAUSE THE WEIGHT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Harrison County, Mississippi, and a judgment of conviction for the crime of Manslaughter. Jonathan Barfield was sentenced to twenty (20) years in the custody of the Department of Corrections following a jury trial on July 8-10, 2008, Honorable Lisa P. Dodson, presiding. Barfield is presently incarcerated with the Mississippi Department of Corrections.

FACTS

On December 27, 2006, Tiffany Talley came over to Barfield's house and Tiffany ultimately died of an accidental gunshot wound to the head. Tiffany and Barfiled had been dating for nearly two (2) years. Tr. 355. Barfield described their relationship as a regular relationship like any other people. *Id.* Barfield stated that they had their ups and downs but overall the relationship was doing fine. *Id.*

According to the testimony of Barfield, on December 27, 2006, Tiffany called Barfield and told him that she was leaving basketball practice. Tr. 358. Basketball practice was over at eleven o'clock that morning. Tr 359. Barfield was asleep on the couch in the living room when she called and woke him up that morning. Tr. 355.

While talking with Tiffany a few times, Barfield was preparing to go to Lacomb, Louisiana to put flowers on his mother's grave. Tr. 360. Barfield stated that he had no plans

of seeing Tiffany on December 27, 2006. Tr. 361. As Barfield was taking a shower, the phone rang. Tr. 362. Barfield answered the phone and it was Tiffany. Tr. 363.

During the conversation with Tiffany, Barfield heard some loud banging on his front door. *Id.* Barfield told Tiffany to hold on and he walked through the hallway toward the living room. *Id.* When Barfield got to the door, the noticed that the door knob was turning on the door. *Id.* Barfield sat his phone on the table and grabbed his gun. *Id.*

Barfield then went to the door with the gun to surprise[1] whoever was trying to come in to his house. *Id.* The bottom lock on the door was unlocked, but the top lock was locked. *Id.* Barfield slid the lock real fast to surprise the intruder with his gun. *Id.* Barfield then realized that Tiffany was at the door. *Id.*

Tiffany saw the gun and questioned what Barfield planned to do with the gun. Tr. 364. As Barfield was trying to uncock the gun, he heard a bang noise. *Id.* The pistol had gone off and Tiffany was shot. Tr. 365. Barfield states that Tiffany had not been at his house a good thirty (30) seconds when the gun went off. *Id.* After the gun accidently discharged a bullet, Barfield was holding it so loosely that he dropped the gun onto the ground. *Id.*

Barfield contends that he was so scared and shaken up that the gun discharged in the house that he took the gun and threw it over a fence beside his house. *Id.* After Barfield threw the gun over the fence, he came back in to tell Tiffany to get up and he saw blood. *Id.*

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[1]Barfield stated that he needed protection because he lived in a bad area.

Barfield states that he just thought Tiffany had fell to the floor to cover herself from the gun shot. *Id.*

Barfield discussed through his testimony that he did not have much knowledge with regard to operating a firearm. Tr. 366. Barfield was trying to uncock the revolver pistol. *Id.* He also stated that he had never shot that gun prior to the accident shooting. *Id.* Barfield did indicate that in order to uncock the revolver, he had to hold the trigger and ease up the lever. *Id.* As Barfield was trying to uncock the pistol, he was bumped by Tiffany causing his finger to slip off of the gun. Tr. 367.

Once he realized that Tiffany was shot, Barfield immediately called his dad and told him what happened because it was his dad's trailer. Tr. 369. Barfield's dad told him to call 911, and he called 911. *Id.* Barfield testified that he was doing everything that he was told to do by 911. Tr. 368. Barfield used a sweatshirt that he received from Tiffany to stop the bleeding. *Id.*

When the police arrived on the scene, Barfield jumped up and ran to the door looking for the ambulance and only police cars were outside of his house. Tr. 370. He told the police that there had been an accident. *Id.* However, the police had their guns drawn on Barfield and put handcuffs on him and threw him in the police car. *Id.* Barfield was arrested and taken to Harrison County Jail. Tr. 372. He told the police that the shot was an accident and that he did not intentionally shoot Tiffany.

SUMMARY OF THE ARGUMENT

The trial court erred by allowing the introduction of gruesome autopsy photographs into evidence. The photographs served no probative purpose and were highly prejudicial.

Also, the trial court did abuse its discretion in denying Barfield's motion for a change of venue. The accused has a right to a change of venue when it is doubtful that an impartial jury can be obtained. Barfield was prejudice due to the prejudicial publicity and series of newspaper and internet articles as well as broadcasts on and after December 27, 2006, which inferred that a crime had been committed and that Barfield was guilty of the crime. A new trial should be granted with directions for a change of venue. A new trial in a different county is necessary to insure that a fair and impartial jury will be impaneled to determine Barfield's guilt or innocence.

Barfield was entitled to an acquittal as a matter of law pursuant to the ***Weathersby*** Rule which is found in ***Weathersby v. State***, 165 Miss. 207, 209, 147 So. 481, 482 (1933) and its progeny. Barfield was the only one present when Tiffany was accidentally shot by Barfield's gun. Barfield's version of the events was not substantially contradicted by the evidence, and therefore he was entitled to an acquittal as a matter of law.

The verdict was against the overwhelming weight of the evidence. Tiffany called Barfield numerous times on the day of the incident and came over to see her boyfriend. She was wearing the earring that Barfield had given her. Furthermore, all the presents that Tiffany had given to Barfield were still in Barfield's home. The state's witnesses account of many details could not be verified and did not coincide with the facts in this case.

The verdict was against the weight of the evidence. Barfield asks that his conviction of manslaughter be reversed and rendered or in the alternative, reversed and remanded for a new trial.

ARGUMENT

ISSUE NO. 1

THE TRIAL COURT ERRED BY ALLOWING INTRODUCTION OF GRUESOME PHOTOGRAPHS THAT WERE UNNECESSARY AND PREJUDICIAL AGAINST BARFIELD.

The admissibility of crime-scene and autopsy photographs containing gruesome depictions of corpses or injuries to them must first be judged under the evidentiary rules proscribing relevancy and its limits. More specifically, a trial court must examine these type of photographs with an eye toward the balancing test of unfair prejudicial effect weighed against probative value required by Mississippi Rules of Evidence 402 and 403, even if the photographs are found to be relevant under Mississippi Rule of Evidence 401.

State's Exhibit 6 introduced during trial is an autopsy photograph of the gunshot wound to the victim's face. Tr. 249. In the photograph the picture depicts the gunshot entry wound to the right cheek and a probe to show the direction that the bullet went into her head. *Id.* In ***McFee v. State***, 511 So.2d 130, 135 (Miss. 1987), the Court reiterated that "photographs which are gruesome or inflammatory and lack an evidentiary purpose are always inadmissible."

In ***Welch v. State***, 566 So.2d 680, 681 (Miss. 1990), Welch, partly under duress, and two of his buddies beat Joe Ray Heath to death over a gambling argument and dumped

Heath's body on the side of the road. Welch's two buddies pled guilty, Welch took his chances at trial and was convicted of murder. *Id* at 682.

The ***Welch*** court found several reversible errors, one of which was the introduction of autopsy photographs which were more gruesome and prejudicial than probative. The ***Welch*** court found fault with the photographs of the victim's "dissected cadaver." *Id* at 685.

The ***Welch*** court reiterated that the admissibility of photographs is at the trial court's discretion and there is no remedy on appeal without an abuse of that discretion. *Id.* One way a trial court abuses the discretion is to allow "[g]ruesome photos which have no evidentiary purpose or probative value except to inflame and arouse the emotion of the jury." *Id.*

The ***Welch*** court said the cadaver photographs had no probative value; because, they did not show "circumstances surrounding the death, the cruelty of the crime, the place of the wounds, or the extent of force or violence used, [and], were extremely unpleasant and used in such a way as to be overly prejudicial and inflammatory." *Id.*

In ***Hewlett v. State***, 607 So.2d 1097, 1102 (Miss. 1992) the Court said, "[p]hotographs of a victim should not ordinarily be admitted into evidence where the killing is neither contradicted nor denied, and the *corpus delicti* and the identity of the deceased have been established." In the present case, the *corpus delicti* of the charges and identity of the deceased were clearly established and unchallenged. This is why it is obvious that the state's motive here was to merely inflame the jury.

> In ***McNeal v. State***, 551 So.2d 151, 159 (Miss. 1989), trial judges were instructed to carefully consider the circumstances surrounding the admission of photographs. The trial judge must specifically consider: (1) whether the proof is absolute or in doubt as to the identity of the guilty party, as well as, (2)

> whether the photographs are necessary evidence or simply a ploy on the part of the prosecutor to arouse the passion and prejudice of the jury.

When the state argued in ***McNeal*** that the gruesome photographs were needed to prove the *corpus delicti* of the crime, the Court said "we believe that the state could have shown the angle and entry of the bullet wound without the full-color, close-up view of the decomposed, maggot-infested skull." *Id.* For the photographs to have "evidentiary value", they must: "(1) aid in opening the circumstances of the killing; (2) describe the location of the body and the cause of death; (3) supplement or [clarify] witness testimony." ***Jones v. State***, 938 So.2d 312, 316-17 (Miss. App. 2006).

In the present case, the gruesome testimony about the victim's fatal injuries from the pathologist were more than sufficient to establish everything the state needed to prove in this case. Therefore, there was not a legitimate reason here to display the two foot by one and one-half foot blown up picture of the victim's bloody face with a probe rammed into the bullet entry wound. Tr. 248-252. This case was not complicated, the details of the injuries were not crucial to the prosecution.

State's Exhibit 6 served no probative purpose. There is no way from the large photograph for the jury to discern the nature or cause of injuries or any other probative matter. The sole purpose of the Exhibit was to arouse the inherent human emotions of viewing the head of the victim. The viewing of these photos is clinical to seasoned members of the Court and criminal bar; but, is highly traumatic to lay jurors. This juror trauma was what the prosecution wanted and obtained. The natural response of a juror is to remain in an emotional state where the only satiation is to convict the person accused of this violent

crime. The verdict is thus product of passion and emotion rather that reason and due process of law.

The appellant, Barfield respectfully requests that this Court here find that the trial court should not have allowed the introduction of State's Exhibit 6. Therefore, the appellant is requesting that a new trial be granted.

ISSUE NO. 2

JONATHAN BARFIELD WAS DENIED HIS RIGHT TO A FAIR TRIAL WHEN THE TRIAL COURT DENIED A CHANGE OF VENUE.

The decision to grant a change of venue is in the sound discretion of the trial judge. ***Gray v. State***, 799 So.2d 53, 62 (Miss. 2001); ***Hoops v. State***, 681 So.2d 521, 526 (Miss. 1996). "[T]his Court will not disturb the ruling of the lower court where the sound discretion of the trial judge in denying change of venue was not abused." ***Gray***, 799 So.2d at 62 (*quoting* ***Harris v. State***, 537 So.2d 1325, 1328 (Miss. 1989)).

This Court held that "[a] motion for change of venue 'must be in writing and supported by affidavits of two or more credible persons showing that the defendant cannot receive an impartial and fair trial in that particular county because of prejudgment of the case or grudge or ill will to the defendant in the mind of the public.'" ***Davis v. State***, 767 So.2d 986, 993 (Miss. 2000)(*citing* ***Hoops***, 681 So.2d at 526).

"The right to a fair trial by an impartial jury is guaranteed by both the federal and state constitutions." ***Gray***, 799 So.2d at 62; ***Johnson v. State***, 476 So.2d 1195, 1208 (Miss. 1985); **U.S. Constitution Amendment VI** and **Mississippi Constitution Article 3 Section 26.** "The accused has a right to a change of venue when it is doubtful that an impartial jury can

be obtained." ***Gray***, 799 So.2d at 62; ***Davis***, 767 So.2d at 993. "[U]pon proper application, there arises a presumption that such sentiment exists; and, the state then bears the burden of rebutting that presumption." ***Gray***, 799 So.2d at 62 (*quoting* ***Johnson***, 476 So.2d at 1211).

This Court in ***White*** listed "certain elements which, when present would serve as an indicator to the trial court as to when the presumption is irrebuttable." ***White v. State***, 495 So.2d 1364, 1349 (Miss. 1986). The elements are as follows:

> (1) capital cases based on considerations of a heightened standard of review;
> (2) crowds threatening violence toward the accused;
> (3) an inordinate amount of media coverage, particularly in cases of
> (a) serious crimes against influential families;
> (b) serious crimes against public officials;
> (c) serial crimes;
> (d) crimes committed by a black defendant upon a white victim;
> (e) where there is an inexperienced trial counsel.

Id.; ***Davis***, 767 So.2d at 993-94.

In the case *sub judice*, Barfield filed a motion for change of venue, two affidavits, and approximately twelve Exhibits in accordance with **Mississippi Code Annotated Section 99-15-35**. C.P. 137-42, R.E. 45. Barfield contends that the prejudice is great and cannot obtain a fair and impartial trial in Harrison County, Mississippi. The Sun Herald, a major newspaper for Harrison County, Mississippi, and the surrounding Gulf Coast, and WLOX.com has published and circulated newspaper articles and internet articles as well as media broadcasts describing the act on and after December 27, 2006, which articles inferred that a crime had been committed and the Defendant/Appellant, Jonathan Barfield, was guilty of said crime. C.P. 38-58, R.E. 23-43.

The State then had the burden of rebutting the presumption. ***Gray***, 799 So.2d at 62. See ***Johnson***, 476 So.2d at 1211. The State offered evidence virtually no evidence that Barfield could receive a fair trial. State did not present enough evidence to rebut this presumption.

In ***Gray***, the case involved a simple murder and there was not a large amount of media coverage. This Court held in ***Gray*** that the trial court did not abuse its discretion for those reasons. However, ***Gray*** can be distinguished from in the case ***sub judice***, in that it did in fact involve a capital murder. In addition, there was a barrage of inflammatory articles appearing in the local newspapers, television, and radio stations.

The trial court did abuse its discretion by not granting Barfield a change of venue. Due to the large circulation of the newspapers, internet articles, and television station broadcasts, it would appear that a large percentage of the citizens in Harrison County have been directly exposed to the prejudicial articles involving Barfield.

"When it is doubtful that a fair and impartial jury can be obtained in the county where a homicide has been committed, an accused on trial for his life 'is but asking for his rights when he requests a change of venue.'" ***Fisher v. State***, 481 So.2d 203, 216 (Miss. 1985)(*quoting* ***Johnson***, 481 So.2d at 1210). "Whatever interest the State may have in proceeding in the county of the offense and however legitimate may be that interest, it is by definition subordinate to vested rights secured to the accused. We do not in this state sacrifice an accused's fundamental rights in favor of the State's pragmatic interests." ***Fisher***, 481 So.2d at 216; *see* ***In Re Brown***, 478 So.2d 1033, 1037 (Miss. 1985). This Court held in

Eddins that "in a case where the accused is on trial for his life, venue should be changed 'when it is doubtful' that a fair and impartial jury may be impaneled in the county where the crime occurred." ***Eddins v. State***, 110 Miss. 780, 783, 70 So. 898, 899 (1916). For the reasons listed, Barfield asks that this Court reverse and remand this case with directions for a change of venue.

ISSUE NO. 3

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT; THEREFORE THE APPELLANT WAS ENTITLED TO AN ACQUITTAL PURSUANT TO *WEATHERSBY V. STATE*, 165 MISS. 207, 209, 147 SO. 481, 482 (1933).

The Mississippi Supreme Court has set forth the standard of review for the sufficiency of the evidence as follows:

> We must, with respect to each element of the offense, consider all of the evidence-not just the evidence which supports the case for the prosecution-in the light most favorable to the verdict. The credible evidence which is consistent with the guilt [of the accused] must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. Matters regarding the weight and credibility to be accorded the evidence are resolved by the jury. We may reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty.

Gleeton v. State, 716 So.2d 1083, 1087 (Miss.1998)(citing ***Wetz v. State***, 503 So.2d 803, 808 (Miss.1987)).

The Appellant asserts that he was entitled to an acquittal based on the rule set forth by the Mississippi Supreme Court in ***Weathersby v. State***, 165 Miss. 207, 209, 147 So. 481, 482 (1933). In ***Weathersby***, the Court held:

> [W]here the defendant or the defendant's witnesses are the only eyewitnesses to the homicide, their version, if reasonable, must be accepted as 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, 165 Miss. At 209, 147 So. At 482. The ***Weathersby*** "rule is alive and well and living in the courtrooms of this state." ***Heidel v. State***, 587 So.2d 835, 839 (Miss. 1991)(citing ***Pritchett v. State***, 560 So.2d 1017, 1019 (Miss. 1990); ***Blanks v. State***, 547 So.2d 29, 33 (Miss. 1989); ***Lanier v. State***, 533 So.2d 473, 490 (Miss. 1998)).

"The ***Weathersby*** rule requires that the reasonable, uncontradicted story of the defendant or his witness must be accepted as true. ***Wetz v. State***, 503 So.2d 803, 808 (Miss. 1987), quoting ***Weathersby v. State***, 165 Miss. 207, 209, 147 So. 481, 482 (1933)." ***Green v. State***, 631 So.2d 167, 174 (Miss. 1994). "Where 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)(quoting ***Blanks v. State***, 547 So.2d 29, 33 (Miss. 1989)). "But where the defendant's story is materially contradicted, the ***Weathersby*** rule has no application and the matter of conviction versus acquittal becomes a question for the jury." ***Id.***

It is for the court and not the jury to determine whether the defendant receives the benefit of the ***Weathersby*** rule. ***Green v. State***, 631 So.2d 167, 175 (Miss. 1994)(citing ***Null v. State***, 311 So.2d 654, 658 (Miss. 1975)). "***Weathersby***, of course, 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)(citing ***Lanier v. State***, 533 So.2d 473, 490 (Miss. 1988); ***Shaw v. State***, 521 So.2d 1278, 1282 (Miss. 1987); ***Wetz v. State***, 503 So.2d 803, 809 (Miss. 1987); ***Harveston v. State***, 493 So.2d 365, 371 (Miss. 1986)).

In the present case, Barfield was the only one present when the gun went off and accidently shot Tiffany. Barfield testified that Tiffany had called him the morning of December 27, 2006, and woke him up from sleeping on the couch. Tr. 355. Tiffany had basketball practice that morning from nine o'clock to eleven o'clock. Tr. 358. Tiffany called Barfield approximately eleven o'clock that morning and stated that she was on her way home. Tr. 359.

Barfield was preparing to go to Lacomb, Louisiana to put flowers on his mother's grave. Tr. 360. Barfield stated that he had no plans of seeing Tiffany on December 27, 2006. Tr. 361. As Barfield was taking a shower, the phone rang. Tr. 362. Barfield answered the phone and it was Tiffany. Tr. 363.

During the conversation with Tiffany, Barfield heard some loud banging on his front door. *Id.* Barfield told Tiffany to hold on and he walked through the hallway toward the living room. *Id.* When Barfield got to the door, the noticed that the door knob was turning on the door. *Id.* Barfield sat his phone on the table and grabbed his gun. Id.

Barfield then went to the door with the gun to surprise whoever was trying to come in to his house. *Id.* Barfield slid the lock real fast to surprise the intruder with his gun. *Id.* Barfield then realized that Tiffany was at the door. *Id.*

Tiffany saw the gun and questioned what Barfield planned to do with the gun. Tr. 364. As Barfield was trying to uncock the gun, he heard a bang noise. *Id.* The pistol had gone off and Tiffany was shot. Tr. 365. Barfield states that Tiffany had not been at his house a good thirty (30) seconds when the gun went off. *Id.* After the gun accidently discharged a bullet, Barfield was holding it so loosely that he dropped the gun onto the ground. *Id.* Barfield stated that he had lived in a dangerous place, and felt that he need protection living in the area. Tr. 354. He thought someone was trying to break into his house and was only protecting himself. Barfield's version of these events is more than reasonable.

The officers that interview Barfield essentially describe the same version of events as Barfield. Officer Fore testified that Barfield stated that they were playing with the gun and the gun was cocked by his leg point at the ground when they bumped each other and the gun went off and shot her in the face. Tr. 157.

Officer Roe, who was the second responding officer stated that Barfield responded that "it was an accident, it was an accident." Tr. 167. Barfield was also asking if his girlfriend was ok. Tr. 172. Barfield never varied from his story that this was an accident.

Even during Barfield's taped interview, he stated that Tiffany being shot was an accident. Barfield said once he realized that Tiffany was at the door, he was trying to uncock the gun. He then stated that she bumped into him and the gun shot her in the face. Barfield's story was uncontradicted and did not vary except for the testimony of Office Fore. Barfield obviously upset with the events that happened might have meant that he was playing with

the gun trying to uncock the gun. Plus Barfield stated that the officers were giving him of different scenarios of what they thought could have happened.

In light of the evidence elicited at trial, Barfield's version of the events on the night in question are more that reasonable. His version of those events was not substantially contradicted in material particulars, and therefore he was entitled to an acquittal under Weathersby and its progeny. Accordingly, the trial court erred in not granting Barfield's motion for a directed verdict. The Appellant asserts that the Court should reverse and render on this issue.

ISSUE NO. 4

THE TRIAL COURT ERRED IN DENYING BARFIELD'S MOTION FOR A NEW TRIAL BECAUSE THE WEIGHT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

In trial counsel's Motion for Judgment Notwithstanding the Verdict (JNOV) or in the Alternative Motion for a New Trial, counsel specifically argued that the jury's verdict was against the overwhelming weight of the evidence. **C.P. 105-108, R.E. 18-21**. The trial judge denied this motion. **C.P. 144, R.E. 22.**

In ***Bush v. State***, the Mississippi Supreme Court set forth the standard of review as follows:

> When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, we will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. ***Herring v. State***, 691 So.2d 948, 957 (Miss. 1997). We have stated that on a motion for a new trial, the court sits as a thirteenth juror. The motion, however, is addressed to the discretion of the court, which should be exercised with caution, and the power to grant a new trial should be invoked only in exceptional cases in which the evidence

> preponderates heavily against the verdict. ***Amiker v. Drugs For Less, Inc.***, 796 So.2d 942, 947 (Miss. 2000). However, the evidence should be weighed in the light most favorable to the verdict. ***Herring***, 691 So.2d at 957. A reversal on the grounds that the verdict was against the overwhelming weight of the evidence, "unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict." ***McQueen v. State***, 423 So.2d 800, 803 (Miss. 1982). Rather, as the "thirteenth juror," the court simply disagrees with the jury's resolution of the conflicting testimony. *Id.* This difference of opinion does not signify acquittal any more than a disagreement among the jurors themselves. *Id.* Instead, the proper remedy is to grant a new trial.

Bush v. State, 895 So.2d 836, 844 (Miss. 2005) (footnotes omitted).

In the present case, Barfield is at a minimum entitled to a new trial as the verdict was clearly against the overwhelming weight of the evidence. The state presented the testimony of several witnesses. Felicia Shaw, who was the aunt of Tiffany, stated that she spoke with Tiffany the morning of her death. Tr. 211. However, the phone records did not support that claim by Shaw. Shaw testified that Tiffany was going by Barfield's house to take him something, because they have broken up the night before. Tr. 212. Well, if Tiffany had broken up with Barfield and wanted to end it for sure this time, then why was there so many phone calls to Barfield. Tiffany was still calling him. Tiffany called Barfield within minutes of leaving basketball practice on the day she died and five or six more times within the next hour.

Also, Shaw stated that Tiffany was taking something back to Barfield so he would know it was over for sure this time. Tr. 212-13. Well, Shaw could not state what Tiffany was going to take to Barfield and nothing was found at the scene that Tiffany had brought back to him. According to Barfield the only item that Tiffany would bring back would have been

the earrings he gave her for Christmas, but she was wearing them that day. Tr. 356, State's Exhibit 6. If Tiffany had broken up with Barfield the night before why she have called him several times that day and then come over wearing the earring that she received as a Christmas gift from Barfield. Shaw story does not make sense and was not a reliable witness.

Julisia Taylor who was a friend of Tiffany's and they also played basketball together stated that Tiffany and Barfield broke up many times. Tr. 96. She stated that Tiffany and Barfield had broken up over the Christmas break and that she was ready to move on with her life. Tr. 228. However, Tiffany did not tell her that she was going over to Barfield's house. *Id.* She did know that Barfield bought he some earrings for Christmas. Tr. 230.

Barfield testified that he and Tiffany had not break up on December 26, 2006. Tr. 358. He said that he had seen Shaw less then five times while he was dating Tiffany and he had only seen Taylor a couple of times. *Id.* Furthermore, Tiffany bought Barfield numerous presents for Christmas. Tr. 356. The presents consisted of cologne, a nike outfit, a pair of nike shoes, and a stainless steel toaster. *Id.* Barfield received those presents the day after Christmas, on December 26, 2006. Tiffany bought a lot of presents for someone she broke up with the same day.

The evidence presented before the court showed that the death of Tiffany, though tragic, was an accident. Tiffany was going to see her boyfriend on December 27, 2006. Barfield made a poor decision to handle a gun with which he had no knowledge or proper

training. However, Barfield lived in a dangerous area and felt that his life was endangered. He was only trying to protect himself and accidentally killed the girlfriend that he loved.

The verdict was against the overwhelming weight of the evidence. The Appellant, Barfield, therefore respectfully asserts that the foregoing facts demonstrate that the verdict was against the overwhelming weight of the evidence, and the Court should reverse and remand for a new trial.

CONCLUSION

Jonathan Barfield is entitled to have his manslaughter conviction reversed and rendered or in the alternative, reversed and remanded for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Benjamin A. Suber, Counsel for Jonathan Barfield, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

Honorable Lisa P. Dodson
Circuit Court Judge
P.O. Box 3295
Gulfport, MS 39502

Honorable Cono Caranna
District Attorney, District 2
Post Office Box 1180
Gulfport, MS 39502

Honorable Jim Hood
Attorney General
Post Office Box 220
Jackson, MS 39205-0220

This the 23 day of March, 2009.

Benjamin A. Suber
COUNSEL FOR APPELLANT

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