

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**JONATHAN COOPER**

**APPELLANT**

**VS.**

**NO. 2009-CA-2031**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

**JIM HOOD, ATTORNEY GENERAL**

**BY: LISA BLOUNT  
SPECIAL ASSISTANT ATTORNEY GENERAL  
MISSISSIPPI BAR NO. [REDACTED]**

**OFFICE OF THE ATTORNEY GENERAL  
POST OFFICE BOX 220  
JACKSON, MS 39205-0220  
TELEPHONE: (601) 359-3680**

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**STATEMENT OF THE CASE**

This appeal proceeds from the denial of Jonathan Cooper's motion for post conviction relief filed in the Circuit Court of Washington County. During the early morning hours of May 25, 2002, Jonathan Cooper ("Cooper") killed Kenneth Shumaker with an aluminum baseball bat following a domestic disturbance between Shumaker and Shumaker's wife. In 2002, a Washington County Grand Jury indicted Jonathan Cooper for murder. On August 28, 2003, a jury convicted Cooper of the lesser included offense of manslaughter and the trial court sentenced him to twenty years. On appeal, Cooper challenged both the weight and sufficiency of the evidence and raised an evidentiary issue about the re-calling of a state witness. On September 20, 2005, the Court of Appeals affirmed his conviction and sentence.

Cooper then filed with the Mississippi Supreme Court a pro-se "Motion for Complaint for

Fraud & Deception,” challenging his conviction. The Court treated the motion as an application to proceed in the trial court pursuant to Mississippi Code Annotated section 99-39-1 *et. seq.*. On October 20, 2005, the Supreme Court granted Cooper leave to file a properly drafted petition for post-conviction relief in the trial court.

On April 7, 2009, appointed counsel filed a “Motion for Post Conviction Relief to Vacate and Set Aside Conviction and Sentence” which alleged ineffective assistance of counsel. The State filed its response to the Motion on May 7, 2009, and Cooper’s counsel filed a rebuttal. On August 13, 2009, the trial court permitted Mr. Cooper’s appointed counsel to withdraw because newly retained counsel filed an entry of appearance for Cooper on August 12, 2009.

The trial court denied Cooper’s motion for post conviction relief after an evidentiary hearing on October 9, 2009, wherein Cooper testified. (CP 60-63). Aggrieved, Cooper appealed claiming ineffective assistance of trial counsel. (CP 67).

### **STATEMENT OF THE ISSUE**

Whether Cooper received ineffective assistance of counsel?

### **SUMMARY OF ARGUMENT**

The judgment of the Washington County Circuit Court denying Cooper’s motion for post conviction relief should be affirmed. In order to prove ineffective assistance of counsel, Cooper must show his counsel’s performance was deficient and that such deficiency prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, (1984), 104 S.Ct. at 2064. The State submits that Cooper failed to prove that he received ineffective assistance of counsel under the two part test established in *Strickland*.

The original indictment gave a clear and concise statement of the elements of the crime with which Cooper was charged and was not defective; therefore, there was no need for defense counsel to file a demurrer. Defense counsel was not deficient in failing to voir dire Dr. Hayne; in failing to hire a forensic expert for the defense; or in failing to object to the photographs admitted into evidence.

Cooper failed to meet his burden of proof required to establish a prima facie showing of ineffective assistance of counsel. Having failed to show a deficient performance, Cooper's issues are without merit.

## **ARGUMENT**

### **STANDARD OF REVIEW**

A trial court's denial of a motion for post-conviction relief should not be reversed "absent a finding that the trial court's [decision] was clearly erroneous." *Holland v. State*, 956 So.2d 322, 325(¶ 6) (Miss.Ct.App.2007) (citation omitted). The defendant bears the burden of proof of ineffective assistance of counsel. *Mohr v. State*, 584 So.2d 426, 430 (Miss.1991).

### **PROPOSITION I: Cooper received effective assistance of counsel.**

Cooper contends that his trial counsel was ineffective due to the following reasons: (1) his counsel moved to amend a defective indictment rather than moving to have it dismissed; (2) his counsel failed to voir dire the State's expert Dr. Hayne; (3) his counsel failed to retain an expert; and (4) his counsel failed to object to the introduction of photographs into evidence. In order to prove ineffective assistance of counsel, Cooper must show his counsel's performance was deficient and that such deficiency prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, (1984), 104

S.Ct. at 2064. To support a threshold finding of deficient performance, the accused must first demonstrate that “counsel’s representation fell below an objective standard of reasonableness.” *Anderson v. Johnson*, 338 F.3d 382, 391 (5th Cir. 2003); see also *Strickland v. Washington*, 466 U.S. 668, 687 (1984). This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is unreliable. *Id.* In judging counsel’s effectiveness, the totality of circumstances of each case must be considered. *McQuarter v. State*, 574 So.2d 685, 687 (Miss.1990).

The totality of circumstances must be considered in conjunction with the “strong but rebuttable presumption that counsel’s conduct falls within a broad range of reasonable professional assistance.” *Id.* The presumption is overcome if the defendant demonstrates “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. “In addition to the presumption that counsel’s conduct is reasonably professional, there is a presumption that counsel’s decisions are strategic in nature, rather than negligent.” *Marshall v. State*, 759 So.2d 511(¶ 9)

Cooper wholly failed in his burden of proof

**A. Defense counsel was not deficient in failing to file a demurrer to the indictment.**

Cooper argues that the state returned a materially flawed indictment, and, rather than challenge it, his defense counsel assisted the State by requesting the indictment be amended to add the element that the killing was “not in necessary self defense.” Cooper relies on *Montana v. State*, 822 So. 2d 954 at 959-60 (Miss. 2002) for the proposition that “not in necessary self defense” is an



element of the crime of murder under section 97-3-19(1). The State contends the Supreme Court was referring to a jury instruction, not an indictment, when it stated “[T]he State must prove beyond a reasonable doubt that the defendant committed the murder “not in necessary self-defense”, and [a jury must be] instructed to acquit where the State has failed to prove this element beyond a reasonable doubt.” (*Id.*). Cooper argues that when his trial counsel proposed the amendment to the indictment and persuaded Cooper that the amendment was proper, he failed to protect Cooper’s rights.

This argument is without merit. Though it is a well-established principle of law that to be sufficient an indictment must contain the essential elements of the crime charged, the lack of “and not in necessary self defense” is not an essential element of the offense of deliberate design murder, § 97-3-19(1)(a).

Murder is “(1) The killing of a human being without the authority of law by any means” or “(a) When done with deliberate design to effect the death of the person killed or of any human being...” Miss.Code Ann. § 97-3-19(1)(a) (Rev.2006). Manslaughter is “[t]he killing of a human being, without malice, in the heat of passion, but in a cruel or unusual manner, or by the use of a dangerous weapon, without authority of law, and not in necessary self-defense....” Miss.Code Ann. § 97-3-35 (Rev.2006). *Moore v. State* --- So.3d ----, 2010 WL 4347751 (Miss.,2010).

Cooper was indicted for deliberate design murder under section 97-3-19(1)(a) not manslaughter. The State respectfully submits that Cooper is confusing the language required for a deliberate design murder indictment with a self defense jury instruction or a manslaughter jury instruction.

As provided in Rule 7.06 of the Uniform Circuit and County Court Rules, an indictment

“shall be a plain, concise and definite written statement of the essential facts constituting the offense charged and shall fully notify the defendant of the nature and cause of the accusation. It is well established that the purpose of an indictment is to put the defendant on notice of the charge against him. *Ishee v. State*, 799 So.2d 70, 76(¶ 18) (Miss.2001) (citing *Westmoreland v. State*, 246 So.2d 487, 489 (Miss.1971)). The original indictment against Cooper tracked the language of § 97-3-19(1)(a), stated the essential facts, and fully notified him of the nature and cause of the accusation.

The State contends Cooper was not prejudiced by defense counsel’s actions in amending the indictment because the indictment was not defective. Defense counsel’s added wording was “mere surplusage in the indictment and the appellant could not have been prejudiced by this erroneous reference.” *Robinson v. State*, 966 So.2d 209, 213 (Miss.App.,2007).

Cooper must show that there is a reasonable probability that but for counsel’s unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. A reasonable probability is a probability that is sufficient to undermine confidence in the outcome. *Id.* The State submits that the outcome of the trial would have been the same whether the indictment was amended or not. Therefore, Cooper fails the first and second prong of the *Strickland* test. As the indictment was proper, there was no deficiency in defense counsel’s failure to file a demurrer to the indictment. This issue is without merit.

**B. Defense counsel was not deficient in failing to voir dire cross Dr. Hayne, for failing to secure an expert witness or for failing to investigate the case.**

Cooper further contends that he suffered ineffective assistance of counsel because his attorney failed to voir dire cross examine Dr. Haynes, a witness the State qualified as an expert.

Cooper does not assert that a challenge to Hayne's qualifications would cause the trial court to fail to qualify the witness as an expert, and as such, does not assert that any prejudice was suffered as a result of his attorney failing to voir dire Dr. Haynes on his qualifications to testify as an expert. Further, the decision whether to question a witness on their qualifications as an expert witness is a part of the attorney's trial strategy. *Sanders v. State*, 825 So.2d 53, 58 (Miss.App.,2002) citing *Scott v. State*, 742 So.2d 1190, 1196 (¶ 14) (Miss.Ct.App.1999).

“The question of whether an individual is qualified to testify as an expert is committed to the sound discretion of the trial court. This Court does not reverse such decisions absent a showing that this discretion has been abused, that is, that the witness was clearly not qualified.” *Cooper v. State*, 639 So.2d 1320, 1325 (Miss.1994). [V]oir dire cross examination of a witness unquestionably qualified to give expert testimony is unnecessary when such cross-examination would add nothing to the trial. *Merritt v. State*, 517 So.2d 517, 519 (Miss.1987). The Mississippi Supreme Court stated in *Duplantis v. State*, 708 So.2d 1327, 1339 (Miss.,1998) that “Dr. Hayne is unquestionably qualified to testify in our courts as a forensic pathologist.” Therefore, defense counsel was not deficient in failing to conduct a voir dire cross examination. This issue is without merit.

Cooper points to this Court's reversal in *Edmonds v. State*, 955 So.2d 787 (Miss.2007), in support of the argument that “an un-counteracted expert can hold the jury in sway to his opinions simply because of the special status of an expert.” (Appellant's brief at 29). Cooper contends that defense counsel was ineffective because he failed to conduct an independent investigation and failed to consult an independent forensic pathologist. Cooper thought an expert could support his theory that the victim died as a result of brain injuries received when he fell face first to the floor after being hit by Cooper in the back of the head with a baseball bat. At the evidentiary hearing, Cooper

testified

That I'm quite sure the blow that I have proceeded with the victim because I didn't use that much force with that bat. I didn't use that much force, and I am quite sure that the sudden impact that he fell face first knocking himself unconscious could have cause the massive brain concussion.

(Evidentiary hearing Tr. at 21).

In *Smith v. State*, 989 So.2d 973, (Miss.App.,2008), this Court held that defense counsel's failure to call an expert witness was reasonable trial strategy, and thus, did not amount to ineffective assistance. "There is a strong presumption that a counsel's conduct is both reasonable and professional and that decisions made are strategic. *Murray v. Maggio*, 736 F.2d 279, 281 (5th Cir.1984). An attorney's "choice of whether or not to file certain motions, call certain witnesses, ask certain questions, or make certain objections falls within the ambit of trial strategy." *Scott v. State*, 742 So.2d 1190, 1196(¶ 14) (Miss.Ct.App.1999). "Such choices are presumed strategic 'unless counsel's tactics are shown to be so ill chosen that it permeates the entire trial with obvious unfairness.' " *McGilberry v. State*, 843 So.2d 21, 31(¶ 26) (Miss.2003) (quoting *Teague v. Scott*, 60 F.3d 1167, 1172 (5th Cir.1995))." (*Id.* at 982). We certainly agree that counsel should energetically prepare to defend the case, but "[d]ecisions regarding which witnesses to call are peculiarly within the gambit of trial strategy." *King v. State*, 679 So.2d 208, 211 (Miss.1996). Likewise, attorneys are permitted wide latitude in their choice and employment of defense strategy. *Hiter v. State*, 660 So.2d 961, 965 (Miss.1995). (*Id.*). In the present case, Cooper failed to show that defense counsel's decision not to retain an expert was "so ill chosen that it permeates the entire trial with obvious unfairness."

Cooper also testified defense counsel didn't review the file and discuss it with him. A

defendant is obligated to provide “more than conclusory allegations on a claim of ineffective assistance of counsel.” *Carpenter v. State*, 899 So.2d 916, 921(¶ 23) (Miss.Ct.App.2005) (citing *Wilcher v. State*, 863 So.2d 776, 824 (¶ 169) (Miss.2003)). For failure to investigate to become ineffective assistance of counsel, the defendant must state with particularity what the investigation would have revealed and how it would have altered the outcome.” *Robinson v. State*, 964 So.2d 609, 614 (¶ 21) (Miss.Ct.App.2007) (citing *Triplett v. State*, 840 So.2d 727, 731 (¶ 11) (Miss.Ct.App.2002)). Cooper has failed to do so.

Cooper cites to *Soffar v. Dretke*, 368 F.3d 441 (5<sup>th</sup> Cir.2004) for support, however, *Soffar* is distinguishable. Soffar had been sentenced to death for robbing a bowling alley with another man, during which robbery three victims were shot to death and one was injured. Soffar sought habeas relief on grounds that his counsel had been ineffective for failing to investigate the surviving victim. The victim had provided the police with four statements and a post-hypnotic interview concerning the crime. Soffar claimed that those statements would have undermined the reliability of his confession to the police. There was evidence to support the contention that the victim could have provided helpful testimony. The victim's account of the robbery and the ballistic evidence were substantially consistent, whereas Soffar's confessed version of events conflicted with both. These inconsistencies were thus powerfully exculpatory. Defense counsel did not attempt to investigate or interview the victim.

In the case at bar, multiple eye witnesses to the killing testified. There is no evidence that defense counsel failed to interview the eye witnesses or that he failed to conduct an independent investigation. This allegation is without merit

**C. Defense counsel was not deficient by failing to object to certain photographs introduced at trial.**

Cooper's final allegation of ineffective assistance of counsel has to do with his trial counsel's decision not to object to the admission of autopsy photographs, specifically, S-7-E. Defense counsel was not deficient by failing to object to autopsy photographs introduced at trial. Photographs that aid in describing the circumstances of the killing, the location of the body and cause of death, or that supplement or clarify a witness's testimony have evidentiary value and are admissible before a jury. Admission of photos of a deceased is within the sound discretion of a trial court and is proper so long as the photos serve some useful, evidentiary purpose. The decision to admit photographs rests soundly within the discretion of the trial judge. *Jackson v. State*, 672 So.2d 468, 485 (Miss.1996). In *Johnson v. State*, 876 So.2d 387 (Miss.App.,2003) this court held defense counsel's failure to object to admission of autopsy photographs did not amount to ineffective assistance of counsel. The decision to admit photographs will be reversed only when it is found to be an abuse of discretion. *Id.*

The State also contends Cooper failed to ensure the questionable autopsy photographs are before this Court. This Court held in *Graham v. State*, 914 So.2d 1256 (Miss.App.,2005) that "It is an appellant's duty to justify his arguments of error with a proper record, which does not include mere assertions in his brief, or the trial court will be considered correct. *Am. Fire Prot., Inc. v. Lewis*, 653 So.2d 1387, 1390 (Miss.1995). Facts alleged to exist by [Cooper] must be proved and placed before this Court by a certified record as required by law; otherwise, we cannot know of their existence. *Phillips v. State*, 421 So.2d 476, 478 (Miss.1982). The autopsy photographs admitted into evidence at Cooper's trial are not before this Court with the trial transcript or the post conviction

hearing transcript. Cooper fails to support his allegations by facts established within the record. The existence of his claims within his brief alone cannot be relied upon by this Court.

### CONCLUSION

The State submits that based upon the record and applicable case law, Cooper has failed to meet his burden under *Strickland* to show that his trial counsel's performance was deficient and that deficiency prejudiced his defense. Accordingly, this Court should affirm the judgment of the circuit court denying Cooper's motion for post conviction relief.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

By: Lisa L. Blount  
LISA L. BLOUNT  
SPECIAL ASSISTANT ATTORNEY GENERAL

## CERTIFICATE OF SERVICE

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

Honorable W. Ashley Hines  
Circuit Court Judge  
P. O. Box 1315  
Greenville, MS 38702-1315

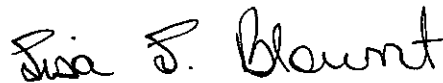
Honorable Dewayne Richardson  
District Attorney  
P. O. Box 426  
Greenville, MS 38702

George T. Kelly, Jr., Esquire  
Attorney At Law  
P. O. Box 5601  
Greenville, Mississippi 38704

and

Ross Parker Simons, Esquire  
Attorney At Law  
P. O. Box 1735  
Pascagoula, Mississippi 39568

This the 15<sup>th</sup> day of November, 2010.



LISA L. BLOUNT  
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL  
POST OFFICE BOX 220  
JACKSON, MISSISSIPPI 39205-0220  
TELEPHONE: (601) 359-3680