

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JONATHAN COOPER

APPELLANT/PETITIONER

VERSUS

NO: 2009-CA-02031-COA

STATE OF MISSISSIPPI

APPELLEE/RESPONDENT

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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 the Supreme Court and/or the judges of the Mississippi Court of Appeals may evaluate possible disqualification or recusal.

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Appellant

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Trial Court Judge
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Attorney for Appellee

So Certified, this the 19th day of August, 2010.


ROSS PARKER SIMONS

CERTIFICATE OF INTERESTED PARTIES

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 the Mississippi Court of Appeals and/or the justices of the Mississippi Supreme Court may evaluate possible disqualification or recusal.

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Circuit Court Judge
Washington County, Fourth District

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SO CERTIFIED, this the _____ day of August, 2010.

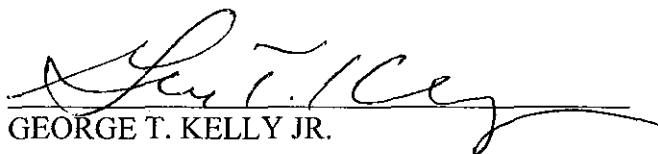

GEORGE T. KELLY JR.

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Statement of Issues

Issue I.

The trial court on remand was in error for finding that trial counsel was not ineffective for moving to amend the state's fatally flawed indictment, rather than challenging it with a demurrer. When counsel proposed the amendment to the indictment and persuaded Mr. Cooper that this was proper, he failed to protect Mr. Cooper's rights under the Sixth Amendment of the United States Constitution and Article 3, Section 26 of the Mississippi Constitution.

Issue II.

The trial court on remand was in error for finding that trial counsel's unconditional and open-armed acceptance of Dr. Steven Hayne when he was tendered as an expert for the state, and his failure to secure an expert witness to challenge Dr. Hayne's testimony was not ineffective assistance of counsel under Sixth Amendment of the United States Constitution and Article 3, Section 26 of the Mississippi Constitution.

Issue III.

The trial court on remand erred in finding that Mr. Cooper was not denied his right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and Article 3, Section 26 of the Mississippi Constitution when trial counsel failed to properly investigate his case or communicate with him before proceeding to trial.

Issue IV.

The trial court on remand erred in finding that Mr. Cooper was not denied his right to effective assistance of counsel for trial counsel's failure to object to certain photographs introduced by the prosecution as their prejudicial effect far exceeded their evidentiary value.

Procedural History

Jonathan Cooper was indicted for murder in Cause Number 2002-393 by the September 2002 Washington County grand jury. His trial commenced on August 27, 2003, and concluded on August 28, 2003, with a conviction of manslaughter and sentence to 20 years in the Mississippi Department of Corrections. In his direct appeal Mr. Cooper raised an evidentiary issue about the re-calling of a state witness and challenged both the sufficiency and the weight and credibility of the evidence presented against him at trial. On September 20, 2005, the Court of Appeals affirmed his conviction.

Mr. 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 Miss. Code Ann. 99-39-1 *et. seq.*, and granted him leave to file a properly drafted petition for post-conviction relief in the trial court.

On April 7, 2009, appointed counsel filed the motion which was re-formed as a “Motion for Post Conviction Relief to Vacate and Set Aside Conviction and Sentence” which alleged various instances of ineffective assistance of counsel. The state filed its response to the Motion on May 7, 2009, and Petitioner’s counsel filed a rebuttal to that response on June 4, 2009. On August 13, 2009, the trial court permitted Mr. Cooper’s appointed counsel to withdraw because newly retained counsel had filed an entry of appearance for Mr. Cooper on August 12, 2009.

On October 9, 2009, the trial court conducted a hearing on Mr. Cooper’s motion. Mr. Cooper testified. The state called no witnesses. Mr. Cooper’s counsel and counsel for the state argued their positions. On November 18, 2009, the trial court denied relief to Mr. Cooper and

dismissed his motion. A Notice of Appeal was filed along with the other required documents and Mr. Cooper now appeals to this Court to reverse the finding of the trial court.

Statement of Facts Relevant to the Issues to be Reviewed

Citations and references to the transcript or Clerk's Papers of the Remand Hearing are noted as: Remand Tr. ____ and Remand CP ____.

Citations and references to the trial transcript of Mr. Cooper's case are noted as: Trial Tr. ____ and Trial CP ____.

The trial transcript and clerk's papers were introduced at the Remand Hearing conducted on October 9, 2009, as Defense Exhibits D-1 and D-2, at pp. 15 and 16.

Relevant facts from the Remand Hearing

Jonathan Cooper

A. Direct testimony

Mr. Cooper was the only witness—defense or prosecution—to testify at the hearing. He testified that he was housed at Parchman, Mississippi, serving a sentence of 20 (twenty) years for his conviction of manslaughter, based on the jury's finding of the lesser charge at his trial for murder. He had presented a defense of self defense at trial, and he had not testified at that proceeding. (Remand Tr. 5).

Mr. Cooper further testified that his case had first been no-billed by the Washington County Grand Jury, but that the case was re-presented and he was indicted for murder. (Remand Tr. 6). After his conviction for manslaughter, he appealed his case and it was affirmed. At that time he filed with the Mississippi Supreme Court a *pro se* motion challenging his conviction and sentence based on errors and omissions of his trial counsel, the first specific complaint being that his counsel was ineffective for failing to secure an expert to challenge the testimony of Dr.

Steven Hayne with whom he could have effectively countered Hayne's conclusions regarding the death of the victim. (Remand Tr. 8). Mr. Cooper testified that he required an expert to refute Dr. Hayne's testimony that the victim was struck in the head two or more times, when, in fact, he, Mr. Cooper had only struck the victim once. (Remand Tr. 9-10).

Mr. Cooper testified that his second allegation of ineffectiveness against his trial counsel was his failing to challenge a faulty indictment, and, instead, making a motion as defense counsel to amend the indictment to add the phrase "and not in necessary self defense" to correct the fatal flaw.¹ Although Mr. Cooper was asked by trial counsel if he agreed to the motion, and acquiesced to the amendment before the trial court, he "was not familiar" with the law regarding the amendment of indictments and relied on his attorney and that he was "misled". (Remand Tr. 11-12, Trial Tr. 2-4).

Mr. Cooper further testified that counsel failed to conduct an adequate investigation into his case and that he did not raise the ineffectiveness issues in Mr. Cooper's direct appeal at which time trial counsel continued to represent him. Mr. Cooper's final assertion of ineffective assistance of counsel was counsel's failure to object to the photographs of the victim introduced at trial (Remand Tr. 13-15).

B. Cross examination testimony

Mr. Cooper testified that he did not have his indictment with him, and in response to the question of if he did, he testified: "during the day of trial my attorney advised me that I might as well go ahead further with trial, that if I deny that they was only going to send me back to county

¹Trial counsel, in fact, asked if the state was "willing to add that ['and not in necessary self defense'] to the indictment." (Trial Tr. 3).

jail for another 90 days, and they were going to get the foreman of the Grand Jury to sign the indictment. I would still come back with the same old process. So basically he misrepresented me on their behalf and allowed me to go through.” (Remand Tr. 16, ln. 26-29, and 17, ln. 1-3).

Mr. Cooper further testified on cross that trial counsel “failed to cross-examine Dr. Hayne due to the amount of blows that the victim had received, his investigation.”, and that Dr. Hayne’s testimony was inconsistent with “that of my witnesses who testified.”² because he testified that the victim had received more than one blow to the head. (Remand Tr. 17, ln. 20-29 and 18, ln. 1-7). Mr. Cooper did not deny striking the victim in the head and the arm, but asserted that he only struck the victim once in the head. (Remand Tr. 19, ln. 3). Mr. Cooper further testified that he objected to the “qualifications” of Dr. Hayne and that his trial counsel did not seek an expert to counter Dr. Hayne’s testimony. (Tr. 19, ln. 13-29). He testified that he had discussions with his trial counsel about talking to an independent expert to “rebuke” [sic] Dr. Hayne regarding his conclusions about the number of blows the victim received. (Remand Tr. 20, 9-27), and that any other injury to the victim’s head had to have come from an impact with the wall. (Remand Tr. 21).

Over counsel’s objection that the question called for a legal conclusion, the prosecutor asked Mr. Cooper whether his indictment “fully or completely explain[ed] to you what the nature of the charges against you were” (Remand Tr. 22, ln.12-19). Mr. Cooper answered yes, that he understood the indictment dealt with his striking of Mr. Shumake. (Remand Tr. 22, ln.12-19 and 23, ln. 1-5).

²In fact, it was each of the three eyewitnesses to the assault who were called by the *state* who contradicted Dr. Hayne’s testimony.

Mr. Cooper then testified that his trial counsel had not conducted an adequate investigation into the case because he had not discussed it with him, and he was required to do so as Mr. Cooper's counsel. (Remand Tr. 23, ln. 5-28). He reiterated, under questioning, that his independent investigation complaint was that his counsel had not reviewed the record of the case or discussed it with him. (Remand Tr. 24, ln. 24-28).

Finally, on questioning from the prosecutor, Mr. Cooper reiterated his objection to his trial counsel not objecting to the photographs because they were introduced just to inflame the jurors (Remand Tr. 25, ln. 23-27) and testified that "it was all the pictures that was presented" that his counsel should have objected to. (Remand Tr. 26, Ln. 28).

Relevant Facts from the Trial

Pre-trial motion

Trial counsel found that the indictment had a fatal omission in it, in that it omitted "an essential element" (trial counsel's description), the required language "and not in necessary self defense." Trial counsel referred to the flaw as "what I thought we explained to you [Mr. Cooper] earlier." Mr. Cooper stated that he just wanted to go on and get it over with. The trial court was silent, asking no questions of Mr. Cooper, nor explaining any rights. (Trial Tr. 2-4).

Relevant facts from trial.

Introduction

Jonathan Cooper is the cousin of Carolyn Cooper. He shared a residence with her and her twin sons. Kenneth Shumake also stayed there at the time of this incident. Kenneth and Carolyn had dated throughout a stormy seven months prior to his death and during which he assaulted

her and others.³ Jonathan was baby sitting for Carolyn's twins, Terdera and Cordera Cooper, as well as for Kenneth's son Kinney Maiten⁴, on the evening of May 24, 2002, while Kenneth and Carolyn went out clubbing.

Eyewitnesses

1. Carolyn Cooper's testimony

When Kenneth and Carolyn returned home some time after 2:00 a.m. on the evening/morning border of May 24 and May 25, 2002, Kenneth was drunk and belligerent. He started an argument with Carolyn about sleeping arrangements and tried to make her throw her sleeping twins out of the bedroom where they had long been settled in for the night, so he could sleep in that room with his son Shaun. (Trial Tr. 244).

Shumake's demand for the change in sleeping arrangements quickly escalated to the violence that led to his death. Shumake struck Carolyn in the back of the head with his fist (Trial Tr. 244) and then again as she tried to leave the house to evade the confrontation he had started (Trial Tr. 245). Then Kenneth grabbed Carolyn by the throat and threw her on the couch. (Trial Tr. 245). When she reached the telephone receiver next to the couch and tried to dial for help, Mr. Shumake snatched the phone from her and told her "You ain't calling no mother fucking body" and struck her in the temple with the telephone, hard enough that the force "broke

³Mr. Shumake had assaulted Ms. Cooper one week before this incident, striking her in the jaw and in the eye because she had beeped her car horn while waiting for him to run an errand because she had to use the bathroom. (Trial Tr. 238-239). She filed charges (Trial Exhibit D-9). Shumake also assaulted Teresa Thomas with a beer bottle, a chair and his fists. (Trial Tr. 264-265).

⁴Kinney Maiten is also known to himself and others as "Shaun", so there are references to both names in the transcript.

apart” the phone. (Trial Tr. 246-248). Carolyn managed to move to a smaller sofa in the living room while still being assaulted by Kenneth and at this time Jonathan came to her aid, getting between Kenneth and Carolyn, with Kenneth still trying to swing around Jonathan and strike Carolyn. (Trial Tr. 248-249).

Mr. Cooper tried to calm Mr. Shumake down or to make him leave the house. Mr. Shumake responded with threats to beat him. (Trial Tr. 249). This part of the confrontation ended with Mr. Cooper again trying unsuccessfully to calm Mr. Shumake who then shoved Carolyn toward the door. She continued on that trajectory and left the house to go to a neighbor’s house to call for help. (Tr. 250).

The only eyewitness testimony of what happened after Carolyn left the house comes from the three children who were present: Carolyn’s twin sons, Cordera and Tredera Cooper who were about 10 (ten) years old at the time of the incident (Trial Tr. 147) and Kinney Maiten (Kenneth Shumake’s son) who testified that at the time of trial he was in second grade, putting him in first grade at the time of the incident and about 6 or 7 years old. (Trial Tr. 186). Each of these three were called as state witnesses.

2. Tredera Cooper’s testimony

A. Direct examination

On direct examination Tredera testified that on the night in question he was awakened by his mother to have something to eat on her return home, and that an argument started between Kenneth Shumake and his mother while he ate. The fight moved to the front room where his mother tried to call the police but was stopped when Kenneth took the phone and hit her in the head with it. (Trial Tr. 141). He told the jury that Jonathan had tried to break up the fight and

told Kenny to leave Carolyn alone but that Kenneth and Carolyn had been drinking, and Kenneth had come home with a bottle of whiskey, and was “bumping into walls and stuff”, and that Kenneth told Jonathan that “he’d beat the brakes off him, too”, while Jonathan continued trying to calm Kenneth by telling him he “[didn’t] want all that fighting.” Then, Tredera testified, his mother left the house to get their neighbor, Val, to call the police. (Tr. 142-143).

Next, Kenneth Shumake confronted Cooper again who was trying to call his father to help defuse the conflict. Shumake grabbed the phone forcefully enough to pull the cord from the wall and used it to hit Johnny Cooper in the face. It was a strong enough blow that Johnny held his face, which had turned red. (Trial Tr. 143). After he struck Mr. Cooper with the telephone, Kenneth asked where the bat was. He asked repeatedly because the boys did not know where it was. Cooper got the bat instead of Shumake and Shumake confronted him saying “what you fixing to do with that bat?” Then Shumake tried to strike a blow with his fist, but Cooper ducked and avoided it. (Tr. 144). Shumake swung again with his fist at Cooper, but Jonathan ducked and avoided the blow again. Then Cooper struck Shumake on the arm with the bat, and then, one time, on the head. After which Cooper tried to put some water on Shumake, but was stopped by Carolyn Cooper. (Trial Tr. 145).

B. Cross examination

On cross-examination, Tredera testified that Jonathan Cooper was laying on the couch watching television when Kenny and Carolyn got home. Only Kenny “got loud” during the fight he started with Tredera’s mother, and Jonathan Cooper had tried to get Kenny to leave his mother alone, but Kenny continued his assault and hit her with the cordless phone, even after Cooper had tried to stop Kenny from fighting and that Kenny threatened to “beat the breaks” off

Johnny, just as he had done to Carolyn Cooper. (Trial Tr. 151-152).

He testified that after his mother left the house, Johnny went back to the back bedroom to use the phone to call for help, and that Kenneth, while first on his way out the door, reversed course and came back to where Johnny was, jerked the telephone from the wall socket and hit Johnny in the head with it. Additionally, Tredera testified that Johnny had not done anything to make Kenneth mad. (Trial Tr. 153-154). Then Kenneth asked the boys where the baseball bat was and that Johnny was in the same room with Kenneth and the boys when Kenneth asked them where the bat was and that he commenced a search for the bat in the bedrooms under the beds while Johnny held his chin from the blow Kenneth had given him with the telephone. (Trial Tr. 156-157).

Tredara testified that Johnny picked up the bat from behind a dresser while Kenneth "was in the hallway coming back toward our room," and that Johnny's position would not have let him see if Kenneth was carrying anything. Then, the confrontation continued at the juncture of the bedroom door and the hallway with Kenneth taking a swing at Johnny, Johnny ducking the punch and Kenneth "twist[ing] around." Johnny then landed a blow with the bat to Kenneth's wrist and Kenneth remained standing. (Trial Tr. 158-161).

Tredera testified that only two blows struck Kenneth. The first to the wrist, and then a second and final to the head, which caused Kenneth to drop to the floor. Then Johnny went to the kitchen and got a bottle of water to pour on Kenneth, but he was stopped by Carolyn who thought it might be harmful. Tredera reiterated he and his brother, Cordera, watched the fight, while Kinney "Shaun" remained under the covers (Tr. 160-163).

Tredara further testified that he and his brother were standing up and watching the

confrontation between Kenneth and Jonathan, but Shaun (Kinney) was “up under the cover, shaking and crying.” and did not raise up his head to see what was going on. (Trial Tr. 155). Toward the end of his testimony, Tredera reiterated he and his brother, Cordera, watched the fight, while Shaun (Kinney) remained under the covers (Tr. 160-163).

3. Cordera Cooper’s testimony

A. Direct examination.

Cordera testified that when Kenneth Shumake and his mother came home they were “fussing” about where Kenneth wanted to sleep that morning and that Kenneth got mad and hit his mom in the head. Then Kenneth grabbed her, threw her on the couch and hit her again. Then his mother went “over there by Jonathan” and Kenneth reached around and hit his mother again on “top of her forehead—in her temple,” after which Jonathan tried to get Kenneth to calm down and to go outside. This caused Kenneth to curse and threaten Jonathan. Kenneth pushed Cordera’s mother toward the front door after she asked him to “chill out”, and then Jonathan went to the back room to try to phone his father, but got no answer. Kenneth then came to the room where Jonathan tried to call his dad, snatched the phone from the wall socket and from Jonathan and hit Jonathan in the face with it. Jonathan leaned against the wall after the blow and Kenneth came over and told him, “You better watch yourself, cause I’m going to hurt you.” (Trial Tr. 167-169).

Cordera further testified that Jonathan retrieved a bat from behind a dresser which was backed up against the wall he leaned on after being hit by the telephone. Kenneth came back down the hallway toward Jonathan, threatened him and swung at him with his fist and missed because Jonathan ducked. Kenneth did not have a weapon. When Kenneth tried to punch

Jonathan, Kenneth twisted around and then Jonathan hit him in the back of the head with the bat. Then he hit him on the wrist, then Kenneth fell to the ground, after which Jonathan tried to get some water to wake up Kenneth. (Trial Tr. 170-171).

B. Cross examination

Cordera testified that the night's event for him started when he heard Kenneth Shumake hollering at his mother about sleeping arrangements. The shouting escalated to a physical attack and Kenneth hit his mother three times with his fist and one time with the telephone with Jonathan Cooper intervening to try to calm Kenneth down, including calling for help. The phone "broke in pieces" when Kenneth hit his mother with it, and it hurt her. (Trial Tr. 174-176).

When Jonathan went back to the boys room to use the other phone to call for help, Kenneth followed him there, snatched the phone from the wall and from Jonathan and hit him in the face with it (Trial Tr. 176) without provocation from Jonathan (Trial Tr. 177), and the blow appeared to hurt Jonathan because "he had tears in his eyes and was holding his face." (Trial Tr. 178). Kenneth was also looking for his bat, "saying where's my bat. Where's my bat" to no one in particular, but he did not find it. (Trial Tr. 177).

Johnny did not do anything to Kenneth before striking Kenneth with the bat, but Kenneth swung his fist at Johnny and missed right before he was struck. This occurred right after Kenneth had been looking for the bat. (Trial Tr. 178). In an event not directly related to this case, Kenneth had "jumped on" Cordera (Trial Tr. 179) and hit him his fist three times, in the head, jaw and nose. (Tr. 180). Cordera's mother had intervened and Kenneth "just tore her shirt up" when she tried to hold him back. (Trial Tr. 179). Kenneth and Cordera's mother would argue "a lot" and Kenneth would hit his mother. Johnny seemed sorry for what had happened (Trial Tr.

180) and he looked like he was afraid before he hit Kenneth with the bat. (Trial Tr. 181).

4. Kinney (Shaun) Maiten's testimony.

A. Direct examination

Kinney Maiten testified that he is also called Shaun, and that he is the son of Kenneth Shumake. (Trial Tr. 182-183).⁵ He was awakened by "the boys" the night of the incident not from hearing any argument. (Trial Tr. 183). He testified that he later heard an argument between his father and Carolyn Cooper but that he did not see anything at all that night after he heard them argue. (Trial Tr. 184, ln. 1-6). To the question "Could you see anything at all that night?" he "shook his head negatively. (Tr. 184, ln. 7-9), and replied "Yeah." when asked "Were you under the covers because you were scared that night. (Trial Tr. 184, ln. 10-12).

He testified that he saw Jonathan Cooper hit his daddy and when asked how he saw that, he gave no audible response, but then replied "Yep." to the prosecutor's question "Did you peek out from under the covers?" (Trial Tr. 184, ln. 18-21). He knew who Jonathan Cooper was but he did not remember what he looked like (Trial Tr. 184, ln. 24-28), but he saw somebody hit his daddy with a baseball bat. (Trial Tr. 184, ln. 29 and 185, ln. 1). He concluded his direct examination testimony by affirming that it was Jonathan Cooper who hit his father with a bat, and stated that he hit him "20" times, reaffirming the number as twenty when the prosecutor replied, "Huh? (Trial Tr. 185, ln. 17-25).

B. Cross examination

On cross examination, Kinney testified that he was in second grade. (Trial Tr. 186, ln.

⁵On cross examination, Kinney testified that he was in second grade, putting him in first grade a year and two months before the trial when the incident occurred. This would make him about six or seven years old at the time of the incident.

14). He reiterated that he heard an argument between his dad and Carolyn, though he did not see Kenneth hit Carolyn with or without a telephone or anything else. (Trial Tr. 187, ln. 10-20), and that he was in bed with his head under the covers when his father, Kenneth, fought Jonathan Cooper, with his face all the way under the cover and seeing only dark when he opened his eyes while looking down toward his feet. (Trial Tr. 187, ln. 21-29, Trial Tr. 188, ln. 1-7). He also testified that Jonathan's brother, nicknamed Head, also was fighting with Kenneth when Jonathan was and that his daddy was saying "stop hitting me" (Trial Tr. 191, ln. 4-5). Finally, he reiterated that Jonathan had struck Kenneth 20 (twenty) times. (Trial Tr. 191, ln. 13-15). It was also Kinney's testimony that he was the only person who saw the fight because Tredera and Cordera were "outside" when it occurred and did not come back until the fight was over. (Trial Tr. 192).

Expert Witness.

Dr. Steven Hayne's testimony.

A. Direct examination

Dr. Hayne testified to his qualifications, identifying himself as the senior pathologist at Madison County Medical Center Renal Laboratory, and as a state pathologist for the Department of Public Safety Medical Examiner's office, and noted that he also provided some forensic services to many parishes in northeast Louisiana. His most common task is the performance of postmortem examinations to determine a medical cause of death as well as the manner of death. He testified that he had performed approximately 25,000 autopsies over his career as of his testimony in the instant case in late August of 2003. The "vast preponderance" of Dr. Hayne's work is determining cause and manner of death within the legal system. (Trial Tr. 216-217).

Trial counsel accepted Dr. Hayne as an expert in the field of forensic pathology without question or questioning and after conducting no *voir dire*: “We’ve known Dr. Hayne and his expertise for some year[s] now.” (Tr. 217).

Dr. Hayne’s direct testimony first generally covered the process by which he comes into a case and then described in detail the procedures and protocols used in an autopsy to determine cause and manner of death and how the findings that derive from his examination are reported. (Trial Tr. 218-219).

More specifically, relating to his examination of Mr. Shumake, he reported three injuries evident in his external examination of Mr. Shumake: 1) an “abrative laceration” or skin tear measuring one inch and located on the back of Mr. Shumake’s head. (Trial Tr. 219, ln. 18-24), 2) an “abrasion” or scraping of the skin on the left side of the head (Trial Tr. 219, ln. 24-25), and, 3) a deep cut on the forearm about three quarters of an inch which cut into the skin and showed fractures of both the radius and the ulna of the left arm protruding through the skin near the wrist. The forearm bones evidenced a “comminuted fracture” broken in several places, and were consistent with “defensive posturing injuries”, which Dr. Hayne described as an injury, usually to the fingers, hand, or forearm, caused in an attempt to ward off a blow to the face, neck or upper chest. (Trial Tr. 219, ln.26-29, Trial Tr. 220, ln. 1-25).

Dr. Hayne then described the findings of his internal examination, which were: 1) extensive bleeding between the skin and the outer surface of the skull, 2) large multiple fractures of the skull on the cranial vault, the skull cap and the base of the skull, running across the skull predominantly on the left side, 3) extensive bleeding between the inner surface of the skull and the brain, and, 4) significant swelling and bruises of the brain. (Trial Tr. 221, ln. 1-20).

Photographs marked S-7A through S-7E were introduced during Dr. Hayne's testimony without objection. (Trial Tr. 222), as were other photographs/diagrams as S-8A through S-8-D, also without objection. (Trial Tr. 225).

B. Cross examination

On cross, trial counsel asked about the number of injuries and Dr. Hayne answered that "there was one injury to the left forearm. There was a minimum of two injuries to the head." (Trial Tr. 227, ln. 11-12). Counsel inquired about the injury to the forearm and Dr. Hayne again characterized it as consistent with defensive posturing. (Trial Tr. 227, ln. 13-16). Then trial counsel asked Dr. Hayne if defensive posturing was the "exclusive possibility" to explain the forearm injury, and Dr. Hayne replied, "No, sir." Hayne then confirmed that he could not exclude the possibility that the injury could have occurred while the arm was in the middle of "a swing towards someone." Defense counsel asked no other questions. (Trial Tr. 227, ln. 13-24).

C. Re-Direct examination

On re-direct, Dr. Hayne testified that it was more probable that the injury to the forearm was a defensive injury than an injury received in the process of delivering an offensive blow. (Tr. 228, ln. 4-7).

Summary of the Argument

Mr. Cooper was denied his right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and Article 3, Section 26 of the Mississippi Constitution during the course of his trial.

Mr. Cooper was charged with murder by a faulty indictment which did not pass constitutional muster or comply with the rule controlling indictments. His trial counsel

recognized the fatal facial defect in the indictment and, rather than file a demurrer to challenge it, he moved to amend the indictment. The trial court granted the motion.

Mr. Cooper did not knowingly, voluntarily or intelligently acquiesce to the amendment of the indictment. In fact, nothing in the scant record surrounding trial counsel's motion shows that trial counsel or the trial court engaged in sufficient questioning of Mr. Cooper to determine that he knew that he was waiving his Sixth Amendment right to indictment by agreeing to the amendment, or what the possible results would have been had his attorney challenged the indictment, rather than corrected it. In fact, Mr. Cooper only stated that he wanted to "go on and get it over with."

Mr. Cooper's right to a fair trial and effective assistance of counsel was also compromised by trial counsel's failure to engage an expert pathologist to counter the testimony of Dr. Hayne. The three eyewitnesses called by the state contradicted Dr. Hayne's testimony, yet Dr. Hayne's testimony was given sufficient credibility to defeat Mr. Cooper's theory of self defense, and/or to allow middle-ground agreement to convict of manslaughter. Counsel should have engaged an expert to review Dr. Hayne's findings about the number of blows to the victim's head, and whether or not the injury to the forearm of the victim—the aggressor in this case—was, in fact, a defensive injury. Without engagement of a defense expert, Dr. Hayne's conclusions, already contradicted by eyewitnesses for the state, as well as Mr. Cooper's statement to the Greenville Police Department, were left as the only expert opinion on the critical issue of how many and what type of injuries were inflicted. Failure to call an expert to counter Dr. Hayne's testimony was critical to the jury rejecting Mr. Cooper's defense of self defense.

Trial counsel was also ineffective for failing to conduct an adequate investigation of the

case and not communicating with Mr. Cooper about the evidence in his case, and in failing to object to photographs of the victim which had a prejudicial effect far exceeding their probative value.

Burden of Proof

It is evident from the trial court's order denying Mr. Cooper relief and dismissing his Petition (RE 60-62) that the trial court failed to note the burden of proof that it employed in examining the evidence presented by Mr. Cooper. The standard of proof in rulings on PCR petitions is by a preponderance. "[T]he defendant bears the burden of proving by a preponderance of the evidence that he is entitled to post-conviction relief." *McClendon v. State*, 539 So. 2d 1375, 1377 (Miss. 1989). The court's ruling states only that it considered the "motions filed, the evidence presented, and arguments made at the hearing in this matter, as well as the record in Washington County cause number 2002-393." If the trial court held Mr. Cooper's proof to a higher burden, such as clear and convincing or beyond a reasonable doubt it was in error. There is no indication in the record at all and this court should not assume that the trial court employed the correct burden and instead should review Mr. Cooper's issues *de novo*.

Standard of Review

A reviewing court's standard of review when considering the denial of a petition for post-conviction collateral relief on a ruling from a trial court is the clearly erroneous standard. *Moore v. State*, 986 So. 2d 928, 932 (Miss. 2008) (citations omitted). "However, where questions of law are raised the applicable standard of review is *de novo*."

Argument

Issue I.

The trial court on remand was in error for finding that trial counsel was not ineffective for moving to amend the state's fatally flawed indictment, rather than challenging it with a demurrer. When counsel proposed the amendment to the indictment and persuaded Mr. Cooper that this was proper, he failed to protect Mr. Cooper's rights under the Sixth Amendment of the United States Constitution and Article 3, Section 26 of the Mississippi Constitution.

The state returned a materially flawed indictment against Mr. Cooper, and, rather than challenge it, trial counsel assisted the state by requesting the indictment be amended to add the element that killing was "not in necessary self defense". (Trial Tr. 2-5, Remand RE 10). The Mississippi Supreme Court has recognized this language to be an essential element of a murder charge: "[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 ." *Montana v. State*, 822 So. 2d 954 at 959-60 (Miss. 2002). Emphasis added.

Mr. Cooper's indictment appears at Remand CP 5. A cursory review shows its fatal flaw, because it omits the element that whatever actions Mr. Cooper had taken during the incident that was charged as murder in his indictment were "not "in necessary self defense". Trial counsel recognized the flaw and, rather than challenging it with a proper motion, he assisted the state in amending the indictment on the material matter, so that the state could proceed to trial against Mr. Cooper.

URCCC 7.06 requires that indictments:

....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.

Case law emphasizes the requirement that all elements of the crime be set out and describes the consequences of not meeting this requirement:

It is fundamental, of course, that an indictment, to be effective as such, must set forth the constituent elements of a criminal offense; if the facts alleged do not constitute such an offense within the terms and meaning of the law or laws on which the accusation is based, or if the facts alleged may all be true and yet constitute no offense, the indictment is insufficient. Every material fact and essential ingredient of the offense—every essential element of the offense—must be alleged with precision and certainty, or as has been stated, every fact which is an element *prima facie* case of guilt must be stated in the indictment.”

Love v. State, 52 So.2d 470 (Miss. 1951)

The indictment failed to allege the essential element that Mr. Cooper did not act in necessary self defense. In the absence of this elemental allegation, the indictment failed to allege a crime, and was defective on its face.

Case law supports the rule, and points out the rationale for the plain, concise, definite and full notice requirements:

an indictment, of course, constitutes a “pleading” in a criminal case. Its office is to apprise the defendant of the charge against him in fair and intelligible language (1) in order that he may be able to prepare his defense, and (2) the charge must be laid with sufficient particularity of detail that it may form the basis of a plea of former jeopardy in any subsequent proceedings.

Westmoreland v. State, 246 So.2d 487 (Miss. 1971)

Rather than assisting the state in correcting the faulty indictment, trial counsel should have argued a demurrer, attacking it as failing to set out an essential element of the crime. His failure to do so, as noted below amounted to ineffective assistance of counsel when judged by the

two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Trial Counsel's Performance Was Deficient.

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).

Under the Sixth Amendment, a defendant in a criminal case can only be tried after presentment of his case to a grand jury. One may, however, waive presentment to a grand jury, usually when a plea bargain is struck, and proceed on an information and properly-filed waiver. At such a plea—as well as those to a charge in an indictment—the defendant is apprised of all constitutional rights, including that of presentment and indictment, and a trial court engages in a colloquy to determine that the accused fully understands those rights and that he or she is knowingly and intelligently waiving the right to challenge each and every constitutional violation upon entering the plea. The consequences of one of these fully-informed guilty pleas are broad and well-known: “[A] valid guilty plea waives all non-jurisdictional claims concerning defective indictments as well as any evidentiary issue. *Phillips v. State*, 25 So. 3d 404, 407 (para. 6) (Miss.Ct. App. 2010).

In Mr. Cooper’s case, however, he did not enter a guilty plea and therefore did not waive his protective panoply of constitutional rights. Instead, he proceeded to trial relying on the skills and advice of his counsel, who, when the prosecutors returned a materially flawed indictment aided them in amending an un-amendable flaw in it, rather than challenging the indictment with a demurrer. The courtroom exchange during which trial counsel tried to explain to the court that

Mr. Cooper agreed with his request to amend the indictment and proceed to trial is less than enlightening about whether or not Mr. Cooper knew he was giving up rights and what rights those were. The trial court did not ask Mr. Cooper any questions, and when trial counsel referred to a conversation he said he had with Mr. Cooper, Mr. Cooper responded only “Yeah”, when counsel referenced the amendment and said that it was “what I thought we explained to you earlier.” There was no doubt some confusion here as Mr. Cooper’s testimony at the remand hearing referenced a conversation about the indictment that centered around whether or not the foreperson of the grand jury had signed Mr. Cooper’s indictment. (Remand Tr.16-17).

Trial counsel recognized a fatal flaw in Mr. Cooper’s indictment and successfully moved the court to amend it. Trial counsel did not have an in-depth conversation with Mr. Cooper explaining all the legal ramifications of waving this critical protection afforded him by the Sixth Amendment and thus did not effectively assist Mr. Cooper in making an informed and knowing waiver of those protections. No proof was put on by the state at the remand hearing that trial counsel’s actions were the result of a reasoned and reasonable trial strategy that would forgive this deficient performance as trial strategy. Thus, the first prong of *Strickland* has been met.

Mr. Cooper Was Prejudiced by Counsel’s Deficient Performance

Petitioner must also show that there is a reasonable probability that but for counsel’s unprofessional errors, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 694. A reasonable probability is a probability that is sufficient to undermine confidence in the outcome. *Id.* at 694.

Trial counsel stated that he had informed Mr. Cooper that if he were to successfully challenge the fatal flaw in the indictment, the state would re-present his case to the grand jury

and simply return another indictment for murder, while Mr. Cooper waited in jail. (Trial Tr. 2-3). The trial court conducted no colloquy with Mr. Cooper about his rights and there can be no doubt that he was at a disadvantage for not having a lawyer's understanding of the ramifications of his defective indictment and that those went much further than a simple re-presentation and another murder indictment.

Mr. Cooper testified at the remand hearing that he was not skilled in the law and did not have an in depth understanding of the law regarding amendments to indictments. (Remand Hrng. Tr. 12, ln. 12). However, Mr. Cooper's counsel should have been conversant with the potential benefits of challenging the indictment, and should have explained the following benefits that would have accrued to him had he challenged the indictment's failure to include the language "and not in necessary self defense and sent the state back to the drawing board at its next grand jury. What should have been clear to Mr. Cooper's counsel—and clearly relayed by him to Mr. Cooper—are these salient facts, each of which evidence the prejudice visited on Mr. Cooper by his trial counsel's successful request that Mr. Cooper's indictment be amended:

1. That if the case were presented to a new grand jury, that grand jury would not be obligated to indict, and could—like the first grand jury to consider Mr. Cooper's case—no bill the charge.

2. That had Mr. Cooper been convicted on this indictment it would have likely resulted in a reversal and rendering or a reversal and remand of his conviction, either discharging him in the first instance, or offering him another proceeding at which he could be found not guilty.

3. That if a new grand jury reviewed his case it was not obligated to indict him for murder, but could decide that his actions supported only a charge of manslaughter.

4. That if this third grand jury reviewed Mr. Cooper's case and voted to indict him for manslaughter he would be in an eminently more favorable position than he would be with a murder indictment. In such a position he could have negotiated for a sentence under the probation and post-release supervision statutes, or for a sentence of a minimal term of years, and the trial court would have been in a position to sentence him accordingly either upon a recommendation by the state, or upon his entry of an open plea in hope of a lesser sentence, an option not available to one indicted for murder.

Mr. Cooper's showing of prejudice on this issue is that all of the hopeful and helpful probabilities set out above were eliminated when trial counsel helped the prosecutor correct the defective indictment so the state could proceed to trial on August 27, 2003.

Issue II.

The trial court on remand was in error for finding that trial counsel's unconditional and open-armed acceptance of Dr. Steven Hayne when he was tendered as an expert for the state, and his failure to secure an expert witness to challenge Dr. Hayne's testimony was not ineffective assistance of counsel under Sixth Amendment of the United States Constitution and Article 3, Section 26 of the Mississippi Constitution.

Trial counsel openly accepted Dr. Hayne as an expert, even though did not *voir dire* him, though given the opportunity to do so, prior to Hayne's critical testimony for the state. (Trial Tr. 217). When given the opportunity to cross-examine Dr. Hayne, trial counsel asked a minimal amount of questions in an attempt to support Mr. Cooper's theory of self defense. There was a golden opportunity for trial counsel to challenge Dr. Hayne because the only eyewitnesses to the assault which led to the victim's death were called as state witnesses—and their testimony was in critical conflict with the testimony of Dr. Hayne that Mr. Cooper had struck Mr. Shumake in the head at least two times an possibly more. (Trial Tr. 227).

Mr. Cooper did not testify at trial, but in his statement to Rainey Smith of the Greenville Police Department Mr. Cooper stated that he had struck the victim once in the arm and only once in the head. (Trial Tr.108). The testimony of Tredera Cooper and Cordera Cooper—twin sons of Mr. Cooper's cousin, Carolyn, who were ten years old at the time they witnessed the event—was that Mr. Cooper struck only one blow to Kenneth Shumake's head and one to his arm. The state's third eyewitness, Kinney "Shaun" Shumake, was about 6 or 7 years old when he saw the fight and he testified that Mr. Cooper had hit his father Kenneth 20 (twenty) times in the head. The conflicts were all embedded within the state's case, with each witness's testimony—and the police statement given by Mr. Cooper—in stark contrast with that given by Dr. Hayne.

Trial counsel no doubt had all the witness statements tendered to him in the discovery process as well as Dr. Hayne's report. Nevertheless, counsel did not investigate Mr. Cooper's case thoroughly enough to recognize the need for expert assistance, and take the steps needed to acquire an expert to support Mr. Cooper's theory of the case, which was that he only struck Mr. Shumake once in the head and once in the forearm while acting in self defense and the defense of others.

what's the point?

Trial counsel proceeded with Mr. Cooper's theory of self defense. He submitted instructions on the theory which were granted, and his few questions to Dr. Hayne on cross-examination appeared to be geared toward showing that Mr. Shumake—by agreement of all the initial aggressor in this case—was still lashing out at Mr. Cooper as he had at others that evening. However, without an independent expert to assist him he was unable to counter Dr. Hayne's testimony and the implication that Mr. Cooper had repeatedly struck Shumake in the head,

weakening Mr. Cooper's self defense arguments. Had trial counsel taken Dr. Hayne's report to an independent pathologist, along with the countering statements of the eyewitnesses, the expert could have challenged Hayne's opinion that two or more blows had struck Mr. Shumake in the head.

Trial Counsel's Performance Was Deficient for Failing to Secure a Pathologist.

The question of how many blows Mr. Shumake received to the head was critical to the jurors's favorable consideration of Mr. Cooper's defense theory. With three state witnesses contradicting Dr. Hayne's expert testimony, it was deficient performance for trial counsel not to seek out an expert to professionally neutralize Dr. Hayne's findings.

In *Howard v. State*, 945 So.2d 326, 352 (Miss. 2006), the Mississippi Supreme Court found deficient performance in trial counsel's failure to retain an expert ("we find that the failure to call an expert witness was deficient performance."). In *Soffar v. Dretke*, 368 F.3d 441, 478-479 (5th Cir. 2004), the Fifth Circuit held that the failure to consult an independent expert was not an acceptable professional judgment and that had trial counsel obtained an independent expert, counsel would have been able to make strategic decisions as to what information would be helpful to the defense. *Soffar* also recognized that if the jury had heard evidence favorable to the defendant, there was a chance that at least one juror, if not all, would have refused to return a verdict of guilty.

The state called no witnesses during the remand hearing, so there is nothing in the record to indicate that the failure to call an expert to counter Dr. Hayne's opinion that the victim suffered a "defensive posturing" injury and that he was struck two or more times on the head was a reasonable strategic decision made by trial counsel after careful consideration of all the

facts of the case.

Mr. Cooper Was Prejudiced by Counsel's Failure to Call and Expert Witness

Dr. Hayne's questionable but unquestioned testimony regarding the defensive wound to the forearm and the two or more head wounds on the victim was used to refute Mr. Cooper's theory of the case that he struck the victim only one time each in the arm and the head and was acting in reasonable self defense. Without his attorney securing an expert to examine and challenge Dr. Hayne's findings regarding the injuries to the victim, Mr. Cooper was left with no evidence to counter a critical and damning expert opinion offered by the prosecution.

Relying only on Dr. Hayne's testimony that the victim received two or more blows to the head, the jurors could have thought that this showed more than the "reasonable force" necessary for self defense. Testimony from a defense expert that there was only one blow to the head would have agreed with two eyewitnesses and offered a firmer evidentiary basis on which the jury could have found self defense. It is beyond speculation that the jurors had difficulty deciding what is reasonable force even with Dr. Hayne's damaging testimony before it, because they sent out a note to the trial court asking: "Show or tell me what reasonable force is." (Trial Tr. 300, Exhibit C-11 for Identification).

Dr. Hayne's unrefuted testimony also prejudiced Mr. Cooper because the state relied on it in its closing arguments to show that multiple blows were landed on Mr. Shumake's head during the fight with Mr. Cooper. "What the boys didn't tell you was that third lick on the back of the head, as Dr. Hayne said, delivered with great force." (Trial. Tr. 280). Again, in the state's second closing, the prosecutor emphasized that Dr. Hayne's testimony was expert testimony and used it in closing to further denigrate the lay testimony of "those two boys", to argue that the arm

wound was severe and defensive, and to show malice in his efforts to defeat Mr. Cooper's self defense argument:

Those two boys said two licks. They didn't say nothing about three licks. Dr. Hayne, expert Dr. Hayne, who has performed 25,000 autopsies, I can't tell you how many times he's testified in court, how many examinations of situations like this—expert testimony. This was a defensive posturing wound delivered with such force it completely shatters his arm with a compound fracture. He goes forward with that intent and malice aforethought and inflicts two blows to Kenneth Shumake's head. Two more blows. Reasonable? Absolutely not. This is not even close to self defense.

Trial Tr. 299.

It is clear from both of these closing arguments that the state trumpeted the fact that it had an expert witness, and relied heavily on his un-rebutted testimony to secure Mr. Cooper's conviction. Without his own expert, Mr. Cooper was helpless to defend himself from Dr. Hayne's opinions, or the state's arguments.

It should also be noted that although *Edmonds v. State*, 2004-CT-02081-SCT (Miss. 2007) had not yet been overturned at the time of Mr. Cooper's trial and direct appeal, its criticism regarding experts was available and cited to the trial court by counsel at Mr. Cooper's remand hearing, conducted in October 2009. The case raised concerns about expert testimony which were grave enough to cause the reversal of a capital murder conviction. In *Edmonds* the Mississippi Supreme Court wrote:

We have no alternative but to find that [Edmonds's] substantial rights were affected by Dr. Hayne's conclusory and improper testimony. Juries are often in awe of expert witnesses because, when the expert witness is qualified by the court, they hear impressive lists of honors, education and experience. An expert witness has more experience and knowledge in a certain area than the average person. Therefore, juries usually place greater weight on the testimony of an expert witness than that of a lay witness. Here, Dr. Hayne's two-shooter testimony impermissibly (because it was not empirically proven) bolstered the State's theory of the case.... The error was magnified when Dr. Hayne's testimony was the only

evidence – other than Edmonds’s contested confession – to support the State’s theory of the case.

Edmonds, Para. 9, citations omitted.

Even though Mr. Cooper was tried and appealed his conviction before the reversal in *Edmonds*, the principle is the same: an un-counteracted expert (especially one with 25,000 autopsies to his credit) can hold the jury in sway to his opinions simply because of the special status of an expert. In Mr. Cooper’s case the prejudice from counsel’s failure to consult with and/or call an expert to counter Dr. Hayne’s testimony is enhanced because Hayne’s testimony was contradicted by the state’s own eyewitnesses.

This court should hold that the circuit court erred in finding that Mr. Cooper’s counsel rendered effective assistance pursuant to *Strickland v. Washington*, relating to his failure to consult with and secure an expert to counter the opinions offered by Dr. Hayne. Hayne’s testimony not only provided the cause of death for the state, but also was used to refute Mr. Cooper’s defense of self-defense, which was consequently rejected by the jury. Such an omission on the part of counsel cannot be considered a reasonable trial strategy that did not result in prejudice to Mr. Cooper.

Issue III.

The trial court on remand erred in finding that Mr. Cooper was not denied his right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and Article 3, Section 26 of the Mississippi Constitution when trial counsel failed to properly investigate his case or communicate with him before proceeding to trial.

A reasonable trial strategy cannot be arrived at without a thorough investigation which permits trial counsel to make the informed and constitutionally supportable judgments of what evidence to present. *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005); *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). Certainly, a critical


part of that investigation must be to consult with the client. If that strategy is based on no investigation or on an inadequate investigation, “trial strategy” cannot be claimed to elevate counsel’s performance to the required reasonable standard. “[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland, supra*, at 690-691.

Clearly, every attorney has Sixth Amendment duties as well as ethical directives that demand meaningful communication with their clients in the course of representation. Mr. Cooper’s testimony at the remand hearing shows that trial counsel did not share discovery materials or trial strategies to the extent that he received effective representation during the investigation stage of his case. He also ties this to trial counsel’s failure to secure an expert in forensic pathology. So far as that is the case, Mr. Cooper relies on the deficient performance and prejudice analyses made in Issue II. which specifically focus on trial counsel’s failure to engage an expert witness to counter Dr. Hayne’s testimony.

Issue IV.

The trial court on remand erred in finding that Mr. Cooper was not denied his right to effective assistance of counsel for trial counsel’s failure to object to certain photographs introduced by the prosecution as their prejudicial effect far exceeded their evidentiary value.

Through Dr. Hayne, the state introduced photographs and diagrams of the injuries to Mr. Shumake. (Trial Tr. 222, 225). Each one was introduced without objection from trial counsel. (Trial Tr. 221). At the remand hearing on Mr. Cooper’s petition, he raised a claim that his trial counsel was ineffective for failing to object to all of the photos, but specifically cited those that showed the victim’s skull. (Remand Tr. 26). For the purposes of this brief, Mr. Cooper



specifically objects to counsel's performance in not objecting to the introduction of the photographs marked S-7E, an 8 x 10 color photo referenced by Mr. Cooper at the remand hearing.

#6 blows to skull 95
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4500

In *Sudduth v. State*, 562 So.2d 67,69 (Miss. 1990) the Mississippi Supreme Court reminded the trial courts that photographs of the victim should not ordinarily be admitted into evidence where the killing is not contradicted or denied and the corpus delicti and the identity of the deceased have been established. This, of course, was the case here because Mr. Cooper admitted the killing but urged before the jury that he had acted in self defense. If this Court finds, however, that the challenged photographs were relevant and admissible to support Dr. Hayne's theory that the victim received at least two blows to the head, then Mr. Cooper cites the court to his argument that trial counsel was ineffective for not engaging forensic pathologist for the defense to counter that testimony.

The photographs served only to inflame the jury as Mr. Cooper noted in his testimony at the remand hearing. (Remand Tr. 25). The state properly used diagrams to illustrate some of Dr. Hayne's testimony and any point it made with a photograph could also have been made with a diagram. The prosecution could have served its evidentiary purposes without inflaming the jury by employing diagrams and black-and-white photograph instead. Such a process has been approved by several courts as a means to avoid the imbalance of prejudice over probative value in a MRE 401, 402, 403 analysis. See *State v. Polk*, 164 N.J. Super. 457, 397 A.2d 330,334 (N.J. Super A.D. 1977); *State v. Monroe*, 397 So.2d 1258, 1267 (La. 1981) (approving use of photos over objection that they were gruesome, noting that "[a]ll five photographs are in black and white"); *State v. Myles*, 389 So.2d 12, 16 (La. 1979) (approving use of a low-contrast black and

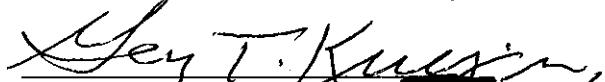
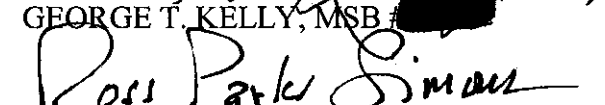
white study made at the morgue and noting that the court also refused to admit a color photograph of the crime scene.

Trial counsel failed to object pursuant to MRE 401, 402 and 403. This could not have been a tactical decision or part of a reasonable trial strategy. Mr. Cooper consequently prejudiced by the introduction into evidence of the inflammatory photographs. For these reasons, the trial court erred in finding that trial counsel rendered constitutionally effective assistance to Mr. Cooper on this issue.

Conclusion

For the reasons cited above, this court should reverse the November 18, 2009, ruling of the trial court which denied and dismissed Mr. Cooper's petition.

RESPECTFULLY SUBMITTED,


GEORGE T. KELLY, MSB # [REDACTED]

ROSS PARKER SIMONS, MSB # [REDACTED]

CERTIFICATE OF SERVICE

I, Ross Parker Simons, hereby Certify that I have this date filed via U.S. Mail the original and three (3) copies of the foregoing Appellant's Brief, as well as four (4) copies of Appellant's Record Excerpts, in *Jonathan Cooper v. State*, 2009-KA-02031-COA, with the Clerk of the Mississippi Supreme Court, and that I have mailed to the Office of the Attorney General P.O. Box 220, Jackson, Mississippi 39205, as well as to the District Attorney for Washington County at P.O. Box 436 Greenville, Mississippi, 38702 and Circuit Court Judge Ashley Hines, at P.O. Box 1315, Greenville, Mississippi, 38702, true and correct copies of the same via U.S. Mail.

This, the 13th day of August, 2010, A.D.

ROSS PARKER SIMONS, MSB # [REDACTED]