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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DANTE LAMAR EVANS — APPELLANT

VS.

NO. 2009-KA-0854-SCT CT

STATE OF MISSISSIPPI — APPELLEE

CERTIORARI FROM THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

SUPPLEMENTAL BRIEF FOR THE APPELLEE

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On December 15, 2011, this Court granted Evans' Petition for Writ of Certiorari. Pursuant to Rule 17(h) of the Mississippi Rules of Appellate Procedure, the State of Mississippi files this Supplemental Brief in support of its contention that the Court of Appeals' Opinion in this case is correct and that Evans' conviction and sentence should be affirmed.

ARGUMENT

I. THE TRIAL COURT PROPERLY REFUSED EVANS' IMPERFECT SELF-DEFENSE INSTRUCTION AS HAVING NO EVIDENTIARY BASIS.

The Court of Appeals correctly found that the record did not support the granting of an imperfect self-defense instruction. This is so because there is absolutely no evidentiary foundation to support Evans' claim that he honestly believed that shooting his sleeping father in the head was necessary to prevent death or great bodily harm. "A defendant is entitled to have instructions on his theory of the case presented, even though the evidence that supports it is weak, inconsistent, or of doubtful credibility." *Banyard v. State*, 47 So.3d 676, 681 (¶12) (Miss. 2010). The Court of Appeals correctly found that Evans failed to meet even this low evidentiary burden.

An intentional killing may be reduced from murder to manslaughter under the theory of imperfect self-defense where the killing is committed "without malice but under a bona fide (but unfounded) belief that it was necessary to prevent death or great bodily harm." *Wade v. State*, 748 So.2d 771, 775 (¶ 12) (Miss. 1999). The Court of Appeals correctly relied on this Court's opinion in *Moore v. State*, 859 So. 2d 379 (Miss. 2003) in rejecting Evans' claim that the history of alleged abuse alone provided the evidentiary basis for the granting of an imperfect self-defense instruction. In *Moore*, the appellant had suffered abuse at the hands of her husband throughout their marriage. *Id.* at 381 (¶2). On the day Moore shot her husband to death, he had physically abused her just forty-five minutes prior. *Id.* at 384 (¶13). The fact that the abuse had not occurred immediately prior to the murder was a major factor in this

Court's determination that no jury could have found that Moore acted under a bona fide but unfounded belief that it was necessary to shoot her husband to prevent death or great bodily harm. *Id.* See also *Fair v. State*, 859 So. 2d 379, 383 (¶9) (Miss. 2003) (Fair's claim that at the time of the murder he was in fear of death or great bodily harm because of a past altercation with the victim failed in part due to the fact that "there was no testimony presented regarding violence or threats of violence between the two men before the shooting occurred."). In the present case, Evans admitted in his statement to police that his father had not hit him on the night of the murder or even in the days leading up to the murder. Exhibit 12 at 0:56:40; 1:24:37. If being physically abused by one's husband forty-five minutes prior to the killing does not establish a bona fide but unfounded belief that killing is necessary to prevent death or great bodily harm, then certainly shooting one's sleeping father cannot establish the requisite belief.

Wade is the only Mississippi case that even remotely suggests that a history of violence between the defendant and the victim can go toward establishing the requisite bona fide (but unfounded) belief that the killing was necessary to prevent death or great bodily harm. However, the State would argue that while the *Wade* opinion discussed imperfect self-defense, this Court's analysis in *Wade* focused on heat of passion manslaughter, and the Court actually found that the defendant's actions were heat of passion manslaughter, not imperfect self-defense. 748 So. 2d at 776, 777 (¶¶15, 16) ("The killing was more appropriately a killing in the heat of passion, thus manslaughter was the only appropriate verdict. . . . Such evidence, we find, is sufficient for a 'heat of passion' manslaughter conviction."). Even if this Court finds that the *Wade* decision stands for the proposition that a history of violence between the defendant and the victim can go toward establishing a bona fide (but unfounded) belief that the killing was necessary to prevent death or great bodily harm, *Wade* is easily distinguishable. In *Wade*, it was undisputed that the victim was extremely violent toward Wade, and the beatings he inflicted upon her were "too numerous to count." *Id.* 776 (¶15). Also, the frequent abuse was witnessed by others. *Id.*

On the night of the killing, the victim had beaten Wade, and immediately before Wade shot the victim, the victim made what could have been considered another threatening move toward Wade. *Id.* In the present case, the record shows at the most that Mr. Evans may or may not have crossed the line two to three times in disciplining Evans by shoving him in the chest. This is a far cry from the frequent and witnessed beatings Wade suffered. Also, by Evans own admission, his father had not touched him in the days leading up to the murder, much less on the night of the murder. Finally, as Mr. Evans was asleep,

there is no record support for a finding that Evans perceived a reasonable or unreasonable threat.

In addition to there being no evidentiary basis that Evans acted under a bona fide belief that killing was necessary to prevent death or great bodily harm, equally important is the fact that there was no evidentiary basis to show that Evans acted without malice. Malice aforethought, deliberate design, and premeditation are synonymous. *Wilson v. State*, 936 So.2d 357, 363-364 (Miss. 2006) (citing *Hawthorne v. State*, 835 So.2d 14, 19 (Miss. 2003). Therefore, a killing committed with malice is a planned killing committed with full awareness of what one is doing. *Id.* It is clear from Evans's taped confession that he planned his father's murder. In addition to telling numerous people that he wanted to kill his father, he took his father's gun and hid it under his mattress just days before the murder and practiced shooting his father the night prior to the murder. Evans' confession is replete with statements which clearly illustrate that he planned to murder father. Imperfect self-defense reduces murder to manslaughter. Surely one cannot plan and carry out a murder and then claim imperfect self-defense.

Accordingly, Evans failed to meet the extremely low burden of showing that the record contained even one iota of evidence to support the granting of an instruction on imperfect self defense.

II. TESTIMONY REGARDING THE VICTIM'S ALLEGED VIOLENCE TOWARD HIS SON WAS PROPERLY EXCLUDED BECAUSE THERE WAS NO EVIDENCE TO SUGGEST THAT THE VICTIM WAS THE INITIAL AGGRESSOR WHEN HE WAS

SHOT TO DEATH IN HIS SLEEP.

Evans' friend, Terrence Russell, was prepared to testify that he saw the victim strike Evans in the chest one time three weeks prior to the murder. T. 308-309. Russell also stated in his proffer that Evans told him of two other times that his father hit him. T. 310. The trial court properly excluded Russell's testimony under Rule 404 of the Mississippi Rules of Evidence.

Evidence of a victim's alleged propensity for violence is only admissible where there is a dispute as to who was the initial aggressor at the time of the killing. MRE 404(a)(2). Proof of an overt act of violence committed by the victim against the defendant at the time of the fatal encounter is a condition precedent to offering evidence of a victim's alleged propensity for violence. *Robinson v. State*, 566 So.2d 1240, 1241 (Miss. 1990) (citing *McDonald v. State*, 538 So.2d 778, 779 (Miss.1989)).[1] Evans did not, and of course could not, claim self-defense. Neither did he, nor could he, claim that his father was the initial aggressor at the time of the killing. As such, Mississippi case law makes clear that the victim's alleged propensity for violence was inadmissible. Therefore, because there was no evidence that the victim in the present case was the initial aggressor, evidence of his alleged propensity for violence, including specific instances of conduct, was inadmissible. Accordingly, the trial court properly excluded Russell's testimony.

Evans also claims that the trial court erred in sustaining the State's objection during Investigator Susan Kimball's cross-examination when she was asked if victim had many restraining orders issued against him in last year. T. 236. First, it is clear that defense counsel was again attempting to show the

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[1]See also *Gates v. State*, 936 So.2d 335, 339-40 (Miss. 2006) (trial court properly excluded evidence of previous altercation between victim and defendant because defendant failed to show that victim was initial aggressor in the aggravated assault for which defendant was tried); *Hodge v. State*, 823 So. 2d 1162, 1165 (¶9) (Miss. 2002) ("In order to introduce [evidence of a pertinent character trait of the victim] a defendant must introduce evidence of an overt act of aggression by the victim."); *McGilberry v. State*, 797 So.2d 940, 945 (¶21) (Miss. 2001) (evidence that victim allegedly beat defendant with iron pipe two months prior properly excluded where defendant failed to offer proof that victim was initial aggressor at time of murder).

victim's alleged propensity for violence, which the State has already shown was inadmissible under Rule 404. Second, Evans failed to preserve this issue for appellate review because he failed to make a proffer regarding what Kimball's response to the question would have been. *Murray v. State*, 849 So.2d 1281, 1289 (¶32) (Miss. 2003). Without a proffer, the reviewing courts refuse to accept as true that a witness would have testified in accordance with the appellant's claim. *Gates v. State,* 484 So.2d 1002, 1008 (Miss. 1986). Accordingly, the Court of Appeals correctly rejected Evans' claim that the trial court erred in excluding the aforementioned testimony.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING FUNDS FOR AN EXPERT IN POST-TRAUMATIC STRESS DISORDER.

Pursuant to a court ordered psychiatric evaluation, Dr. Beverly Smallwood determined that Evans was competent to stand trial and that he was legally sane at the time he murdered his father. Opinion at (¶18). Defense counsel subsequently filed a motion for funds to obtain an expert, Dr. Gerald O'Brien, "to testify on the symptoms, characteristics, attitudes from someone who **may** be suffering from" post-traumatic stress disorder (PTSD). T. 6, 11; C.P. 33. Defense counsel claimed that Dr. Smallwood found documentation to suggest that Evans had been diagnosed with post-traumatic stress disorder six years prior to murdering his father.[2] Defense counsel alleged that Dr. O'Brien could assist the defense in presenting the defense of imperfect self defense. Defense counsel stated that Dr. O'Brien would not examine Evans, but instead merely testify about the characteristics of a person suffering from PTSD. T. 10-11. The trial court denied the motion, finding that Dr. Smallwood, Evans, and other lay witnesses could testify that Evans had been diagnosed with PTSD, if he in fact had been, and that Dr. Smallwood

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[2]Evans' appellate brief contains what he claims is an excerpt from Dr. Smallwood's report in which she claimed that Evans was diagnosed with PTSD six years prior to the murder. However, this report is not contained in the record. Reviewing courts are bound by the record and will not consider matters that do not appear in the record. *Pulphus v. State*, 782 So.2d 1220, 1224 (¶15) (Miss. 2001).

could testify about the symptoms of PTSD. T. 20. Defense counsel would later argue that he wanted an expert who was "more expert than [Dr. Smallwood] was in the disorder of post-traumatic stress disorder." T. 424.

Evans now claims that the trial court's denial of funds to hire Dr. O'Brien prohibited him from successfully presenting his defense.

The Court of Appeals correctly found that Dr. O'Brien could not have assisted Evans in putting on a defense of imperfect self-defense because that defense was not available on this evidentiary record. Opinion at ¶18. Additionally, Evans presented nothing more than unsubstantiated assertions that Dr. O'Brien could have assisted in his claim of imperfect self-defense. Unsubstantiated assertions that expert assistance would be beneficial to the defense are insufficient to show substantial need for expert assistance. *Harrison v. State*, 635 So.2d 894, 901 (Miss. 1994). Lastly, even where a defendant is entitled to expert assistance, he is not entitled to an expert of his own choosing. *Woodward v. State*, 726 So. 2d 524, 529 (¶18) (Miss. 1997). Dr. Smallwood was available to give expert testimony in the area of PTSD. Evans chose to forgo that option. For all of these reasons, the Court of Appeals correctly found that the trial court did not abuse its discretion in denying public funds to hire Dr. O'Brien.

IV. THE TRIAL COURT WAS DUTY BOUND TO ACCEPT THE STATE'S STRIKES FOR CAUSE OF VENIREMEN WHO INDICATED THAT THEY COULD NOT BE FAIR AND IMPARTIAL DUE TO THE DEFENDANT'S AGE.

Evans claims that the trial court impermissibly prohibited the jury from considering Evans' age, which he again claims was central to the inapplicable defense of imperfect self-defense. In reality, the trial court simply performed its statutory duty in excluding veniremen who openly admitted that they could not be fair and impartial due to Evans' age.[3]

[3]Stuart Sanders, Tina Mobbs, Marilyn Byrd, and Brenda Marin all admitted on the record that they could not be fair and impartial due to Evans' young age. T. 95-96, 115-116.

Trial court judges are duty bound to strike for cause any potential juror they believe cannot be fair and impartial. "Any juror shall be excluded . . . if the court be of opinion that he cannot try the case impartially, and the exclusion **shall** not be assignable for error." Miss. Code Ann. § 13-5-79. Additionally, "[A] defendant has no right to have specific prospective jurors try his or her case, and ... the defendant cannot complain on appeal of a particular exclusion if the end result was a jury composed of fair and impartial jurors." *Coverson v. State*, 617 So.2d 642, 646 (Miss. 1993). Trial courts have "complete discretion" to remove any juror that the trial court believe cannot be fair and impartial. *Langston v. State*, 791 So. 2d 273, 281 (¶17) (Miss. Ct. App. 2001). Accordingly, the Court of Appeals found that the trial court had no choice but to exclude jurors who admitted they could not be fair and impartial. Opinion at ¶24.

V. EVANS' INCRIMINATING STATEMENTS MADE TO THE FEMA SECURITY GUARDS WERE PROPERLY ADMITTED.

Jeffrey Jones was a private security guard hired to patrol the FEMA trailer park where Evans lived with his father. T. 40. On the night of the murder, Jones was at his post at the front of the trailer park when a resident drove up and exclaimed that a boy who lived in a trailer across the street from him just shot his father. T. 41. Jones and his fellow security guard, Derrick Fillmore, followed the man to the 70 block of the trailer park, where a large group of adults, teenagers, and small children was already gathered outside. T. 42, 44. The front door of trailer 69 was wide open, and Jones saw the lifeless victim covered in blood lying on a recliner in the living room. T. 42. Evans, who was in the living room talking on a cell phone, was asked to step outside and show his hands. T. 42. Evans eventually complied and was then handcuffed by Jones "for my safety, the residents' safety, and his own safety." T. 43. Jones informed Evans that Biloxi Police Department officers were on the way. T. 43. For safety concerns, Jones then asked Evans where the gun was. T. 44. At first, Evans responded vaguely by

saying, "It's around," and "It's outside." T.44. Evans finally told Jones that he hid the gun under a trailer across the street. T. 45. At that point, police officers arrived. T. 45. After some time, the officer found the gun hidden behind the skirting of trailer across the street from the Evans' trailer. T. 46.[4]

Miranda warnings are a prerequisite to the admissibility of a defendant's statement only when that statement is made during custodial interrogation. *Tolbert v. State*, 511 So. 2d 1368, 1375 (Miss. 1987). "By custodial interrogation, we mean questioning initiated by **law enforcement officers** after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Private security guards are not required to give Miranda warnings prior to questioning a defendant even where the security guard performs his duties on public property. *DeLoach v. State*, 722 So.2d 512, 518 -519 (Miss. 1998). "Without State action, [a defendant] cannot claim that his Fifth Amendment privilege against self-incrimination was violated." *Moore v. State*, 816 So.2d 1022, 1027 (¶16) (Miss. Ct. App. 2002).

See also *Hennington v. State*, 702 So. 2d 403, 409 (¶23) (Miss. 1997) (social worker employed by State not required to give *Miranda* warnings prior to questioning defendant about allegations of child sexual abuse even where incriminating statements were turned over to law enforcement because social worker was not a law enforcement officer). Because Jones is not a law enforcement officer, he was not required to announce *Miranda* warnings prior to asking Evans the location of the gun.

The Court of Appeals correctly relied on this Court's decision in *DeLoach v. State*, 722 So.2d 512 (Miss. 1998) in finding that the private security guard was not required to give *Miranda* warnings prior to asking Evans where the gun was located. In *DeLoach*, a private security guard assigned to patrol the Laurel Housing Authority encountered DeLoach on Laurel Housing Authority property and reminded

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[4]Evans was Mirandized by a police officer who escorted him to a patrol car after Evans kept repeating, "I killed my dad, I killed my dad." T. 32.

him that he had been previously banned from the property. *Id.* at 514 (¶¶3-4). The security guard patted DeLoach down and asked whether he had anything on him. *Id.* at 514-15 (¶4). DeLoach advised that he had drugs on him and proceeded to remove the drugs from his shoe. *Id.* A Laurel Police Department officer responded to the security guard's call and took DeLoach into custody. *Id.* DeLoach argued on appeal that his incriminating statement to the security guard should have been suppressed because the security guard was "clothed with law enforcement powers" in carrying out his duties on city owned property. *Id.* at 519 (¶27). Relying on United States Supreme Court precedent, this Court rejected DeLoach's claim, stating the following.

> The mere fact that the security guards performed their duties on public or city property, or for the public's benefit, does not make them state actors necessitating *Miranda* warnings being given to DeLoach. . . . . Furthermore, the Supreme Court has stated that the fact that a private entity contracts with the government or receives governmental funds or other kinds of governmental assistance does not automatically transform the conduct of that entity into state action. . . . . Additionally, the private surveillance, apprehension and questioning of DeLoach was in no way instigated by a police officer or undertaken upon the official instruction of a law enforcement agency.

Id. at (¶28).

In the present case, it was undisputed that Jones was a security guard employed by a private company. Under the authority of *DeLoach*, the mere fact that his duties were carried out at a FEMA trailer park does not make him a state actor. Because Jones is not a law enforcement officer, nor was he acting at the direction of a law enforcement agency, he was not required to read Evans *Miranda* warnings before asking him the location of the gun. Accordingly, the trial court properly denied Evans' motion to suppress.

The Court of Appeals also correctly accepted the State's alternative argument that even if Jones could have been considered a law enforcement officer, Evans' statement to Jones about the gun would still be admissible under the public safety exception announced by the United States Supreme Court in

New *York v. Quarles*, 467 U.S. 649 (1984).

VI. EVANS KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY WAIVED HIS *MIRANDA* RIGHTS PRIOR TO GIVING INCRIMINATORY STATEMENTS TO INVESTIGATOR KIMBALL.

Evans' claim that he was led to believe that his mother wanted him to confess is baseless. The only reference Investigator Kimball made regarding her contact with Evans' mother was at the beginning of the interview when Kimball stated, "I just got off the phone with your mom, Dante. She knows I'm talking to you." Hearing Exhibit S-2 0:03:50. The Court of Appeals agreed that Kimball's statement was not coercive, nor was it a suggestion to Evans that his mother wanted him to confess.

Due to the strict ten page limit, the State incorporates by reference the remainder of the argument made pertaining to this issue in the State's Response in Opposition to the Petition for Writ of Certiorari and in the State's Appellee Brief to the Court of Appeals.

VII. A LIFE SENTENCE IMPOSED ON A JUVENILE CONVICTED OF MURDER DOES NOT VIOLATE THE EIGHTH OR FOURTEENTH AMENDMENTS.

Due to the strict ten page limit, the State incorporates by reference the arguments made pertaining to this issue in the State's Response in Opposition to the Petition for Writ of Certiorari and in the State's Appellee Brief to the Court of Appeals.

CONCLUSION

For the foregoing reasons, the State asks this honorable Court to uphold the Court of Appeals' Opinion affirming Evans conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, La Donna C Holland, 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 **SUPPLEMENTAL BRIEF FOR THE APPELLEE** to the following:

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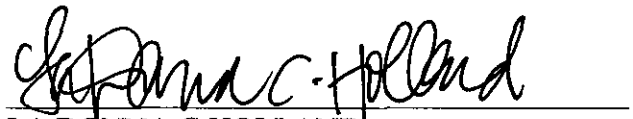
This the 21st day of December, 2011.



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