

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

SHAUNTELL SUMMERALL

APPELLANT

V.

NO. 2009-KA-0110-COA

STATE OF MISSISSIPPI

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Shauntell Summerall, Appellant
3. Honorable Jon M. Weathers, District Attorney
4. Honorable Robert Helfrich, Circuit Court Judge

This the 8th day of July, 2009.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

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BRIEF OF THE APPELLANT

STATEMENT OF THE ISSUES

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AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

STATEMENT OF INCARCERATION

Shauntell Summerall, the Appellant in this case, is presently incarcerated in the Mississippi Department of Corrections.

STATEMENT OF JURISDICTION

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

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Forrest County, Mississippi, and a judgment of conviction on one count of being a felon in possession of a dirk knife against Shauntell Sumerall, following a jury trial on November 11, 2008, the honorable Robert Helfrich, Circuit Judge, presiding. Shauntell was subsequently sentenced to ten years in the custody of the Mississippi Department of Corrections.

FACTS

The facts of this case are relatively simple. Around 1:15 a.m. on September 12, 2007, Chris Hensley, an officer with the Hattiesburg Police Department, was patrolling the neighborhood and heard what he deemed to be “loud music.” (T. 61). Officer Hensley, believing the music violated a city ordinance, proceeded to investigate. (T. 62). When he arrived at the scene, he noticed the music coming from a vehicle in the yard. (T. 63). One person, Shauntell Sumerall, was standing outside of the vehicle. (T. 63-64).

Officer Hensley testified that when he asked Sumerall to turn the music down, he appeared very nervous, and wouldn’t stand still. (T. 64). Officer Hensley then patted Summerall down and observed a “fixed-blade knife” in his right back pocket. (T. 65). Officer Hensley secured the knife,

while Officer Michael Walker arrived on the scene. (T. 67). Summerall was arrested and charged with being a felon in possession of a dirk knife.

Under cross-examination, however, Officer Hensley was unable to give a concrete definition for what exactly a “dirk knife” is. (T. 74-77).¹ Officer Michael Walker, on cross-examination, was further unable to provide a concrete definition of a dirk knife. (T. 88-89, T. 92-95).² On cross-examination, Detective Mark Mitchell, a detective with the Hattiesburg Police Department was similarly incapable of providing the jury with a precise definition of a “dirk knife.” (T. 101-102).

Melanie Schrub, a correctional field worker for the Mississippi Department of Corrections testified that she read Summerall a list of the prohibited weapons, but not an actual definition of a “dirk knife.” (T. 108-109). In fact, Schrub testified she did not know what a “dirk knife” was.

After the State rested its case, the defense moved for a directed verdict, which was denied by the trial court. (T. 112).

During deliberations, the jury sent a question to the Court asking whether they could see the pages from the internet definition a “dirk knife.” (T. 144). The trial court responded that the jury had been fully instructed, and the jury ultimately returned a guilty verdict against Sumerall. (T. 145-46, C.P. 20-21, R.E. 5). Accordingly, trial counsel, on December 10, 2008, filed a Motion for Judgment Not Withstanding the Verdict and in the Alternative Motion for a New Trial. (C.P. 32-33, R.E. 6-7). Within that motion, trial counsel specifically asserted that Mississippi Code Annotated § 97-37-5 was unconstitutionally vague because dirk knife is “an antiquated, undefined term, and the average person of average intelligence in the community has no reason to know what a “dirk

1. Officer Hensley’s testimony will be examined more in greater detail, *infra*.

2. Officer Walker’s testimony will be examined in greater detail, *infra*.

knife is.” (C.P. 32, R.E.6).

On December 16, 2008, this motion was denied by the trial court. (C.P. 34, R.E. 8). Feeling aggrieved by the verdict against him, Summerall timely filed his notice of appeal to this honorable Court. (C.P. 36, R.E. 9).

SUMMARY OF THE ARGUMENT

This is the story of a man sentenced to prison for ten (10) years for a crime he did not commit. Furthermore, even if, despite all evidence to the contrary, this man did commit a crime, he could not have known he was doing so, because Mississippi Code Annotated § 97-37-5 is unconstitutionally vague in its prohibition of possession of a dirk knife.

The knife recovered from Summerall’s back pocket was a fixed-bladed knife sharpened on one side, inside of a nylon sheath in of Summerall’s back pocket. This officers determined and the State maintained that this was a “dirk knife.”

At trial, however, it became abundantly clear that no one knew what a “dirk knife” was. Not one of the State’s witnesses could provide the jurors with a concrete definition of a dirk knife. In fact, when pressed during cross-examination by trial counsel, the State’s witnesses agreed to varying definitions of dirk knives, some of them mutually exclusive from one another.

The reality is that an average citizen does not know what a dirk knife is, much less law enforcement officers. This is highlighted by both the officers’ inabilities to precisely define the term, as well as the jury’s desire to have a definition of the term. “Dirk knife” is an antiquated, unused, and unfamiliar term to the average citizen. Summerall could not have known he was breaking the law by possessing the knife in question. No citizen could have. Therefore, § 97-37-5, at least as it pertains to its prohibition on dirk-knives is unconstitutionally vague.

Alternatively, even if this honorable Court determines that the statute in question is not

unconstitutionally vague, it is abundantly clear that the State presented insufficient evidence that the knife possessed by Summerall was, in fact, a dirk knife. The dictionary meaning of a dirk knife is wholly opposite of the characteristics of the knife possessed by Summerall. These differences are further highlighted by case law in other jurisdictions throughout the United States determining that a dirk knife has properties wholly separate than the knife in the case *sub judice*.

Moreover, should this Court determine that in Mississippi, a dirk knife is the exact opposite of the dictionary definition of the term, § 97-37-5 must be considered unconstitutionally vague, for, in Mississippi, a dirk knife would be precisely contrary to the dictionary definition of the term. No person could, no matter how informed, know that he or she was breaking the law.

Lastly, should this Court conclude that testimony from the law enforcement agents, without any foundation and without any concrete knowledge, supported the jury being given the case, the verdict was against the overwhelming weight of the evidence. Not one of the State's witnesses could give any reason why, in their opinion, the knife possessed by Summerall was, in the State of Mississippi, a dirk knife, when the dictionary definition plainly, clearly, and blatantly shows otherwise.

ARGUMENT

ISSUE ONE: WHETHER MISSISSIPPI CODE ANNOTATED § 97-37-5 IS UNCONSTITUTIONALLY VAGUE AS IT APPLIES TO THE PROHIBITION OF THE POSSESSION OF A "DIRK KNIFE" BY A CONVICTED FELON.

i. Standard of Review.

This Court reviews the constitutionality of Mississippi statutes de novo. *Thoms v. Thoms*, 928 So.2d 852, 855 (Miss. 2006).

According to the Fifth Circuit, a statute is unconstitutionally vague if its prohibitions are not clearly defined from the standpoint of an ordinary person. *J & B Entm't, Inc. v. City of Jackson*,

152 F.3d 362, 367 (5th Cir. 1998)(emphasis added). Put slightly differently, “the test to be used in determining whether a statute is unconstitutionally vague is whether the statute defines the criminal offense with sufficient definiteness such that a person of ordinary intelligence has fair notice of what conduct is prohibited.” *Davis v. State*, 806 So. 2d 1098, 1101 (Miss. 2001)(citing *Lewis v. State*, 765 So.2d 493 (Miss.2000))(emphasis added). Furthermore, a “restriction must be reasonably clear, enabling a citizen to understand what is allowed, and what is not.” *Mayor of Clinton v. Welch*, 888 So.2d 416, 420(¶ 21) (Miss. 2004)(emphasis added).

ii. What is a dirk knife?

Mississippi Code Annotated § 97-37-5³ provides, in pertinent part:

(1) It shall be unlawful for any person who has been convicted of a felony under the laws of this state, any other state, or of the United States to possess any firearm or any bowie knife, dirk knife, butcher knife, switchblade knife, metallic knuckles, blackjack, or any muffler or silencer for any firearm...

Miss. Code Ann. § 97-37-5.

The Mississippi Code, however, provides no definition for these terms. To make matters worse, Mississippi case law provides no definition for the term “dirk knife” contained therein. In the absence of statutory definition, this Court should construe the terms “dirk” and “dirk knife” in their “common and ordinary acceptance and meaning.” **Miss. Code Ann. § 1-3-65.**

3. This Statute is sometimes referred to as prohibiting felons from possessing deadly weapons. This, perhaps, however, is a misnomer, as this statute does not contain the word “deadly.” **Mississippi Code Annotated Section 97-37-1**, Mississippi’s concealed weapon statute provides for a more exact list of what is defined as a deadly weapon. **97-37-1** provides, in pertinent part, “... any person who carries, concealed in whole or in part, any bowie knife, dirk knife, butcher knife, switchblade knife, metallic knuckles, blackjack, slingshot, pistol, revolver, or any rifle with a barrel of less than sixteen (16) inches in length, or any shotgun with a barrel of less than eighteen (18) inches in length, machine gun or any fully automatic firearm or deadly weapon, or any muffler or silencer for any firearm, whether or not it is accompanied by a firearm...” **Miss. Code Ann. § 97-7-1**. Accordingly, it is inappropriate to refer to **97-3-5** as relating to deadly weapons.

Dictionary.com defines a “dirk” as “a dagger, esp. of the Scottish Highlands.” **Dictionary.com**, dirk, <http://dictionary.reference.com/browse/XXXXdirk> (last visited July 7, 2009). Similarly, dictionary.net defines a “dirk” as “a kind of dagger or poniard; – formerly much used by the Scottish Highlander.” **Dictionary.net**, dirk, <http://www.dictionary.net/dirk> (last visited July 7, 2009). Merriam-Webster.com further defines a “dirk” as “a long straight-bladed dagger.” **Mirriam-Webster.com**, dirk, <http://www.merriam-webster.com/dictionary/dirk> (Last visited July 7, 2009). Dictionary.com further defines a “dagger” as “a short, swordlike weapon with a pointed blade and a handle, used for stabbing.” **Dictionary.com**, dagger, <http://dictionary.reference.com/browse/dagger> (Last visited July 7, 2009).

The dictionary meaning of “dirk knife,” however, varies from that of a “dirk.” Dictionary.net defines a “dirk knife” as a “clasp knife having a large, dirklike blade.” **Dictionary.net**, dirk knife, <http://www.dictionary.net/dirk+knife> (last visited July 7, 2009)(citing Webster's Revised Unabridged Dictionary (1913).

Therefore, under the plain dictionary meanings of the words “dirk” and “dirk knife,” a “dirk” and a “dirk knife” are two separate types of knives.

In *Commonwealth v. Miller*, 497 N.E. 2d 29 (Mass. 1986), the Appeals Court of Massachusetts was faced with a similar inquiry as this honorable Court is. The defendant in *Miller* was convicted of carrying a dirk knife. *Id.* At 29. As in Mississippi, Massachusetts had no statute to define the term “dirk knife.”

The *Miller* Court, after lengthy analysis, reached a definition of dirk knife;

A dirk is a long straight-bladed dagger or short sword usually defined by comparison with ceremonial weapons carried by Scottish highlanders and naval officers in the Eighteenth and Nineteenth Centuries. See Webster's Third New International Dictionary 642 (1971). A “dirk knife” is a “clasp knife,” or large pocket knife,

“having a large blade like that of a dirk.” *Ibid*.

Miller, 497 N.E. 2d at 29.

The Court further noted that the dictionary gave no information regarding the nature of the blade in question. However, in turning to secondary sources, the *Miller* Court reached the following conclusion:

Other sources, however, allow a comparison of the blade of the defendant’s knife with the characteristic features of both the Highland and the naval dirk. *See, e.g.*, Military Collectibles (O’Neill ed. 1983) and Weapon (St. Martins Press 1980), which provide illustrations and detailed descriptions of these dirks and show tapered blades ranging in length from 7.9 to 11.9 inches and in width from on to one and a half inches. Such knives “are designed and are useful almost exclusively for stabbing.” *State v. Pruett*, 586 P. 2d 800, XXX (Or. 1978). To facilitate this purpose the blade is usually double-edged and symmetrical. *See* 26A C.J.S. Dirk (1956).

Miller, 497 N.E. 2d at 29-30 (emphasis added).

Like Massachusetts, courts in other states have turned to the dictionary to define dirk knife and have reached similar conclusions. The Nevada Supreme Court concluded that the dictionary defines a dirk as a long, straight-bladed dagger. *Knight v. State*, 993 P. 2d 67, 72 (Nev. 2000)(citing Webster’s Third New International Dictionary (1976). The Nevada Court defined a dagger as a short weapon used for thrusting and stabbing. *Id.* .

The *Knight* Court listed factors for the determination of whether a knife is a dirk knife. One such factor is whether the weapon has a blade that locks into an open position. *Bradvica v. State*, 760 P. 2d 139, 141 (Nev. 2000)(citing *People v. Bain*, 489 P. 2d 564, 570-71 (Cal. 1971)).

Similarly Oregon courts have found that a dirk is a knife used to stab. The court said that a “dirk” is commonly understood to mean a “long straight-bladed dagger formerly carried esp. by the Scottish Highlanders.” *State v. McJunkins*, 15 P.3d 1010, 1011-12 (Or. App. 2000) citing *Webster’s New Third Int’l. Dictionary*, 642. The term dirk has also been used to describe a long straight dagger with a blade of approximately eighteen inches. *Id.* *See generally* 6 Encyclopedia Britannica, 984

(1971); *The Complete Encyclopedia of Arms and Weapons*, 153-58 (Leonid Tarassuk & Claude Blair eds 1982).

The Oregon court defined a dagger as a short knife for stabbing. *Id. See generally Webster's New Third Int'l. Dictionary*, 570. Daggers are long, straight and come to a point. The function of a dagger is to stab. *Id.* The issue of whether or not a weapon is a dagger is not one of whether or not it could be used to stab but whether or not its function is to stab because if the issue was whether or not a weapon could stab then anything under the sun could be considered a dagger. *Id.* (emphasis added).

Florida courts have also dealt with the dirk knife issue and found that dirks and daggers are synonymously used to designate any straight weapon designed primarily for stabbing. *Garcia v. State*, 789 So.2d 1059, 1060 (Fla. 4th DCA 2001) citing *Miller v. State*, 421 So.2d 746, 747 (Fla. 4th DCA 1987). In *Miller*, the Florida court went through an analysis of when a weapon qualifies as a dirk that had earlier been used by the courts in California. Indeed, the California test went so far as to define a dirk or dagger as being “primarily fitted” for stabbing. *People v. Forrest*, 432 P.2d 374, 375 (Cal. 1967) see also *Bills v. Superior Court*, 150 Cal.Rptr. 582, 584 (Cal. App. 1978).

In a case decided this year, a Virginia court found that for a knife to be a dirk it must be used for stabbing. The court again defined a dirk as a long-straight bladed dagger or a short sword. *Thompson v. Com.*, 673 S.E.2d 469, 473-74 (Va., 2009) (quoting Webster's Third New International Dictionary 642 (1981))(emphasis added). Within that definition the court also cited a prior Virginia decision defining a dirk as any stabbing weapon having two sharp edges and a point, including daggers, short swords, and stilettos. *Richards v. Commonwealth*, 443 S.E.2d 177, 179 (Va. 1994)(emphasis added).

iii. The State's own witnesses, under cross-examination, could not conclusively define what a dirk knife is.

During cross-examination, Officer Hensley, claimed that a dirk knife possessed a fixed blade and was over six inches in length. (T. 75). When asked where he obtained his definition fo a dirk knife, Officer Hensley simply responded, "I can't advise that." (T. 75). Defense counsel then cross-examined Officer Hensley regarding some of the definitions of dirks and dirk knives;

Q. Would you disagree with the dictionary.com when it defines a dirk knife as a clasp knife having a large dirk-like blade?

A. I don't think I would.

Q. Do you know what a clasp knife is?

A. Is that a –

Q. That's another term for "folding knife."

A. Okay.

Q. Would you disagree with the Webster's dictionary definition of a dirk knife as being a clasp knife being a folding knife having a large dirk-like blade?

A. No, sir.

Q. Do you know what a dirk-like blade is?

A. A dirk-like blade?

Q. What a dirk is?

A. No, sir.

Q. Then, you wouldn't disagree with the definitions found in Webster's and Funk and Wagnalls dictionaries that a dirk is a double-edged blade or dagger? You wouldn't disagree with that, would you?

A. No, sir.

(T. 76-77).

It is thus clear from the record that Officer Hensley was unable, even as a trained police officer, to testify as to what a dirk knife was. His answers ranged from fixed-bladed knives to folding knives.

Officer Michael Walker was equally incapable of giving a definition of what a dirk knife is;

Q. What would you estimate the length of the blade to be on this knife?

A. On the blade, approximately four inches.

Q. I would agree with you on that. Now, would you agree or disagree with the Websters Dictionary definition of a dirk knife which says it's a clasp knife having a large-dirk-like blade?

A. Yes, sir, I agree.

Q. You would agree with that?

A. Yes, sir.

Q. Would you agree that "dirk" is a Scottish term for dagger?

A. If that's wherever you got that information from, sir, I have no reason to disagree with that.

Q. Would you agree that when you look up the definition of dagger or dirk you come up with several different definitions?

A. Yes, sir.

Q. One of them is that of a poniard. Are you familiar with that term?

A. No, sir.

Q. Are you any more familiar with that term than you are with the word "dirk?"

A. No, sir.

....

Q. Now, this knife is not a double-edge knife, is it?

A. No, sir.

Q. And you would agree it's also not a poniard?

A. No, sir, it's not.

Q. Would you agree that some definitions say that a dirk is – a dirk blade is similar to a small sword?

A. Yes, sir.

Q. And this is in no way like a small sword, is it?

A. No, sir, it's not.

(T. 92-94).

Detective Mark Mitchell was also incapable of providing any concrete definition of what a dirk-knife is:

Q. But this is a term used in the statute, a "dirk knife," right?

A. Yes, sir.

Q. And according to you – you wouldn't disagree with the definition laid out in the various dictionaries of what a dirk knife is, would you?

A. No, sir.

Q. And you would agree with Websters dictionary when they define a dirk knife?

A. Yes, sir.

Q. Would you agree that Websters dictionary says it's a folding knife with a dirk-like blade?

A. I wouldn't believe that.

Q. You wouldn't believe that?

A. Huh-uh (negative response).

....

Q. Would you agree that a dirk and a dirk knife are two different items?

A. There's a possibility of that.

Q. Would you agree that a dirk is a dagger, a double-edged dagger?

A. It's a possibility of that. I didn't look that up before I came.

Q. Okay. Would you agree that the term "dirk" is an old antiquated term from ancient Scotland? Are you familiar with where that term comes from?

A. No, sir.

Q. Then, you wouldn't be able to agree or disagree that the term "dirk" originally meant cutting off the end of a sword and attaching it to a dagger handle?

A. There's a possibility. I got it from the Mississippi state code. That's where I got it from.

Q. And the Mississippi state code just uses the term "dirk knife." It doesn't define it, does it?

A. No, sir. It just uses "dirk knife."

(T. 101-02).

Detective Mitchell's testimony is verry telling. By his own admission, Detective Mitchell merely selected the term "dirk knife" out of the statute with no concrete knowledge of what a dirk knife actually is (i.e. "I got it from Mississippi state code."). Detective Mitchell testified that he disagreed with the dictionary definition of the term, however, he failed to give any support whatsoever for his definition of a dirk knife, which resulted in criminal charges being filed against Summerall and, ultimately, the loss of Summerall's liberty for ten years upon his conviction. Summeral respectfully contends that is against the spirit of the law to play fast and loose with definitions when a man's liberty is at stake. This is not trivia; This is justice.

The arresting officers and the detective in the case *sub judice*, when cross-examined by defense counsel, failed to give a workable definition of what a dirk knife. Their answers covered

a wide spectrum of knives, from fixed-bladed to folding or clasp-knives. Their answers also concerned knives of various length. If these officers of the law were unable to provide a workable definition of a dirk knife, how can the average citizen be expected to understand what one is?

iv. Dirk knife an antiquated term.

As noted by the Appeals Court of Massachusetts, the terms dirk and dirk knife are antiquated ones. *Miller*, 497 N.E. 2d 29 FN2. According to the Encyclopedia Britanica, dirks had ceased being “all-purpose” knives and were limited to ceremonial use by 1850. Encyclopedia Britannica 487 (Revised 14th ed. 1967).⁴

In the case *sub judice*, this notion manifested itself in the record during cross-examination of Officer Walker:

Q. “Dirk knife” is just a term that is not used by normal people, is it?

A. No, sir.

Q. It’s just not a common name for any kind of a knife, is it?

A. No, sir, it’s not.

(T. 88).

Summerall contends that the fact that the term dirk knife is no longer in use is relevant and pertinent to the determination as to whether Mississippi’s felon in possession of a weapon statute, as it relates to the “dirk knife” is unconstitutionally vague.

v. Based on the arguments above, the “dirk knife” prohibition in 97-37-5 is unconstitutionally vague.

4. In fact, the most recent versions of Encyclopedia Britannica lack even an article concerning dirks and/or dirk-knives. This should be viewed as to show just how obsolete the term is in everyday vernacular and as evidence that these terms are not readily-accessible or universally known by everyday citizens.

There can be little argument that Mississippi's prohibition of felons being allowed to possess "dirk-knives" is unconstitutionally vague. The statute itself provides no definition itself to the term. Rather, it leaves the essential aspect of the prohibition (i.e. the item that is prohibited) up to the common and ordinary acceptance and meaning. As noted *supra*, the term "dirk knife" is an antiquated term, unrecognizable by the general public today. Even law enforcement agents were unable to define the term dirk knife.

Summerall respectfully contends that it is constitutionally impermissible to allow citizens of the State of Mississippi, be they convicted felons or not, to be subjected to laws which are so vague in their construction, so as to render one unaware as to whether they had broken such a law.

The term simply has no use in society today. The dictionary definitions themselves lend credence to the argument that this term is out of date. The citizens of the State of Mississippi, with ordinary mental faculties that allow them to use common sense and reason, are incapable of understanding terms that are simply not part of the everyday vernacular. Citizens can not be expected to expand their lexicons to yesteryear to understand the legality of their actions. The statute should be reasonably clear in what it prohibits, rather than relying on terms that only exist in history books, collector's guides, and/or ancient vernacular. Even those with specialized training in the field of the law were helpless to define the term in a sufficiently appropriate manner.

Despite Officer Hensley's testimony, a dirk knife cannot be both a clasp-knife and a fixed-bladed knife. Just as one cannot be both pregnant and not pregnant - these are mutually exclusive things. Detective Mitchell's testimony is that his definition of a dirk knife is different from that of the dictionary. Law enforcement agents cannot be allowed to simply charge someone with a crime with which they have no definitional basis. Put more bluntly, just because a law enforcement agent says something is a dirk knife, does not make it a dirk knife. This legal ipse-dixitism wholly

disregards the spirit of the law. “It is because we say it is” is not an adequate justification for depriving someone of liberty.

vi. Conclusion.

The citizens of the state of Mississippi can, in no way, be aware that they are breaking the Mississippi Code’s prohibition of the possession of a dirk knife by a convicted felon. This antiquated term is not defined by statute, nor does the statute provide any measurements to give some meaning to the term. Even trained law enforcement officers prepared for trial are unable to agree to what precisely a dirk knife is. The legality of actions can not be left to vague terms with no grounding in modern society. The citizens of our State should not have to be soothsayers in order to determine whether their actions are in accordance with the law.

ISSUE TWO: EVEN IF § 97-37-5 IS NOT UNCONSTITUTIONALLY VAGUE, THE STATE FAILED TO PROVIDE SUFFICIENT EVIDENCE THAT KNIFE POSSESSED BY THE APPELLANT WAS, IN FACT, A DIRK KNIFE.

i. Standard of Review.

“A motion for JNOV challenges the legal sufficiency of the evidence. *Montana v. State*, 822 So.2d 954, 967 (Miss. 2002)(citing *McClain v. State*, 625 So.2d 774, 778 (Miss.1993)). “Under this standard, this Court will consider the evidence in the light most favorable to the appellee, giving that party the benefit of all favorable inference that may be reasonably drawn from the evidence.” *Coleman v. State*, 697 So.2d 777, 787-788 (Miss.1997)(citing *Sperry-New Holland, a Div. of Sperry Corp. v. Prestage*, 617 So.2d 248, 252 (Miss.1993). “If the facts so considered point so overwhelmingly in favor of the appellant that reasonable men could not have arrived at a contrary verdict, we are required to reverse and render.” *Id.*

It is Summerall's contention that the jury should never have been given the chance to determine his guilt. As noted above,

Mississippi Code Annotated § 97-37-5 provides, in pertinent part:

(1) It shall be unlawful for any person who has been convicted of a felony under the laws of this state, any other state, or of the United States to possess any firearm or any bowie knife, dirk knife, butcher knife, switchblade knife, metallic knuckles, blackjack, or any muffler or silencer for any firearm...

Miss. Code Ann. § 97-37-5.

Therefore, the elements of the crime are as follows: 1.) That one be a felon.
2.) That he or she, in at least this specific instance, be in possession of a dirk knife. Implicit in element number two of the crime is that the dirk knife alleged to be in possession in element number two is actually a dirk knife.

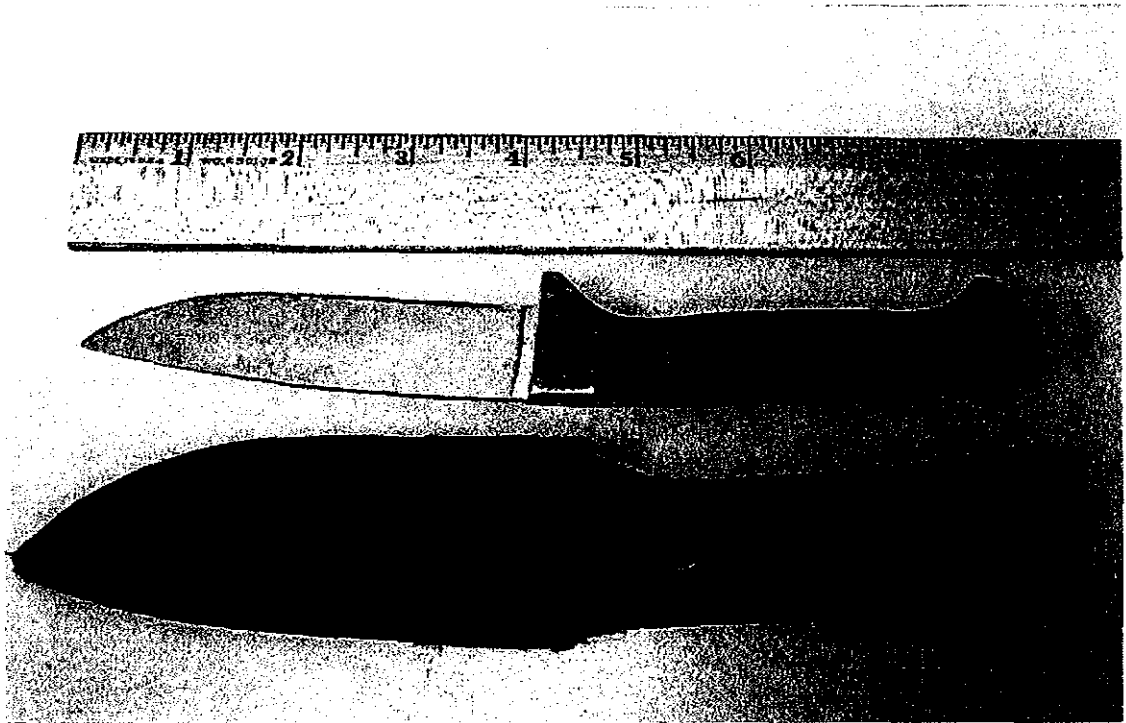
The knife Summerall possessed was not a dirk knife. Therefore, the State presented no workable definition for a dirk knife and, thus, insufficient evidence that he was in possession of a dirk knife. The jury should never have been given the case. The following analogy serves as a comparable example. One of the elements of the crime of murder in the State of Mississippi is that it be the "killing of a human being without the authority of law" **Miss. Code Ann. § 97-3-19.**

If, in this analogy, the State presented evidence that an individual unlawfully killed what, by dictionary definition was a goat, yet insisted through the testimony of its witnesses that, though it appeared to be a goat by all definitions of a goat, at least according to their knowledge, it was a human being, the State would have presented insufficient evidence of that element of the crime of murder.

A goat is a goat. A human is a human. A dirk knife is a dirk knife. The knife in question was something wholly different.

iii. The knife in question was not a dirk knife.

Before engaging in an analysis comparing the knife in question to the definition of “dirk knife,” it is important to note the characteristics of the knife that sent Sumerrall to prison for ten years. The relevant information can be easily obtained from observing Exhibit S-2:



(Exhibit S-2).

Observing the above picture, the knife possessed by Sumerrall can be described as follows:

- This is a fixed-bladed knife.
- The blade was approximately four inches in length, and, at the most, one inch in width.
- The blade is single-bladed - only sharp on one side.
- The handle is approximately four and a half inches long and wooden.

This is a pocket knife, designed for the purposes of utility. As noted in Issue One, *supra*, these characteristics are different from those of a dirk knife. As previously noted, dictionary.net defines a “dirk knife” as a “clasp knife having a large, dirklike blade.” **Dictionary.net**, dirk knife, <http://www.dictionary.net/dirk+knife> (last visited July 7, 2009)(citing Webster's Revised Unabridged

Dictionary (1913)(emphasis added). Hence, a dirk knife is a clasp knife. The knife in question is not. This could, therefore, be the end of this sufficiency analysis, for, as noted above, something can not be both a folding and a fixed bladed knife. That which is fixed does not move.

However, a lengthier analysis of the definition yields even more disparity between a dirk knife and what Summerall possessed. A “dirklike blade” is a blade similar to that of a “dirk.” A dirk is defined as “a kind of dagger or poniard; - formerly much used by the Scottish Highlander.”

As noted above, dirk knives have other characteristics not possessed by the knife possessed by Summerall:

Other sources, however, allow a comparison of the blade of the defendant’s knife with the characteristic features of both the Highland and the naval dirk. *See, e.g.*, Military Collectibles (O’Neill ed. 1983) and Weapon (St. Martins Press 1980), which provide illustrations and detailed descriptions of these dirks and show tapered blades ranging in length from 7.9 to 11.9 inches and in width from one to one and a half inches. Such knives “are designed and are useful almost exclusively for stabbing.” *State v. Pruett*, 586 P. 2d 800 (Or. 1978). To facilitate this purpose the blade is usually double-edged and symmetrical. *See* 26A C.J.S. Dirk (1956).

Miller, 497 N.E. 2d at 29-30 (emphasis added). The blade in the knife in question was single-sided. Its blade was approximately four inches in length. These are just two more of the clear and distinct differences between a dirk knife and the knife possessed by Summerall.

As the Oregon Court noted in *State v. McJunkins*, 15 P.3d 1010, 1011-12, a dagger is a short knife for stabbing. *State v. McJunkins*, 15 P.3d at 1011-12 (citing generally *Webster’s New Third Int’l. Dictionary*, 570). Hence, logically, a dirk knife is a clasp knife with a blade that is used for stabbing. As the *McJunkins* Court noted, that something can be used for stabbing is not the relevant question. *Id.* Rather, the focus is on whether its primary function is to stab.

The knife that sent Summerall to prison for 10 years possessed a single-sided blade. There can be little argument that it's primary purpose is to stab. This is simply more proof that the knife in question is not a dirk knife, by any stretch of the definition.

iv. In the alternative, should this Court find the evidence sufficient, the statute in question is rendered unconstitutionally vague.

Should this honorable Court determine, despite the fact that the knife in question bore no similarity to a dirk knife, that the State provided sufficient evidence to deprive Summerall of his liberty for ten years of his life, the necessary result of that conclusion is that the statute alleged to be unconstitutionally vague in Issue One above is just that – unconstitutionally vague.

As noted above, “the test to be used in determining whether a statute is unconstitutionally vague is whether the statute defines the criminal offense with sufficient definiteness such that a person of ordinary intelligence has fair notice of what conduct is prohibited.” ***Davis v. State***, 806 So. 2d 1098, 1101 (Miss. 2001)(citing *Lewis v. State*, 765 So.2d 493 (Miss.2000)). Furthermore, a “restriction must be reasonably clear, enabling a citizen to understand what is allowed, and what is not.” ***Mayor of Clinton v. Welch***, 888 So.2d 416, 420(¶ 21) (Miss.2004).

Should this Court determine that the knife in question is a dirk knife, it would, as noted above, mean that, under Mississippi law, a dirk knife is wholly opposite of the dictionary definition of the word. The consequences of that determination would yield an undesirable result. Take for instance the following tale of Frank the Felon.

The term “dirk knife” is not defined by statute. Therefore, Frank, an average citizen, could not simply read the statute and know what was prohibited. Reasonably, Frank could rely on his common knowledge and understanding to reach a conclusion as to whether he prohibited from carrying a particular type of knife.

However, as noted in Issue One, “dirk knife” is an antiquated term, not readily used in current times. So, again, as noted above, that means it is not reasonably clear and does not enable Frank, an average citizen, to understand what is prohibited and what is not.

Frank, still wholly unaware whether he would be breaking the law by possessing a particular type of knife, could go the extra mile and attempt to clarify the statute’s prohibition and turn to the dictionary definition of the term “dirk knife.” Perhaps unconvinced by one particular dictionary’s definition of a “dirk knife,” Frank could turn to another dictionary, and then another, and then another. Frank could turn to the internet for further research, and attempt to clarify what was within his legal rights to possess.

This, however, would not yield Frank any protection in the courts of Mississippi. Because, were this Court to determine that the knife possessed by Summerall, in the absence of all evidence to the contrary, was a dirk knife, no amount of research would protect Frank, an average citizen, from going to prison for his good faith attempt to understand the prohibition.

Therefore, should this honorable Court conclude that the knife in the case *sub judice* is a dirk knife, it would mean that the average citizen would have no chance, no matter how much research done on definitions of the term, of determining whether or not he or she was breaking the law. This is, at its very essence, unconstitutionally vague.

v. Conclusion.

It is glaringly clear, given the dictionary definition of the word, Shauntell Summerall was not in possession of a dirk knife. The knife in question was fixed-bladed. A dirk knife is not. The knife in question had a single-sided blade. A dirk knife does not. The knife in question was approximately four inches in length. A dirk knife ranges from seven point five to eleven point nine inches in length.

However, should this honorable Court choose to find that in the state of Mississippi, a dirk knife is defined as something contrary to its definition in countless dictionaries and other courts throughout the United States, it would render the statute in question unconstitutionally vague. Such a determination would mean that a Mississippi citizen, with no matter how much common knowledge or wherewithal and motivation to research the term, would not know whether he or she was breaking the law. Put another way, Mississippi courts would be unlike any other court in the land, sentencing people for possession of a dirk knife, which is not, in fact, a dirk knife.

ISSUE THREE: IN THE ALTERNATIVE, SHOULD THIS COURT, DESPITE THE COMPLETE LACK OF EVIDENCE, DETERMINE THE STATE'S EVIDENCE WAS SUFFICIENT TO SUPPORT GIVING THE CASE TO THE JURY, THE APPELLANT'S CONVICTION IS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

i. Standard of Review

A motion for a new trial challenges the weight of the evidence; reversal is only warranted if the lower court abused its discretion in denying a motion for a new trial. *Dilworth v. State*, 909 So. 2d 731, 737 (Miss. 2005). “Only in those cases where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal.” *Herring v. State*, 691 So. 2d 948, 957 (Miss. 1997).

A jury verdict will only be disturbed on appeal in exceedingly rare cases. *Thomas v. State*, 92 So. 225, 226 (Miss. 1922). Despite the standard of review being so high, “this Court has not hesitated to invoke its authority to order a new trial and allow a second jury to pass on the evidence where it considers the first jury’s determination of guilt to be based on extremely weak or tenuous evidence, even where that evidence is sufficient to withstand a motion for a directed verdict.” *Dilworth v. State*, 909 So. 2d 731, 737 (Miss. 2005) (citing *Lambert v. State*, 462 So. 2d 308, 322 (Miss. 1984)).

ii. The Appellant's conviction was against the overwhelming weight of the evidence.

Although Summerall still contends the evidence presented by the State was insufficient to justify withstanding defense counsel's motion for a directed verdict, should this honorable Court determine that such evidence, despite not being in any way grounded in some concrete foundation, supports the jury having been handed the case, it is abundantly clear the verdict is not supported by the overwhelming weight of the evidence.

All of the State's witnesses, as noted above, were significantly impeached by defense counsel during cross-examination. Not one could state a succinct foundation for why, in their knowledge, a dirk knife, in the State of Mississippi, did not match the dictionary definition of the term.

Therefore, based on all the evidence noted in Issues One and Two above, Summerall's conviction is not supported by the overwhelming weight of the evidence. The State of Mississippi should not allow its law enforcement agents to define the terms in statutes in a way that is wholly contradictory of all other definitions of the term.

iii. Conclusion.

Accordingly, this honorable Court should remand the case for a new trial, with instructions to the lower court as to what, precisely, a dirk knife is. Surely, then, Summerall will be vindicated in the eyes of the law for his possession of an item that is not, by any stretch of the term, a dirk knife.

CONCLUSION

The Appellant herein submits that based on the propositions cited and briefed hereinabove, together with any plain error noticed by the Court which has not been specifically raised, the judgment of the trial court and the Appellant's conviction and sentence should be reversed, vacated, this matter rendered, and the Appellant discharged from custody, as set out hereinabove.

Alternatively, the Appellant requests that, should this court find sufficient evidence to support the Appellant's conviction, that the Appellant's conviction be reversed and remanded for a new trial due to the overwhelming lack of evidence against the Appellant. The Appellant further states to the Court that the individual and cumulative errors as cited hereinabove are fundamental in nature, and, therefore, cannot be harmless beyond a reasonable doubt.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:


Justin T Cook

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I, Justin T Cook, Counsel for Shauntell Summerall, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

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Circuit Court Judge
Post Office Box 849
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Honorable Jon M. Weathers
District Attorney, District 12
Post Office Box 166
Hattiesburg, MS 39403

Honorable Jim Hood
Attorney General
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This the 8th day of July, 2009.


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