IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO.: 2009-CA-00321-COA

TAVARES SHOWERS **APPELLANT**

VS.

STATE OF MISSISSIPPI **APPELLEE**

REPLY BRIEF

Appeal from the Circuit Court of Lowndes County, Mississippi

ORAL ARGUMENT NOT REQUESTED

OF COUNSEL:

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ARGUMENT

Denial of Self-Defense Instruction:

The State answers specific facts and specific case law on the facts with platitudes and nothing from the record except restatement of the jury instructions. This hardly overcomes the arguments advanced. The State essentially conceded the appeals ground by failing to advance any answer.

The deceased was a 6'7", 251 pound young man who choked the defendant – 5'10" and 150 pounds – with both hands. The defendant responded with a steak knife in the kitchen of his own home. (R. 208-09, 290). The defendant had reason to fear death as the deceased choked him – a man 101 pounds heavier and 9 inches taller.

Case law in Mississippi holds that under these conditions a specific self-defense instruction is required on the specific self-defense law when a much larger person attacks a smaller person. *Manuel v. State*, 667 So. 2d, 590, 592 (Miss., 1995), *Hester v. State*, 602 So. 2d, 869, 874 (Miss., 1992), *Robinson v. State*, 858 So. 2d 887, 896 (Miss Ct. App., 2003). These cases require a self-defense instruction based on size difference if requested and supported by the evidence.

To answer these cases and facts, the State offered not a single counter case. Total silence.

The State does not even defend the Circuit Court's assertion that the defendant failed to prove a fear of bodily harm or death (R. 382). The Court plainly made a mistake of fact there and the State does not disagree.

The State only offers generic boiler plate language about jury instruction law saying only general jury instructions should be allowed. But in the narrow area of law applying to this case, the Supreme Court and Court of Appeals already said that general language just won't do.

> This is the language of the denied instruction, D-6:
>
> > If you believe from the evidence that the deceased was a much larger and stronger man than the Defendant, and was capable of inflicting great and serious bodily harm upon the Defendant with his hands, and that the Defendant had reason to believe and did believe as a man of ordinary reason that he was then and there in danger of such harm at the hands of the deceased and used a knife, with which he fatally stabbed the deceased, to protect himself from such harm, then the Defendant was justified, and your verdict shall be "not guilty" even though the deceased may not have been armed.
> >
> > The instruction was denied as being "repetitious of some other instructions" already given.
> >
> > In cases of homicide, failure by the trial court to grant an instruction which presents the defendant's theories of justification, defense or excuse is reversible error so long as there is some evidence to support the theory. *Hester v. State*, 602 So. 2d 869, 872 (Miss. 1992).
>
> (*Robinson vs. State of Mississippi, supra,* at 896)

This is not a hidden quote, this comes right from p. 15 of the Appellant's brief. The State chooses to let that go undenied. *Robinson* already said the State's

position was in error before the State made its argument. The State had no answer to the authority of *Robinson v. State*.

"Jurors need more than simple generic statements when facts and defense raise the issue of attack by a larger individual is:

In *Robinson*, the trial court did give a general self-defense instruction which the Appeals Court held insufficient:

> Though the jury was told to consider Robinson's actions in light of the manner in which the "circumstances reasonably appeared to the defendant on that occasion," this does not explicitly raise the issue of the right in some situations to use a deadly weapon to ward off an attack with fists.

(*Id.*, at 898)

The *Robinson* Court analyzing *Manuel* found an abstract instruction as granted by the circuit court was not sufficient to explain the law well enough for a jury to consider the issue of a smaller person using a weapon to defend himself against a larger person:

> In an abstract way, the instructions call on jurors to consider the reasonableness of the grounds on which the defendant may have been fearful of serious injury. In neither case was a specific instruction in which the facts of the disparate size and the right in some circumstances to use a deadly weapon in response to mere fists explained to the jury. Those instructions were not sufficient in *Manuel* to prevent reversal.

(*Id.*, at 899)"

Again this is not hidden from the State, this is straight from p. 16 of the Appellant's brief. The Appeals Court found no merit in the precise arguments the State now advances without explanation or support.

The State cannot give one case to support its position on the law of this case nor can it advance a single reason to change the law on jury instructions on self-defense when a smaller weaker individual is attacked by a much larger individual. If the State does not desire a change of law, then the law and facts now support a remand. If the law is to be changed, then the State should have said so and justified its position.

Stephen Hayne is Not Qualified to Testify:

The record of the limited voir dire of Dr. Haynes the Court granted the defendant is clear. The defendant asks the Court to examine the record and determine if it is correct to prevent an attorney from questioning a witness about his failings based on facts that can be found in published Supreme Court options. In other words, can a Circuit Court find facts important to the Supreme Court to be irrelevant?

Secret Videotaping Violated *Miranda*

Miranda

Before going into specifics as to the State's arguments, defendant would draw the Court's attention to a serious deficiency in this brief: The State asserts strong positions on objective and subjective expectation of privacy without ever once citing to a single fact in the record. There is no basis for any assertion of fact made anywhere in the brief – not one. The entire theory advanced is done without using the facts of the case. But that does not stop the State from repeatedly asserting facts not in the record and of doubted validity.

As to the law, the State advances several positions from what amounts to a memo on the Fourth Amendment. That is not, however, the appeal issue. The State ignores the argument advanced by the defendant and Mississippi authority on violation of the right to counsel.

Once *Miranda* rights have been asserted, questioning must stop. In this case, the issue is whether secret videotaping by the police after a *Miranda* assertion is a continual interrogation.

> However, the term "interrogation" has not been limited to encompass only express questioning by the police. In fact, the Mississippi Supreme Court has applied a broad interpretation to the term "interrogation" to include not only questioning, but rather "questioning and its functional equivalent. *"Culp v. State, 933 So. 2d 264,*

> *273(P19) (Miss. 2005) (citing Pierre v. State, 607 So. 2d 43, 52 (Miss. 1992)).* In the landmark decision of *Rhode Island v. Innis, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d, 297 (1980),* the United States Supreme Court defined "functional equivalent" to mean "words or actions . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Innis, 446 U.S. at 301.* In broadening it definition of "interrogation," the Supreme Court in *Innis* noted that its concern in *Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2 694 (1966)* was that "the interrogation environment" created by the interplay of interrogation and custody would 'subjugate the individual to the will of his examiner' and thereby undermine the privilege against compulsory self-incrimination." *Innis, 446 U.S. at 299.*

Pannell vs. State of Mississippi 7 So. 3d, 277, 282-283 (Miss. Ct. App. 2003)

The Columbus Police Department admitted that its policy was to violate *Miranda* after a client said stop the interrogation by a continued recording of the defendant.

> Q. Now, did y'all continue taping after you got through with your part of the interview?
>
> A. We – excuse me – we run a – we tape the whole time that someone's in the room. They don't have any expectation of privacy, so we just record.
>
> Q. They don't have any expectation of privacy?
>
> A. No, I wouldn't think so, at a police department, no.
>
> Q. Has anyone told you that, or is that just your opinion?
>
> A. It's policy at the Columbus Police Department, when you put a subject in a room and you start videoing it, you video it until the person is taken out and transported to the county.

> Q. And is also part of the policy that you do not inform the individual or any people coming in to talk to him that they are being recorded?
>
> A. I have been told by the – my last lieutenant, when I was – during this case that you do not tell anybody that it's being videoed, so that's they way it's been.

(R.27, lines 10-29)

Nowhere does the State defend this practice nor can it give a single case to justify secret taping as an isolated act much less a department policy – especially for a teenager.

When examining the record on *Miranda* violation the issue is intent of the officer. (*Id.*, at 280) The State tries to move the intent to the defendant under a Fourth Amendment expectation of privacy issues. *Miranda* focuses on the police :

> The test does not examine the subjective intent of the police, but rather, whether the officer 'should have known his actions were reasonably likely to elicit an incriminatory response.' *Id. (quoting Snow v. State 800, So. 2d, 472, 497 (P91) (Miss. 2001))*

(Id., at 284)

The State defends on Fourth Amendment practice which is essentially search and seizure law. That is a straw man. The real issue is that the defendant's right to counsel violation because the functional equivalent of an interrogation occurred under *Pannell v. State* after repeated refusals to speak without counsel. (R. 323, line 6-9). This is right to counsel law, not search and seizure. The State is not

allowed to violate any of the other 9 amendments in the Bill of Rights even if it claims it can show it actually complied with one.

This is a secret hidden recording, the cameras are not readily apparent.

> Q. How is this room set up? Is the camera sitting in the room?
> A. There's four cameras in the room.
> Q. And they are just independently – I mean they're standing out where you can see?
> A. There's one in each wall.
> Q. Are they in the wall, or are they –
> A. They're – if you look at the video, you will see four square boxes, one on each wall.
> Q. Do they have, like, red lights on them when they're recording?
> A. Huh-uh (Indicating a negative response).

(R. 18, lines 3-14)

The officer further describes the cameras.

> Q. Now, these cameras that are in the room, I believe you said there were four?
> A. Correct.
> Q. Is that right?
> A. Correct.
> Q. And none of them have little red lights when they're on?
> A. No, sir.
> Q. Nothing really to indicate they're even cameras. I guess they're fairly small?
> A. I described it earlier as probably about three inches tall and two inches wide.
> Q. What color are they?
> A. Black.

Q. So they're pretty innocuous. They're not something that really call your attention to them too much, do they?

A. Well, they stick out, seeing it's on a wall about that color.

(R. 323, line 23 to R. 324, line 12)

No one, neither the defendant nor his mother nor anyone else knew of the taping as far as is known. The police did not tell anyone. (R. 19)

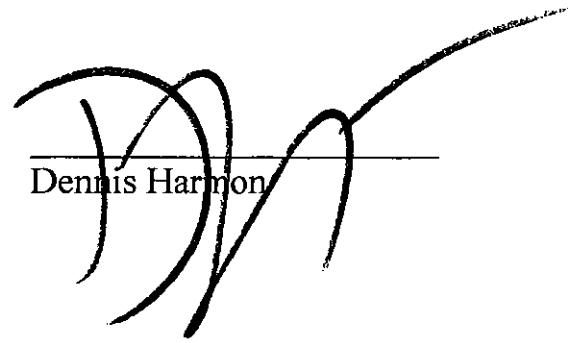
No one except the police knew of the recording. The documented knowledge of the defendant on the record is a refusal to speak to the police without a lawyer present. The police response is to introduce family into the recording chamber and to secretly record so the defendant does, in fact, speak to the police – only now he does not even have the protection of his own caution much less the aid of attorney.

This is the functional equivalent of an interrogation under *Pannell*. That DVD and the entire recording should be suppressed.

CONCLUSION

Defendant requests reversal and remand.

Respectfully submitted, this the 10th day of May 2010.



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CERTIFICATE OF SERVICE

This is to certify that I, the undersigned, have this day served, via hand delivery, a true and correct copy of the foregoing **Rebuttal Brief** to:

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and

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and

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SO CERTIFIED, this the 10th day of May 2010.

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