IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ROBERT PORTER — APPELLANT

VS. — NO. 2009-KA-0657-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: BILLY L. GORE
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [redacted]

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 4

SUMMARY OF THE ARGUMENT 20

ARGUMENT 23

THE EVIDENCE, VIEWED IN ITS ENTIRETY, WAS LEGALLY SUFFICIENT TO SUSTAIN A CONVICTION OF MURDER.

PORTER HAS FAILED TO DEMONSTRATE THE TRIAL JUDGE ABUSED HIS JUDICIAL DISCRETION IN OVERRULING HIS MOTION FOR A NEW TRIAL GROUNDED, IN PART, ON A CLAIM THE JURY VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

THE REASONABLENESS OF THE DEFENDANT'S APPREHENSION WAS A QUESTION FOR THE JURY AND NOT FOR THE REVIEWING COURT.

AFFIRMATION OF THE JURY'S VERDICT WOULD NOT SANCTION AN UNCONSCIONABLE INJUSTICE. 23

CONCLUSION 34

CERTIFICATE OF SERVICE 36

TABLE OF AUTHORITIES

STATE CASES

Anderson v. State, 904 So.2d 973 (Miss. 2004) 29

Blocker v. State, 809 So.2d 640, 645 (Miss. 2002) 21

Bright v. State, 349 So.2d 503, 504 (Miss. 1977) 28

Brown v. State, 98 Miss. 786, 54 So. 305 (1911) 24

Brown v. State, 907 So.2d 336, 339 (¶8) (Miss. 2005) 28

Bullock v. State, 391 So.2d 601 (Miss. 1980) 29

Brown v. State, 556 So.2d 338 (Miss. 1990) 29

Bush v. State, 895 So.2d 836, 844 (Miss. 2005) 22, 29, 31

Byrd v. State, 522 So.2d 756, 760 (Miss. 1988) 21

Chambliss v. State, 919 So.2d 30, 33-34 (¶¶ 10-16 (Miss. 2005) 22, 32

Clemons v. State, 460 So.2d 835 (Miss. 1984) 29

Davis v. State, 530 So.2d 694 (Miss. 1988) 29

Ellis v. State, 667 So.2d 599, 612 (Miss. 1995) 29

Fairchild v. State, 459 So.2d 793 (Miss. 1984) 24

Forbes v. State, 437 So.2d 59 (Miss. 1983) 29

Franklin v. State, 676 So.2d 287, 288 (Miss. 1996). 28

Gibson v. State, 895 So.2d 185 (Ct.App.Miss. 2004) 25

Greer v. State, 819 So.2d 1(Ct.App.Miss. 2000) 21

Groseclose v. State, 440 So. 297, 300 (Miss. 1983) 22, 33

Hall v. State, 644 So.2d 1223, 1229-30 (Miss. 1994) 26, 27

Hendrieth v. State, 230 So.2d 217 (Miss. 1970) 24

Herring v. State, 691 So.2d 948, 957 (Miss. 1997) 31

Holloman v. State, 656 So.2d 1134, 1142 (Miss. 1995) 28

Hubbard v. State, 819 So.2d 1192 (Miss. 2001) 29

Johnson v. State, 140 Miss. 889, 105 So. 742 (1925) 24

Johnson v. State, 723 So.2d 1205 (Ct.App.Miss. 1998) 27

Jones v. State, 381 So.2d 983 (Miss. 1980) 21

Jones v. State, 904 So.2d 149, 153-54 (Miss. 2005) 29

Lanier v. State, 684 So.2d 93 (Miss. 1996) 20

Lynch v. State, 877 So.2d 1254 (Miss. 2004) 29

Maddox v. State, 230 Miss. 529, 533, 93 So.2d. 649, 650 (1957) 21

Maiben v. State, 405 So.2d 87, 88 (Miss. 1981) 33

May v. State, 460 So.2d 778, 781 (Miss. 1984) 29, 31

Mitchell v. State, 572 So.2d 865, 867 (Miss. 1990) 31

Molphus v. State, 124 Miss. 584, 598, 87 So. 133, 135 (1921) 25

Rainer v. State, 473 So.2d 172, 173 (Miss. 1985) 35

Robinson v. State, 434 So.2d 206, 207 (Miss. 1983) 21, 27

Rush v. State, 278 So.2d 456, 459 (Miss. 1973) 25, 27

Russell v. State, 497 So.2d 75 (Miss. 1986) 24

Shields v. State, 244 Miss. 543, 144 So.2d 786 (1962) 24

Shinall v. State, 199 So.2d 251, 259 (Miss. 1967) 25, 26

Sloan v. State, 368 So.2d 228 (Miss. 1979) 27

Smith v. State, 754 So.2d 1159 (Miss. 2000) 27

Smith v. State, 925 So.2d 825, 830 (¶10) (Miss. 2006) 28

Stewart v. State, 986 So.2d 304 (Miss. 2008) **26, 29**

Stokes v. State, 240 Miss. 453, 128 So.2d 341 (1961) **24**

Wade v. State, 748 So.3d 771 (Miss. 1999) **22**

Wetz v. State, 503 So.2d 830, 868-68 (Miss. 1987) **28**

Yarber v. State, 230 Miss. 746, 93 So.2d 851, 852 (1957) **27**

Yates v. State, 685 So.2d 715, 718 (Miss. 1996) **26, 29**

Young v. State, 420 so.2d 1055, 1057 (Miss. 1982) **21**

Young v. State, 962 So.2d 110, 116 (Ct.App.Miss. 2007) **28**

STATE STATUTES

Miss.Code Ann. §97-3-35 ..... **20**

Miss. Code Ann. §99-19-81. (R. 211; C.P. at 45) **19**

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ROBERT PORTER **APPELLANT**

VS. **NO. 2009-KA-0657-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

The focal point in this appeal is the sufficiency and weight of the evidence used to convict Robert Porter of murder and simple assault.

According to Rosemary Porter, the estranged wife of Robert Porter, on the night of April 7, 2007, at a night spot known as "Clea's Place," Porter approached her and Terry Moore with whom Rosemary was sitting and asked: "Didn't I tell you, both of you, if I had caught y'all together I would kill both of you?" (R. 18, 50)

Porter then left the bar. When he returned he walked directly to the table where Rosemary and Moore were sitting and stabbed Moore once in the chest. Then, after exclaiming, "Yeah, B., I'm going to kill your M.F. butt, too," Porter cut Rosemary on the arm. (R. 19)

In a post-arrest statement made voluntarily while in transit to the station house, Porter told Deputy Mark Carpenter "he intended to kill Mr. Terry Moore" and that "it was too bad he didn't kill the bitch, too." (R. 87-88)

Porter contends ". . . there was no proof of a deliberate design to kill." (Brief of Appellant

at 4) According to Porter, " . . . no rational juror could conclude that Porter acted with deliberate design to kill Moore, nor wilfully harm Rosemary." (Brief of Appellant at 5)

When the brief facts recited above are viewed in a light most favorable to the verdict returned, there is no way under the sun this can be so.

Porter, upon observing the victim, Terry Moore, sitting inside a bar with Porter's estranged wife, threatened to kill Moore as well as his wife. He left the bar only to return and remove from his pocket a folding knife (R. 121) which he used to stab Moore through the heart and, during a brief scuffle, nick his wife on the arm. (R. 19-20)

Porter, who testified in his own behalf, claimed he stabbed Moore in self-defense after Moore made an aggressive move toward him which Porter interpreted as a move for a gun. According to Porter, Moore's "[r]eaching for a weapon, had me scared." "I feared for my life at that time." (R. 129)

Testimony from Rosemary reflected that Moore was sitting at the table when he was stabbed and "[h]e wasn't doing nothing with his hands" and "[h]e didn't have nothing in his hands." (R. 21)

The jury, in the wake of proper instructions (C.P. at 32, 34-39), rejected Porter's claim of self-defense and found him guilty of murder and simple assault.

Porter claims the evidence was insufficient to support the jury's verdict but, even if otherwise, the verdict of the jury was at least against the overwhelming weight of the evidence.

We submit, on the other hand, the reasonableness of Porter's apprehension was a jury issue decided adversely to him in the wake of "she said, he said" testimony and generous jury instructions explaining Porter's right to self-defense as well as authorizing the jury to find Porter guilty of the lesser offense of heat of passion manslaughter. *See* jury instructions C-40 and D-1. (C.P. at 32, 38, respectively)

Although Porter claimed he was scared of what Moore might do, the reasonableness of Porter's apprehension was a question for the jury and not for a reviewing court acting as a limited thirteenth juror.

Affirmation of the guilty verdict returned by the jury, quite clearly, would not work an unconscionable injustice.

ROBERT PORTER, a mechanic married to Rosemary Porter for fifteen (15) years but separated from her at the time of this incident (R. 109-10, 122-23), prosecutes a criminal appeal from the Circuit Court of Bolivar County, Mississippi, Albert B. Smith, III, Circuit Judge, presiding.

Following a two count indictment returned on March19, 2008, for murder (Count I) and aggravated assault (Count II), Porter was convicted on May 12-13, 2008, of murder (Count I), simple assault (Count II), and recidivism charged under Miss.Code Ann. §99-19-81 and/or 83. (C.P. at 3-6)

The indictment, omitting its formal parts, alleged in Count I

> "[t]hat **ROBERT PORTER** . . . on or about April 7, 2007, . . . did unlawfully, wilfully, and feloniously, without the authority of law, and with deliberate design to effect death, did kill and murder a human being, to-wit: Terry Moore, and the defendant is further charged as an habitual offender as is set forth in the attachment to this indictment . . ." (C.P. at 3)

The indictment charged in Count II that Porter

> " . . . on or about April 7, 2007, . . . did unlawfully, wilfully and feloniously, and purposely or knowingly cause bodily injury to Rosie Mary Porter, with a deadly weapon, to-wit: a knife, and the defendant is further charged as an habitual offender as is set forth in the attachment to this indictment, . . ." (C.P. at 3)

Following a trial by jury conducted on May 12-13, 2008, the fact finder returned dual verdicts of guilty of murder and simple assault. (R. 202; C.P. at 45-46)

Although the distinction appears to be somewhat blurred, two (2) issues are apparently raised

on appeal to this Court:

[1] The evidence was insufficient to support the verdict, as the State failed to prove beyond a reasonable doubt that Porter did not act in necessary self-defense.

[2] The verdict was against the overwhelming weight of the evidence which established that Porter acted in "imperfect self-defense" and could be guilty of no crime greater than manslaughter. (Brief of Appellant at 1, 3, and 5-6)

The Brief for the Appellee will be heavy on the facts because resolution of the issues raised by Porter, as is usually the case, turns on the facts.

STATEMENT OF FACTS

Robert Porter is a fifty-eight (58) year old African-American male with a rather lengthy and notorious criminal history. (R. 208-212)

In April of 2007, he and Rosemary Porter, his wife of fifteen (15) years (R. 122-23), were separated. Rosemary was living with her mother and sisters in Cleveland while Porter was living in Renova. (R. 110) Porter testified they still shared time together. (R. 11)

Porter's association with Terry Moore had been "very limited." Three (3) weeks prior to April 7, 2007 , the date of the incident at bar, Moore and Rosemary's nephew had "jumped me" and beat Porter up. (R. 113)

On April 7th, following the funeral of his god mother, Porter and several family members were drinking, mingling, and club hopping. (R. 115-16) From time to time they would adjourn to Clea's Club in Choctaw. (R. 115)

Porter testified that around 11:00 p.m. (R. 115) he walked into Clea's Place, went to the bar, and purchased a cigar. (R. 117) He saw Terry Moore and his wife sitting together inside. (R. 117) Porter did not see Wendell Taylor. (R. 119) Porter admitted saying to Rosemary: "Didn't I tell you

that I didn't want to catch y'all together? What y'all doing out here anyway." (R. 119)

"I told her, 'I told you I didn't want to catch y'all together anymore 'cause I don't want to be - - I don't want to be responsible for my actions." (R. 119-20) "I catch y'all together, I'm not responsible for my actions." (R. 120)

Terry Moore was sitting down when Porter stabbed him once in the chest with a folding knife he retrieved from his pocket. (R. 120-21)

Porter's version of the stabbing is found in the following colloquy:

> Q. [BY DEFENSE COUNSEL:] Show me what [Moore] was doing as far as his pants or his hands, or whatever he was doing?
>
> A. When I was talking to my wife and after he made the remark about, "Don't worry about me. I don't want to do nothing," he had his hands - - he had on a windbreaker, a silk jacket that zips up and strings hanging down.
>
> Q. Yes, sir.
>
> A. He had his hands up in 'em, like this here. He was fumbling trying to get out of them. So I told him, I said, "Terry, I ain't talking to you. I'm talking to my wife." I said, "Don't do that." (R. 121)
>
> Q. After you told Mr. Moore, "I'm talking with my wife, don't do that," what did Mr. Moore do or say?
>
> A. He was still trying to come up with something out of his coat.
>
> Q. Okay. Have a seat.
>
> (Witness seated on stand.)
>
> Q. What did you do then?
>
> A. What did I do then?
>
> Q. Yes, sir.

A. He kept coming up, and he was coming up. Once he get to a certain point, he was coming up gradually. I just - - I just stuck him.

Q. Now, where was this knife that you stuck Terry Moore with?

A. Where was the knife?

Q. Yes, sir.

A. In my pocket.

Q. Okay. Was this a fixed blade knife or a locked blade knife. Do you know what the difference is?

A. Uh, yes, I think it a lock blade. I think it was.

Q. Was it folded?

A. Right.

Q. Why did you stick Terry Moore?

A. Why did I stick him?

Q. Yes, sir.

A. Because he had jumped on me once before, and by the police arresting him, he had it out for me.

Q. What was he doing that day that prompted you to stick a knife in another human being?

A. Reaching for a weapon, had me scared.

Q. Did you ever see a weapon, Robert?

A. No, sir. I didn't see nothing, but I know he carried one.

Q. How many times did you stick Terry Moore?

A. Once.

* * * * * *

Q. Now, let's talk about you and Rosemary Porter.

A. Yes, sir.

Q. What happened between you and Rosemary Porter?

A. When he got up and went wherever he went, I was still talking to her. I was still talking to her. And then she jumped up. When she jumped up - - I know her. She will cut you, 'cause she cut me once before. (Laughing) (R. 122)

* * * * * *

Q. So, she jumped up. What happened?

A. When she jumped up, I went for it. I went to grabbing.

Q. Now, where was this knife that you had used on Terry Moore? Where was this knife, Robert?

A. I don't know.

Q. I mean, was it in your hand? That's what I'm trying to get at.

A. No, sir. I had lost it.

Q. So, she jumped up. Then what happened?

A. When she jumped up, I grabbed her. I grabbed her, I pushed her back in the seat, and she started kicking and fighting, you know.

Q. Okay.

A. So, I wear long fingernails.

Q. Sir?

A. I wear long fingernails 'cause I'm out on the street. When I do mechanic work, I cut my fingernails.

Q. Did you cut her with a knife.

A. No, sir.

Q. Did you have a knife in your hand?

A. When I went after her, I didn't have nothing but my hands. (R. 123)

After Robert and his wife tussled, Robert left the club in his privately owned vehicle. (R. 124) Porter later passed out inside his automobile. (R. 125-26)

Porter testified that after the incident he " . . . was exhausted, scared, drunk, and mad." (R. 129) "[W]e probably drunk a fifth of whiskey and a 12 pack of beer." (R. 126)

Q. [BY DEFENSE COUNSEL:] [W]hat was your emotion [while] talking to [your] wife?

A. Oh, when he first started, I asked him to put his hands where I could see them. Don't come out of his pockets like that with nothing on me. He wouldn't. He wouldn't quit coming up.

Q. Well, what were you thinking?

A. I feared for my life at that time.

Q. Were you mad?

A. I was scared, really.

Q. You know the difference between being scared and mad, don't you, Robert?

A. Yes, sir. I really was scared, to be honest with you. I really didn't get mad until afterwards.

Q. Sir?

A. I really didn't get mad until afterwards. (R. 129)

* * * * * *

Q. * * * When you stabbed Mr. Moore, were you mad or were you scared, Robert?

A. I was scared. (R. 130) [emphasis ours]

During cross examination, the following colloquy took place:

> Q. [BY PROSECUTOR MITCHELL:] So, when you walked in that club that night, you were already kind of tanked up, kind of drunk, and already mad? When you saw them in there, that made you mad?
>
> A. No, I wasn't mad.
>
> Q. You wasn't mad?
>
> A. No. I wasn't mad.
>
> Q. When you walked in and saw them the first time, that didn't make you mad?
>
> A. I didn't see them but one time. (R. 134)
>
> Q. You didn't see them but one time?
>
> A. No, ma'am.
>
> Q. And you came straight to them?
>
> A. No. I walked up. I went to the bar to get a cigar, and I went out to get a light and got a light at the back door. And when I walked back in the club, that's when I saw her.
>
> Q. She was sitting with her back to you?
>
> A. Yeah, right.
>
> Q. And you went straight to her?
>
> A. I went straight to her.
>
> Q. And told her that, "I told y'all that if I ever caught y'all together, I was going to kill both of you."? That's what you told her.
>
> A. "I told both of you if I ever catch you together, I won't be responsible for my actions."

Q. Okay. You weren't going to be responsible for your actions. You knew you were going to do something to them?

A. I thought I wasn't going to be responsible for my action. Whatever action it was, I didn't know. (R. 135)

Six (6) witnesses testified on behalf of the State during its case-in-chief, including **Rosemary Porter** and **Wendell Taylor**, both ear and eye witnesses to the incident.

Rosemary Porter's version of the stabbing of Terry Moore is found in the following colloquy:

Q. [BY PROSECUTOR MITCHELL:] When y'all got to the club, what happened?

A. Well, we got to the club and sit at this table. Terry and Wendell [Taylor] was sitting on one side of the table and I sit on the other side of the table. And I was sitting in the chair with my back up to the wall, with my leg kicked off in another chair, okay?

And me, Terry, we got up and we danced. We swung. And Terry and Wendell - - Terry stayed back in his spot and I sit down where I was sitting, same position, you know, and sit back.

And after a while, here come Robert Porter. He walked in the door, looked at Terry. He looked at me. He said, "Didn't I tell you, both of you, if I had caught y'all together I would kill both of you?" Something like that. I sat straight up in my chair. Terry told me, he said, "Don't worry about nothing. He ain't going to do nothing like that." You know, I kind of got at ease. He walked out the door.

Q. Who walked out the door?

A. Terry - - Robert walked out the door.

Q. Okay.

A. Walked out the door. And it happened so quick. He rushed back in there. Terry never did move. He sit there when he come - - rushed back in. He went up - -he did like that (indicating). Terry - -

Q. Let's stop right there. You said "he did like that." Tell me

A. He stabbed him.

Q. Who stabbed who?

A. Robert stabbed Terry.

Q. Did you see that when this happened?

A. Yes, ma'am. I seen it.

Q. Okay. Go ahead.

A. And then Terry, he got up from the table and he turned around. There was a garbage can sitting behind the table where we were sitting at, and Terry got a bottle out. By the time he got the bottle out, he just collapsed and fell backwards like that (indicating), with his hands over his head.

Q. Okay.

A. Then that's when Robert Porter attacked me. He said, "Yeah, b., I'm going to kill your M.F. butt, too." Only way I got him, I throw this arm up and I kicked him off me.

Q. Now, when you threw your arm up, what happened?

A. He stabbed me in the arm.

Q. Now, describe the injury that you had. You say he stabbed you in the arm. Describe how he cut.

A. How?

Q. Did you have a deep cut?

A. It was deep. I was bleeding real bad.

Q. You were bleeding bad?

A. Yes, ma'am.

Q. Did you ever go to the hospital?

A. No, I didn't go to the hospital.

Q. Did you have that cut on your arm before this happened?

A. No ma'am.

Q. Did you and Robert Porter have any kind of fight, physical fight, fist fight during that time?

A. No, ma'am.

Q. After you kicked him off you, what happened?

A. He ran out the door.

Q. Did you see him again after that?

A. No.

Q. Did you see what he stabbed Mr. Moore with?

A. Well, not really, but I knew he stabbed him with something 'cause he fell out on the floor.

Q. Okay. Now, you said that Mr. Moore went to the garbage can and got a beer bottle. What did he do with that bottle?

A. He collapsed on the floor. He dropped it.

Q. Did he ever make it back up to where Robert Porter was?

A. He couldn't make it back. He was laying out in the floor. He was dead. (R. 17-20)

* * * * * *

Q. When he came back that [second] time, did he have any conversation with y'all before he started stabbing?

A. No ma'am.

Q. Okay. When he came in, did he come directly to y'all, or

what did you see him do?

A. When he first come in?

Q. When he came in the second time.

A. Well, he came straight - - he went straight to Terry.

Q. What did you see Mr. Moore doing at that time?

A. He was sitting at the table.

Q. What was he doing with his hands?

A. He wasn't doing nothing with his hands.

Q. Do you recall if he had his hands under the table or in his pants or anything like that?

A. No, ma'am.

Q. You're saying you don't recall, or he didn't?

A. He didn't have nothing in his hands.

Q. All right. Did Mr. Moore have any kind of weapon at all?

A. No, ma'am.

Q. Did he have any kind of weapon on the table?

A. No, ma'am.

Q. Okay. Was there any fight or any struggle between Mr. Moore and Mr. Porter?

A. No ma'am. (R. 21-22)

Wendell Taylor, a nephew of Terry Moore, was seated at a table with Rosemary and Terry Moore. Taylor described the incident in this colloquy:

Q. [BY PROSECUTOR MITCHELL:] Tell us what you saw [Robert Porter] do when you first saw him come in.

A. He came in. He walked over to the table with me, Rosemary, and Terry.

Q. Okay. And what, if anything, did he do when he walked up to the table? What did he do or what did he say?

A. He stood up, he looked at us, turned around, and walked out the door.

Q. Okay.

A. Then a couple of minutes later, he come back in. He said, "I told you - - didn't I tell you that if I catch both of y'all together I'm going to kill you and him."

Q. What happened after that? What did he do then?

A. He stabbed Terry Moore.

Q. When he told him that, he stabbed him?

A. Ma'am?

Q. Right after he told Terry Moore that, did he stab him then?

A. Yes. (R. 50-51)

* * * * * *

Q. Now, when Mr. Moore - - I mean, Mr. Porter, Robert Porter came in the door, did you see him when he came in the first time.

A. Yes.

Q. And then when he came back the second time, what did you see him do?

A. Walk over to our table.

Q. What happened? Walked over to the table?

A. Ma'am?

Q. Tell us what happened when he walked over to the table.

A. When he walked over to the table, he said the words, "I told you when I catch y'all together, I would kill you and him."

Q. And what did he do?

A. He stabbed Terry Moore, Terry jumped up, shot towards the back, and he stopped - -

Q. Wait a minute. When you say he "shot towards the back," what do you mean by he shot.

A. He ran towards the back.

Q. When he ran towards the back, where did he go?

A. Back to the barrel I was pointing at on the picture.

Q. When he got to the barrel, what did he do?

A. Picked up a Busch bottle, 32 ounce.

Q. You say "a Busch bottle." A beer bottle?

A. Yes.

Q. What did he do then?

A. He started - - headed back toward Mr. Porter.

Q. What happened then?

A. He collapsed on the way. (R. 54-55)

* * * * * *

Q. Did you see the knife before he stabbed him?

A. No.

Q. How do you know he stabbed him?

A. Because when he came back with it - - when he stuck

him in the chest, he snatched back and I saw it, and then that's when he slashed at Ms. Porter.

Q. You said when he - - I believe this is what you said; when he struck Terry and then he snatched back. When he snatched back, what did you see?

A. Blade of a knife.

Q. Did you see a full knife or just a blade?

A. Just a blade like a steak knife or something.

Q. And then what did he do right after that?

A. Sliced at Ms. Porter.

Q. What happened when he sliced her?

A. She went to kicking and swinging her arm.

Q. Swinging her arm?

A. (Demonstrates)

Q. And after he sliced at her and she kicked and swung her arm, what happened?

A. He exited [the building.] (R. 56-57) [emphasis ours]

During cross-examination Taylor testified the blade of the knife " . . . was about six and ½ inches long." (R. 64) According to the pathologist testifying for the State, the wound inflicted on Moore measured 5 ½ inches in depth. (R. 103)

Jeff Joel, a criminal investigator for the Bolivar County Sheriff's Office, arrived at Clea's Club after responding to the dispatch. (R. 68-69) He observed Moore lying on the floor. "There was nothing in his hands." (R. 70)

Arthur Coleman, a member of the Ruleville Police Department, testified he found Porter's

motor vehicle parked " . . . at Double Quick and Church's located on Highway 49 North, in Ruleville." (R. 75) Porter, who was halfway asleep and "highly intoxicated" (R. 76), was placed under arrest by Deputy Mark Carpenter from the Bolivar County's Sheriff's Office. (R. 76)

According to Coleman, who refreshed his memory by reviewing his written report, Porter " . . . made the statement that the guy that he assaulted was with his wife and that he thought at the time that he had killed his wife, but he wasn't sure about the guy."

"[Porter] stated to the Ruleville police officer and Bolivar County SO unit that he had told his wife that if he caught her with a man, he'd kill her and the man. He admitted that he had killed both of them and the suspect - - ." (R. 78)

Mark Carpenter, a deputy sheriff for the Bolivar County Sheriff's Office, testified that after taking custody of Porter and reading him his rights under *Miranda*, he handcuffed Porter and placed him in Carpenter's patrol car. (R. 85)

According to Carpenter, Porter made several post-arrest statements while in transit. (R. 90)

> Q. [BY PROSECUTOR MITCHELL:] If I show you your report, would that refresh your memory as to what he said to you. Let me show you. Can I show you the statement?
>
> A. Yes, ma'am.
>
> Q. I know it and I need to be sure on this.
>
> Would you look at the bottom here where I've got this little squiggly line drawn. "Mr. Porter was read his *Miranda* rights and placed into my patrol car." Would you read the part after that and see if that refreshed your memory.
>
> A. (Witness complies.) Yes, ma'am.
>
> **Q. What did he say to you?**
>
> **A. That he intended to kill Mr. Terry Moore.**

Q. And who else?

A. Along with his wife, Rosemary.

Q. And what else did he say? Your report says he went on to say. What else did he tell you?

A. That he had told both of them prior if he ever caught them together, that he would kill both of them.

Q. Then after that he asked you if Mr. Moore was dead?

A. Correct.

Q. You told him yes. What did he say then?

A. That "It served him right."

Q. Is that exactly what he said? Would you look at your report and refresh your memory as to what he said. You can paraphrase some of the language a little bit when you get to that part.

* * * * * *

A. That "It served the son of a bitch right."

BY MS. MITCHELL:

Q. What else did it say after that? What was the rest after that?

A. And that it was too bad he didn't kill the bitch, too. (R. 87-88) [emphasis ours]

During cross-examination, Coleman testified he " . . . never asked Mr. Porter a question. Porter volunteered everything he was saying." (R. 89)

Dr. Steven Hayne, the State's pathologist, conducted the post-mortem examination on Terry Moore. Dr. Hayne testified that Moore died from a single stab wound to the chest that punctured his heart and right lung. The depth of the wound was five and one-half (5 ½) inches, and " . . . death

was a result of exsanguination or bleeding to death." (R. 102-03)

At the close of the State's case-in-chief, the defendant moved for directed verdicts of acquittal of both murder and aggravated assault as well as simple assault. (R. 107-08)

The motions were overruled. (R. 107)

Robert Porter, the defendant, elected to testify in his own behalf. (R. 109-150)

The State produced no rebuttal. (R. 150)

Following closing arguments on May 13th, the jury retired to deliberate at 9:04 a.m. (R. 201)

Thirty-four (34) minutes later, at 9:38 a.m., the jury returned with the following verdicts:

> Count I: "We, the jury, find the defendant guilty of Murder." (R. 202; C.P. at 45)
>
> and
>
> Count II: "We, the jury, find the defendant guilty of simple assault in Count II of the indictment." (R. 202; C.P. at 45)

A poll of the jury reflected both verdicts were unanimous. (R. 203)

At the close of a separate sentencing hearing adjudicating the charges of recidivism, Porter was found guilty by virtue of Miss. Code Ann. §99-19-81. (R. 211; C.P. at 45)

Porter was thereafter sentenced to life imprisonment without probation or parole for murder and to six (6) months for simple assault. (R. 212; C.P. at 45) The sentences were to run consecutively and are to be served without the benefit of probation or parole. (R. 212)

On July 24, 2008, Porter filed a motion for new trial or, in the alternative, for J.N.O.V. (C.P. 47-48) He alleged, *inter alia*, the verdict was against the overwhelming weight of the evidence. (C.P. at 47-48)

The motion was denied on July 28, 2008. (C.P. at 153)

Porter received constitutionally effective representation at trial from Boyd P. Atkinson, a Bolivar County public defender.

Appellate representation by George T. Holmes, an attorney with the Mississippi Office of Indigent Appeals, has been equally effective.

SUMMARY OF THE ARGUMENT

The evidence was clearly sufficient to sustain a finding by a reasonable, fair-minded, hypothetical juror that Porter did not stab Terry Moore in self-defense and was guilty of murder.

In addition, threats by Porter to kill both Moore and Rosemary made immediately prior to the incident and post-arrest admissions made by Porter to law enforcement expressing Porter's intent support the jury's rejection of Porter's invitation to find him guilty of manslaughter. *See* Miss.Code Ann. §97-3-35 which reads, in its entirety, as follows:

> "The killing of a human being, without malice, in the heat of passion, but in a cruel or unusual manner, or by the use of a dangerous weapon, without authority of law, and not in necessary self-defense, shall be manslaughter."

See also **Lanier v. State,** 684 So.2d 93 (Miss. 1996), and jury instructions C-40 and C-50 which authorized the jury to find Porter guilty of the lesser included offense of manslaughter if it found from the evidence beyond a reasonable doubt that on August [sic] 7, 2007, "Robert Porter did kill Terry Moore without malice, in the heat of passion, by the use of a dangerous weapon, without authority of law, and not in necessary self-defense." (C.P. at 32, 37)

Testimony from which a jury could either find directly or infer malice permeates the record in the form of Porter's prior threats to kill, post-arrest statements made to law enforcement expressing Porter's intent to kill Moore, Porter's regret that he did not kill his wife also, and the unlawful use of a deadly weapon to kill Moore, *viz.*, a knife.

With respect to Porter's claim of self-defense, the reasonableness of a defendant's apprehension is a question for the jury, not the reviewing court. "It is for the jury to determine the reasonableness of the ground upon which the defendant acts." **Robinson v. State,** 434 So.2d 206, 207 (Miss. 1983). *See also* jury instruction CR2-D-1. (C.P. at 38)

The trial judge did not abuse his judicial discretion in overruling Porter's motion for a new trial because the testimony and evidence concerning self-defense placed the question of guilt or innocence squarely in the hands of the jury, and the evidence fails to preponderate heavily, if at all, in Porter's favor.

Admittedly, there are some slight differences in the versions given by Rosemary and Wendell Taylor with respect to the point in time Porter's threats were uttered to the victims.

No matter.

Lest we forget, "[t]he jury has the duty to determine the impeachment value of inconsistencies or contradictions as well as testimonial defects of perception, memory and sincerity." **Jones v. State,** 381 So.2d 983, 989 (Miss. 1980). *See also* **Blocker v. State,** 809 So.2d 640, 645 (Miss. 2002), para. 18 ["(I)t is up to the jury to weigh any inconsistencies or contradictions in [a witnesses] testimony"]; **Greer v. State,** 819 So.2d 1 (Ct.App.Miss. 2000), reh denied.

In **Young v. State,** 420 So.2d 1055, 1057 (Miss. 1982), quoting from **Maddox v. State,** 230 Miss. 529, 533, 93 So.2d 649, 650 (1957), this Court pointed out that "[s]eldom do witnesses agree upon every detail. Indeed, their failure to do so is often strong evidence each is trying to accurately portray the situation as he saw it, and that is to the credit, rather than the discredit of the witnesses."

"The jury is the **sole judge** of the weight and credibility of the evidence." **Byrd v. State,** 522 So.2d 756, 760 (Miss. 1988). The evidence in the case at bar, viewed and weighed in the light most

favorable to the verdict, clearly does not lead to a conclusion that an unconscionable injustice resulted from Porter's convictions of murder and simple assault.

The standards of review for weight and sufficiency of the evidence are fully articulated in **Chambliss v. State,** 919 So.2d 30, 33-34 (¶¶ 10-16 (Miss. 2005), citing **Bush v. State,** 895 So.2d 836, 844 (Miss. 2005). The evidence in this case passes these tests with flying colors.

The testimony and evidence in this case does not preponderate in favor of Porter's theory of imperfect self-defense. Porter cites **Wade v. State,** 748 So.2d 771 (Miss. 1999), in support of his claim he can be guilty of no crime greater than heat of passion manslaughter because he was under a bona fide, although unfounded, belief it was necessary to kill Moore to prevent death or great bodily harm at Moore's hands.

Imperfect self-defense has no applicability here because the official record is replete with evidence of malice, and Porter, unlike Deanna Wade, a victim of repeated and recent domestic abuse, testified he stabbed Moore because he was scared of what Moore was going to do and he ". . . really didn't get mad until afterwards." (R. 129-30)

By Porter's own admission, he exhibited no emotional rage and conduct precipitated by Rosemary's presence in the company of Moore. Moreover, Porter, unlike Deanna Wade, testified he stabbed Moore because he perceived and feared great bodily harm or even death at the hands of Moore. Thus, Porter's own testimony negates heat of passion manslaughter and imperfect self-defense.

Allowing verdicts of murder and simple assault to stand where, as in this case, the defendant admitted stabbing the victim once with a knife and then grabbing and pushing his wife would not be sanctioning an unconscionable injustice. **Groseclose v. State,** 440 So.297, 300 (Miss. 1983).

ARGUMENT

THE EVIDENCE, VIEWED IN ITS ENTIRETY, WAS LEGALLY SUFFICIENT TO SUSTAIN A CONVICTION OF MURDER.

PORTER HAS FAILED TO DEMONSTRATE THE TRIAL JUDGE ABUSED HIS JUDICIAL DISCRETION IN OVERRULING HIS MOTION FOR A NEW TRIAL GROUNDED, IN PART, ON A CLAIM THE JURY VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

THE REASONABLENESS OF THE DEFENDANT'S APPREHENSION WAS A QUESTION FOR THE JURY AND NOT FOR THE REVIEWING COURT.

AFFIRMATION OF THE JURY'S VERDICT WOULD NOT SANCTION AN UNCONSCIONABLE INJUSTICE.

The focal point in this appeal is the strength and sufficiency of the evidence used to convict Robert Porter of murder after Porter, upon observing the victim, Terry Moore, sitting inside a nightclub with Porter's estranged wife, threatened to kill Moore as well as his wife. Either prior to the threat or immediately thereafter, Porter removed a knife from his pocket and stabbed Moore through the heart. According to Rosemary Porter and Wendell Taylor, Porter then slashed at his wife and cut her on the arm.

Porter's explanation for stabbing Terry Moore is found in our statement of the facts. We need not plow that ground again here. Porter testified he stabbed Moore because he was scared of him. He also testified he "really didn't get mad until afterwards." (R. 129, 134-35) This testimony completely negates Porter's claim he acted on impulse without premeditation. Lest we forget, Porter had threatened to kill both Rosemary and Moore and his post-arrest statements to Carpenter point unerringly to malice/deliberate design/premeditated design.

Porter assails both the *sufficiency* and the *weight* of the evidence. (Brief of the Appellant at 3-8)

He claims the evidence was such that no reasonable juror could find beyond a reasonable doubt that Porter killed Moore with malice and that he did not have a reasonable apprehension of an imminent threat of great bodily harm when he stabbed Moore. (Brief of the Appellant at 4-7) Stated differently, Porter says no reasonable and fair-minded juror could have found he did not act in self-defense.

We submit, on the other hand, that reasonable minds could have differed. The evidence, viewed in its entirety, was clearly sufficient for a reasonable, fair-minded, hypothetical juror to find beyond a reasonable doubt that Porter did not act in self-defense and was guilty of murder. Evidence of malicious intent permeates the record.

It has been said that malice may be implied or inferred from the unlawful and deliberate use of a deadly weapon. **Russell v. State,** 497 So.2d 75 (Miss. 1986) [Malice could be inferred from defendant's use of a knife]; **Fairchild v. State**, 459 So.2d 793 (Miss. 1984); **Shields v. State**, 244 Miss. 543, 144 So.2d 786 (1962); **Stokes v. State**, 240 Miss. 453, 128 So.2d 341 (1961). *See also* **Hendrieth v. State**, 230 So.2d 217 (Miss. 1970). Stated differently, a killing done with a deadly weapon is presumed to have been done maliciously. **Johnson v. State**, 140 Miss. 889, 105 So. 742 (1925).

We find in **Brown v. State**, 98 Miss. 786, 54 So. 305 (1911) , the following language applicable here:

> * * * * * * The malice essential to a conviction of murder may be ascertained from **previous threats** and measures taken in preparation, **and too, may arise suddenly and be implied from circumstances, as from the intentional use at the outset of a deadly weapon.** * *

* * * [emphasis supplied]

Cf. **Gibson v. State,** 895 So.2d 185 (Ct.App.Miss. 2004) [Granting of jury instruction stating that intent may be inferred from use of a deadly weapon not error.]

There is nothing in the record to suggest that Terry Moore, the victim, was actually armed that day.

The jury was generously instructed with respect to the defendant's theory of self-defense. *See* jury instruction CR-2-D-1. (C.P. at 38)

The defendant's testimony that he "was scared," and not mad negated his theory of imperfect self-defense. There was neither heat nor passion when Porter stabbed Moore. "One does not have the right to kill another merely because he is afraid of him; nor may one kill another because he is afraid that he will receive some bodily harm." **Shinall v. State,** 199 So.2d 251, 259 (Miss. 1967).

One does not have the right to kill another on the first appearance of danger. Rather, there must be a threat or some overt act by the party making the threat or committing the act which would induce a reasonable man to believe there was danger of the threat or act being immediately executed. **Molphus v. State,** 124 Miss. 584, 598, 87 So. 133, 135 (1921).

Whether or not an accused, in a particular case, has measured up to that standard of conduct is a question to be submitted to and decided by the jury. **Rush v. State,** 278 So.2d 456, 459 (Miss. 1973).

In the case at bar, a reasonable, hypothetical juror could have rejected Porter's claim of self-defense after assessing the reasonableness of Porter's apprehension as well as the imminency of the danger.

Where, as perhaps here, the issue presented is the denial of a directed verdict, peremptory

instruction, or judgment notwithstanding the verdict, any evidence favorable to the defendant must be disregarded. **Stewart v. State,** 986 So.2d 304 (Miss. 2008); **Yates v. State,** 685 So.2d 715, 718 (Miss. 1996). This includes Porter's testimony he acted in self-defense when he stabbed Moore in the chest and he cut Rosemary, not with a knife, but with an errant fingernail. (R. 123) Given this state of affairs, there can be no doubt - not one whit - that Porter was not acting in self-defense, imperfect or otherwise, when he stabbed Moore in the chest and grabbed and pushed Rosemary. (R. 123) A jury could have found Porter was not in imminent danger and used more force than reasonably necessary to repel any contemplated assault.

The jury was properly instructed on the issue of self-defense. *See* jury instruction CR2-D-1. (C.P. at 38) Porter does not take issue with the jury instructions.

Porter testified he was "scared" of Moore because of the prior altercation he had had with Moore. (R. 120-22)

We reiterate.

Porter did not have the right to kill or assault Moore simply because he was afraid of him or afraid he would receive some bodily harm. **Shinall v. State,** *supra*, 199 So.2d 251, 259 (1967). Rather, whether Porter was acting in self-defense, perfect or imperfect, and whether Porter used excessive force in repelling an attack on him, were issues for the jury to resolve. **Hall v. State,** 644 So.2d 1223, 1229-30 (Miss. 1994).

A reasonable and fair-minded juror could have found that Porter did not have reasonable grounds to apprehend a design on the part of Moore to kill Porter or do him great bodily harm or that there was imminent danger of such design being accomplished. *See* jury instruction CR2-D-1 at C.P. 38. Moore, if he was armed at all, was armed only with his mouth. (R. 18, 120)

Admittedly, a defendant is not required to prove he acted in self-defense; rather, if a

reasonable doubt of his guilt arises from the evidence, including evidence of self-defense, he must be acquitted. **Smith v. State,** 754 So.2d 1159 (Miss. 2000); **Sloan v. State,** 368 So.2d 228 (Miss. 1979).

In the case at bar, a reasonable, hypothetical juror could have found that Moore was not an aggressor and that Porter's apprehension, under the circumstances, was unreasonable. Stated differently, the evidence presented a jury question as to whether or not the defendant was acting in self-defense when he stabbed Moore. **Hall v. State,** *supra*, 644 So.2d 1223 (Miss. 1994); **Johnson v. State,** 723 So.2d 1205 (Ct.App.Miss. 1998).

The jury is the final judge of whether a defendant acted in justifiable self-defense. **Rush v. State**, 278 So.2d 456, 459 (Miss. 1973); **Yarber v. State**, 230 Miss. 746, 93 So.2d 851, 852 (1957). Put another way, "[i]t is for the jury to determine the reasonableness of the ground upon which the defendant acts." **Robinson v. State**, *supra*, 434 So.2d 206, 207 (Miss. 1983).

In **Yarber v. State**, 230 Miss. 746, 93 So.2d 851, 852 (1957), this Court opined:

> * * * But of course the threat must be reasonably "apparently necessary", since **a party may have an apprehension that his life is in danger and believe the grounds of his apprehension just and reasonable; and yet he acts at his peril, since the jury and not he is the final judge of whether he acted upon reasonable grounds.** Ransom v. State, 1928, 149 Miss. 262, 115 So. 208; Robinson v. State, Miss. 1950, 49 So.2d 413. * * * [emphasis supplied]

And, in **Rush v. State**, 278 So.2d 456, 459 (Miss. 1973), we find this language:

> The apprehension of such danger must be real and such as would or should, under the circumstances, be entertained by a reasonably well-disposed man of average prudence; and **whether the accused has, in a particular case, measured up to that standard of conduct is a question to be submitted to, and decided by, the jury . . .** [emphasis supplied]

In **Bright v. State,** 349 So.2d 503, 504 (Miss. 1977)], the following jury instruction was

approved:

> To make a homicide justifiable on the grounds of self-defense, danger to slayer must be either actual, present, and urgent, or slayer must have reasonable grounds to apprehend design on part of deceased to kill him or to do him some great bodily harm, and in addition to this, to apprehend that there was imminent danger of such design being accomplished; mere fear, apprehension, or belief, however sincerely entertained by one person that another designs to take his life or to do him some great bodily harm will not justify former taking life of the latter.

Who, other than the jury, could decide fully, fairly, and finally whether Porter had " . . . reasonable grounds to apprehend a design on the part of the deceased [Terry Moore] to kill him or to do him some great bodily harm, and in addition to this, that there was imminent danger of such design being accomplished?." *See* jury instruction CR2-D-1 at C.P. 38.

Sufficiency.

"Requests for a directed verdict and motions JNOV implicate sufficiency of evidence." **Franklin v. State**, 676 So.2d 287, 288 (Miss. 1996). Porter is correct when he suggests this Court must review the trial court's finding regarding sufficiency of the evidence at the time the motion for JNOV was overruled. **Holloman v. State**, 656 So.2d 1134, 1142 (Miss. 1995), citing **Wetz v. State**, 503 So.2d 830, 868-68 (Miss. 1987). This occurred on July 28, 2008, over two months post-verdict. (C.P. at 47, 53)

"The standard of review for motions for directed verdict and JNOV is abuse of discretion." **Young v. State,** 962 So.2d 110, 116 (Ct.App.Miss. 2007) citing **Smith v. State,** 925 So.2d 825, 830 (¶10) (Miss. 2006) (citing **Brown v. State,** 907 So.2d 336, 339 (¶8) (Miss. 2005)).

No abuse of judicial discretion has been demonstrated here.

In judging the legal sufficiency, as opposed to the weight, of the evidence on a motion for a directed verdict or request for peremptory instruction or motion for judgment notwithstanding the

verdict, the trial judge is required to accept as true all of the evidence that is favorable to the State, including all reasonable inferences that may be drawn therefrom, and to *disregard* evidence favorable to the defendant. **Stewart v. State,** *supra*, 986 So.2d 304 (Miss. 2008); **Anderson v. State,** 904 So.2d 973 (Miss. 2004), reh denied; **Lynch v. State,** 877 So.2d 1254 (Miss. 2004), reh denied, cert denied 125 S.Ct. 1299, 543 U.S. 1155, 161 L.Ed.2d 122 (2004); **Hubbard v. State,** 819 So.2d 1192 (Miss. 2001), reh denied; **Yates v. State,** 685 So.2d 715, 718 (Miss. 1996); **Ellis v. State,** 667 So.2d 599, 612 (Miss. 1995); **Clemons v. State,** 460 So.2d 835 (Miss. 1984); **Forbes v. State,** 437 So.2d 59 (Miss. 1983); **Bullock v. State,** 391 So.2d 601 (Miss. 1980). *See also* **Jones v. State,** 904 So.2d 149, 153-54 (Miss. 2005) ["The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."]

If under this standard, sufficient evidence to support the jury's verdict of guilty exists, the motion for a directed verdict and request for peremptory instruction or JNOV should be overruled. **Brown v. State**, 556 So.2d 338 (Miss. 1990); **Davis v. State**, 530 So.2d 694 (Miss. 1988). A finding the evidence is insufficient results in a discharge of the defendant. **May v. State**, 460 So.2d 778, 781 (Miss. 1984).

Judge Waller's opinion in **Bush v. State,** 895 So.2d 836, 843 (¶16) (Miss. 2005), makes it perfectly clear that in resolving sufficiency of the evidence issues the evidence must be viewed and considered in the light most favorable to the State's theory of the case. We quote:

> In *Carr v. State,* 208 So.2d 886, 889 (Miss. 1968), we stated that in considering whether the evidence is sufficient to sustain a conviction in the face of a motion for directed verdict or for judgment notwithstanding the verdict, the critical inquiry is whether the evidence shows "beyond a reasonable doubt that accused committed the act charged, and that he did so under such circumstances that

every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction." **However, this inquiry does not require a court to**

> **'Ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.' Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.**

Jackson v. Virginia, 443 U.S. 307, 315, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (citations omitted) (emphasis in original.) Should the facts and inferences considered in a challenge to the sufficiency of the evidence "point in favor of the defendant on any element of the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty," the proper remedy is for the appellate court to reverse and render. *Edwards v. State,* 469 So.2d 68, 70 (Miss. 1985) (citing *May v. State,* 460 So.2d 778, 781 (Miss. 1984)); *see also Dycus v. State,* 875 So.2d 140, 164 (Miss. 2004). However, if a review of the evidence reveals that it is of such quality and weight that, "having in mind the beyond a reasonable doubt burden of proof standard, reasonable fairminded men in the exercise of impartial judgment might reach different conclusions on every element of the offense," the evidence will be deemed to have been sufficient. *Edwards,* 469 So.2d at 70; *see also Gibby v. State,* 744 So.2d 244, 245 (Miss. 1999).

* * * * * *

In light of these facts, we find that any rational juror could have found beyond a reasonable doubt that all of the elements had been met by the State in proving capital murder with the underlying felony being armed robbery. This issue is without merit. **Bush v. State,** 895 at 843-44 (¶¶16, 17) [emphasis in bold print ours].

Our position on the issue of self-defense can be summarized in only three (3) words: "classic jury issue" resolving "she said, he said" testimony. Based upon Porter's prior threat to kill and his post-arrest statements expressing his intent, a reasonable and fair-minded juror

could have rejected Porter's claim of self-defense and found beyond a reasonable doubt that all of the elements had been met by the State in proving murder.

In short, it was a jury issue, and the jury has spoken.

Weight.

Weight of the evidence complaints, as opposed to claims of legal insufficiency, implicate the denial of a motion for a new trial. **May v. State,** 460 So.2d 778, 781 (Miss. 1984).

In ruling on a defendant's motion for a new trial, the trial judge - and this Court on appeal as well - again must look at the evidence in the light most favorable to the State's theory of the case, i.e., "in the light most favorable to the verdict." **Herring v. State,** 691 So.2d 948, 957 (Miss. 1997), citing **Mitchell v. State,** 572 So.2d 865, 867 (Miss. 1990).

In **Bush v. State,** *supra*, 895 So.2d 836, 844 (¶18) (2005), the Supreme Court penned the following language articulating the true rule:

> When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, we will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. *Herring v. State,* 691 so.2d 948, 957 (Miss. 1997). We have stated that on a motion for new trial,
>
> > The court sits as a thirteenth juror. The motion, however, is addressed to the discretion of the court, which should be exercised with caution, and the power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict.
>
> *Amiker v. Drugs for Less, Inc,* 796 So.2d 942, 947 (Miss. 2000)/2 However, the evidence should be weighed in the light most favorable to the verdict. *Herring*, 691 So.2d at 957. A

> reversal on the grounds that the verdict was against the overwhelming weight of the evidence, "unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict." *McQueen v. State*, 423 So.2d 800, 803 (Miss. 1982). Rather, as the "thirteenth juror" the court simply disagrees with the jury's resolution of the conflicting testimony. *Id.* This difference of opinion does not signify acquittal any more than a disagreement among the jurors themselves. *Id.* Instead, the proper remedy is to grant a new trial./3
>
> Sitting as a limited "thirteenth juror" in this case, we cannot view the evidence in the light most favorable to the verdict and say that an unconscionable injustice resulted from this jury's rendering of a guilty verdict. * * * " [text of notes 2 and 3 omitted]

See also **Chambliss v. State,** 919 So.2d 30, 33-34 (¶10) (Miss. 2005), quoting *Bush*, 895 So.2d at 844 (¶18).

The jury's verdict was not against the overwhelming weight of the credible evidence which does not preponderate heavily, if at all, in favor of Porter's theory of self-defense, whether perfect or imperfect.

The jury was sufficiently instructed on the issue of self-defense. *See* jury instruction CR2-D-1 at C.P. 38. As stated previously, Porter does not take issue with any of the jury instructions which were granted at his request.

A reasonable and fair-minded hypothetical juror could have found from the testimony and evidence that Porter fulfilled ½ of his threat to kill by stabbing Moore and then going after Rosemary. According to both Rosemary and Wendell Taylor, Porter cut her by "slicing at her." (R. 19-20, 56-57) The jury, however, found Porter guilty of simple assault as was its prerogative by virtue of instruction CR1-D-3 which authorized the jury to find Porter guilty of simple assault if it found beyond a reasonable doubt " . . . that the injuries sustained by

Rosemary Porter on her arm by the defendant were not made with a deadly weapon . . ." (C.P. at 39)

A fair-minded juror could have found that Porter did not have reasonable grounds to apprehend a design on the part of Moore to either kill him or do him great bodily harm and, if so, there was imminent danger of such design being accomplished.

In **Maiben v. State**, 405 So.2d 87, 88 (Miss. 1981), this Court announced that

> . . . . . we will not set aside a guilty verdict, absent other error, **unless it is clearly a result of prejudice, bias or fraud, or is manifestly against the weight of credible evidence.** [emphasis supplied]

The following observations made in **Groseclose v. State**, 440 So.2d 297, 300 (Miss. 1983), are also worth repeating here:

> We will not order a new trial unless convinced that the verdict is so contrary to the overwhelming weight of the evidence that, to allow it to stand, **would be to sanction an unconscionable injustice.** *Pearson v. State*, 428 So.2d 1361, 1364 (Miss. 1983). Any less stringent rule would denigrate the constitutional power and responsibility of the jury in our criminal justice system. [emphasis supplied]

In short, this Court will not set aside a guilty verdict unless the verdict is manifestly against the weight of credible evidence [**Maiben v. State**, 405 So.2d 87, 88 (Miss. 1981)] and unless this Court is convinced that to allow the verdict to stand, would be to sanction an unconscionable injustice. **Groseclose v. State**, 440 So.2d 297, 300 (Miss.

Contrary to Porter's position (Brief of the Appellant at 3), the case at bar does not exist in this posture.

CONCLUSION

There was more than sufficient evidence to support the jury's verdict that Porter did not stab Moore in self-defense, whether imperfect or otherwise, and was guilty of premeditated murder, not heat of passion manslaughter.

Porter, after threatening to kill both Moore and his estranged wife, removed a knife from his pocket and stabbed Moore. Following his arrest Porter made post-arrest admissions to law enforcement expressing his intent to kill Moore and his regret over the fact he did not also kill his wife.

In this posture, any rational juror could have found beyond a reasonable doubt that Porter was not acting in self-defense, whether perfect or imperfect, when he approached Moore and stabbed Moore once in the chest.

Indeed, in our opinion, the question is not even close.

Furthermore, in light of the evidence presented at trial which, we submit, fails to preponderate heavily, if at all, in Porter's favor, and giving the State the benefit of all favorable inferences, the verdict was not against the overwhelming weight of the evidence.

"In any jury trial, the jury is the arbiter of the weight and credibility of a witness' testimony, [and] [t]his Court will not set aside a conviction without concluding that the evidence, taken in the most favorable light, could not have supported a reasonable juror's conclusion that the defendant was guilty beyond a reasonable doubt." **Rainer v. State**, 473 So.2d 172, 173 (Miss. 1985).

The case at bar does not exit in this posture.

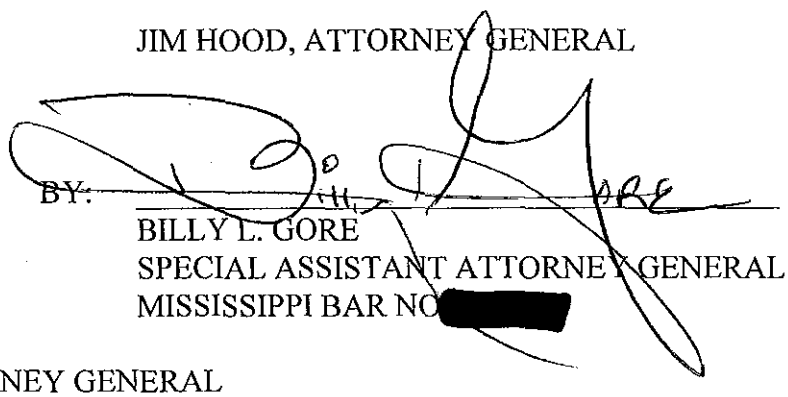
Although Porter, with the able and effective assistance of trial counsel, claimed he stabbed Moore in self-defense, his claim was rejected by the jury in the wake of appropriate

jury instructions.

Appellee respectfully submits that no reversible error took place during the trial of this cause and that the judgments of conviction of murder, simple assault, and recidivism, together with the life sentence and consecutive six (6) month sentence imposed by the trial court, should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL



BY: _____

BILLY L. GORE
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO [redacted]

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

CERTIFICATE OF SERVICE

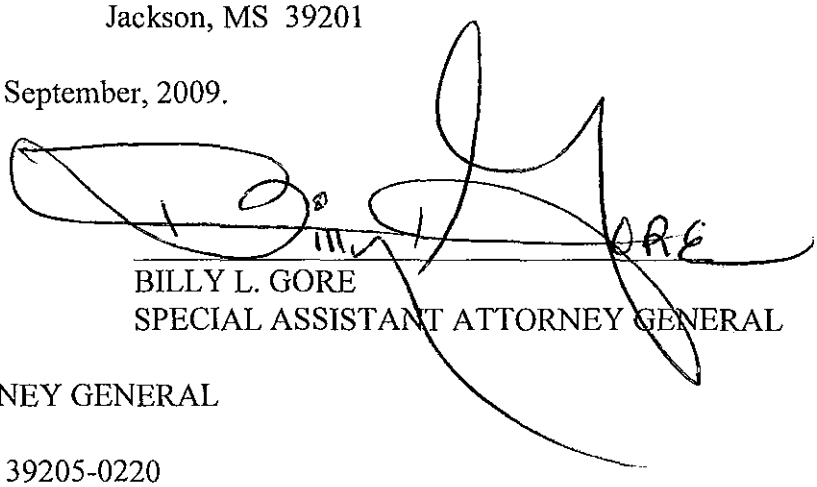
I, Billy L. Gore, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Albert B. Smith, III
Circuit Court Judge, District 11
Post Office Drawer 478
Cleveland, MS 38732

Honorable Laurence Y. Mellen
District Attorney, District 11
Post Office Box 848
Cleveland, MS 38732

George T. Holmes, Esquire
Attorney at Law
301 North Lamar Street, Suite 210
Jackson, MS 39201

This the 15th day of September, 2009.



BILLY L. GORE
SPECIAL ASSISTANT ATTORNEY GENERAL

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