IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ROBERT PORTER — APPELLANT

V. — NO. 2009-KA-00657-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
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CERTIFICATE OF INTERESTED PERSONS

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

1. State of Mississippi
2. Robert Porter

THIS 4th day of August 2009.

Respectfully submitted,

ROBERT PORTER, Appellant

By: George T. Holmes

George T. Holmes, Staff Attorney
MISSISSIPPI OFFICE OF INDIGENT APPEALS

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STATEMENT OF THE ISSUES

ISSUE NO. 1: **WHETHER THE VERDICT IN BOTH COUNTS IS SUPPORTED BY THE EVIDENCE?**

STATEMENT OF THE CASE

This appeal proceeds from of Circuit Court of the Second Judicial District of Bolivar County, Mississippi, and a judgment of conviction for the crime of murder under Count I, and simple assault under Count II, against Robert Porter resulting from a jury trial held May 12, 2008 with the Honorable Albert B. Smith, III, Circuit Judge, presiding. Porter was sentenced as an habitual offender to life without parole under Count 1 and was sentenced to a consecutive six (6) months under Count II, and is currently incarcerated with the Mississippi Department of Corrections.

FACTS

According to the trial testimony supporting the verdict, during the evening of April 7, 2007, Robert Porter entered a "club" known as "Clea's Place" or "the L. A. Connection" in Choctaw, Mississippi, and noticed his estranged wife Rosemary Porter sitting with a male friend Terry Moore. [T. 17-22, 49-58, 68]. According to Rosemary, Porter approached her and Moore, stating, "[d]idn't I tell you, both of you, if I had caught y'all together I would kill both of you. " [T. 18, 50].

Then Porter reportedly left the bar, but came right back, walked up to Rosemary

and Moore's table, stabbed Moore once and then cut Rosemary on her left arm and exited. [T.17-22, 49-58]. Witnesses said Moore was able to get up from his chair, grab a beer bottle from a nearby table, but, then he collapsed and died on the scene. *Id.* Moore's cause of death was caused by a single knife wound between the right sixth sand seventh ribs which pierced his right lung and punctured his heart. [T. 102, 104-05].

Porter was arrested thereafter in Ruleville sleeping in his car. [T. 72, 75-77, 79]. The arresting officer, and a detective both said Porter was very intoxicated, and admitted to them that he had just assaulted two people. [T. 77-78, 87].

Porter testified at trial explaining that he had been at a family funeral earlier and then had been drinking. [T. 113]. Porter said that three weeks prior to the above described incident at Clea's Place, Terry Moore had "jumped him" and beat him up, and that, when the stabbing occurred, he responded in self-defense to Moore's move for a weapon and aggressive movement towards him. [T. 120-23]. According to Porter, Moore's "[r]eaching for a weapon, had me scared." *Id.* Porter reiterated, "I feared for my life at that time." [T. 129]. Porter said that since Moore had attacked him previously, and because Moore had allegedly been arrested for that attack, Moore was "out to get" him and that Moore was known to carry a weapon. [T. 121-23]. Porter said Moore "kept coming up" and "I just stuck him." *Id.*

Porter testified that Rosemary ended up being cut by Porter's fingernail in tussling just after the stabbing of Moore, because, Rosemary "jumped up" and "[s]he will cut you,

'cause she cut [Porter] once before." *Id.*

Porter admitted telling Rosemary that evening after discovering her with Moore, that he had said, "I didn't want to catch y'all together anymore 'cause I don't want to be -- responsible for my actions." [119-20]. Porter did not remember making any admissions to police officers after his arrest. [T. 128, 142].

SUMMARY OF THE ARGUMENT

The evidence did not support the two convictions and Porter should have been acquitted under both counts; alternatively, the verdict in Count I should have been manslaughter, not murder.

ARGUMENT

ISSUE NO. 1: WHETHER THE VERDICT IN BOTH COUNTS IS SUPPORTED BY THE EVIDENCE?

The rule is clear that the appellate courts of Mississippi will not reverse a conviction for being against the weight of the evidence unless "to allow it [the conviction] to stand would sanction an unconscionable injustice." *Bush v. State*, 895 So.2d 836, 844 (¶ 18) (Miss.2005). In making this determination the "Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the trial court abused its discretion in failing to grant a new trial." *Nicolaou v. State*, 612 So.2d 1080, 1083 (Miss.1992). "Any factual disputes are properly resolved by the jury

and do not mandate a new trial." *McNeal v. State*, 617 So.2d 999, 1009 (Miss.1993).

Porter's position is that this was a case of justifiable self-defense. Even taking the state's case is the best possible light, there was no proof of a deliberate design to kill. The trial court should have granted Porter's motion for a new trial. [R.107-08]. Not only was there insufficient proof of murder, Rosemary Porter was the aggressor under Count II.

Murder requires premeditation or deliberate design. MCA § 97-3-19(1) (1972):

> Although our law has never prescribed any particular *ex ante* time requirement, the essence of the required intent is that the accused must have had some appreciable time for reflection and consideration before pulling the trigger. *Blanks v. State,* 542 So. 2d 222, 226-227 (Miss. 1989)

The present facts are akin to those in the case of *Kirkland v. State*, 573 So.2d 681, 682 (Miss. 1990) where the Mississippi Supreme Court reversed a manslaughter conviction and ordered a new trial finding the weight of the evidence in that case did not support the verdict. Specifically, the *Kirkland* court found that Kirkland killed the victim in necessary self-defense after seeing the victim reaching for a pistol. The *Kirkland* court said, "[w]hile we are not willing to say that no reasonable juror could have convicted the defendant of manslaughter under these facts, the evidence is, in our opinion, exceedingly unconvincing that the shooting was not justified." *Id.* As here, in *Kirland*, there had been some history of prior violence over a female, and prior to the altercation leading to the homicide, Kirkland had armed himself. *Id.*

In the present case, no rational juror could conclude that Porter acted with deliberate design to kill Moore, nor wilfully harmed Rosemary. It follows that the verdicts of guilty under Counts I and II were not supported by the credible evidence and Porter's conviction should be reversed, even viewing the state's evidence in the best possible light. *Edwards v. State*, 736 So. 2d 475, 477-79 (Miss. Ct. App.1999).

Alternatively, Porter's motion for JNOV should have resulted in a manslaughter verdict notwithstanding the murder conviction based on the theory of "imperfect self-defense" as set out in *Wade v. State*, 748 So. 2d 771, 773-76 (Miss.1999). In other words, taking the State's case in its best light, the only conviction which could arguably said to be supported by the evidence is one for manslaughter, not murder.

Manslaughter is defined in MCA § 97-3-35 (1972)

> 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.

In *Wade, supra,* the defendant was charged with killing her boyfriend with whom she was in business as co-owners of a bar. As in the present case, in *Wade*, there was testimony of previous violence. Wade's boyfriend had been physically abusive to her. *Id.*

On the day of the killing in *Wade*, the boyfriend became abusive, Wade went and retrieved a gun and said, "You ain't gonna hit me no more," the boyfriend moved toward Wade and she shot him. In the present case, Moore had reportedly assaulted Porter on a previous occasion, and made some gesture indicating to Porter that Moore was becoming

aggressive again. [T. 120-23, 129].

In *Wade,* the Supreme Court stated that Wade was angered by "what appeared to be a renewed attack", and so Wade's case "clearly was a killing in the heat of passion and arguably a case of imperfect self defense, and as such, manslaughter was the appropriate verdict. 748 So. 2d at 773. The same conclusion is valid in the present case.

An important point made by the court in *Wade* was that there was insufficient evidence of "malicious intent"; and, the same can be said of Porters's situation, as any "ill will", was engendered by past physical attacks. *Id.* at 774. The similarities between *Wade* and present facts require the same result here.

The Supreme Court described the theory of "imperfect self-defense" reducing murder to manslaughter as "an intentional killing ... done without malice but under a bona fide (but unfounded) belief that it was necessary to prevent great bodily harm." *Id.* at 775. See also *Lanier v. State*, 684 So. 2d 93, 97 (Miss.1996). This language in definitely applicable here.

The Supreme Court has defined "heat of passion" as:

> ... a state of violent and uncontrollable rage engendered by a blow or certain other provocation given, which will reduce a homicide from the grade of murder to that of manslaughter. Passion or anger suddenly aroused at the time by some immediate and reasonable provocation, by words or acts of one at the time. The term includes an emotional state of mind characterized by anger, rage, hatred, furious resentment or terror. *Mullins v. State*, 493 So. 2d 971, 974 (Miss. 1986).

When "an intent to kill" arises "from a sudden passion induced by insult,

provocation or injury from another," if the defendant is "still enraged," the homicide may nevertheless be manslaughter. *Windham v. State*, 520 So. 2d 123, 126-27 (Miss 1988). Whether such a killing is murder or manslaughter is usually a question for the jury. *Id.*

So, "it is possible for a deliberate design to exist and the slaying nevertheless be no greater than manslaughter." *Williams v. State*, 729 So. 2d 1181,1186 (Miss. 1998). In *Williams,* where the defendant had joined with several other defendants in the beating death of the victim for no apparent reason and Williams was convicted of murder, the supreme court reversed on grant of certiorari because the trial court failed when requested to instruct the jury on differentiating between malice aforethought and deliberate design, and because Williams' murder conviction resulted in a miscarriage of justice. *Id.*

The definition of "heat of passion" is:

> ... a state of violent and uncontrollable rage engendered by a blow or certain other provocation given, which will reduce a homicide from the grade of murder to that of manslaughter. Passion or anger suddenly aroused at the time by some immediate and reasonable provocation, by words or acts of one at the time. The term includes an emotional state of mind characterized by anger, rage, hatred, furious resentment or terror. *Mullins v. State*, 493 So. 2d 971, 974 (MS 1986)

In this case, all of the evidence shows that Robert Porter acted on impulse without premeditation. There is no proof of premeditation to commit a homicide. As described in the state's evidence, there was no cooling off period from the time that Porter first saw Moore and Rosemary and went out to his car and back.

In *Dedeaux v. State*, 630 So. 2d 30, 31-33, (Miss. 1993) the court reviewed the

facts of a barroom shooting where the Defendant was charged and convicted of murder for shooting his girlfriend's husband. Similar to this case, there was ongoing animosity. *Id.* The defendant Dedeaux shot the victim three times, twice while the victim was moving toward him, and a third time as the victim lay on the ground. *Id.*

Even though the defense did not request a manslaughter instruction in the *Dedeaux* case, the supreme court found that the facts only supported a conviction for manslaughter because, "this clearly was a killing in the heat of passion" even though a "greater amount of force than necessary under the circumstances" was used. *Id.* The *Dedeaux* court reversed the murder conviction and remanded the case for re-sentencing for the crime of manslaughter. 630 So. 2d 31-33

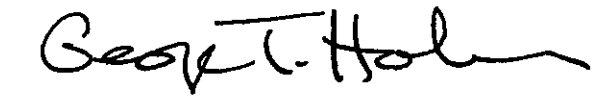
In *Clemons v. State*, 473 So. 2d 943 (Miss. 1985), the court pointed out that there was "such contradictory testimony that it is virtually impossible to reconstruct what actually happened". 473 So. 2d at 944. The *Clemons* case involved a barroom stabbing. The *Clemons* court pointed out "there is more than enough conflicting evidence to cast at least a reasonable doubt as to murder", then, reversed the murder conviction and remanded for sentencing for manslaughter. *Id.* at 945.

In the case at bar, we see a similar factual scenario as in *Dedeaux* and *Clemons*. Namely, there is some sort of argument with provocation by the victim and reaction by the accused involving more than reasonable force, resulting in the unfortunate and unnecessary death of the victim.

CONCLUSION

Robert Porter respectfully requests that his convictions under both counts be reversed and rendered, or, be remanded for a new trial, or that the murder conviction in Count I be reduced to manslaughter with remand for resentencing.

Respectfully submitted,
ROBERT PORTER, Appellant

By: 

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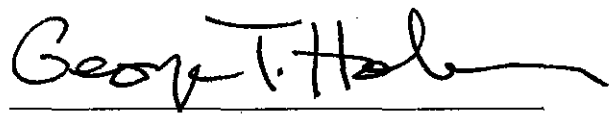
CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 4th day of August, 2009, mailed a true and correct copy of the above and foregoing Brief Of Appellant to Hon. Albert B. Smith, IIII, Circuit Judge, P. O. Box 478, Cleveland MS 39090, and to Hon. Brenda F. Mitchell, Asst. D. A. , P. O. Box 848, Cleveland MS 38732, and to Hon. Charles Maris, Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid.



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