IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JEREMY NEIL PITTS — APPELLANT

VS. — NO. 2009-KA-1034-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JEREMY NEIL PITTS **APPELLANT**

VS. **NO. 2009-KA-1034-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

PROCEDURAL HISTORY:

On April 28-30, 2009, Jeremy Neil Pitts, "Pitts" was tried for the murder of Matthew Joseph Rogers before a George County Circuit Court jury, the Honorable Dale Hankey presiding. R.1. Pitts was found guilty and given a life sentence in the custody of the Mississippi Department of Corrections. R. 293.

Mr. Pitts' motion for a new trial was denied by the trial court. C.P. 135. Pitts through his trial counsel filed notice of appeal to the Mississippi Supreme Court. C.P. 122-123.

ISSUES ON APPEAL

I.

WAS THE JURY PROPERLY INSTRUCTED?

II.

WERE THE MANSLAUGHTER INSTRUCTIONS PROPERLY GIVEN?

III.

DID PITTS RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL?

IV.

WAS THERE CREDIBLE, SUBSTANTIAL EVIDENCE IN SUPPORT OF THE CONVICTION?

STATEMENT OF THE FACTS

On October 15, 2007, Mr. Pitts was indicted along with Mr. Ray Hancock, and Mr. Kevin Davis for deliberate design murder of Mr. Matthew Rogers on April 2, 2007 by a George County Grand jury. C.P. 1.

On April 28-30, 2009, Jeremy Neil Pitts was tried for the murder of Mr. Matthew Joseph Rogers before a George County Circuit Court jury, the Honorable Dale Hankey presiding. R.1. Pitts was represented by Mr. George Shaddock. R. 1. Mr. Hancock and Mr. Davis had previously pled guilty to manslaughter. R. 140; 166.

Mr. Ray Hancock testified that he was an eye witness to the shooting. He was living with his wife, Amy, in an upstairs apartment at his parent's house where the shooting occurred. He along with others had been drinking beer and smoking pot prior to the shooting. R. 131. Hancock testified that the victim, Matthew Rogers, was not armed when he was shot. R. 136. He had given his handgun to him prior to the shooting. Hancock also testified that the victim had a beer in his hand when shot. R. 145.

Mr. Hancock also testified that he was a member of a gang. R. 102. It was called the Simon City Royals. Both the victim and Pitts were also members. R. 102. The leader of the gang, Jay Bullock, had a dispute with the victim. He wanted the victim "to lay down the flag," or leave the gang. The victim refused. R. 104. Under the gang rules, this called "for minutes," or for a fight between the victim and the leaders of the gang, who were Bullock and Pitts. R. 100-105.

Mr. Hancock had previously pled guilty to manslaughter and was serving an eighteen year sentence. R. 140.

Ms. Amy Hancock testified that she was present at the crime scene. R. 157. She testified that those present beside herself were members of a gang called the Simon City Royals. Rogers, the

victim, was not armed when he was shot. R. 158. The gun which Rogers had previously had in his possession was in her husband's possession. Amy testified that her mother and father and three children were present downstairs at the time of the shooting. One child was a six months old baby. R. 157.

Mr. Kevin Davis testified that he was present when the victim was shot. Rogers was not armed when shot unexpectedly by Pitts. R. 170. Davis admitted that he was a member of the Simon City Royals. R. 167. He admitted knowing that the leaders of the gang, Bullock, and Pitts, were going to confront the victim. This was over Rogers, a.k.a. Hollywood's, defiance of the gangs binding rules of conduct. R. 166-167.

Davis testified that he left the scene of the crime with Pitts in his car. R. 170. When Pitts informed the leader of the Simon City Royals, Mr. Bullock, that he had "just shot Mr. Rogers," Bullock stated, "that's what he gets." R. 171.

Dr. Stephen Hayne testified that he performed an autopsy on the victim. He determined the cause of death to be a gunshot wound to the left side of his chest. The path of the bullet was downward and into the victim's body. It traveled through his lungs, and severed the victim's aorta. Mr. Rogers died quickly from a massive loss of blood. R. 97-98.

The trial court denied a motion for a directed verdict. R. 209-210. The trial court also denied a motion for mistrial based upon testimony about gang affiliation. The trial court found that testimony about gang membership was relevant and its probative value exceeded its prejudicial effect. R. 207-208.

It provided a context for understanding the circumstances under which the shooting and death of the victim occurred. It occurred as a result of an alleged "violation" of the rules of the Simon City Royals. Mr. Pitts admitted that he and the victim were members of this gang. R. 208-

209.

State's exhibit 20 is a copy of the **Miranda** waiver form that was executed, witnessed and signed by Mr. Pitts in the presence of Officers Lambert and Keel. Accompanying this is state's exhibit 21 a video and audio CD which recorded the interviews with Pitts, including his knowingly and intelligently signing the **Miranda** waiver of rights form. This was in the presence of Sheriff Lambert, and Officer Keel. It indicates that Pitts understood his right to remain silent but was waiving that right along with his right to counsel.

State's exhibit 22 is a verbatim transcription of the verbal portion of the interview. This included a series of post-**Miranda** interview statements with Mr. Pitts. See manila envelop marked "Exhibits." Initially, Pitts claimed to know nothing concerning the death of the victim. He claimed to have slept most of the day, and been informed of the death by others by telephone. See CD, exhibit 21, and State's exhibit 22, page 268-269.

Exhibit 23 was a hand marked diagram of the small up stairs apartment where the shooting took place. It was drawn by Mr. Pitts. It shows the close proximity of the four persons when Pitts fired his 9 millimeter handgun.

Mr. Pitts testified in his own behalf. R. 216-279. Pitts admitted to shooting Mr. Rogers on April 2, 2007. R. 221-222. Pitts claimed he was afraid the victim might shoot him. R. 222. Mr. Pitts admitted that Mr. Rogers was not armed when he shot him. Rather Pitts testified that the victim was reaching for the weapon Mr. Hancock had on his person. Hancock was standing near Rogers when he was shot. R. 136.

There was no objection to jury instruction S-2, the murder elements instruction which combined deliberate design murder and depraved heart murder. R. 282. There was no objection to the granting of the heat of passion manslaughter instruction. R. 282; C.P. 102. There was no

objection to S-6b which was a complimentary manslaughter instruction. It stated the conditions for finding reasonable grounds to apprehend danger of being killed for self defense purposes was for the jury to determine. R. 186; C.P. 96. In addition, the defense was granted D-3 which was a lesser included crime instruction for heat of passion manslaughter. C.P. 102.

The record reflects the defense requested and was granted a heat of passion manslaughter instruction on behalf of Mr. Pitts. Mr. Pitts was present with his counsel at that time. R. 285.

Mr. Pitts was found guilty and given a life sentence in the custody of the Mississippi Department of Corrections. R. 293.

Pitts' motion for a new trial was denied by the trial court. C.P. 135. Pitts filed notice of appeal to the Mississippi Supreme Court. C.P. 123.

SUMMARY OF THE ARGUMENT

1. This issue was waived for failure to even raise it with the trial court. R. 281-287; C.P. 111-112. **Gollott v. State**, 672 So. 2d 744, 752 (Miss. 1996). It is also not "plain error." **Morgan v. State**, 793 So.2d 615, 617 (Miss. 2001)

The record reflects that the jury were properly instructed. C.P. 84-93; 97-99. Pitts was given jury instructions for heat of passion manslaughter, and self defense as he requested. C.P. 96; 98. There was no objection to jury instruction S-2 which included the elements for both deliberate design and depraved heart murder. R. 282-285; C. P. 88-89. The appellee believes that this combined elements instruction for murder was proper given the testimony in the record. R. 282 . **Young v. State** , 891 So. 2d 813, 820 (¶17) (Miss. 2005).

Mr. Pitts testified before the jury that he was afraid the victim "might shoot him." R.221-222. Mr. Rogers was reaching for a gun someone else had near him. R. 221-222. See state's exhibit 23 in manila envelop marked "Exhibits" for drawing of crime scene by Mr. Pitts. R. 274-275.

There were some four people present when the victim was shot. R. 156-157. **Young, supra.** Nevertheless, since Pitts claimed to be fearful of being harmed, he was given jury instructions for self defense, and heat of passion manslaughter. R. 221-222.

The record reflects that Pitts' counsel requested a heat of passion manslaughter instruction. This was in Mr. Pitts' presence. R. 282. Therefore , this issue was both waived as well as lacking in merit.

2. This issue was also waived for failure to raise it with the trial court. R. 281-287; C.P. 111-112.. **Russell v. State** , 607 So. 2d 1107, 1117 (Miss. 1993). It is also lacking in merit. Pitts requested a heat of passion manslaughter instruction. R. 282. When given an opportunity, Pitts did not request

an imperfect self defense instruction or a culpable negligence manslaughter instruction. R. 282-287.

He would not be entitled to a culpable negligence instruction since he never claimed and there was no evidence that the shooting was an accident. **Taylor v. State**, 597 So. 2d 192, 195 (Miss. 1992). Pitts admitted to intending to shot the victim. R. 221-222.

In his pre-trial statements to law enforcement, Pitts spoke of being afraid of the allegedly violence prone victim. He claimed the victim was reaching for a weapon when he shot him in self defense. State's exhibit 22, page 305.

In addition, Pitts testified that the victim did not have a weapon "only after" co-defendant eyewitnesses had testified. They testified that the victim was unarmed. R. 136;159. Rather the victim had given his handgun to Ray Hancock. Hancock was present with Pitts, when the victim was shot. Mr. Pitts admitted that after the shooting, Hancock gave him the other handgun. He left with the crime scene with both guns. R. 223. Pitts testified to throwing them into a river when he left George County. R. 223. They were never recovered by investigators.

3. There was neither evidence of deficient performance or prejudice to Pitts's defense to the murder charge, given the evidence against Pitts, his admissions before trial, and his testimony before the jury in which he contradicted himself more than once. R. 216-279.

There is no evidence in support of Pitts allegedly wanting jury instructions for imperfect self defense. R. 282-283. The request for one jury instruction rather than another was presumed to be a matter of "trial strategy" by defense counsel. **Scott v. State**, 742 So. 2d 1190, 1196 (¶14) (Miss. C. A. 2006). Testimony about gang activity is admissible where relevant and probative to an understanding of the charges as it was in this case. **Hoops v. State** 681 So.2d 521, 533 (Miss. 1996).

4. There was credible, substantial corroborated evidence in support of Pitts' conviction for depraved heart murder. **McClain v. State**, 625 So. 2d 774, 778 (Miss. 1993). Mr. Pitts admitted before the

trial and before the jury that he shot Rogers, but merely denied intending to kill him.

Since Mr. Pitts admitted to shooting the victim, there was no basis for an instruction based upon an accident. Since Pitts admitted there were others present when the victim was shot, the appellee believes that an instruction for depraved heart murder was proper. R. 221-222. **Young, supra.**

Since Pitts testified to being afraid the victim would kill him, there was a basis for a heat of passion manslaughter instruction. Pitts testified about the victim's alleged history of violence, possession of firearms, and his having allegedly threatened Pitts the night before the murder. R. 220. The record also reflects that a manslaughter and self defense instructions were requested by Pitts, and granted by the trial court. R. 282; 285. C.P. 102.

Mr. Pitts was not denied a fair trial by jury instructions he never requested, or by an insufficiently effective or active trial counsel. Rather Mr. Pitts had every opportunity to defend himself. He chose to waive his **Miranda** rights knowingly and intelligently, and then proceeded to contradict himself more than once, both before and during his trial. The jury did not find him a credible witness in his own defense. **Neal v. State**, 451 So. 2d 743, 758 (Miss. 1984).

ARGUMENT

PROPOSITION I

THIS ISSUE WAS WAIVED AND IS ALSO LACKING IN MERIT.

Mr. Pitts argues that the trial court erred in not providing proper jury instructions in his case. Pitts argues that jury instruction S-2 on the elements of murder was in error. C.P. 88-89. He does not think that "depraved heart murder" should have been included in the same instruction for "deliberate design murder." C.P. 96. He also thinks that jury instruction S-6B, the self defense instruction, was erroneous. It stated that the defendant must have grounds to fear a design "of some person" to kill him, rather than specifically a design "of the victim" to kill him. Appellant's brief page 15-29.

To the contrary, the record reflects that these jury instruction related issues were waived. They were waived for failure to object or even raise these issues with the trial court. R. 281-287; C.P. 111.

In **Nicholson / Gollott v. State**, 672 So. 2d 744, 752 (Miss. 1996), the Court stated that failure to object to a jury instruction waived that issue on appeal.

> This Court does not review jury instructions in isolation. **Malone v. State**, 486 So. 2d 360, 365 (Miss. 1986). If the instructions given provide correct statements of the law and are supported by the evidence, there is no prejudice to the defendant. **Sanders v. State**, 313 So. 2d 398, 401 (Miss. 1975). This Court has fully examined the instructions granted by the trial court in the case sub judice and finds that, taken together, the jury was correctly and completely charged.
>
> Regarding the instructions Galled claims the trial Court erroneously refused, Gollott failed to object to the refusal of D-4. As a result, this Court is not bound to address the alleged error on appeal. **Locket v. State**, 517 So. 2d 1317, 1332-33 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed 895 (1988). Instruction D-11, which was also refused by the trial court, defines "willful" and "intent." This Court has specifically stated that trial courts need not grant defendant's instructions defining "willful," as that definition is a matter of interpretation for the jury. **Ramon v. State**, 387 So. 2d 745, 751 (Miss. 1980). Instruction S-1 provided the jury with a correct definition of "intent" and the trial courts are under no obligation to grant

cumulative instructions. **Medley v. State**, 600 So. 2d 957, 962 (Miss. 1992).

In addition, the granting of the jury instructions as contained in the record was not "plain error" that substantially effected the Constitutional rights of Mr. Pitts.

In **Morgan v. State**, 793 So.2d 615, 617 (Miss. 2001), the Supreme court found that unless there were errors so egregious as to result in a fundamental miscarriage of justice they would not be considered "plain error."

> ¶ 9. The plain error rule is codified in Miss. R. Evid. 103(d). It provides that nothing precludes the Court from taking notice of plain errors affecting the substantial rights of a defendant, even though they were not brought to the attention of the trial court. If a party persuades the court of the substantial injustice that would occur if the rule were not invoked, the court may invoke the rule. See **Edwards v. Sears, Roebuck & Co.**, 512 F.2d 276 (5th Cir.1975). "Only an error so fundamental that it generates a miscarriage of justice rises to the level of plain error," however. **Gray v. State**, 549 So.2d 1316, 1321 (Miss.1989); **Cohn & Nagel (AG & Co.) v. Guesswork, Inc.**, 874 F.2d 283, 292 (5th Cir.1989).

The appellee believes the record reflects that the jury was properly instruction on the elements of murder as well as on the lesser offense of manslaughter. C.P. 88-89; 96. The record reflects that Pitts claimed in his pre-trial statement to law enforcement that he acted in self defense. See defense exhibit 4, and 22 at page 305 for Pitts' statement at the George County Sheriff's office on April 3, 2007. He claimed that the victim was armed, and he shot him when he saw him "pulling out" a handgun from his waistband.

In defense exhibit 2, Pitts' letter to the victim's family, he admitted to shooting the victim in the shoulder but not intending to kill him. Pitts claimed he died allegedly because someone else, Mr. Ray Hancock, could not or did not get the victim the medical care he needed to stop his bleeding.

However, in his testimony before the jury, Mr. Pitts admitted that he went to the scene to confront or "fight" Mr. Rogers. R. 252. He claimed Rogers was armed, and had previously

threatened to kill him "the night before." R. 220. He also admitted reluctantly that the victim, Matthew Rogers, was not armed when he was shot "in the shoulder." R. 221-222.

However, this happened only after Mr. Ray Hancock, and other eye witness to this tragedy, testified that Rogers was unarmed. This was when Pitts shot him. This was allegedly during an argument. R.136; 170-171. Nevertheless, Pitts insisted, as he had before trial, that when he shot Rogers he was afraid for his own life. R. 222. Mr. Pitts insisted , prior to trial and before the jury that the victim had a reputation for violence and was a previously convicted felon. R. 225-226.

The record reflects that Mr. Pitts gave inconsistent statements to investigators prior to trial. Pitts initially denied knowing anything about the charges or being present when the shooting occurred at Hancock's families house. Exhibit 21, beginning portions of CD, and 22, page 258. However, when he realized what investigators were learning from their investigation, he admitted to being present and to shooting the victim. However, initially this was based upon the victim alleged "reaching" for a handgun when he was shot. Exhibit 22, page 290-291.

After eye witness Ray and Amy Hancock testified that the victim was not armed when shot, Pitts admitted reluctantly that when shot Rogers was not armed. R. 221-222. However, he had previously been armed and was reaching for his handgun near him. It was allegedly the victim's weapon, but in the possession of Hancock who was standing near him.

Mr. Davis testified that he left the scene of the crime with Pitts in his car. When Pitts informed the leader of the Simon City Royals, Mr. Bullock, that he had "just shot Mr. Rogers", Bullock stated, "that's what he gets." R. 171.

In **Readus v. State** 997 So.2d 941, 944 (Miss. App. 2008), the Court relied upon **Lett v. State**, 902 So.2d at 637(¶ 21) (Miss. C.A. 2005), in finding that deliberate design murder and depraved heart murder are not mutually exclusive.

There was evidence that Readus fired a handgun inside an apartment which contained his wife, who was killed, and several children. They were not armed. The Court found this was sufficient evidence for granting a depraved heart murder instruction.

> ¶ 11. We are unable to accept Readus's argument that the State failed to produce evidence showing that he was guilty of either deliberate design murder or depraved heart murder. The State produced evidence showing Readus was the person who shot Marlow and shot and killed Sherry. In fact, Reads himself admitted that he perpetrated the shooting. At the very least, the State produced evidence of depraved heart murder by establishing that while Readus was engaged in an argument with his wife, he fired shots inside an apartment that contained unarmed individuals and several children. The classic example of depraved heart murder is shooting into a crowd of people. **Lett**, 902 So.2d at 637(¶ 21). It is within the province of the jury to draw reasonable inferences from the evidence based on their experience and common sense. **Lewis v. State**, 573 So.2d 719, 723 n. 2 (Miss.1990). We find that Readus's argument is without merit.

In **Young v. State** , 891 So.2d 813, 820 (¶17) (Miss. 2005) the Supreme Court did not find error in granting a depraved heard jury instruction. Young had been indicted, like Pitts, for deliberate design murder.

> ¶ 17. Regarding instruction S-1a, Young argues that the trial court erred when it allowed a "depraved heart murder" clause to be added to the deliberate design instruction. Because the indictment was for deliberate design, Young claimed that this was akin to amending the indictment and specifically objected to it because they were not informed of it by the indictment. In **Mallett v. State**, 606 So.2d 1092, 1095 (Miss.1992), this Court approved just such an instruction, holding that "as a matter of common sense, every murder committed with deliberate design is by definition done in the commission of an act imminently dangerous to others, evincing a depraved heart." This conclusion was based on the fact that "[t]hese two versions of murder are taken straight from the statute, Miss. Code Ann. § 97-3-19 (Supp.1987)" and "[o]ur cases have for all practical purposes coalesced the two so that Section 97-3-19(1)(b) subsumes (1)(a)." Id. There is no error here.

The appellee would submit that, given the presence of other persons near the victim, the jury was instructed properly on the elements of murder. R. 156-157.

There was a factual basis for S-6b self defense instruction including the language "to

apprehend a design on the part of some person to kill him..."C.P. 96. The record reflects that there were four persons in the room when the victim was shot. R. 156-157. The victim's handgun was near the victim in the possession of Mr. Hancock. Pitts' testimony was that the victim was reaching toward the gun when he was shot. R. 221-222 .

Mr. Pitts testified in his own behalf. R. 216-279. His testimony provided a basis for a heat of passion manslaughter and a self defense instructions which he requested and was given. C.P. 96;97; 103. The appellee would submit, given the record cited, the jury instructions did not interfere with Pitts' defense to the charge or the fairness of his trial.

This issue was not only waived , it was lacking in merit.

PROPOSITION II

THIS ISSUE WAS WAIVED AND IS ALSO LACKING IN MERIT.

Mr. Pitts argued that he was denied a proper defense by not having a jury instruction granted for an imperfect self defense instruction. While admitting that he was given manslaughter instructions, he argues that he should have been given this alternative variation for self defense. He also claimed the trial court stated that Pitts was entitled to an imperfect self defense instruction. Appellant's page 29-34.

This issue was also waived for failure to object or to even raise it with the trial court. R. 282. C.P. 111. **Gollott, supra.**

Contrary to assertions by appeal counsel , the record clearly indicates that counsel for Mr. Pitts requested and was granted a heat of passion manslaughter instruction. D-3. Brief page 24; R. 282; 285. C.P. 102.

> Lawrence: Your Honor, that is a manslaughter instruction for heat of passion. Mr. Shaddock told me he wanted one, so that's why I did it. His, I think, is almost exactly the same, and I think we've agree just to submit this one. **But I want the record to show that the defense wants a manslaughter instruction.**
>
> Shaddock: **I do.** R. 282.
>
> Court: Well, I think it would be appropriate. If the jury were to decide that the basis upon which Mr. Pitts feared for his life was an imperfect self defense, a manslaughter instruction would be appropriate. **And y'all agree that this should be given? Mr. Shaddock?**
>
> Shaddock: **I do.** R. 282. (Emphasis by appellee).

Additionally, the trial court did not state that Pitts was entitled to an imperfect self defense instruction, rather he mentioned it when the prosecution wanted the record to reflect that Pitts, through counsel, was requesting a heat of passion manslaughter instruction. R. 282. Pitts was

present when his counsel indicated he wanted such an instruction. There was record support for that instruction. R. 220-222. The jury were also instructed that they were to judge the reasonableness of the apprehension of danger to Pitts, given his testimony, about fearing harm to himself when he fired his hand gun. C.P. 96.

In **Mason v. State**, 440 So. 2d 318, 319 (Miss. 1983) the court stated that it did not accept assertions about facts not proven in the certified record of the cause on appeal.

> We have on many occasions held that we must decide each case by the facts shown in the record, not assertions in the brief, however sincere counsel may be in those assertions. Facts asserted to exist must and ought to be definitely proved and placed before us by a record, certified by law; otherwise we cannot know them. **Phillips v. State**, 421 So. 2d 476 (Miss. 1982); **Branch v. State**, 347 So. 2d 957 (Miss. 1977);...

In addition, as stated under proposition I, the record reflects that Mr. Pitts' defense to the murder charge varied considerably over the course of the investigation, autopsy, and taking of statements from eye witnesses. See State's exhibit 21, the exhibit, and 22, the transcription and Defense exhibit 4 in manila envelop for post-**Miranda** interviews with Pitts.

Suffice it to say, Mr. Pitts went from denying any knowledge or involvement in the slaying to admitting to shooting the victim but not intending to kill him. He also claimed self defense, which changed from claiming fear when the victim was allegedly reaching for his handgun on his person, to claiming before the jury that he was reaching for his gun which was in the possession of someone else. The record reflects that Hancock, a fellow gang member, was standing near the victim inside a small apartment, when he was shot and killed. R. 136; 221.

In **Taylor v. State**, 597 So. 2d 192, 195 (Miss. 1992), this Court stated that the trial court's instructions must be taken together and need not cover every point of importance as long as the point is fairly presented elsewhere.

In the instant cause, Mr. Pitts requested and received a lesser included crime instruction, jury

instruction D-3 which was a heat of passion manslaughter instruction. It was for a killing done without deliberate design or in necessary self defense. R. 282; C.P. 102. This was in addition to other jury instructions which covered manslaughter. C.P. 90; 96; 98; 102.

> Our well settled rule is that on appeal we consider complaints of error in jury instructions by reading the instructions as a whole. All instructions "are to be read together and if the jury is fully and fairly instructed by other instructions the refusal of any similar instruction does not constitute reversal error." **Laney v. State**, 486 So. 2d 1242, 1246 (Miss. 1986). Not every instructions need cover every point of importance, so long as the point is fairly presented elsewhere.

The record reflects there Pitts shot an unarmed fellow gang member. R. 221-222. The only issue had to do with "the mens rea." Since Pitts admitted that he intended to shot the victim, there was evidence of intent to use a deadly weapon. On the other hand, after the Hancocks' testimony, Pitts admitted that the victim was unarmed . However, he was standing beside Hancock who had his gun. This provided a basis for depraved heart murder given evidence of indifference or disregard for the safety of three others present nearby at the time of the shooting. R. 156-157.

Mr. Pitts testimony also included the fact that victim threatened to kill him the night before the slaying, and that the victim was an ex-convict with a history of violence. R. 225-226. While reluctant to admit the victim was unarmed when shot, nevertheless, he still maintained he was reaching for a handgun. It was within easy reach when he was shot. The appellee would submit that this testimony was in keeping with his request for a heat of passion manslaughter and self defense instructions, as were granted by the trial court.

The appellee would submit that this issue is lacking in merit.

PROPOSITION III

PITTS RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Pitts believes that he was not given effective assistance of counsel. He faults trial counsel for not making objections to the testimony of the victim's mother, to the admission of gang related documents and testimony about the Simon City Royals, to the prosecution's jury instructions, to Pitts interview statements to investigators and failure to request imperfect self defense or culpable negligence manslaughter instructions on his behalf. Appellant's brief page 35-43.

To the contrary, the appellee would submit that the record reflects that Mr. Pitts received effective assistance of counsel. There is a lack of evidence of either deficient performance or of prejudice to Pitts' defense as a result of the alleged inadequate performance of his trial counsel. In addition, Pitts did not meet his burden of proof for faulting his counsel. Pitts has no affidavits from anyone in support of his contentions, including none from trial counsel who is being accused of incompetence. **Lindsay, infra.** Appellant's brief page 1-46.

Therefore, there is no record support for appeal counsel's claims of Pitts wanting different jury instructions from those requested in his presence by his experienced defense counsel. R. 280-289. **Mason, supra.**

There is a presumption that trial counsel's actions in requesting some jury instructions and not others was reasonable and a result of trial strategy. **Scott v State**, 742 So 2d 1190 , 1196 (¶14) (Miss. C. A. 1999)

For Mr. Pitts to be successful in his ineffective assistance claim, he must satisfy the two-pronged test set forth in **Strickland v. Washington**, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064-65, 80 L. Ed. 2d 674, 693-95 (1984) and adopted by this Court in **Stringer v. State**, 454 So. 2d 468,

476-477 (Miss. 1984). Pitts must prove: (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense. The burden of proving both prongs rests with Pitts. **McQuarter v. State**, 574 So. 2d 685, 687 (Miss. 1990).

Finally, Pitts must shown that there is "a reasonable probability" that but for the alleged errors of his counsel, Mr. Shaddock, the result of his trial would have been different. **Nicolau v. State**, 612 So. 2d 1080, 1086 (Miss. 1992), **Ahmad v. State**, 603 So. 2d 843, 848 (Miss. 1992).

The second prong of the **Strickland v. Washington**, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) is to determine whether there is a reasonable probability that but for the alleged errors of Mr. George Shaddock, the result of Pitts' trial would have been different. This is to be determined from "the totality of the circumstances" involved in his case.

Appellee would submit that based upon the record we have cited, there is a lack of evidence for holding that there is "a reasonable probability" that Mr. Shaddock erred in representing Pitts before the jury. The record reflects overwhelming corroborated evidence against Pitts. Three eye and ear witnesses, testified to seeing Pitts shot the victim. R. 136; 158-159, 170-171. Pitts admitted to shooting the victim prior to trial. See defense exhibit 1 page 2.

Pitts admitted reluctantly before the jury , given his pre-trial statements of shooting an armed man "pulling out" a handgun, that the victim was actually not armed. Exhibit 22, page 305; R.221-222. He also admitted to leaving the scene without seeking medical assistance for the person he claimed he shot but did not intent to kill. R.222.

State's exhibit 20 was a copy of an executed, and witnessed **Miranda** waiver of your rights form. It shows Pitts' signature along with that of Officers Lambert and Keel. On state's exhibit 22, page 267, a transcript of law enforcement's contact with Pitts, Pitts acknowledged understanding his right to remain silent, as well as to have counsel, but was knowingly waiving those rights. See also

and view CD made of post-**Miranda** interviews with Pitts.

Medical diagram 15 and photographs 17 and 18 taken at the autopsy indicate that the bullet entrance wound to the front of the victim's upper left chest and exit wound to the back of the victim's right middle chest was "catastrophically fatal." R. 98 . The bullet penetrated both lungs and the victim's aorta. The direction of the bullet was from left to right into the victim's body. It was in no way a flesh wound to the outside "shoulder." R. 221-222. Consequently, the victim died quickly from massive internal and external bleeding.

In addition, Pitts admitted that he left the crime scene and George County without checking on the victim , or his medical condition without calling for assistance. Eye witness Hancock testified that Pitts left the scene of the crime after asking him what he was going to tell police investigators. R. 137.

The record reflects Pitts left the scene to seek the leader of the Simon City Royals, who was informed that the victim had been shot. R. 171.

In **Hoops v. State** 681 So.2d 521, 533 (Miss. 1996), the Supreme Court found that testimony about gang involvement was admissible where relevant and if its probative value exceeded any unfair prejudice .

> On balance, this Court finds Hoops's gang involvement to be relevant, not unfairly prejudicial, and adequately supported by the evidence. Consequently, this assignment of error is meritless

In the instant cause, Pitts admitted that he was a member of the Simon City Royals, as did Mr. Hancock and Mr. Davis. R.104;167; 226 . This was at the time of the shooting. As occurred in **Hoops, supra**, an understanding of gang activity was necessary if the jury was to understand the reasons for the hostile and fatal confrontation with the victim. The record reflects that trial counsel did object to such testimony more than once but was overruled by the trial court based upon the

Hoops, precedent.

As stated in **Strickland** to show ineffective assistance it is necessary to show that without the alleged errors the outcome of the proceedings would have been different:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. 698.

In **Lindsay v. State**, 720 So. 2d 182, 184 (¶6) (Miss. 1998), the Court stated that an ineffective assistance claim is deficient when supported only by a defendant's affidavit.

> In examining applicable case law, it is further shown that Lindsay's claims are without merit. The only affidavits in the record that suggest appellant's counsel was deficient are those filed by Lindsay. This is not enough to prove ineffective assistance. In a case involving Post Conviction Relief, this Court has held, "that where a party offers only his affidavit, then his ineffective assistance for counsel clam is without merit." **Vielee v. State**, 653 So. 2d 920, 922 (Miss. 1995) See also **Brooks v. State**, 573 So. 2d 1350 (Miss. 1990); **Smith v. State** , 490 So. 2d 860 (Miss. 1986).. Since that is all that the appellant offers, his claim of ineffective assistance must fail.

The appellee would submit that there was a lack of evidence of either deficient performance, given the evidence against Mr. Pitts and his own unsupported self serving defense, much less any evidence of prejudice to his defense as a result of his trial counsel's representation. R. 216-279.

This issue is also lacking in merit.

PROPOSITION IV

THERE WAS CREDIBLE, SUBSTANTIAL CORROBORATED EVIDENCE IN SUPPORT OF THE JURY'S VERDICT.

Mr. Pitts argues that there was insufficient evidence in support of his conviction for depraved heart murder. He argues there was no evidence of meditation or intent to kill the victim. He also believes there was no evidence that he committed an act eminently dangerous to others, evincing a depraved heart. Pitts believes that if there was sufficient evidence for a conviction, it would be solely for involuntary manslaughter or culpable negligence manslaughter. Appellant's brief page 43-46.

To the contrary, as shown under prior propositions, Mr. Pitts was not denied a fair trial by jury instructions he never requested, or by an insufficiently active and/or effective trial counsel. Rather Mr. Pitts had ever opportunity to defend himself. He chose to waive his **Miranda** rights knowingly and intelligently, and then proceeded to contradict himself more than once, both before and during his trial. R. 255. The jury did not find him a credible witness.

Mr. Pitts testified that he acted in self defense, fearing for his life. He testified that the victim threatened to kill him prior to their confrontation. R. 219-222. Rogers, a.k.a. "Hollywood" was a convicted felon with a history of violence, and was allegedly known to be armed. R. 219-221.

Since Mr. Pitts admitted that he shot the victim, and he died, the only issue left to be resolved was what was Pitts mental state at the time he used his hand gun. The appellee would submit that there was credible, substantial corroborated evidence in the record in support of the jury's verdict. When Pitts shot the victim, there were four persons present, three of whom were members of "the Simon City Royals" gang. R. 104, 167, 226. In addition, there were five people included three children downstairs. R. 157. Hancock was standing near the victim. His wife, Amy Hancock, was

also present as was fellow gang member Mr. Kevin Davis.

Mr. Pitts admitted in his testimony that Rogers did not have a handgun when he shot him. Rather he testified that he had previously given the gun to Mr. Ray Hancock. R. 221-222. Pitts testified that when he shot Rogers, he thought he was reaching for that gun. This was the handgun Hancock had near him in the small apartment room.

> Q. Okay. What happened next?
>
> A. Okay. What happened next, Ray Hancock went into the third room, asked Matt Rogers could he see his gun. Okay. **Matt handed him the gun. Matt stayed in the third room. Ray come back in the second room with the gun.**
>
> Q. Okay.
>
> A. Okay. Well, Matt come out of the third room, back into the second room, and he told Ray to give him the gun back. So, they started arguing and we all three started arguing. **And in the middle of the argument, he goes for the gun and I fired one shot and hit him in the shoulder, not meaning to kill him.** R. 221-222.
>
> ...
>
> Q. And you left?
>
> A. I really didn't. I didn't think it was–you know, I surely didn't think he was going to die, because, you know, when it happened, he grabbed his shoulder. He said a few words, I can't remember what it was, and he walked into the other room.
>
> Q. **And you left?**
>
> A. **Yes.** R. 222. (Emphasis by appellee).

On cross examination, Mr. Pitts admitted that he had never previously told law enforcement that Hancock, rather than Matthews, the victim had the handgun.

> Q. **You never told the police that Ray Hancock had the gun?**
>
> A. **Sir, once again, like I said, I was confused and , you know, I didn't tell exactly everything that happened. I was confused.** And now I'm telling what really happened. R. 255. (Emphasis by appellee).

The record reflects that Mr. Ray Hancock, another admitted member of the Simon City

Royals gang, testified prior to Mr. Pitts. R. 100-150. His eye witness testimony made it clear that Mr. Rogers, the victim, was not armed when Pitts shot him in his presence. R. 136.

Mr. Ray Hancock testified that Rogers, a.k.a. "Hollywood," handed him a handgun prior to his being shot by Pitts. R. 134. They had been smoking pot and drinking beer. Hancock also testified that Pitts pulled a gun out of his "back waistband." This was when Rogers came through an interior door, and was speaking to Pitts. Rogers was not armed. After Rogers was allegedly unexpectedly shot, Pitts left the victim. Pitts left after he asked Hancock what he was going to tell the police. R. 137.

> Q. Who's they? Give us blow by blow, if you remember, as best you can.
>
> A. Well, Jeremy came in, he started talking about what's up now? And Wood was–he was like, oh, it's going to be like this, it's going to be like this. And then he shot him.
>
> Q. **Who shot him?**
>
> A. **Jeremy.**
>
> Q. All right. Did Jeremy have his gun out when he first walked in?
>
> A. No.
>
> Q. Where was his gun?
>
> A. Behind his–in his waistband.
>
> Q. **At the time Matthew was shot by Jeremy, did he have any weapon in his hand?**
>
> A. **No.** R. 136. (Emphasis by appellee).
>
> ...
>
> Q. Yes.
>
> A. **I had–when he got shot, he had a beer in his left hand.**
>
> Q. **Yes.**

Q. You talking about the dead man, the deceased?

A. Yes. R. 145-146. (Emphasis by appellee).

Therefore, it is uncontested that Pitts shot an unarmed man. He admitted that he intended to shot him, just not to kill him. R. 221-222. Hancock was near Rogers when he was unexpectedly shot by Pitts. He made it clear the victim was not armed. He was corroborated by two other eye witnesses, Amy Hancock and Kevin Davis. R. 158-159; 170. Mr. Pitts admitted reluctantly that the victim was not armed. Nevertheless, Pitts claimed he was afraid of Rogers because of his threat to kill him, and his history of violence. R. 219-220; 222.

In **McClain v. State**, 625 So. 2d 774, 778 (Miss. 1993), the Court stated that when the sufficiency of the evidence is challenged, the prosecution was entitled to have the evidence in support of its case taken as true together with all reasonable inferences. Any issue related to credibility or the weight of the evidence was for the jury to decide, not an appeal's court.

> The three challenges by McClain (motion for directed verdict, request for peremptory instruction, and motion for JNOV) challenge the legal sufficiency of the evidence. Since each requires consideration of the evidence before the court when made, this Court properly reviews the ruling on the last occasion the challenge was made in the trial court. This occurred when the Circuit Court overruled McCain's motion for JNOV. **Wetz v. State**, 503 So. 2d 803, 807-08 (Miss. 1987). In appeals from an overruled motion for JNOV, the sufficiency of the evidence as a matter of law is viewed and tested in a light most favorable to the State. **Esparaza v. State**, 595 So. 2d 418, 426 (Miss. 1992); *Wetz* at 808; **Harveston v. State**, 493 So. 2d 365, 370 (Miss. 1986);...The credible evidence consistent with McCain's guilt must be accepted as true. **Spikes v. State**, 302 So. 2d 250, 251 (Miss. 1974). The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. *Wetz*, at 808 , **Hammond v. State**, 465 So. 2d 1031, 1035 (Miss. 1985); *May* at 781. Matters regarding the weight and credibility of the evidence are to be resolved by the jury. **Neal v. State**, 451 So. 2d 743, 758 (Miss. 1984);..We are authorized to reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty. *Wetz* at 808; *Harveston* at 370; **Fisher v. State**, 481 So. 2d 203, 212 (Miss. 1985).

When the testimony, and other evidence, including forensic evidence, was taken as true there

was more than sufficient credible, substantially corroborated evidence in support of Pitts' conviction for murder. Pitts admitted in his testimony to shooting Mr. Rogers "in the shoulder." R.221-222. He did so before trial (defense exhibit 1, page2) and in his testimony.

However, in his testimony , he admitted that the victim was not armed when shot. R. 221-222. This was after eye witness Ray Hancock, Amy Davis and Kevin Davis had testified that the victim was not armed. R. 136, 158-159,170. In fact, Hancock testified that the victim had a beer in his left hand when shot. R. 145.

Nevertheless, Pitts claimed he was afraid of the victim. Rogers had allegedly threatened him the night before the shooting, and had a history of violence, and was thought to be armed.
In addition, the record reflects that all the men present at the crime scene were members of the Simon City Royals gang. R. 104, 167, 222; 226.

Pitts admitted that he went to Hancock's apartment because he knew the victim was there at the time. He went to confront the victim. This was to confront him over his violation of gang rules. Since Rogers had defied the authority of the gang leaders, he had been requested "to lay down the flag," or resign from the gang. Since he had refused to resign, and was allegedly defiant, he was supposed to be "violated." This meant be forced into a fight with another gang member. R. 105.

However, the record reflects that instead of fighting with Rogers, the victim, Pitts unexpectedly shot him. This was during an alleged argument. The leader of the gang believed that the victim got what he deserved for defying his authority in the gang. R. 171.

Therefore, the elements of murder had been clearly satisfied except for the issue of whether Pitts acted with "deliberate design," or acted in a manner eminently dangerous to others, and evincing "a depraved heart." C.P. 89.

The jury found from all the evidence presented that Pitts had acted in a way that displayed

reckless disregard for human life. The appellee would submit that we have cited sufficient corroborated record evidence in support of their verdict.

Mr. Pitts testimony about how he acted in self defense out of fear of "Hollywood " was considered by the jury but found wanting. Pitts self serving testimony of acting in self defense when the victim was not armed was considered but not found believable, given all the evidence. R. 221-222.

There was corroborated eye witness testimony indicating that not only was the victim not armed, there were other persons near him when he was shot. R. 136; 170-171; 221-222. There were five other persons in the apartment downstairs including a six months old baby. R. 157

This was sufficient evidence in support of finding that Pitts acted with disregard for the safety of others when he intentionally fired his hand gun in close proximity to others in a small apartment. **Young, supra.** See photograph exhibit 8 for photograph of upstairs apartment where shooting occurred.

In **Noe v. State**, 616 So. 2d 298, 302 (Miss. 1993), this Court stated that when the sufficiency of the evidence is challenged that the evidence favorable to the State must be accepted as true with all reasonable inferences. Evidence favorable to the defendant is to be disregarded.

> In judging the sufficiency of the evidence on a motion for a directed verdict, or request for peremptory instruction, 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. **Clemons v. State**, 460 So. 2d 835 (Miss. 1984).

In **Jones v. State** , 635 So. 2d 884, 887 (Miss. 1994), the Mississippi Supreme Court stated that a motion for a new trial should be denied unless doing so would result in an "unconscionable injustice."

The appellee would submit that there was no injustice in denying Pitts' motion for a new

trial. The trial court and jury did not finding his self serving and contradictory testimony credible. R. 216-279.

The appellee would submit that this issue is lacking in merit.

CONCLUSION

Mr. Pitts' conviction for murder should be affirmed for the reasons cited in this brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, W. Glenn Watts, 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:

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This the 20th day of April, 2010.

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