IN THE MISSISSIPPI SUPREME COURT

NO. 2009-KA- 01034-COA

JEREMY NEAL PITTS — APPELLANT

VERSUS

STATE OF MISSISSIPPI — APPELLEE

APPEAL FROM THE CIRCUIT COURT
OF GEORGE COUNTY, MISSISSIPPI

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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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 so that the Justices of this Court may evaluate possible disqualification of recusal:

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Kevin Dwayne Davis
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Jeremy Neal Pitts
Defendant/Appellant

Matthew Joseph Rogers
Deceased

Amy Hancock
Alleged accessory after the fact

Walley J. Bullock, III
Alleged accessory after the fact

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STATEMENT OF THE CASE

I. Course of the Proceedings and Disposition in the Court Below:

On October 15, 2007, an Indictment charging deliberate design murder was returned against Jeremy Neal Pitts, in the Circuit Court of Jackson County, Mississippi.

On April 28, 29, & 30, 2009, trial was held for Jeremy Pitts. On April 30, 2009, the trial concluded with a jury verdict and the return of a guilty verdict as to depraved heart murder. Final Judgment was entered by the trial court on April 30, 2009. [R.E. 105].

Following the State's announcement that it rested, and the presentation of the Appellant's case-in-chief, the Appellant requested that the trial court grant him a directed verdict; which was denied by the trial court judge. [Tr.280]

Pitts filed for a Motion for a New Trial and for JNOV. After consideration thereof, this motion was denied on June 26, 2009. [R.E. 135]. Notice of Appeal was filed on June 23, 2009.

II. STATEMENT OF FACTS:

On October 15, 2007, Jeremy Neal Pitts was indicted for killing and murdering Matthew Joseph Rogers "with deliberate design to effect the death of Matthew Joseph Rogers". (CP 1). The Appellant contended the homicide was in self-defense. Without amending the indictment, the State offered a jury instruction, that the Appellant's trial counsel did not object to, requesting the jury to consider convicting the Appellant of

a"depraved heart murder", a crime that the Appellant was not indicted for and the State never amended or moved to amend its indictment and charge him with this crime. The jury verdict read as follows:

> "We, the jury, find the Defendant, Jeremy Neal Pitts, Guilty of depraved heart murder" (CP 104).

The Court sentenced the Appellant to a life sentence (CP 105). A Motion for New Trial was filed and on June 18, 2008, was argued and overruled (CP 135, TR 307).

The Appellant, Jeremy Neal Pitts, was indicted for a "deliberate design murder". No motions to amend this indictment, formally or *ore tenus*, were ever made. The Appellant's trial counsel did file a suggestion of incompetency (CP 31), but a subsequent evaluation by psychologist Chris Lock was performed, finding the Appellant competent to stand trial and competent to assist his counsel. This motion was subsequently withdrawn (TR 25). The Appellant's counsel, prior to jury selection, did move that the Court instruct the District Attorney's Office not to question prospective jurors about gang activity (TR 12). The trial court indicated it had prior knowledge about the facts of the case and how "gang activity" was involved because of a co-defendant's plea, and the Appellant's attorney requested that the judge recuse himself (TR 17). Both of these motions were subsequently overruled. (TR 22). During *voir dire*, the Court limited the State as to what they could say concerning the Appellant's gang affiliation or gang activity, but the State renewed its motion prior to trial and the trial court relied on *Hoops v. State*, 681 So.2d 521 (Miss. 1996) and felt some gang testimony is permissible under the Mississippi Rules of Evidence, Rule 404(b). (TR 34). The District Attorney, in his opening statement, pointed out that the Appellant was a member of the Simon City Royals, a gang "that had just started up here in George County"

(TR 41). The Appellant's attorney moved for a mistrial and was overruled. The District Attorney made further comments about the Simon City Royals and the Appellant's attorney made another motion for a mistrial, then asked for a continuing objection to the reference to the Simon City Royals and the gang activity. (TR 41).

The Appellant's attorney, in his opening statement, tried to introduce a six-page letter written by the Appellant which was an apology to the victim's parents (TR 47) and to which the State objected, and it was not allowed to be introduced.

The State offered the following witnesses at trial:

LINDA ROGERS

Linda Rogers was the decedent's mother. She had almost no relevant testimony whatsoever, except to try to inflame the jury so they would be prejudiced against the Appellant. She pointed out that her husband was a pastor, and identified some pictures of her son. She stated that both she and her husband greatly loved their son and "he was his heart. He was his only son." (TR 52). No objection to Mrs. Rogers' testifying or any motion in limine was filed by the Appellant' s attorney to limit her testimony. The Appellant's attorney attempted at trial to introduce the six-page letter that the Appellant wrote to the victim's parents, but it was objected to and not allowed to be introduced. (TR 61-62).

JAMES D. MITCHELL

On April 2, 2007, Deputy Mitchell was one of the first responders to a call from 3148 Old Mobile Highway in George County, Mississippi. Upon approaching the house they found Ray Hancock in the front yard on a cell phone yelling "upstairs, upstairs, he's got a gun, he's got a gun" (TR 69). Deputy Mitchell indicated they announced 'sheriff's department' and went from room to room with their guns drawn. Deputy Mitchell went

upstairs and found the victim's body in the third room upstairs with blood around him. (TR 75-76).

STEVE HANEY

Pathologist Steve Haney was offered as an expert in the field of forensic pathology and was allowed to testify with no objection by the Appellant's attorney and without being voir dired at all concerning his qualifications (TR 89). Dr. Haney testified that the victim died of a gunshot wound to the left shoulder which went through his left lung, aorta, esophagus, and right lung. (TR 97-98).

DANIEL RAY HANCOCK

Ray Hancock is the individual who lived at 3148 Old Mobile Highway in George County, Mississippi. He was a member of the Simon City Royals (TR 101-102) and testified that the victim, Matthew Rogers, was a member and that the Appellant, Jeremy Pitts, was also a member and was "ace trey five", and that he knew Jeremy Pitts shot Matthew Rogers. (TR 103). Jay Bullock was the leader of the Simon City Royals. (TR 104). The victim had been asked to "lay down his flag", which means leave the organization, and the victim refused to leave the organization. (TR 104). The victim's name was Hollywood or "Wood" and he requested to be "called out for minutes", which meant that all the members would get into a circle and any animosity you might have for each other would be resolved by fighting. (Tr 105). Gang documents were introduced that had the signatures of the Appellant and the victim. (TR 109). Hancock pointed out that the Simon City Royals are affiliated with the Gangster Disciples and the State was repeatedly allowed to argue, similar to testifying, that the motive behind the entire killing was gang related and this was all done in the presence of the jury. (TR 113-115). After all of these comments were made in

the presence of the jury, the Court even questioned how long the gang had been here, who was in it, bordering on sensationalism. (Tr 117). This occurred after the State had introduced most of this as evidence in the presence of the jury, with no objection by the Appellant's attorney, Hancock discussed a conversation he had with the victim on the day of the shooting. (TR 129). It was Hancock's understanding that Jay Bullock and the victim were going to "go minutes", which means fighting, and the Appellant showed up at the house. (TR 134). The Appellant got into an argument with the victim and the Appellant shot the victim. (TR 134). Hancock admitted that at the time of the shooting he had the victim's pistol. (TR 134). Hancock admitted he pled guilty to manslaughter and received twenty years, eighteen to serve, two years post release supervision (TR 139). Hancock admitted that the victim, Matthew Rogers, had a criminal history for assaulting an old man. (TR 149). Hancock admitted he joined the Simon City Royals when he was in prison serving a sentence for burglary. (TR 150).

AMY MARTIN HANCOCK

Amy Hancock admitted she was married to Ray Hancock and she lived at the same address on Old Mobile Highway. (TR 153-154). She testified about a hearsay conversation between the victim and her husband concerning the victim's gun. (TR 158). She claimed Mr. Pitts showed up and said "MF, I got a beef with you " (Tr 158-159). Mrs. Hancock admitted she lied to law enforcement, though when she gave her reason for first lying to law enforcement but later telling the truth, she said "because Jeremy was in jail then. Then I felt like I could go tell the truth." The District Attorney then asked her, "So you felt safe at that point?" She responded affirmatively. (TR 161). This exchange was had with no objection from the Appellant's attorney.

KEVIN DAVIS

Mr. Davis admitted he pled guilty to manslaughter and that on April 2, 2007, he went over to Mr. Hancock's house to violate Mr. Rogers because he was a member of the Simon City Royals (TR. 167). He was then questioned about a hearsay conversation he had with the victim, where the victim asked him was Mr. Pitts at Mr. Hancock's home. No objection was made by the Appellant's attorney. Davis "reckoned he was worried about Pitts being over there". (Tr 168-169). Davis indicated that Jeremy Pitts walked in, they started arguing, and Pitts shot Rogers. (TR 170). Davis further claimed he and Pitts went and picked up Jay Bullock, and Pitts admitted to shooting Rogers, and Bullock told him "that's what he gets". (TR 171). Then the Appellant's attorney reiterated the point that Davis had talked to the victim and the victim was concerned about the Appellant being at Hancock's house on Old Mobile Highway before he showed up. (TR 174). No objection was made by Appellant's counsel about the hearsay conversation between the victim and witness Davis. Davis pointed out that Rogers had threatened Appellant Pitts the night before. (TR 179).

JOHN ANTHONY KEEL

Keel was a George County Sheriff's Deputy who arrived with Deputy Mitchell. He said Ray Hancock was outside in a panic state, stating "he's got a gun, he's upstairs, Matt Rogers is upstairs and he's got a gun" (TR 183). Deputy Keel testified concerning all the various statements that all of the witnesses, Ray Hancock, Amy Hancock, and Kevin Davis, had given to him and the contents of these statements with no objection from the Appellant's attorney. (TR 190-191). With no objection from the Appellant's attorney, and no pre-trial motion to suppress, the Appellant's statement was offered into evidence. For

the first hour of the Appellant's statement, he would not admit to anything. Then the deputies and the sheriff himself made the following expressed and implied promises of leniency to the Appellant:

> KEEL:
> It boils down to this, were you deceitful and led us down the wrong path or did you cooperate with the investigation? It makes a difference. Did you cooperate and did you help law enforcement? Were you forthcoming and did you give truthful statements? Or did you withhold information? Did you not tell the truth?

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> KEEL:
> If you don't tell your story and all these other people tell it, *you know how it's gonna make you look when you get upstairs to go to court?* You know how it's gonna look?

****

> SHERIFF WELFORD:
> I mean I - I know you - you - you know I told you when you came in, you done the right thing by doing this. *If you came in here to not talk to us then you're not gonna help yourself a whole lot because they're gonna saddle you with this whole thing if you don't - if you don't help us out a little bit, son. I - I just, you know, you gotta help yourself.*

****

> SHERIFF WELFORD:
> . . . And basically *I want you to help yourself. I want you to help yourself. You know?*. . . Uh, do something to help yourself or either you gonna have a whole (unintelligible) on your shoulders son 'cuz they - they're draggin' you down.

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> SHERIFF WELFORD:
> *We as the Sheriff's Department at some point in time, if you - if you tell me the truth and it was a self-defense thing, if it was self-defense we're gonna take what you tell us before a grand jury in George County, you know?. . . You know, there's different levels of killing people.*

With all of these expressed and implied promises of leniency throughout his statement, the Appellant's attorney did not even file a pre-trial motion to suppress same and did not request a hearing to suppress the statement. The statement was played in its entirety to the jury. (Exhibit #21, TR 194). This statement was used to impeach the Appellant's testimony greatly when he testified and it was clearly involuntary. The District Attorney asked the Appellant more than fifteen (15) times questions starting with "Didn't you tell the police . . .". (TR 244, 245, 246, 247, 254, 255, 256, 257, 258, 259,260, 264, 266 and 267). With no objection from the Appellant's attorney, the District Attorney asked Deputy Keel, other than the Defendant, "Did anybody tell you Matthew Rogers had a gun at the time of the shooting?" The deputy responded no. (TR 202).

After Deputy Keel testified, the State rested. (TR 209). The Appellant's attorney called Jay Bullock, who invoked his 5th Amendment right to remain silent and did not answer any questions. (TR 211-215). The Appellant then took the stand himself.

JEREMY NEAL PITTS

The Appellant testified that he did not mean to kill the victim at the time of the shooting, and that the victim went for a gun and he fired once at the victim's shoulder, not meaning to kill him. He did not feel like he had greatly injured Rogers, and he left the home on Old Mobile Highway. (TR 221-224). Pitts voluntarily went to the Sheriff's Department and turned himself in. (TR 224).

Most of the cross-examination by the District Attorney's Office was about the Appellant's activity as a Simon City Royal. (TR 226- 237). The first question the District Attorney asked the Appellant was "Are you a Simon City Royal?" (TR 226). The remainder of the questioning was impeaching the Appellant with his previous statement, which was

the result of expressed or implied promises of leniency from the George County Sheriff's Department, and was clearly involuntary.

After the Appellant testified, the defense rested.

Appellant's attorney renewed his Motion for Directed Verdict, which he made at the close of the State's case. (TR 209 and 280).

SUMMARY OF THE ARGUMENT

I. The trial court was in error when it allowed the State to submit an elements instructions which contained depraved heart murder, when the Appellant was indicted for deliberate design murder only. The Appellant Court should review its opinions utilizing the coalescing language of *Windham v. State*, 602 So.2d 798 (Miss.1992), and, *Mallet v. State*, 606 So.2d 1092 (Miss.1992), and return to the traditional view of M.C.A. 97-3-19(1)(a) & (b). In addition, it was error for the trial court to grant the State's instruction on self-defense which did not conform to the approved language of *Robinson v. State*, 434 So.2d 206 (Miss.1983) and *Reddix v. State*, 731 So.2d 591 (Miss.1999).

II. The Appellant's trial counsel, as well as the trial court, should have instructed the jury on involuntary manslaughter, imperfect self-defense or culpable negligence manslaughter. To not do so, given the evidence which had been presented to the jury, was error.

III. The Appellant's trial counsel provided ineffective assistance of counsel, pursuant to the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), which resulted in the Appellant's conviction for depraved heart murder.

IV. The evidence is legally insufficient to convict the Appellant of depraved heart murder. At most, the evidence would support only a conviction for manslaughter.

LEGAL ARGUMENT

I. THE TRIAL COURT WAS IN ERROR WHEN IT GRANTED (a) STATE'S JURY INSTRUCTION S-2 (elements instruction); (b) STATE'S JURY INSTRUCTION S-6B (self-defense).

There were numerous jury instructions offered by both the State and the Appellant's trial counsel. A review of the record indicates that Appellant's trial counsel had no objection to any of the instructions discussed, even those that were incorrect/incomplete statements of the law, such as D-1and S-6. A list of the pertinent jury instructions presented to the trial court are:

S-2[1] State's instruction which set forth the elements for both deliberate design murder and depraved heart murder(M.C.A. §19-3-19(1)(a) & (b) (Tr.282, no objection)

S-4[2] State's elements instruction for heat of passion manslaughter (Tr.282, no objection)
D-3 Appellant's elements instruction for heat of passion manslaughter (Tr.286)

S-6[3] State's self-defense instruction (Tr.283, no objection)
D-1 Appellant's self-defense instruction (identical to S-6)
S-6A[4] State's self-defense instruction (Tr.288, no objection)
S-6B[5] State's self-defense instruction

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[1]Jury Instruction 2.

[2]S-4 was ultimately refused by the trial court. (Tr.286)

[3]S-6 does not contain the language required by *Reddix v. State*, 731 So.2d 591,595 ¶¶20-21 (Miss.1999). (Tr.285; D-1 was withdrawn). See R.E. #

[4]S-6A does contain the language required by *Reddix*, supra.

[5] Jury Instruction 3. Identical to S-6A but changes the word "murder" to "killing".

S-7[6] (from the record it appears that this was a deliberate design instruction)

S-7A Definitions for malice, deliberate design, design.
S-8 Definition for heat of passion.

A culpable negligence manslaughter instruction was not requested by the Appellant's trial counsel, nor was one suggested by either the trial court or the State. The trial court did comment during the jury charge conference that it felt like an imperfect self-defense manslaughter instruction may be warranted. There was no response to the trial court's suggestion of giving this instruction; although, the State and Appellant's trial counsel did submit a heat of passion manslaughter. (Tr. 282).

Standard of Review:

The following standard of review is used by the Appellate Court when an objection is made to a jury instruction which was given or refused by the trial court:

> Jury instructions are to be read together and taken as a whole with no one instruction taken out of context. A defendant is entitled to have jury instructions given which present his theory of the case, however, this entitlement is limited in that the court may refuse an instruction which incorrectly states the law, is covered fairly elsewhere in the instructions, or is without foundation in the evidence. (citations omitted)

Harris v. State, 861 So.2d 1003,1012 (¶18) (Miss.2003); *Austin v. State*, 784 So.2d 186,192 (Miss.2001).

The Appellant requests that the Appellate Court review the complained of jury instructions given to the jury under the plain error doctrine as his trial counsel failed to preserve any errors regarding jury instructions in the record. Further, that these errors were of such magnitude that they affected the substantive and fundamental rights of the

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[6]The form of this instruction was refused by the trial court; however, Appellant's trial counsel had no objection to it. (Tr.283)

Appellant. See, *Jackson v. State*, 815 So.2d 1196,1199 (¶4) (Miss.2002); *Snow v. State*, 800 So.2d 472,483 (¶34) (Miss.2001). This Court has also held:

> We again hold that when the circuit court grants instructions clearly erroneous and which deny the accused a fair and objective evaluation of the evidence by the jury, we will reverse, even though there was no objection by defense counsel. *McMullen v. State*, 291 So.2d 537, 541 (Miss.1974). A circuit judge has a responsibility to see that the jury is properly instructed. *Peterson v. State*, 518 So.2d 632, 637-638 (1987); *Harper v. State*, 478 So.2d 1017, 1018, 1022-1023 (Miss.1985); *Newell v. State*, 308 So.2d 71, 78 (Miss.1975).

Duvall v. State, 634 So.2d 524,525-26 (Miss.1994).

Analysis:

A. Jury Instruction 2 (S-2) - Elements Instruction:

The Appellant was indicted for committing a killing with deliberate design. (CP 1). However, during the jury charge conference the State submitted S-2[7] which contained the elements of deliberate design murder, as well as, depraved heart murder pursuant to M.C.A. §97-3-19 (1)(a) & (b).

There have been numerous cases considered by the Appellate Courts involving the same issue complained of now by the Appellant. A review of some of these cases would seemingly provide a quick answer to the Appellant's suggestion of error here, i.e.:

> There is no question that the structure of the statute suggests two different kinds of murder: deliberate design/premeditated murder and depraved heart murder. The structure of the statute suggests these are mutually exclusive categories of murder. Experience belies the point. As a matter of common sense, every murder done with deliberate design to effect the death of another human being is by definition done in the commission of an act imminently dangerous to others and evincing a depraved heart, regardless of human life. Our cases have for all practical purposes coalesced the two so that Section 97-3-19(1)(b) subsumes (1)(a). *See Windham v. State*, 602 So.2d 798 (Miss.1992);

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[7]See. R.E. #

Fairman v. State, 513 So.2d 910, 913 (Miss.1987); *Johnson v. State,* 475 So.2d 1136, 1139-40 (Miss.1985); *Talbert v. State,* 172 Miss. 243, 250, 159 So. 549, 551 (1935).

Mallet v. State, 606 So.2d 1092,1095 (Miss.1992).

The Appellant would submit that the quick answer may not necessary hold true when its application in those cases since *Windham v. State*, 602 So.2d 798 (Miss.1992) and *Mallett, Id.* are examined.

Although pre-dating *Windam, Id.*, the review should begin with *Johnson v. State*, 475 So.2d 1136 (Miss.1985). In that case the defendant was convicted for the murder of her infant son; Johnson was indicted, and convicted for, depraved heart murder. Two of the arguments on her appeal of that conviction, were that the indictment did not contain the words "malice aforethought," and a State's jury instruction which stated that a finding of malice aforethought was not necessary. The Court did not discuss or debate the requirement of "*others*" found in M.C.A. §97-3-19(1)(b), but addressed its opinion to the question raised by the defendant regarding the absence of the language "malice aforethought". In discussing her argument regarding the jury instruction, the Court noted that "[t]he statute itself, therefore, expressly dispenses with the requirement of premeditated design, or malice aforethought." *Id.* at 1140. Consequently, since the indictment tracked the language of M.C.A. §97-3-19(1)(b) it was sufficient.

Roughly six years later the case of *Windham v. State*, 602 So.2d 798 (Miss.1992) was considered by the Court. This appeal dealt with Windham's conviction following his second

trial[8]. Unlike the defendant in *Johnson, Id.*, Windham was indicted for deliberate design murder pursuant to M.C.A. §97-3-19(1)(a). However, his jury was instructed on both "deliberate design" murder and "depraved heart" murder. Windham objected that there was no evidentiary basis for the instruction as his actions were directed at Mr. Calvert and not "others" as required by M.C.A. §97-3-19(1)(b). In addressing the evidentiary basis for the instruction, the Court stated the following:

> The evidence clearly establishes the existence of actual or implied malice or deliberate design. More specifically, the evidence establishes the possibility that Otis could have killed Calvert "while acting in a manner eminently dangerous to others [i.e., the Calverts] and evincing a depraved heart, regardless of human life."

Id. at 801.

In addressing his objection, the Court further noted that "[u]nder that the traditional view, death which resulted from a reckless act directed toward a *particular* individual would not be deemed to be within the scope of depraved-heart murder in general." *Id.* at 802. The Court went on to discuss how the traditional view on depraved heart murder had evolved to include a risk to only one person, especially from injuries inflicted through the use of an object, citing to opinions from other jurisdictions. The Court then stated that *Johnson*[9] "left no question ... that the depraved-heart murder statute ... encompasses a reckless and eminently dangerous act directed toward a single individual." *Id.* at 803. It can also be seen from reading the following passage in the *Windham* opinion that the Court was of the opinion that adhering to the traditional view may result in a manslaughter

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[8]Windham's first conviction was reversed and remanded in *Windham v. State*, 520 So.2d 123 (Miss.1987).

[9]*Johnson v. State*, 475 So.2d 1136 (Miss.1985).

conviction, rather than, to a murder conviction:

> Indeed, this Court can perceive no rationale for characterizing a horrendously-violent act, like the one committed by Otis, as manslaughter rather than depraved-heart murder, simply because, under the traditional view, the act must have been directed toward "*human life in general*" as opposed to *one individual in particular*.

Id. at 803.

As to Windham's argument that the giving of a depraved heart murder instruction negatively impacted upon his manslaughter instruction, the Court stated:

> Depraved-heart murder and culpable-negligence manslaughter are distinguishable simply by degree of mental state of culpability. In short, depraved-heart murder involves a higher degree of recklessness from which malice or deliberate design may be implied.

Id. at 801.

Justice Hawkins concurred in affirming Windham's conviction, but issued a separate written opinion as he had "serious misgivings." In discussing the *Windham* case and the giving of the depraved heart murder instruction, Justice Hawkins stated the following:

> If the slaying in this case was indeed a subparagraph (b) murder, then there is no way any court can ever direct a verdict to a jury that the defendant is at most guilty of manslaughter. Every instance of a *slaying* in the *heat of passion* is perforce committing an act *dangerous to another*. Whether the defendant is convicted of murder or manslaughter will depend upon the whim or circumstance of the jury hearing the case, not upon understandable instructions delineating what constitutes each crime. *Id.* at 805.

> If we read the statute as the Legislature manifestly meant it to be read, we would encounter no difficulty. This statute says quite simply that a person who (1) engages in some act extremely dangerous to others and (2) who does so with an evil state of mind---*e.g.*, placing a bomb in a building---this meets the requirement. If we would leave it at that, we would have no problem. We had none in the first 150 years we had the statute. It is when a Court seeks to expand the statute to mean something else that we run into trouble. *Id.* at 806.

> When the distinction between criminal statutes, which over the years have accumulated well-defined meanings, is blurred, we create problems for the prosecution and defense, and ourselves as well. *Id.* at 806.

Id. at 805-06 (Hawkins, P.J., concurring).

Three months later the Appellant Court issued its opinion in *Mallett v. State,* 606 So.2d 1092 (Miss.1992). The jury in *Mallett* was instructed as to both deliberate design murder and depraved heart murder, although from the opinion it appears that he had been indicted for deliberate design murder only. *Mallett's* objection to this instruction was that it allowed the "jury 'a multiple choice' in considering the charge of murder." *Id.* at 1094. It is in this opinion that the "coalescing" language appears:

> Our cases have for all practical purposes coalesced the two so that Section 97-3-19(1)(b) subsumes (1)(a).

Id. at 1095.

In *Catchings v. State,* 684 So.2d 591 (Miss.1996) we begin to see evidence of the concerns expressed by Justice Hawkins in *Windham*[10]. In this case, Catchings struck the victim in the head with a saw horse, which severed the latter's nose and resulted in his death some seven weeks later. Catchings was indicted for deliberate design murder, however, the jury was instructed as to both deliberate design and depraved heart murder. One of Catching's arguments concerning the giving of a combined deliberate design-depraved heart murder instruction was that there was no evidence to support an instruction on depraved heart. In response to his argument, the Court's opinion referenced Catchings' actions in

[10]*Windham v. State,* 602 So.2d 798,805-06 (Miss.1992).

relation to "one individual"[11] and the "coalescing" language of *Mallett*[12].

Of further note in this case, Catchings was given a manslaughter instruction; and, he objected to the trial court's giving of S-5[13], the State's deliberate design instruction because it conflicted with the holding in *Windham v. State*, 520 So.2d 123 (Miss.1987). The Court found that there was no conflict because (1) Catchings' presented a self-defense argument; and, (2) there was no evidence to support the manslaughter instruction he was given. *Id.* at 595.

In *Ruttley v. State*, 746 So.2d 872 (Miss. App.1998) the defendant was indicted for depraved heart murder and the only instruction submitted to the jury was for depraved heart. The thrust of his argument on appeal was that the evidence presented[14] indicated that his actions were deliberate in nature, i.e., deliberate design; consequently, there was no evidence to support a depraved heart instruction. The Court of Appeals responded by citing the "coalescing" language of *Mallett*[15], and Ruttley's use of "an object" to inflict the injuries as bringing this matter within the scope of M.C.A. §97-3-19(1)(b).

There have been numerous other opinions since *Windham*[16] and *Mallett, Id.*,

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[11]Citing to *Windham, Id.* at 802.

[12]*Mallett v. State*, 606 So.2d 1092,1095 (Miss.1992).

[13]S-5 contained the following language: "... malice aforethought does not have to exist in the mind of the slayer for any given length of time; and **if at the moment** of the act of violence...." (emphasis added).

[14]Ruttley shot the victim in the chest following an argument over the purchase of marijuana. *Id.* at 875.

[15]*Mallett v. State*, 606 So.2d 1092,1095 (Miss.1992).

[16]*Windham v. State*, 602 So.2d 798 (Miss.1992).

wherein the issue arose of submitting both deliberate design and depraved heart murder instructions to the jury, when the defendant had been indicted for only one or the other. The majority of these decisions do not discuss the issue at length, but merely cite to the language found in *Windham, Id.*, *Mallett, Id.*, and *Catchings, Id.*

Another problem arising from the "coalescing" language contained within the *Windham, Id.*, and *Mallett, Id.*, opinions is the effect of this "coalescing" on the various manslaughter statutes in effect in Mississippi. Justice Banks issued a separate dissenting opinion in *Windham, Id.*, concerning the deliberate design-depraved heart discussion of the majority. In his dissent, Justice Banks said the following:

> The "depraved heart" provision is designed to reach different conduct, undirected as to a single individual or the individual harmed as fully explained in Justice Hawkins' opinion. As Justice Robertson incisively notes, the majority reading of "depraved heart" murder subsumes both deliberate design murder and most, if not all, of our various manslaughter statutes. That's the problem.

Windham, Id. at 808-09 (Banks, J., dissenting).

The very concern[17] raised by Justice Banks in his dissenting opinion can be seen in different opinions issued by the Appellant Courts since the issuance of *Windham, Id.*

In *Tait v. State*, 669 So.2d 85 (Miss.1996) the defendant was indicted for, and convicted of, depraved heart murder. In its' opinion, the Court discussed the "coalescing" language of *Mallet, Id.* and how depraved heart murder had been construed as "encompassing 'a reckless and eminently dangerous act directed toward a single individual.'" *Id.* at 88, citing to *Windham, Id.* at 802. The jury was not instructed on culpable negligence, however, a heat of passion manslaughter instruction was given at the

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[17]And also noted in Justice Hawkins concurring opinion in *Windham, Id.*

State's request[18]. The Court found that the evidence did not support the giving of a heat of passion manslaughter; if anything, the Court believed that the evidence supported culpable negligence and remanded the case for the defendant to be sentenced for culpable negligence manslaughter.

Later, in *Outlaw v. State*, 797 so.2d 918 (Miss.2001), the defendant argued that the murder instruction (which encompassed both deliberate design and depraved heart) contradicted the heat of passion manslaughter instruction which was also given. The Court did not find that such a conflict existed in this particular case. However, the Court also stated that:

> It is true, however, that the application of "depraved heart" murder to circumstances such as these conflicts with "heat of passion" manslaughter. Unfortunately for Outlaw, this Court approved that conflict in *Windham II.*

Id. at 921.

And, in *Chandler v. State*, 946 So.2d 355 (Miss.2006), the defendant was indicted for deliberate design murder. The jury was instructed as to both deliberate design and depraved heart murder. In addition, instructions were granted for manslaughter, imperfect self-defense and accident/misfortune. However, the trial court denied the defendant's instructions regarding culpable negligence, stating that these instructions were not supported by the evidence and therefore improper. *Id.* at 361.

These cases seem to beg the question. Since this Court has clearly said on prior occasions that depraved heart murder and culpable negligence manslaughter are distinguished by the degree of "mental state culpability", how then, can the evidence

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[18]The defendant did not request a manslaughter instruction.

presented in *Chandler, Id.*, support an instruction for depraved heart murder, but not a culpable negligence manslaughter instruction?

As can been seen from a review of those cases discussing "deliberate design" murder as opposed to "depraved heart"murder, it is clearly seen that the fears of both Justice Hawkins and Justice Banks[19] have materialized since the issuance of the *Windham*[20] opinion. In some of these cases there has been no real discussion of the raised issue that the evidence supports only one, but not both, other than to repeat the language of *Windham, Id., Mallett, Id.* or *Catchings, Id.*

The language of M.C.A. §97-3-19(1)(b) states that the act must be "eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual." Conversely, M.C.A. §97-3-19(1)(a) requires that the act which results in the death of another be "done with deliberate design to effect the death of the person killed, or of any human being."

In other words, a person could be convicted of a depraved heart murder with or without the presence of deliberate design. While a person could only be convicted of deliberate design murder if it were found that he/she acted with deliberate design to effect the death of another.

In *Windham, Id.* the Court stated the following regarding Johnson's conviction for killing her infant son:

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[19]As expressed in their respective separate opinions.

[20]*Windham v. State*, 602 So.2d 798 (Miss.1992).

> In *Johnson v. State*, 475 So.2d 1136 (Miss.1985), this Court left no question regarding the view to which Mississippi adheres. That is, this Court construed Miss.Code.Ann. §97-3-19(1)(b) (Supp.1984) -- the depraved heart murder statute -- in a manner which encompasses a reckless and eminently dangerous act directed toward a single individual.

Id., at 803.

It is easy to see why the Court would take the position that it took in *Johnson*, *Id.*, i.e., that her conviction for depraved heart murder should be affirmed. First, there is no indication in the Court's opinion that Johnson voiced an objection that M.C.A. §97-3-19(1)(b) was not applicable in her case[21], as the evidence did not establish that she had been engaged in an act which was "eminently dangerous to *others*" (emphasis added). In addition, it appears that her child was an infant and had been subjected to repeated beatings. Likewise, the Court in *Windham*, *Id.*, expressed concern that a following of the traditional view could result in a manslaughter conviction for *Windham*[22]. However, these opinions have resulted in a line of cases that have no clear delineation of how the various murder and manslaughter statutes are to be applied, or even in some cases, which ones are really applicable.

The unpublished opinion in *Johnson v. State*, 2008-KA-01176-COA, slip op. (Miss.App.2009) is yet a further example of how this "evolution" of M.C.A. §97-3-19(1)(a) & (b) has confused the issue. The defendant in *Johnson* was indicted for deliberate design

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[21]Or it doesn't appear to have been raised on appeal.

[22]If the depraved heart language of subsection (b) was unavailable because "others" had not been threatened by Windham's act, then deliberate design would be required. Since there appears to have a real question as to whether or not malice aforethought existed, that could have resulted in a manslaughter conviction for Windham.

murder; however, the jury was instructed on both deliberate design and depraved heart murder. The Court of Appeals reversed the conviction of depraved heart murder and sent the case back to the trial court for sentencing as a manslaughter pursuant to the direct-remand rule. The Court of Appeals noted that the jury had requested further instructions to assist them in distinguishing between manslaughter and depraved heart murder. The Court further noted that even the trial court and the attorneys wondered how that could be done. The following comments in Justice Hawkins' concurring opinion in *Windham*, *Id.*, along with the Court's comment, was recited in the opinion:

> In his concurring opinion in *Windham*, Presiding Justice Hawkins stated serious misgivings. *Id.* at 804 (Hawkins, P.J. concurring). Justice Hawkins opined that the court's expansion of the statute to encompass reckless acts evincing a depraved heart or malice toward an individual as well as no "particular individual," would create problems for the prosecution, defense, and the court. *Id.* at 806. The instant case indicates that it had done just that.

Johnson, at slip op. 9,¶45.

As can be seen from a review of the cases referenced above, as well as those other cases wherein the question of "deliberate design *vs.* depraved heart *vs.* manslaughter" has arisen, the distinctions between them have become hazy which has resulted in an inconsistent application of the law. The Appellant urges the Court to re-visit the language of the separate sub-parts of M.C.A. §97-3-19(1) (a) & (b) and the problems and inconsistencies that have arisen in the case law subsequent to their "coalescing", and once again view sub-parts (a) and (b) as separate entities.

B. Jury Instruction 3 (S-6B) - Self-Defense Instruction:

The final instruction submitted by the State on self-defense reads as follows:

> The Court instructs the Jury that to make a killing justifiable on the

> grounds of self-defense, the danger to the Defendant must be either actual, present and urgent, or the Defendant must have reasonable grounds to apprehend a design on the part of ***some person*** to kill him or to do him some great bodily harm, and in addition to this he must have reasonable grounds to apprehend that there is imminent danger of such design being accomplished. It is for the jury to determine the reasonableness of the ground upon which the defendant was acting. If you, the Jury, unanimously find the defendant acted in self-defense, then it is your sworn duty to return a verdict in favor of the defendant. (*emphasis added*)

In *Robinson v. State*, 434 So.2d 206,207 (Miss.1983)[23], the Appellate Court stated the exact language that was to be used in a self-defense instruction. Additional language informing the jury that it was duty bound to acquit the defendant if it believed that he had acted in self defense was required in *Reddix v. State*, 731 So.2d 591,594-95 (¶20) (Miss.1999).

The initial instructions[24] submitted by the State and Appellant's trial counsel regarding self-defense were identical, and both lacked the additional language required by *Reddix, Id.* S-6A, submitted by the State, contained the *Reddix* language and, is identical to S-6B except that the word "murder" in the first line of the instruction was changed to "killing."

The Appellant would submit that the following language in S-6B is in error:

> ... the Defendant must have reasonable grounds to apprehend a design on the part of ***some person*** to kill him .... (emphasis added)

A review of those cases which discuss the self-defense instruction since *Robinson, Id.* and *Reddix, Id.* clearly indicates that the apprehension which the Defendant perceives is from the victim in that particular case, not "*some person.*" See, *Ford v. State*, 975 So.2d

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[23]Overruled in part on other grounds by *Flowers v. State*, 473 So.2d 164,165 (Miss.1985).

[24]S-6 and D-1.

859,864 (¶12) (Miss.2008); *Montana v. State*, 822 So.2d 954,958-59 (¶¶11,14) (Miss.2002).

In the case at hand, the evidence presented to the jury established that there were a number of other persons present in the house and yard at the time of this incident. In particular, there was a total of four persons present in the room where the shooting occurred - two of whom were the decedent and the Appellant. Consequently, the language "*some person*" does not adequately instruct the jury as to "who" the Appellant had to have "reasonable grounds to apprehend a design ... to kill him...." Was it the decedent, one of the other persons present in the room at the time of the shooting, or another person somewhere else?

In deciding whether a particular jury instruction correctly and completely states the law, this Court will review all of the jury instructions to determine if the instructional issue raised is "covered fairly elsewhere in the instructions." *Harris v. State*, 861 So.2d 1003, 1012 (¶18) (Miss. 2003). In the case at hand, neither S-6B, or any other jury instruction given by the Court, advised the jury whom this "*some person*" was.

The Appellant would submit that it was error for the trial court to grant this instruction; and further, that it was error for his trial counsel to (1) not object to this instruction, and, (2) submit his own instruction which contained the same erroneous language.

II. ERROR WAS COMMITTED BY THE TRIAL COURT AND THE APPELLANT'S TRIAL COUNSEL IN NOT PROPERLY INSTRUCTING THE JURY ON MANSLAUGHTER.

During the jury charge conference, the trial court commented that it believed that the Appellant was entitled to some type of "imperfect self defense jury instruction" (Tr.

282), however, one was not submitted by either party or the trial court. Appellant's trial counsel and the State appear to have discussed the fact that Appellant wanted a manslaughter instruction, so D-3 which was a ' heat of passion' jury instruction, was given to the jury.

Standard of Review:

In *Harper v. State*, 478 So.2d 1017 (Miss.1985) the following standard was given by the Court in deciding whether a lesser-included offense instruction should be granted:

> [A] lesser included offense instruction should be granted unless the trial judge---and ultimately this Court---can say, taking the evidence in the light most favorable to the accused, and considering all reasonable references which may be drawn in favor of the accused from the evidence, that no reasonable jury could find the defendant guilty of the lesser included offense (and conversely not guilty of at least one essential element of the principal charge).

Id., at 1021.

The trial judge was correct when he told defense counsel he was entitled to some type of "imperfect self-defense jury instruction". (TR 282). The Appellant's testimony was that he shot the victim when he thought the victim was going for a gun, and he was not meaning to kill him. (TR 221-224). Unfortunately for the Appellant's theory, the victim was not armed. "Imperfect self-defense" is defined in *Lanier v. State*, 684 So. 2d 93, 97 (Miss. 1996), as:

> The imperfect self-defense theory is: "that [the defendant] killed the deceased without malice, under the bona fide belief, but without reasonable cause therefor, that it was necessary for him so to do in order to prevent the appellant from inflicting death or great bodily harm upon him . . . ." *Cook v. State*, 467 So.2d 203, 207 (Miss. 1985) (quoting *Williams v. State*, 127 Miss. 851, 854, 90 So. 705, 706 (1921)).

Id. at 97

Lanier correctly pointed out "heat of passion" is not "imperfect self-defense" reducing a murder to manslaughter; they are two different theories. *Id.* at 97. Involuntary manslaughter is not heat of passion manslaughter. *Id.* at 97.

In Appellant's trial there was no proof of heat of passion and it is inconceivable that one would want a jury instruction on heat of passion manslaughter and not one on involuntary manslaughter/imperfect self-defense, as the judge told the Appellant's attorney he was entitled to and *Lanier v. State*, 684 So.2d 93 (Miss. 1996) approves.

The Appellant's jury instructions ignored his only real defense in involuntary manslaughter under Miss. Code Ann. §97-3-35. *Lanier* points out:

> Lanier's counsel argues that there are two distinct manslaughter theories: (1) heat of passion manslaughter and (2) involuntary manslaughter and that he was entitled to an instruction on the latter theory.
>
> > Miss. Code Ann. §97-3-35 (1972) reads:
> > 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 the present case, Instruction C-02 reads, in relevant part: "without malice **and** in the heat of passion" (emphasis added). This Court reversed Lanier's first conviction because, absent inferences from the physical evidence that Lanier fired first, "the testimony is uncontradicted that Dedeaux fired first and because of this he was entitled to the manslaughter instruction." *Lanier v. State*, 450 So.2d 69, 80 (Miss. 1984). As we stated:
>
> > [A] jury might properly find that the threat of death or serious bodily injury was not imminently pending, and thereby reject the theory of self-defense and the acquittal of a defendant. From the same facts a jury reasonably could, we think, if permitted to do so by a manslaughter instruction find a defendant not guilty of capital murder because the fatal shot was in response to a shot first fired by an officer in a tense, sudden confrontation arising without design of either party, thereby reducing the offense to

manslaughter with a corresponding reduction in sentence.

Id. at 81.

> We agree with Lanier that the statute may be read in the disjunctive and that the killing of a human being without malice, or by the use of a dangerous weapon without authority of the law and not in necessary self-defense, may be manslaughter. In the present case, it was reversible error to grant a heat of passion manslaughter instruction where all parties agreed there was no proof of heat of passion.

Id. at 97.

This error in not giving the proper manslaughter instruction sealed the fate of the Appellant, and that was compounded by allowing the State to offer a depraved heart murder instruction, a crime the Appellant was not indicted for, that no one mentioned during the entire trial, that neither counsel argued to the jury, yet for what the Appellant was convicted:

> "We, the jury find the Defendant, JEREMY NEAL PITTS, guilty of depraved heart murder". (CP 104).

In addition to reviewing the trial court's failure to give a proper instruction on manslaughter, the Appellant requests that the Court review the failure of Appellant's trial counsel to request such an instruction under the plain error doctrine. Further, the Appellant would submit that this error was of such a magnitude that it affected his substantive and fundamental rights. See, *Jackson v. State*, 815 So.2d 1196,1199 (¶4) (Miss.2002); *Snow v. State*, 800 So.2d 472,483 (¶34) (Miss.2001); *Wade v. State*, 748 So.2d 771, 775 (Miss. 1999).

Analysis:

This suggestion of error further supports the Appellant's request for the Court to re-visit its view of M.C.A. §97-3-19(1)(a) & (b), and, is yet another example of how the

"coalescing" language of *Windham v. State*, 602 So.2d 798 (Miss1992)., has resulted in the various trial courts of this State mis-applying this State's various manslaughter statutes.

As "deliberate design" murder requires an intentional act, a lesser-included instruction of imperfect self-defense would be an appropriate manslaughter instruction provided the evidence supported it. And, depending on the evidence, a heat-of-passion manslaughter instruction would also be a lesser-included instruction of "deliberate design" murder.

The question arises as to why the trial court gave (without discussion) the heat-of-passion manslaughter instruction submitted by the parties and not one for imperfect self-defense which it believed was supported by the evidence. The trial court also granted (without discussion) the State's elements instruction, S-2, which instructed the jury on both "deliberate design" and "depraved heart" murder. Nor, was there any discussion by the trial court or the parties regarding whether or not the evidence supported any appropriate lesser-included manslaughter instructions in conjunction with the "depraved heart" murder instruction.

In *Newell v. State*, 308 So.2d 71 (Miss. 1975) the Court held that:

> In order, therefore, that the jury may be fully instructed as to the law in each case, we hold that in addition to the written instructions presented for approval by the attorneys for the litigants, . . . the trial judge may initiate and give appropriate written instructions in addition to the approved instructions submitted by the litigants if, in his discretion, he deems the ends of justice so require. The trial judge may also modify the instructions submitted by the litigants for his approval if, in his discretion, he concludes such to be necessary.

Id., at 78.

The jury in this case returned a verdict finding the Appellant "guilty of depraved

heart murder." This Court has repeatedly stated that the only difference between depraved heart murder and culpable negligence manslaughter is the "degree of mental state of culpability." *Windham*, 602 So.2d at801. The record is silent, but the Appellant can only assume that the trial court believed the evidence supported the granting of the "depraved heart" murder language in S-2 when the Appellant had been indicted for "deliberate design" murder only. Consequently, the trial court committed error when it did not *sua sponte* instruct the jury, or instruct either of the parties to so instruct the jury, on the lesser-included culpable negligence manslaughter after it had approved the inclusion of "depraved heart" murder. Appellant's trial counsel also committed error in not submitting a proper manslaughter instruction as a lesser-included offense instruction - clearly, there was no "trial strategy" in not doing so when a heat-of-passion instruction was given, and actually no proof existed to support a heat of passion theory, but it clearly supported the two other manslaughter theories.

III. THE APPELLANT'S TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL.

The Appellant would incorporate the above arguments as evidence of his trial counsel's ineffective assistance, as well as, the other examples outlined below.

Standard of Review:

If the Appellant "is to be successful on his ineffective assistance of counsel claim, he must satisfy the 2-pronged test in *Strickland*," which has been adopted by this Court. This test requires: "(1) that counsel's performance was deficient; and, (2) that the deficient performance prejudiced the defense." *Burns v. State*, 813 So.2d 668,673 (¶14) (Miss.2001); *Stringer v. State*, 454 So.2d 468,477 (Miss.1984), *citing to Strickland v. Washington*, 466

U.S. 668,687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "The burden to demonstrate both prongs is on the defendant." *Dickey v. State*, 662 So.2d 1106,1109 (Miss.1995); *Moody v. State*, 644 So.2d 451,456 (Miss.1994).

The first part of the test requires that the Appellant overcome the strong presumption that his trial counsel's performance "falls within the wide range of reasonable professional assistance," or put differently, could his counsel's actions have been one of "sound trial strategy" under the circumstances. *Carter v. State*, 775 So.2d 91,93 (¶10) (Miss.1999); *Foster v. State*, 687 So.2d 1124,1130 (Miss.1996).

In order to satisfy the second part of the test, the Appellant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Snow v. State*, 800 So.2d 472,495 (¶85) (Miss.2001); See, *Burns v. State*, 813 So.2d 668,673 (¶14) (Miss.2001).

"The benchmark for judging any claim of ineffectiveness of counsel must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Burns, Id.*; *Brown v. State*, 798 So.2d 481,493 (¶14) (Miss.2001).

Analysis:

In addressing the first prong of the *Strickland* test, the Appellant would show that his trial counsel repeatedly (1) should have objected to Linda Rogers, the victim's mother, testifying; (2) advised the trial court that he (trial counsel) did not know what the key witnesses for the State would say; (3) made objections to the State's introduction of gang related documents during the State's case-in-chief, and then, had no objection when the State moved to introduce one of them (State's Exhibit 5) into evidence during cross-

examination of the Appellant[25]; (4) failed to make objections, or timely objections, regarding evidence improperly placed before the jury by the State; (5) failed to object to jury instructions which were incorrect/incomplete statements of the law (see Appellant's 1st Assignment of Error above); (6) failed to request a proper manslaughter instruction (see Appellant's 2nd Assignment of Error above); (7) participated in argument with the State, in the jury's presence, regarding the very gang references that he had objections to outside the jury's presence; (8) failed to move to suppress the Appellant's statement to law enforcement which ultimately resulted in the Appellant having two conflicting stories presented to the jury, following his testimony during trial about the events of this shooting[26].

The following listing contains some examples of his trial counsel's performance/comments during the course of trial:

1. Linda Rogers should not have been allowed to testify. Her testimony was prejudicial and inflammatory and had no relevant or material information. She was called as the State's first witness as a 'victim impact' witness that had nothing to do with the innocence or guilt of the accused. Such testimony is only allowed at the sentencing phase of capital murder trials, "not at the culpability phase of trial". *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d. 720 (1991), *Havard v. State*, 928 So.2d. 771, 792 (Miss. 2006). Such testimony is expressly not allowed in homicide cases. *Wiley v. State*, 484 So.2d 339, 349 (Miss. 1986); *Shinall v. State*, 199 So.2d 251, 257 (Miss. 1967); and *Hubbard v. State*, 288 So.2d 716 (Miss. 1974).

This was a 'plain error' in itself and no trial strategy can be established or claimed.

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[25]See, R.E. (Transcript pages 119-120; 122-23; 230).

[26]See, R.E. (Transcript pages 243-47; 253-59; 246; 266-67).

Defense counsel should have moved to stop Linda Rogers from testifying or limit her testimony to what little, if any, relevant material testimony she could have given.

2. During pre-trial matters the Appellant's trial counsel, George Shaddock, began to expound on two of the State's witnesses, Ray Hancock and Kevin Davis. More specifically, Mr. Shaddock stated to the Court:

> Shaddock: I don't know what these two defendants are going to testify to. I'm going to ask the Court to let me interview them before they testify. They have hidden from me for about six months. They have lawyers representing them, yet they intend to use them as witnesses. And I want the opportunity to talk with them prior to their testimony. But I don't have a clue what they may say. But I know if they get up there and say what the District Attorney just told you, that that's prejudicial and we object to it. (Tr.33)
>
> * * * * * * * * *
>
> Shaddock: ... They have been incarcerated since this event took place. They've been moved, one to Greene County, one to Stone County, and they have lawyers who have prohibited me talking to them. But now that they're going to be used as witnesses in the case, I think I have a right to interview them. (Tr.35)
>
> Court: ... Number one, are you telling me that you have not been furnished any information in regard to the testimony that these witnesses are expected to give in the form of a statement, narrative form, transcripts, prior hearings or anything? (Tr.35)
>
> Shaddock: I've been furnished a copy of what they may testify to. I don't know that they're going to until I ... (Tr.36)
>
> Court: Well, I've heard enough. I mean, we're here in opening statements and you're wanting an opportunity to talk to witnesses.
>
> Shaddock: I'd like to talk to them. I'm not going to take the testimony of a convicted felon. Why should I take that testimony? (Tr.38)

3. During Mr. Shaddock's opening statement he began to tell the jury about how he hadn't been allowed to speak with the State's witnesses because their respective lawyers

wouldn't let him. The State objected:

> State: Your Honor, I'm going to object to that. He's acting like there's no discovery. He's been produced everything these people are going to say.
>
> Shaddock: I don't know what I have. (Tr.46)

4. Prior to opening statements, the State argued a motion *in limine* to prevent the Appellant from eliciting evidence (a) that the victim had a positive test for marijuana; and, (b) the victim's prior criminal history. (Tr.6). Mr. Shaddock argued that he believed the evidence of prior crimes was important to establish that the Appellant felt threatened by the victim. When the trial court questioned Mr. Shaddock as to what evidence he had regarding the victim's criminal history (Tr. 9), Mr. Shaddock responded:

> Shaddock: I didn't file the motion, so I didn't get the evidence, but I assume that in this courthouse, we can produce it. If necessary. But the State filed the motion. (Tr.10)

5. Upon cross-examination of a State's witness, Mr. Shaddock questioned the witness as to whether he (witness) knew of the victim's criminal history, to which the State objected. When the trial court sustained the objection:

> Shaddock: Well I can get the public records from downstairs. (Tr.83)[27]

6. During the State's examination of Daniel Ray Hancock, Mr. Hancock was questioned as to who signed State's Exhibit 2. Hancock responded that it was "Jeremy and Hollywood." (Tr.109) To which Mr. Shaddock interjected:

> Shaddock: Judge, we want a continuing objection. I mean, we don't have

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[27]Mr. Shaddock did not present any "public records" concerning the victim's criminal history during the course of the trial.

Jeremy here to cross-examine. (Tr.109)[28]

7. Shaddock conducted some voir dire of Mr. Hancock regarding State's Exhibit 2:

Shaddock: Okay. And that says "Pitt" down at the bottom?

Hancock: Yes. (Tr.112)

Shaddock: And you're saying that's this man's signature?

Hancock: Yes.

Shaddock: Well, we'd challenge that, Judge.

Court: Ok.

Shaddock: We object to the introduction of it, and we will get a handwriting expert, if necessary.

Court: Ok.

Shaddock: Thank you.

Court: Is that it?

Shaddock: That's it.

Court: Do you have a handwriting expert?

Shaddock: Not today. We may have tomorrow. (Tr.113)[29]

8. Throughout the entire course of the trial, Mr. Shaddock continuously objected to any references being made about gangs, papers that purported to be gang related, as well as, the Appellant's affiliation with a gang. Notwithstanding his objections, Mr. Shaddock, the trial court and the State engaged in repeated discussions about gangs, gang affiliations, gang membership being the motive for the crime, etc. , in front of the jury. When the jury's

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[28]"Jeremy" was the Appellant, Jeremy Pitts - and he was present during the course of the trial; although, it had not been placed into the record as to whether he would testify or not.

[29]A hand-writing expert was not called, nor, referenced again.

presence was remembered, they were excused[30].

9. When the State called Kevin Davis as a witness. Mr. Shaddock stated (in the presence of the jury):

> Shaddock: Judge, I'd like to have an opportunity to interview this witness.
>
> Court: Well, we're here in the middle of the trial, he's been called and sworn in. I'll deny that request. You can cross-examine him, Mr. Shaddock. (Tr.165)

10. When the State moved to have State's Exhibit #21 admitted into evidence (video statement of the Appellant), the trial court inquired as to whether Mr. Shaddock had any objection, to which he responded:

> Shaddock: We're going to object to it until we see it, Judge.
>
> Court: Until you see it?
>
> Shaddock: Somebody's got to see it. I mean, we can't just put a piece of plastic into evidence. (Tr.194)

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If you will review Exhibit #21 that was offered into evidence at trial and played to the jury, the following transpired between the Appellant and the George County Sheriff's Department:

> KEEL:
>
> It boils down to this, were you deceitful and led us down the wrong path or did you cooperate with the investigation? It makes a difference. Did you cooperate and did you help law enforcement? Were you forthcoming and did you give truthful statements? Or did you withhold information? Did you not tell the truth?

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[30]See, RE. (Transcript pages 114-116; 123-124)

or statements. See *Abraham v. State*, 606 So.2d 1015, 1031 (Miss. 1992), and *Dunn v. State*, 547 So.2d 42 (Miss. 1989). *Dunn v. State*, 547 So.2d 42, 44-45 (Miss. 1989), pointed out:

> "Long before Miranda warnings were mandated by the U.S. Supreme Court, it was well settled in Mississippi jurisprudence that a confession given after promises of leniency was incompetent as evidence.

The statement or confession given by the Appellant was suppressible and it is doubtful if the Appellant's attorney had even reviewed same prior to trial. This statement affected the outcome of the trial because it was used to greatly impeach the Appellant when he testified at trial. At least fifteen (15) times at trial the District Attorney asked the Appellant, "Didn't you tell the police . . .".(TR 244, 245, 246, 247, 254, 255, 256, 257, 258, 259, 260, 264, 266, 267). Not trying to suppress illegally obtained statements has been found to be deficient performance warranting reversal. *Barnes v. State*, 577 So.2d 840, 843-44 (Miss. 1991); *Yarbrough v. State*, 529 So.2d 659, 662 (Miss. 1988); and *Bigner v. State*, 822 So.2d 342, 351 (Miss. App. 2002).

11. The Appellant's counsel was ineffective in not offering proper jury instructions as outlined in **II** above.

The Appellant would submit that he has met the first prong of the test and clearly established that his trial counsel's performance did not fall "within the wide range of reasonable professional assistance," nor, could his actions/inactions be considered that of "sound trial strategy" under any circumstances. See *Carter v. State*, 775 So.2d 91,93 (¶10) (Miss.1999); *Foster v. State*, 687 So.2d 1124,1130 (Miss.1996).

The Appellant would further submit that but for the errors of his trial counsel, there is a reasonable probability that the outcome of his trial would have been different,

i.e., it is reasonable to believe that his conviction (if any) would be something other than murder. Appellant's major contention is that this was a manslaughter case and his attorney did not properly make sure the jury was properly instructed on the correct manslaughter theory. That cannot be trial strategy. It cannot be trial strategy to allow your client to be cross-examined and greatly impeached with an illegal statement

The Appellant has met the second prong of the test and the Court should find that he received ineffective assistance of trial counsel. Therefore, the Appellant requests that the Court reverse his conviction for depraved heart murder and remand this matter for a new trial. See *Read v. State*, 430 So.2d 832,841 (Miss.1983); *Barnes v. State*, 577 So.2d 840, 843-44 (Miss. 1991); *Yarbrough v. State*, 529 So.2d 659, 662 (Miss. 1988); and *Bigner v. State*, 822 So.2d 342, 351 (Miss. App. 2002).

IV. THE EVIDENCE WAS LEGALLY INSUFFICIENT TO CONVICT THE APPELLANT OF DEPRAVED HEART MURDER.

Standard of Review:

The standard of review for a claim of insufficient evidence has been well established by the Court. In reviewing such a claim, the Court must review all of the evidence in the light most consistent with the verdict returned by the jury. This evidence is to receive all reasonable inferences. However, if this points in "favor of the accused with sufficient force that reasonable men could not have found beyond a reasonable doubt that he was guilty, reversal and discharge is required." *Carr v. State*, 655 So.2d 824 (Miss.1995); *Cooper v. State*, 639 So.2d

1320 (Miss.1994).

Analysis:

In the case at hand, the jury returned a verdict of guilty to the charge of depraved heart murder. The evidence presented at trial by both the State and the Defense showing the Appellant's involvement with the death of the Decedent was concentrated upon four matters - calling the Decedent "out for minutes"; the Appellant's assertion that the Decedent had threatened him the night before; the argument between the Appellant and the Decedent at the time of the shooting; and, who had a gun at the time of the shooting.

Clearly, the evidence presented to the jury during the course of this trial established that there was no pre-mediation on the part of the Appellant to kill the Decedent. Nor, do the events leading up to the shooting of the Decedent reveal any horrendous actions taken against the Decedent, such as a brutal beating or continued torture, as is seen in many of the cases discussing the killing of a person which resulted in a murder conviction.

All of the evidence presented during the trial of this matter raises reasonable doubt and points in favor of the Appellant with such force that reasonable men could not have found beyond a reasonable doubt that Appellant was guilty of depraved heart murder. At most, the Appellant should only have been convicted of imperfect self-defense/involuntary manslaughter or culpable negligence manslaughter; however, such an instruction was not requested by Appellant's trial

counsel or tendered by the State or trial court. The failure to give such an instruction has resulted in a manifest injustice to the Appellant and this matter should be remanded to the trial court, pursuant to the direct-remand rule, for sentencing as involuntary manslaughter or culpable negligence manslaughter as the Court did in *Tait v. State*, 669 So.2d 85 (Miss.1996), *Dedeaux v. State*, 630 So.2d 30 (Miss. 1993), and Miss. Code Ann. §97-3-35 or Miss. Code Ann. §97-3-48.

CONCLUSION

Based upon the arguments stated above , the Appellant asks this Court to reverse his conviction for depraved heart murder and remand for a new trial, or, remand for sentencing for involuntary manslaughter or culpable negligence manslaughter. See Miss. Code Ann. §97-3-47, *Dedeaux* and *Tait*, supra.

RESPECTFULLY SUBMITTED this 20th day of March, 2010.

JEREMY PITTS, Defendant-Appellant

By: James L. Davis III
JAMES L. DAVIS, III
Attorney for Jeremy Pitts

CERTIFICATE OF SERVICE

I, James L. Davis, III, do hereby certify that I have this day served the original and three (3) copies of the above and foregoing BRIEF OF THE APPELLANT, along with an electronic version of same on CD, via United States mail, postage prepaid, to the following, to-wit:

Betty Sephton, Clerk
Supreme Court of the State of Mississippi
P.O. Box 249
Jackson, MS 39201

I further certify that one (1) copy of said BRIEF OF THE APPELLANT has this day been forwarded, via United States Mail, postage prepaid, to the following, to-wit:

Honorable Dale Harkey
Circuit Court Judge
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This the 20th day of March, 2010.

James L. Davis III
JAMES L. DAVIS, III