IN THE SUPREME COURT OF MISSISSIPPI
NO. 2009-KA-01186-SCT

RODNEY SANDS — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

George T. Holmes, MSB No. [redacted]
MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 N. Lamar St., Ste 210
Jackson MS 39201
601 576-4200

Counsel for Appellant

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CERTIFICATE OF INTERESTED PERSONS

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

1. State of Mississippi
2. Rodney Sands

THIS 4th day of November, 2009.

Respectfully submitted,

RODNEY SANDS

By: George T. Holmes

George T. Holmes,
Mississippi Office of Indigent Appeals

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STATEMENT OF THE ISSUES

ISSUE NO. 1: WHETHER RODNEY SAND'S MOTION FOR DIRECTED VERDICT SHOULD HAVE BEEN SUSTAINED?

ISSUE NO. 2: DOES THE WEIGHT OF EVIDENCE SUPPORT CONVICTIONS FOR MANSLAUGHTER AND AGGRAVATED ASSAULT AGAINST RODNEY SANDS?

ISSUE NO. 3: WAS JURY INSTRUCTION S-9 REGARDING AIDING AND ABETTING IMPROPER AND PREJUDICIAL?

ISSUE NO. 4: WAS IT ERROR FOR THE TRIAL COURT TO ALLOW BAD CHARACTER EVIDENCE?

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ISSUE NO. 6: IS COUNT THREE OF THE INDICTMENT IS FATALLY DEFECTIVE?

ISSUE NO. 7: WAS RODNEY SANDS PREJUDICED BY INEFFECTIVE COUNSEL?

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Jefferson Davis County, Mississippi where Rodney Sands was convicted of two counts of manslaughter and one count of aggravated assault. A jury trial was conducted March 30-April 1, 2009, with Honorable Prentiss G. Harrell, Circuit Judge, presiding. Rodney Sands was sentenced to twenty years for each count, consecutive, and is presently incarcerated with the Mississippi Department of Corrections.

Rodney Sands and his co-defendant, Aqui Demetrius Rhodes, were tried jointly. Rhodes was convicted of two counts of murder and one count of aggravated assault.

FACTS

On July 7, 2006, around 6:00 p. m., Randolph Sands and Robert McInnis were killed in a shoot-out on the grounds of the Church of Christ on Mississippi Highway 84, just outside the city limits of Prentiss, where Granby Road runs into the highway. [T. 84, 87, 93, 95, 104]. Jefferson Davis County Sheriff's deputies and Prentiss Police responded immediately, and investigated the incident with the Mississippi Bureau of Investigations. [T. 84, 87, 93, 95, 104, 379]. The appellant Rodney Sands and Aqui Demetrius Rhodes were charged with murder in relation to the two deaths and were also charged with an aggravated assault count to have been committed against Jason McNair who was also involved in the fray. [R. 11-12; R. E. 16-17].

The Crime Scenes

Responding officers found the body of Randolph Sands laying face down next to a house across Granby Road on the same side of the highway as the church. [T. 85, 91, 96, 380]. The woman living at this house told officers that she did not hear any shooting. [T. 84, 88, 91]. Officers secured Randolph Sands' body and an area at the church where shell casings were found, along with other evidence. [T. 85-90, 95-97, 102, 104, 109, 111-113].

While on the scene at the church, and house across the street, law enforcement received a call that "a crowd [was] building up at the hospital" in Prentiss [T. 98-99, 380-81; Ex. 88A]. At the entrance of the hospital emergency room, in the parking lot, a brown Pontiac automobile was taped off with crime scene tape. [T. 99; Exs. 38, 61]. Sheriff's Investigator Ronnie Barnes, who responded to the hospital, briefly spoke with Jason McNair, who was being treated for a gun shot wound in the emergency room. [T. 381].

Inside the Pontiac there was a marijuana blunt, a .40 caliber Kel-Tec[1] semi-automatic pistol on the driver side rear floorboard, a brand new 7.62 mm assault rifle in the trunk, three spent .45 caliber projectiles (two in the rear seat area, one in the front), and twelve shell casings, as follows: four .40 caliber Smith & Wesson casings (two in the back seat, one in front, one on the ground), two .45 caliber Remington-Peters casings (one in the back seat, one in the front), six .45 caliber Winchester casings (three in the rear seat area, three in the front). [T. 115, 122, 124-26, 139, 154-60, 163-64, 171-72, 184-85, 187, 190, 195, 200-04, 402-03; Exs. 13, 30-59, 61, 81, 88]. There were no identifiable fingerprints on the rifle or pistol. [T. 209-10; Ex. 62].

The rear window of the Pontiac was shattered out, broken glass was in the interior of the vehicle. [T. 161; Exs. 38-61]. Apparent blood stains were on the seats. [T. 164; Ex. 60, 92].

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[1] Referred to in the transcript as a "Celtic" .40 caliber pistol.

Back at the church, officers found, on the ground, one athletic shoe, a t-shirt with some possible blood stains, broken automobile windshield glass, one spent projectile, eight shell casings (three .45 caliber Remington-Peters, four .45 caliber Winchester and one .40 caliber Smith &Wesson), a bag of live ammunition for a .223 caliber rifle (5.56 millimeter, incompatible with the assault rifle) was found at the far corner of the church near a .45 caliber Taurus brand magazine (clip) also retrieved. [T. 114, 118-22, 125, 128-30, 141-54, 156, 182-83, 190-92, 194, 196; Exs. 6, 7, 8, 10, 12-29].

A computer generated diagram of the church crime scene was developed by the MBI evidence specialist, along with a log of the evidence collected there. [T. 139-40; Exs. 10, 12]. A depiction of the vehicle and log evidence from the Pontiac at the hospital was generated as well. [T. 139-40; Exs. 11, 13].

Pathology

The deceased Randolph Sands had four gunshot wounds, two of which were lethal; the two fatal shots were to the right side of Randolph's back and were through and through, both having corresponding exit wounds at the abdomen. [T. 215-223, 227; Exs. 64, 78]. Of note, the two fatal wounds to Randolph Sands' back had "tattooing" indicating that the shots were fired at close, near contact, range, 8 to 10 inches, [T. 216-20; Exs. 64, 67, 68, 69].

The other decedent, Roberto McInnis, died on the way to the hospital, and was also shot four times, two of which were lethal; one shot to the right flank hit the spine and

aorta and other organs; Roberto's other fatal shot entered at the left nipple piercing the left lung; there was no tattooing; two .45 caliber projectile fragments were found lodged by Roberto's left rib cage. [T. 228-36, 238-39, 242; Exs. 70, 72, 73, 74, 75, 77, 79]. Roberto's body tested positive for alcohol, .17 per cent. *Id.*

Jason McNair's Version of Events

The state's case was based largely on the testimony of Jason McNair. Jason said he met up with Randolph Sands and Roberto McInnis about 10:00 a. m. on July 7, 2006, and they hung out, watched television, rode around Prentiss in Randolph's brown Pontiac, visited friends, drank alcohol and smoked marijuana. [T. 260-69, 300-07, 311; Ex. 81]. They eventually ran into Rodney Sands, the appellant, on Highway 84 near the church where the incident happened. *Id.*

Randolph was driving the brown Pontiac, Roberto was in the back, and Jason was the front seat passenger. [T. 266, 335-36]. Rodney Sands was in a green Lexus. [T. 268]. Rodney flagged the Pontiac down. [T. 269, 311]. The Pontiac pulled into the church's semi-circular driveway off of Granby Road, followed by the Lexus. [T. 272]. The cars pulled up almost side by side in the driveway, Rodney was little behind to the left of the Pontiac, and both vehicles were generally pointed away from the church building and towards Highway 84. [T. 273-75, 316; Exs. 10, 80].

A conversation between Rodney and the three occupants of the Pontiac turned quickly to the topic of missing money. [T. 276]. Rodney indicated that he thought Jason,

Randolph and Roberto had taken some money from his home in an alleged burglary. [T. 276-77]. The accusation was denied by the three in the Pontiac. [T. 277-78]. The four men talked for about ten (10) minutes. [T. 278]. Rodney remained in his vehicle most of the time with his door open briefly coming over to the Pontiac at one point. [T. 284, 313]. Rodney eventually abandoned the idea of the three others admitting anything. *Id.* Rodney made no threats, and Jason felt no fear. [T. 313].

Jason testified that after talking with Rodney for about ten minutes, Aqui Demetrius Rhodes drove by on Highway 84 in a green Ford Explorer and returned to the church pulling up to the other vehicles with the front of the Explorer facing away from the highway with the driver's side by the Pontiac's driver's side, opposite from Rodney's Lexus. [T. 283, 285, 313, 316-17; Ex. 10, 80, 82].

Jason said Rhodes got out of the Explorer and approached the drivers side of the Pontiac and, referring to the men in the Pontiac, said, "Ya'll run up in my house and got my money." [T. 279-83]. There was more discussion and Jason testified the three in the Pontiac became agitated. [T. 317-18].

Jason testified that Rodney Sands, the appellant, continued to remain back at his vehicle. [T. 317]. Rhodes was asking the Pontiac occupants about the burglary of *his* home, not Rodney Sands' home. *Id.* When Rhodes walked up, he had no gun, and was shirtless. [T. 322, 338-39]. Jason said Rhodes eventually backed away from the Pontiac and retrieved a weapon from the Ford Explorer. [T. 322, 338-39, 344].

Then Jason said he heard shots coming from Rhodes' direction; Jason said he turned and saw Rodney Sands at the back of his car, the Lexus. [T. 285-86, 288-89]. Jason said when the shooting started, he got down, Randolph Sands, the driver of the Pontiac, was still in the car at this point. *Id.* Then, Jason said, shots started going off from everywhere.

Jason claimed not to have a gun. [T. 286, 322]. He said that Randolph Sands had no weapon. [T. 286, 293-94]. Jason said Roberto had a .40 caliber Kel-Tec which was found later in the back seat of the Pontiac at the hospital. [T. 286-87; Ex. 31]. Jason said he did not know whether Roberto shot at Rodney and Rhodes. [*Id.*, T. 340-41]. Jason could not explain the source of the .40 caliber shell casings in Pontiac. [T. 322; Exs. 32, 33, 38].

Jason said after the shooting started, he looked again towards the Lexus and saw Rodney Sands, the appellant, crouched down behind the Lexus with a "small" pistol. [T. 288-89]. However, Jason never saw Rodney shooting, or pointing a weapon, at any point. [T. 309-10, 334].

Jason said the shooting briefly subsided and he saw Rhodes and Rodney running towards the church, and about that time realized he had been shot in the buttocks or groin area. [T. 290, 294, 332-34, 346]. Jason said Rhodes then came back towards the Pontiac and started shooting towards the Pontiac. *Id.* Jason said he played dead. [T. 293-94].

At this point, according to Jason, Randolph, the driver, got out of the Pontiac, but,

Jason did not know where he went and thought he got away. [T. 294-95]. Jason looked in the back seat and saw Roberto was shot. [T. 294-95].

Jason claimed to be in shock, but was able to drive away with Rodney in the back, mortally wounded, Jason did not know where the hospital was, so he drove to a hamburger establishment and called 911 for directions on a cell phone that was in the car. [T. 294-95]. He then made his way to the hospital with Roberto in the back. *Id.*

Aqui Rhodes' Version

Aqui Rhodes testified in his own defense and was the only other person to testify about the particulars of the shooting. Rhodes said that on the date of the incident, he was in his mother's Ford Explorer taking it to be washed and he also ran an errand. [T. 439]. On the way, Rhodes spotted Rodney Sands' car at the church, so he stopped to talk; Rhodes did not have a shirt on. [T. 439-40, 457]. Rhodes said he said he saw the Pontiac with Randolph in the driver's seat, Jason was the front passenger and Roberto was in the back; Rhodes was standing outside the Pontiac; Rodney was at his car on the other side. [T. 440-41].

When Rhodes came up, he said Rodney and the three were talking about a burglary at Rodney's house. [T.442-43]. Rhodes' house had also been burglarized about a week prior, so he asked the men in the Pontiac about his loss too. [T. 442]. Rhodes said he approached the Pontiac unarmed. [T. 443]. Rhodes did not know Rodney's house burglarized too until he overheard the conversation at the church [T. 482].

Rhodes said that when he got to the Pontiac, Jason McNair had a pistol on his lap, and, that he saw the butt of a pistol visible under Randolph Sands' leg. [T. 444]. Rhodes did not see McNair's gun. *Id.* Rhodes said the three occupants of the Pontiac always had guns and that he knew Roberto owned a .40 caliber automatic pistol. [T. 461-62, 464].

The three occupants of the Pontiac denied involvement in any burglaries, so Rhodes said he asked for any information they might have. [*Id.*, T. 487]. Rhodes said he was not threatening anyone. [T. 465]. Rhodes said Roberto became visibly upset in the back seat, shouting and yelling, and using profanity. [T. 445. 463-64]. Rhodes said, after Roberto got "amped up," Roberto said he was "ready to die". [T. 446].

While Rhodes was at the Pontiac driver side window, Rhodes said he heard the sound of a pistol chambering a round, or as he put it, "reversing." [T. 446-47, 465-66, 486]. Then Rhodes said he moved from the driver's window towards the rear window to get a better look at Robert and heard Rodney Sands say, "Cuz, I know you ain't pulling that pistol on me." *Id.*

According to Rhodes, Roberto then pointed his pistol at Rhodes' face and fired several shots as Rhodes jumped back. *Id.* The fist shot, Rhodes said, struck him in the right arm and he heard bullets hitting the Explorer behind him. [T. 447-48, 450, 467-68; Ex. 91]. There was damage to the Ford Explorer from the gunfire and a spent projectile was located in the driver's side door frame. [T. 451-53; Ex. 85, 87, 90.]. Rhodes put his hands over his face and backed all the way to the Explorer, retrieved a weapon, and

returned fire towards the Pontiac. [T. 448]. At that time Roberto was the only one shooting. *Id.* Rhodes did not know at that time where Rodney Sands was. *Id.*

Rhodes said after he retrieved his weapon and returned fire, he could not stay at his vehicle nor retreat because his driver's side was exposed to gunfire coming from the three occupants of the Pontiac. [T. 454, 468]. Rhodes said he ran to church with bullets still coming at him from the Pontiac. *Id.* Rhodes said bullets where coming at him out of the back window of the Pontiac as he ran towards the church. [T. 469, 495].

Randolph Sands then jumped out of car and ran towards the opposite side of the church. [T. 448, 469, 488-91]. So, Rhodes said he ran the other way. [T. 449].

When Rhodes made it to the church building, he said he saw Rodney Sands, the appellant, still behind the Lexus and saw Jason McNair halfway out of the Pontiac with a pistol aimed and firing at Rhodes. [*Id.*,T. 472].

Rhodes was afraid that Randolph would circle around the church and shoot him. *Id.* Rhodes said he did not run to woods because Randolph could have been coming from that direction too. [T. 470-71]. While Jason was shooting at him, Rhodes said he was able to run to the Explorer and leave. [T. 455, 472-73]. Rhodes was the first to leave. [T. 475].

Rhodes said, all told, he fired five (5) or six (6) shots in self defense. [T. 457]. Rhodes did not shoot his full clip. [T. 485]. Rhodes said his blood stained the seats of the Explorer. [T. 468; Ex. 92].

Afterwards, Rhodes went to a friend's house, Helen Moore, but did not go to a hospital to avoid retaliation from the men in the Pontiac and their families. [T. 455, 492]. He eventually left town after calling the sheriff the next day. [*Id.*, T. 457].

Rhodes testified that he had no plan or concerted effort with Rodney Sands. [T. 457]. Rhodes said he had no intent of doing any harm and considered all involved to be like family, brothers. [T. 457]. A few days prior, they had a barbeque. [T. 457]. Rhodes testified there was no communication with Rodney before the incident. [T. 476]. According to Rhodes, Rodney Sands never threatened anyone and did not have a gun. [T. 475, 484].

Helen Moore corroborated Rhodes, testifying that Rhodes showed up at her house on July 7, 2007, wounded, bleeding and, looking "awful"; she offered to take him to the hospital, but he left before she could change clothes. [T. 499]. Ms. Moore remembered the date because of a 4th of July family reunion. [T. 500].

Some Background

There is no dispute that all of the persons involved in this incident were close friends with several family connections. Jason McNair was related to McInnis and was friends with everyone else. [T. 256-60, 438]. The two Sands and Aqui Rhodes were cousins of undetermined degree. *Id.* Randolph Sands was often referred to as "Pee Wee" *Id.* McInnis was called "Bird Man". *Id.* Demetrius Aqui Rhodes answered to "Silk." *Id.* Rodney Sands was called "Cheesy." [T. 281]. Rodney even lived Roberto. [T. 474].

Ballistics

The state's ballistics expert concluded that the four (4) .40 caliber shell casings found in the Pontiac were all fired in the same weapon, that is, by the pistol found in the back seat of the Pontiac where Roberto McInnis was sitting. [T. 369, 374]. One of the examined projectiles (Expert's No. 30) was also fired from this weapon. *Id.*

The ballistics expert also said that fourteen (14) of the .45 shell casings found in the Pontiac and at the church were all fired from the same weapon. [T. 369-372, 374].

The six .45 caliber projectiles (3 from the Pontiac, 1 from the ground at the church, and 2 from Roberto's body) were all fired from the same weapon. [T. 369-72, 375, 377; Ex. 83][2]. However, since no .45 weapon was recovered, no matching .45 pistol was ever developed. [T. 369, 375, 377]. Therefore, no determination could be made if more than one .45 caliber weapon was involved, nor whether the same weapon fired the .45 shells and also the .45 caliber projectiles. [T. 369, 377].

Aqui Rhodes' Explorer

A week after the shooting on July 13, 2006, Jefferson Davis County Investigator Ronnie Barnes and the Sheriff were advised of the location of Rhodes' vehicle in a wooded area. [T. 382-83; Ex. 85]. Rhodes testified that he had abandoned the Explorer

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Exhibit 83, the report of the ballistics expert, was not included in the clerk's papers submitted in the record. There is a notation by the clerk "number accidently skipped." However, the transcript index and the transcript itself identify the exhibit and show that it was admitted into evidence. [T. Vol. 3 at vi, Vol. 5 at 370].

on the side of the road, and did not know how it got in the woods. [T. 494].

The Explorer was located, towed in, and secured and then searched actually about five weeks later on August 25 or 26th. *Id.* The delay was due to Barnes' running for circuit clerk and having to prepare cases for an upcoming grand jury. [T. 384]. A projectile was extracted from the Explorer's passenger side door panel, but Investigator Barnes never turned the projectile over for ballistic testing stating that in his non-expert opinion, the fragment was too mutilated for analysis. [T. 382, 388, 390-91].

Barnes said the MBI was advised of the discovery of Rhodes' vehicle and the projectile, but no one ever came to process any of these for evidence. [T. 391-92]. The apparent blood stains in the Explorer were never sampled or analyzed either. [T. 400]. Barnes could not explain why the Pontiac was processed but not the Explorer. [T. 407].

Rodney Sands and Rhodes In Custody

Rodney Sands turned himself in with counsel on July 12, 2006. [T. 385]. Sands allegedly advised police of an alibi defense which turned out to be for the wrong time. [T. 426-29]. Rhodes was arrested in Green Bay, Wisconsin, August 22, 2007.

SUMMARY OF THE ARGUMENT

The evidence establishes that Rodney Sands was merely present when Aqui Rhodes and the others became involved in a shooting incident arising from an argument about a burglary; so, the trial court should have granted Rodney Sands' motion for

directed verdict, or, should have sustained his post-trial motion for judgment of acquittal notwithstanding the verdict or for new trial. Sands was prejudiced by alleged bad character evidence. Sands was likewise prejudiced by a jury instruction on aiding and abetting. Juror misconduct taints the verdict. The trial court did not have jurisdiction for entry of a conviction of Rodney Sands on Count 3 for aggravated assault, because, the indictment was defective. Alternatively, Rodney Sands is entitled to a new trial for ineffective assistance of counsel.

ARGUMENT

ISSUE NO. 1: WHETHER RODNEY SAND'S MOTION FOR DIRECTED VERDICT SHOULD HAVE BEEN SUSTAINED?

Considering a motion for directed verdict, if the evidence and reasonable inferences therefrom "point in favor of the defendant on any element of the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty," the single remedy for an appellate court is to reverse and render. *Edwards v. State*, 469 So. 2d 68, 70 (Miss. 1985). See also *Carr v. State*, 208 So. 2d 889, 889 (Miss. 1968), *Foster v. State*, 919 So. 2d 12, 15 (Miss. 2005), and *Hall v. State*, 644 So. 2d 1223, 1228 (Miss. 1994).

Under this issue, the appellate court should review the "lower court's ruling on the sufficiency of the evidence based on the evidence before the court at the time the last

challenge was made." *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993), *Scarborough v. State*, 956 So. 2d 382, 385-86 (Miss. Ct. App. 2007). The question then is whether there was evidence to support a conclusion, beyond a reasonable doubt, that Rodney committed the act charged, *i. e.* manslaughter, and "that he did so under such circumstances that every element of the offense existed," if not, the evidence is insufficient to support the conviction. *Bush v. State*, 895 So. 2d 836, 843(¶ 16) (Miss.2005). All evidence and reasonable inferences reasonably available therefrom are to be viewed in the light most favorable to the verdict. *McClain*, 625 So. 2d at 778.

Considering the evidence in the light most favorable to the verdict, there was insufficient evidence to convict Sands of manslaughter and aggravated assault as a principal. The evidence is also lacking that Rodney Sands acted as an aider or abettor.

As to manslaughter, the evidence does not establish that Rodney was overcome by "heat of passion," he was never described as angry or upset. Overall, Rodney was described as crouching behind his Lexus after the shooting started. [T. 288-89, 309-10, 334]. He might have ran towards the church building at one point. [T. 290]. Yet, there was no testimony that Rodney fired a shot or even pointed his pistol. There was no physical evidence that Rodney was firing a weapon.

Manslaughter committed in the heat of passion is defined in Miss. Code Ann. §97-3-35 (1972) as, "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... ." Heat of passion has been defined as,

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

See also *Graham v. State*, 582 So. 2d 1014, 1017-18 (Miss.1991).

In addition to passion, rage, and anger, circumstances must also be shown that "would indicate that a normal mind would be roused to the extent that reason is overthrown and that passion usurps the mind destroying judgment." *Parker v. State*, 736 So. 2d 521, 525 (¶ 17) (Miss. Ct. App. 1999) (quoting *Calvin v. State*, 175 Miss. 699, 168 So. 75, 76 (1936)). Words alone and disagreements are insufficient to invoke the "heat of passion" element of manslaughter. *Gates v. State*, 484 So. 2d 1002, 1005 (Miss. 1986).

Rodney's involvement in the incident does not even come close to meeting any of these definitions. So, Rodney Sands' culpability under a theory of manslaughter, is mere fiction.

Following the denial of Rodney's motion for directed verdict on all three counts of the indictment, his counsel objected to a lesser included offense manslaughter instruction for Counts 1 and 2 on the basis that there was no factual basis. [T. 415-16; R. 115-17]. See, *e. g. Phillips v. State*, 794 So. 2d 1034, 1036-38 (Miss. 2001).

Rodney Sand's motion for directed verdict on the murder counts necessarily included a request for directed verdict for the lesser included offense of manslaughter, even though a granting of the motion on the murder charges would not preclude proceeding on manslaughter alone. *Accord, Harris v. State*, 723 So. 2d 546, 548 (Miss. 1997), *Ostrander v. State*, 803 So. 2d 1172, 1176 (Miss. 2002), *State v. Shaw*, 880 So. 2d 296, 299-305 (Miss. 2004), *Fulcher v. State*, 805 So. 2d 556, 560-61 (Miss. Ct. App. 2001), and Miss. Code Ann. § 99-19-5 (Rev. 2004).

The state's case also lacked proof that Rodney aided and abetted Rhodes who was found guilty of murder. "Every person who shall be an accessory to any felony, before the fact, shall be deemed and considered a principal, and shall be indicted and punished as such." Miss. Code Ann. §97-1-3 (Rev.2006). Rodney objected to an aiding and abetting instruction, to no avail, and this will be addressed below in Issue Number 3.

In *Crawford v. State*, 133 Miss. 147, 151, 97 So. 534, 534 (1923), the court held that to be an aider and abetter in the commission of a crime, the defendant must be proven to have done something to "incite, encourage, or assist the actual perpetrator in the commission of the crime." A defendant "who participates in the design and plan of committing an unlawful act which is then carried out can be found guilty as a principal under either the theory of conspiracy or the theory of aiding and abetting. *Shedd v. State*, 228 Miss. 381, 386, 87 So. 2d 898, 899 (1956).

The record here is void of any proof that Rodney incited, encouraged or assisted

Rhodes in the commission of any criminal offense. Nor was there any proof of a conspiracy. In the absolute best possible interpretation of the record in favor of the state, there are no words nor actions attributed to Rodney Sands which support, or which could support a conclusion that he conspired with, aided or abetted Rhodes.

Not only was the evidence against Rodney Sands lacking, the testimony of state's key witness, Jason McNair, contradicted the physical evidence and was unreasonable and ultimately unreliable. It is the appellant's position that the conviction in this case cannot, in the interest of justice, be supported by the testimony of Jason McNair.

Jason McNair was admittedly intoxicated by alcohol and under the influence of marijuana. [T. 264-65, 301-07]. Jason lied about Roberto not shooting, and obviously lied about either he or Randolph not being armed. The Pontiac was full of .45 caliber shell casings. [Ex. 13].

In *Lyle v. State*, 8 So. 2d 459, 460 (Miss. 1942), the court recognized

> the rule that where, upon the entire record, it is manifest that sound and reasonable men engaged in a search for the truth, uninfluenced by bias or other improper motives or considerations, could not safely accept and act upon the evidence in support of an issue as true, a jury will not be permitted to consider it.

In *Lyle*, the Supreme Court reversed and rendered an arson conviction based on weak improbable testimony and the intoxication of the state's key witness. *Id.* In the case at bar, Rodney is entitled the same relief, or alternatively, a new trial; because, reasonable jurors could not have convicted Rodney of manslaughter under the statutory definition

outlined above, nor convicted him of aggravated assault, as a principle or accessory and could not "safely accept and act upon" the testimony of Jason McNair as presented in the trial of this case. The case against Rodney Sands should never have gone to the jury. The Court is respectfully requested to render an acquittal of Rodney Sands on all counts or order a new trial.

ISSUE NO. 2: DOES THE WEIGHT OF EVIDENCE SUPPORT CONVICTIONS FOR MANSLAUGHTER AND AGGRAVATED ASSAULT AGAINST RODNEY SANDS?

The physical evidence proves Jason McNair to be a liar. McNair said neither he nor Randolph Sands were armed. [T. 286, 293-94, 322]. Yet eight (8) .45 caliber spent shell casings were found in the Pontiac. [Ex. 13]. Conversely, the physical evidence shows that Aqui Rhodes told the truth about Jason and or Randolph being armed. [T. 444].

Jason McNair was the only person close enough to Randolph Sands to have shot him at close range to leave tattooing around the gun shot wounds. Randolph Sands was shot from his right side of his back where McNair would have been sitting. Tattooing indicated a "near-contact gunshot wound." [T. 216-17]. Neither Rodney nor Rhodes were ever described as being remotely close enough to Randolph Sands to have inflicted Randolph's fatal wounds.

The physical evidence also contradicts McNair's testimony about not hearing or

seeing Roberto McInnis shooting in the back seat. As shown in the statement of facts, *supra*, not only were .40 caliber shells found in the back seat of the Pontiac, but the .40 caliber Kel-Tec pistol was located there, Rhodes was shot, blood was in his vehicle, an independent witness confirmed his injury, a spent projectile was found in the Explorer and there was apparent bullet damage to the Explorer. [T. 447-48, 450-53, 467-68, 499; Exs. 85, 87, 90, 91.]

Very little was presented to the jury about Rodney Sands. The only incriminating testimony came from the apparent dishonest McNair, and that was that Rodney Sands had a small handgun. [T. 288-89]. Remembering that these gentlemen were familiar with firearms, by McNair describing Rodney Sands' possible weapon as small, it was, likely, something smaller than a .40 caliber or .45 caliber.

Once again turning the physical evidence, no shell casings of any caliber were found from where Rodney Sands reportedly stooped behind his vehicle. No other caliber projectiles or rounds were recovered. Rodney is never described as being aggressive or acting under the throws of heat of passion. So, as stated previously, the record lacks proof of Rodney Sands being a principal in the crime of manslaughter or aggravated assault.

On the other hand, the record supports the conclusion that Rodney Sands was merely present and not acting in concert with Aqui Rhodes. The weight of evidence does not support the theory that Rodney Sands was an aider or abettor of Rhodes. A

conviction cannot be based on guilt by association. *Davis v. State*, 586 So. 2d 817, 821 (Miss. 1991).

To aid and abet the commission of a felony, one must "'do something that will incite, encourage, or assist the actual perpetrator in the commission of the crime .... [or] participate ... in the design of the felony.'" *Hughes v. State* 983 So. 2d 270, 276-77 (Miss. 2008), [citing *Vaughn v. State*, 712 So. 2d 721, 724 (Miss. 1998) (quoting *Malone v. State*, 486 So. 2d 360, 363-64 (Miss. 1986)].

Not only must there be an intent of assisting in a crime, but, this intent must "in some way communicated to [the principal]." *Hughes*, 983 So. 2d 276. [Citing *Crawford v. State*, 133 Miss. 147, 151, 97 So. 534 (1923)].

The *Hughes* case demonstrates perhaps the minimal yet measurable degree of concerted effort and communication of intent to join in a criminal conduct justifying the conviction of an aider or abettor. Hughes was convicted of armed robbery and aggravated assault. 983 So. 2d 274-76. Hughes and his co-defendant had been "riding around talking about ways to make money" and, "robbing." *Id.* After this discussion, Hughes accompanied his co-defendant to the victim's home after parking over a 100 yards away and walking up to the victim's home where the co-defendant knocked on the door and told the victim a lie about running out of gas before bluffing an exit and shooting and robbing the victim. *Id.*

The *Hughes* court found that, with the benefit of all reasonable inferences to the

state, "Hughes knew what was about to transpire and acted, along with [the co-defendant]... [and] communicated his intent to assist ... in the commission of the crimes by accompanying [the co-defendant] some 150 to 200 yards to [the victim's] home, and acting, along" before the shooting began. *Id.* Hughes met the co-defendant back at the car. *Id.*

Comparing *Hughes* to the present case, there was no prior communication between Rodney and Rhodes, there was no concerted effort at any time, and there was no communication between Rodney and Rhodes during the commission of the offense. Rodney did not go along with or assist Rhodes. Rhodes and Rodney did not exit together, nor did they act together after the incident.

If the unreliability of Jason McNair is considered, Rodney Sands' position is all the stronger. Jason was not formally charged with anything, he was not formally an accomplice. Yet, Jason definitely had an interest in absolving himself in this incident since Randolph Sands was shot in the back at close range and the Pontiac was full of .45 caliber shells, arguably shot by McNair.

In *Mister v. State,* 190 So. 2d 869, 871 (Miss. 1966), the Court reversed an arson conviction which was based on the testimony of a witness who was not necessarily an accomplice, but, who, like Jason here, was "manifestly interested in absolving himself from guilt and putting the blame on defendant." The *Mister* court described this witness' testimony as containing "material inconsistencies", and as being "unreasonable in major

respects". *Id.* As repeatedly pointed out herein, Jason's testimony conflicted with the physical evidence and was unreasonable as in *Mister*. There is no reason Rodney Sands case should not be resolved the same as in *Mister*.

Jason McNair's testimony should be considered of the same ilk as the state's witness Jones in *Ross v. State*, 954 So. 2d 968, 1017-18 (¶ 135) (Miss. 2007). In reversing Ross' capital murder conviction, the Supreme Court recognized that this particular witness' "inconsistencies and implausible accounts might be regarded merely as a matter of witness credibility to be determined by a jury. [citation omitted]. However, the fact that Jones' testimony was often inconsistent and implausible weighs against its trustworthiness." Quoting from *Cole v. State*, 217 Miss. 779, 786-87, 65 So. 2d 262, 264-65 (Miss. 1953), the *Ross* court analogized, as in *Cole,* reversal was called for, because of "the overwhelming weight of the evidence", and, because the State's main witness was incredible in "[n]ot one, but a number of aspects" making it "an exceedingly improbable and unreasonable story". *Ross,* 954 So. 2d 1017-18.

It follows, accordingly, that the weight of evidence does not support the two manslaughter convictions against Rodney Sands nor the aggravated assault conviction. Acquittals or a new trial are respectfully requested.

ISSUE NO. 3: WAS JURY INSTRUCTION S-9 REGARDING AIDING AND ABETTING IMPROPER AND PREJUDICIAL?

Rodney Sands objected to S-9, given as Instruction 5, an instruction on aiding and abetting. [T. 417-21; R. 107-08; R. E. 18-19]. The objection was not that the instruction improperly stated the law, see *Milano v. State*, 790 So. 2d 179 (Miss. 2001), rather that there was no factual basis, and that Rodney Sands should not be unnecessarily exposed to the risk that the jury would be confused or would misinterpret the law as instructed. Trial counsel specifically stated that the "acting under the direction of the Defendant, or if the Defendant joins another person" language was inapplicable in this case, because, " Mr. Sands acted under no direction, did not join in any activity in this event. He merely had a conversation." The prejudice was guilt by association rather than actual culpability. The objection was overruled and jury instruction was read [T. 417-21, 507-09].

The lack of a factual basis for aiding and abetting is covered above in Issues 1 and 2. Appellant adopts by reference the arguments from these prior issues on this point.

In overruling the objection to the instruction, the trial court here commented that its initial impression was that Rodney Sands and Rhodes were not acting as "partners;" but, for some unclear reason accepted the state's argument that there was a factual basis that "they were acting in concert." [T. 421]. Surprisingly, the trial said that the instruction would be granted, "even though I do think it's confusing." [T. 421].

"An instruction must not be given to the jury if there is no evidence to support the instruction." *Phillips v. State*, 794 So. 2d 1034 1036-38 (Miss. 2001). Reversible error

results from any prejudice resulting from the giving of instructions which misstate the law, which are confusing, or which have no factual basis. *Scott v. State,* 446 So. 2d 580 (Miss. 1984), *Byrom v. State,* 863 So. 2d 836, 874 (Miss. 2003), *McGee v. State,* 820 So. 2d 700, 704-06 (Miss. Ct. App. 2000).

Here since there was no factual basis, and even the trial court said the instruction would prejudice the defendant by confusing the issues, it follows that Sands should be afforded a new trial.

ISSUE NO. 4: WHETHER THE COURT ERRED IN ALLOWING BAD CHARACTER EVIDENCE?

There was testimony and physical evidence that the three occupants of the Pontiac were riding around drinking and smoking marijuana. [T. 260-69, 300-07]. During the redirect of Jason McNair, the state asked Jason if he had ever smoked marijuana with Rodney Sands and or Aqui Rhodes. [T. 347]. Rodney Sands' objection was overruled. *Id.*

The objection was that the question exceeded the scope of the cross-examination. It is the appellant's position that the objection was accurate and the trial court's ruling was prejudicial because the evidence allowed violated the tenets of Miss. R. Evid. 404(b).

In *Beech v. Leaf River Forest Prods., Inc.*, 691 So.2d 446, 452 (Miss. 1997), the Supreme Court held that a witness should not be permitted to testify about an exhibit during redirect if the exhibit had not been introduced during the direct examination or cross-examination. Notwithstanding, the *Beech* court held too that, unless the trial court

abuses its general discretion in evidentiary rulings causing prejudice to a party, there will be no reversal. *Id.* at 448. See also, *Lloyd v. State*, 755 So. 2d 12, 14 (¶ 9) (Miss. Ct. App.1999) (citing *Blue v. State*, 674 So. 2d 1184, 1212 (Miss. 1996) (overruled on other grounds))] and *Farris v. State,* 906 So.2d 113 (Miss. Ct. App. 2004).

Rodney Sands asserts that the trial court here abused its discretion requiring reversal because of the irreparably prejudicial effect of the jury being told that Rodney was a drug user, an accusation not even remotely related to the facts of the case. Admission of character evidence for improper purposes, and not in line with an appropriate exception, constitutes reversible error. *Darby v. State*, 538 So. 2d 1168, 1173 (Miss. 1989). In *Darby*, the Supreme Court reversed an aggravated assault conviction because the trial Court allowed introduction of evidence about the Defendant's criminal history. See also, *Rose v. State*, 556 So. 2d 728, 732 (Miss. 1990) and *Ballenger v. State*, 667 So. 2d 1242, 1256 (Miss. 1995).

Sometimes, however, where another crime or act is so interrelated to the charged crime so as to constitute a single transaction or occurrence or a closely related series of transactions or occurrences, proof of the other crime or act is admissible. *Townsend v. State,* 681 So. 2d 497, 506 (Miss. 1996). In this case, however, the allegation of drug use against Rodney Sands was not "closely related to a series of transactions" and offered no probative aid to any material issue. Its admission was more prejudicial than probative. There was no limiting instruction.

In *Gallion v. State*, 469 So. 2d 1247, 1249-50 (Miss. 1985), Gallion alleged on appeal that he was denied the fundamental right to a fair trial because the prosecution improperly interjected information about alleged criminal conduct by Gallion which had not resulted in conviction. *Id.* The *Gallion* court held that such evidence "violated the rule that testimony in a criminal trial should be confined to the charge for which the accused is on trial." *Id.*, citing *Tucker v. State*, 403 So. 2d 1274 (Miss. 1981). In responding to the State's argument that any error resulting from the improper evidence was harmless, the *Gallion* court reminded the State that "evidence which is incompetent and inflammatory in character carries with it a presumption of prejudice." *Id.* Citing *Tutor v., State*, 299 So. 2d 682 (Miss. 1974). The *Gallion* court reversed and remanded.

Even more to the point, in *Ainsworth v. State,* 756 So. 2d 826, 827-30, (Miss. Ct. App. 2000), Ainsworth was accused of killing his mother's abusive boyfriend. The State obtained a urine sample from Ainsworth the day after the shooting. It tested positive for marijuana. *Id.* The State was allowed to introduce the report into evidence over Ainsworth's objection. *Id.* The Court of Appeals found that the drug use evidence was was not so interrelated so as to constitute one transaction, and not relevant to establish inconsistencies in what Ainsworth claimed he had done prior to the alleged killing.

The *Ainsworth* court recognized that the real purpose the state offered the possible drug use evidence was to show "that Ainsworth was a bad actor with the tendency to commit crimes," a purpose forbidden by M.R.E. 404(b). *Id.* This is the same reason the

state introduced the accusation against Rodney Sands in the present case.

The *Ainsworth* court reversed and ordered a new trial. The same result is requested here. The admission of this evidence constitutes reversible error.

ISSUE NO. 5: WHETHER JUROR MISCONDUCT TAINTS THE VERDICTS?

Misconduct During the Trial

The jury here was admonished during breaks not to speak with anyone about the case. [T. 166-68; 252-53]. However, on the second day of the trial, the court was informed that several people had seen a juror communicating with the mother of Randolph Sands during the lunch break. [T. 349-57].

The trial judge queried each juror individually in chambers, in the presence of counsel and the defendants, with two questions: 1.) whether any of them "had lunch with" a mother of one of the victims; and, 2.) whether any of them spoke to anyone about the case. *Id.* All of the jurors answered both questions in the negative. *Id.* The trial court found the matter to be a "nonissue". *Id.*

Juries must be "unbiased, impartial, and not swayed by the consideration of improper, inadmissible information." *Hickson v. State*, 707 So. 2d 536, 544 (Miss. 1997). Jurors cannot impeach their own verdict in post trial proceedings normally, yet may testify about "misconduct in their presence or about outside influences on the jury panel." *Lewis v. State*, 725 So. 2d 183, 189 (Miss. 1998), (citing *Fairman v. State*, 513 So. 2d

910, 915-16 (Miss. 1987)). See also Miss. R. Evid. 606(b).

After the trial, the issue was again addressed in the hearing on the defendants' motions for new trial. [R. 156-61, 192-93, 202-20; R. E. 26-52]. In Rodney's motion for new trial, it was further developed that the mother of Randolph Sands was observed outside the Courthouse on the second day of trial during the lunch recess "having a conversation and walking with" and "exchanging an undisclosed item" with Jackie Coleman, one of the jurors. [*Id.*; T. 72]. It was also alleged that Ms. Coleman and Ms. Sands were "seen together" at a hamburger restaurant in Prentiss. *Id.* Three affidavits were submitted with the motion in this regard and the testimony of one witness was presented at a hearing on the motion. *Id.*

Rodney's motion for new trial also claimed that another "elder female juror" was seen talking with other family members of one of the victims and "individuals in the courtroom audience." *Id.* No further proof was offered on this point however.

According to *Gladney v. Clarksdale Beverage Company, Inc.*, 625 So. 2d 407, 418 (Miss. 1993), when "an allegation of juror misconduct arises," the first "step is to consider whether an investigation is warranted." If so, juror polling is permitted to determine if there was exposure to "improper outside influence or extraneous prejudicial information ." *Id.*

It is Rodney Sands position that more inquiry should have been made here during the trial by the trial court. The trial court did not ask any of the jurors whether they had

knowledge of *another* juror having contact with the mother of one the victims and the mothers of the victims were never questioned by the court. The court did not question the person or persons who allegedly witnessed the juror having contact with Randolph Sand's mother, nor the persons who brought the allegation to the court's attention.

Moreover, defense counsel, and the state as well, should have been given the opportunity to *voir dire* the jurors so the parties could be informed to make requests for whatever relief would be appropriate whether it be a mistrial or removal of a juror and replacement with an alternate.

If a "verdict was rendered under circumstances in which its purity might have been affected, it must be set aside; if it could not have been affected, it will be sustained." *Gerlach v. State*, 466 So. 2d 75, 78 (Miss. 1985), (citing *Ned v. State*, 33 Miss. 364, 372-73 (1857)). In the present case, even though more should have been done during the trial, more than sufficient proof was presented to the court post trial that the verdicts' purity was highly questionable. It follows that the trial court should have sustained Rodney Sands motion for new trial.

Non-Disclosure in Voir Dire

During voir dire, the prospective jurors were asked if they knew either of the defendants or victims. [T. 14, 20]. Rodney Sands' motion for new trial also disclosed that after the trial it was learned that the questionable juror Jackie Coleman, was related to Randolph Sands, and the record shows that Ms. Coleman did not respond to either of the

above voir dire questions. [R. 157; R. E. 27]. The non-disclosure by Jackie Coleman left defense counsel uninformed.

In *Odom v. State*, 355 So. 2d 1381, 1382-83 (Miss. 1978), a burglary conviction was reversed because an investing detective's brother sat on the defendant's jury and the trial court denied a new trial. The problem occurred due to a lack of full disclosure during voir dire, as here. *Id.*

The *Odom* decision stands for the proposition that "the failure of a juror to respond to [voir dire] questions leaves the examining attorney uninformed and unable to ask any follow-up questions to elicit the necessary facts to intelligently reach a decision to exercise a peremptory challenge or to challenge a juror for cause." *Id.*

Under *Odom*, the trial court should "determine if prejudice to the defendant in selecting the jury reasonably could be inferred from the juror's failure to respond." *Id.* If prejudice can reasonablely be inferred, a new trial is required as a matter of law. *Id.* The factors required to be examined by the trial court upon an allegation of a juror's failure to respond to a voir dire question are whether the non-answered question was "(1) relevant to the voir dire examination; (2) whether it was unambiguous; and (3) whether the juror had substantial knowledge of the information sought to be elicited." 355 So.2d 1383.

If the answer to these three questions is affirmative, then, "the court should then determine if prejudice to the defendant in selecting the jury reasonably could be inferred from the juror's failure to respond." *Id.* If prejudice to the defendant can be inferred,

then the trial court is obligated to order a new trial. *Id.* The fact that Rodney Sands would want to know that a family member of Randolph Sands was in the venire should be assumed, and prejudice from non-disclosure of this fact should be inferred under *Odom.*

In *Lindsey v. State,* 965 So. 2d 712, 714-18 (Miss. Ct. App. 2007), Lindsey argued that the trial court erred when it refused to conduct a full hearing on a charge of juror misconduct when a juror failed to honestly respond to voir dire questions. The *Lindsey* court recognized that parties in jury trials have the right to examine their jury panel to be informed on matters necessary in exercising challenges under Miss. Code Ann. §13-5-69 (Rev.2002).[3]

The allegation in *Lindsey* was that a juror failed to advise the Court that she had knowledge of the Lindsey's background and family and that she worked with Lindsey's mother and had "numerous complaints and conflicts" with the mother. Lindsey was purported to have known certain witnesses who were alleged to have knowledge of the possible juror bias, but Lindsey never presented these witnesses to the court and " made no request for the trial court to consider any testimony or evidence" other than Lindsey's

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MCA § 13-5-69 (1972). Examination of jurors
Except in cases in which the examination of jurors is governed by rules promulgated by the Mississippi Supreme Court, the parties or their attorneys in all jury trials shall have the right to question jurors who are being impaneled with reference to challenges for cause, and for peremptory challenges, and it shall not be necessary to propound the questions through the presiding judge, but they may be asked by the attorneys or by litigants not represented by attorneys.

mother's affidavit.

Even though the *Lindsey* court ruled that Lindsey did not adequately pursue his motion for a new trial based on the possible juror bias, the Court of Appeals, nevertheless, considered the juror's failure to disclose the bias to see if the failure "left Lindsey's counsel 'uninformed and unable to ask any follow-up questions to elicit the necessary facts to intelligently reach a decision to exercise a peremptory challenge or to challenge a juror for cause.'" *Id.* The *Lindsey* court concluded that Lindsey's counsel was not left uninformed, because, Lindsey's mother was present during voir dire and the trial and yet did not bring the issue to the court's attention until after the verdict. Therefore, there was no abuse of discretion in the trial court not conducting a full blown hearing on the issue. Here in Rodney Sands case, trial counsel was not informed.

The requirement of a full opportunity for investigation and disclosure when juror misconduct is alleged is shown in *Boyles v. State,* 778 So. 2d 144, 146-48 (Miss. Ct. App. 2000). Boyles was convicted of aggravated assault and possession of a firearm by a convicted felon in an attack made on his ex-wife. Boyles moved for new trial on the ground of jury tampering or misconduct.

To support his motion, Boyles tendered affidavits asserting that after the trial, the victim was overheard admitting to counsel for Boyles that she had spoken to members of the jury during the trial and was seen "having a conversation with a juror during a lunch recess." *Id.*

The *Boyles* trial court ordered "a hearing to determine the merits of the allegation, [requiring] the defendant [to] provide to this court the names of all jurors that he contends were tampered with or who were engaged in misconduct" within five (5) days. Boyles was unable to identify the juror by name, but, gave a physical description that " he was a black male juror ... believed to have been either juror number 2 or 3." *Id.* Despite this, "the lower court conducted a hearing to determine the merits of the allegation, giving Boyles ample opportunity to produce evidence to support this motion." *Id.* Boyles' only witnesses at the hearing were his trial counsel and counsel's assistant who both merely "attested to the validity of the affidavits which accompanied the motion for new trial." Boyles counsel did not subpoena the victim nor any juror. The trial court found insufficient evidence of tampering. *Id.*

Contrary to *Boyles*, Rodney Sands here presented not only affidavits but sworn testimony that there was indeed improper juror contact. So, the evidence here is more than sufficient for the trial court should have ordered a new trial for Rodney Sands.

In *Lattimore v. State,* 958 So. 2d 192, 203-05 (Miss. 2007), after the trial, court personnel reported possible juror misconduct. On its own, the trial court held a hearing "in which both sides questioned the witnesses." Witnesses at the hearing said they had seen a juror's boyfriend in the hallway waiting for the juror. *Id.* There was also allegations that the boyfriend had spoken to the juror by cell phone during deliberations. Some of the details were disputed by the juror and it was determined that the juror had no

cell phone. *Id.* Nevertheless, if there was contact, it was all personal and "there was no testimony or other evidence that any discussion of the merits of the case or any attempt was made to improperly influence" the juror. *Id.*

Unlike *Lattimore*, the contact here was no innocuous. Rather than contact between a juror and her boyfriend, there was contact between a juror and the mother of a deceased victim. Once again prejudice to the reliability of the verdict is patent.

If the Court here is concerned that Sands' counsel did not ask for more inquiry or for the opportunity to voir dire the jurors directly, there should be no procedural bar to the Court's considering this issue. According to *Lattimore*, "[t]hat the defense failed to raise such an issue at the trial court level does not bar this Court from considering the matter at the appellate level." *Id.*

For all of these reasons, Sands respectfully requests a new trial, yet, would not oppose remand for further factual development on the issue.

ISSUE NO. 6: WHETHER COUNT THREE OF THE INDICTMENT IS FATALLY DEFECTIVE?

Count Three of the indictment in this case charges Rodney Sands and Aqui Rhodes with aggravated assault against Jason McNair. [R. 11-12]. The language of Count Three leaves out "... and against the peace and dignity of the State of Mississippi" as required by Article 4, Section 169 of the Mississippi Constitution of 1890. *McNeal v. State*, 658 So. 2d 1345 (Miss. 1995) . See also, *Clingan v. State*, 135 Miss. 621, 100 So. 185 (1924).

The year "1972" was also excluded from the statutory reference as well. [R. 11-12].

At the arraignment of Rodney and Aqui, the state sought to orally amend the indictment to correct the errors and was granted permission. [T. 4-5]. However, no order amending the indictment was ever entered.

In *McNeal, supra*, the defendant challenged the validity of his indictment as an habitual offender on the basis that the habitual portion was did not conclude with "against the peace and dignity of the State of Mississippi." 658 So. 2d 1348-49. The part of the indictment charging McNeal as an habitual offender was on a separate page from the rest of the indictment. Finding that Section 169 of the Mississippi Constitution of 1890 requires an indictment to conclude with the language, "against the peace and dignity," the *McNeal* court vacated the habitual offender charge against McNeal. *Id.* at 1350.

The entire opinion in *Halford v. State,* 125 So. 914 (Miss. 1930), reads as follows: "The indictment, because of the omission of the words 'against the peace and dignity of the State of Mississippi,' is fatally defective. Reversed, and the appellant discharged." It follows, then, as a matter of law, that Count 3 of Rodney Sands indictment in this case was fatally defective as drafted.

Here, since the state's requested amendment was never reduced to a written order entered on the court minutes, there was no correction of the aforesaid defect in Count 3. Miss. Code Ann. §99-17-15 (1972) states, to-wit:

> The order of the court for amendment of the indictment, record or proceedings provided in Section 99-17-13 shall be entered on the minutes, and shall specify

> precisely the amendment, and shall be a part of the record of said case, and shall have the same effect as if the indictment or other proceeding were actually changed to conform to the amendment; and wherever necessary or proper for the guidance of the jury, or otherwise, the clerk shall attach to the indictment a copy of the order for amendment.

In *Reed v. State,* 506 So. 2d 277, 279 (Miss. 1987), there was an amendment to the indictment; but, no order was entered regarding the amendment. The *Reed* court found that under MCA §99-17-15 (1972), "the State is required to make sure that such an order appears in the record"; however, the ineffective amendment was not reversible error in *Reed,* because, the other charges involved were severable. Also relevant here is that the faulty pleading in *Reed* pertained to factual elements and not constitutionally required language. That was the same situation in *Mahfouz v. State*, 303 So. 2d 461, 463 (Miss. 1974). Factual defects not properly amended are analyzed for fatal variance.

Here *Halford* and *McNeal* control, and the unamended defect is fatal to the conviction in Count 3 rendering it void *ab initio*. See, *e. g.*, *Miller v. State,* 79 Miss. 162, 32 So. 951 (1902). The trial court simply did not have jurisdiction to enter a judgment of conviction in Count 3. The Court is respectfully requested to vacate the aggravated assault conviction of Rodney Sands.

ISSUE NO. 7: WAS RODNEY SANDS PREJUDICED BY INEFFECTIVE COUNSEL?

Appellant foresees the possibility that the Court may find a procedural bar under Issues 4 since his trial counsel's objection to the state's introduction of alleged marijuana

use did not specifically reference M. R. E. 404(b). [T. 347]. If so, the appellant takes the position that his trial counsel's performance was deficient.

It is also the appellant's position that, if the Court here finds that the facts pertaining to the alleged juror misconduct under Issue No. 5 were not fully developed, then the appellant would assert that would be due to his trial counsel not requesting to voir dire the questionable juror, Jackie Coleman and Randolph Sands' mother or due to counsel not having them present at the motion for new trial under subpoena. So, if trial counsel's performance prevents this Court from granting relief under Issue 4 or 5, then Rodney Sands was denied effective assistance of counsel under the Sixth Amendment and Fourteenth Amendments.

The Mississippi Supreme Court applies the two-part test *from Strickland v. Washington*, 466 U.S. 668 (1984), in claims of ineffective assistance of counsel. *McQuarter v. State*, 574 So. 2d 685, 687 (Miss. 1990). Under *Strickland*, the defendant has the burden to establish that "(1) counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense." *Id.*

There is rebuttable presumption that counsel's performance is within the penumbra of reasonable professional assistance. *Id.* The presumption may be rebutted by showing that, without counsel's deficient performance, there would have been a different result. *Leatherwood v. State*, 473 So. 2d 964, 968 (Miss. 1985). This Court examines the totality of the circumstances in determining whether counsel was effective. *Id.*

If the issue of ineffective assistance of counsel is raised, as is here, on direct appeal the court will look to whether the record reveals ineffectiveness counsel, or whether the parties stipulate that the record is adequate for such a determination without further development of evidence. *Wilcher v. State*, 863 So.2d 776, 825 (¶ 171) (Miss. 2003). The appellant hereby stipulates through present counsel that the record is adequate for this court to determine this issue and that a finding of fact by the trial judge is not needed.

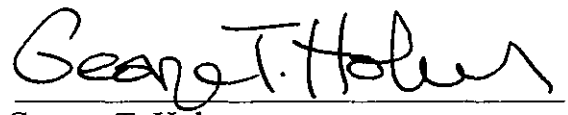
In Issue No. 4, *supra*, the prejudice to Rodney Sands under the *Strickland* test was that the jury considered incompetent character evidence of alleged drug use that would have had no strategic benefit to Sands. Not only was the objection arguably deficient, but, counsel did not request a limiting instruction for the jury in considering this evidence. As to the jury misconduct issue, since counsel did not seek further investigation of the matter or the presentation of further testimony, the verdict in this case remains tainted and unreliable.

These deficiencies would be an infringement on Rodney Sand's fundamental constitutional right to a fair trial. Therefore the appellant is entitled to a reversal if all three convictions in this case based on ineffective assistance of counsel.

CONCLUSION

Rodney Sands is entitled to have his convictions reversed and rendered or remanded for a new trial as to counts 1 and 2. The verdict in Count 3 should be vacated due to the defective indictment.

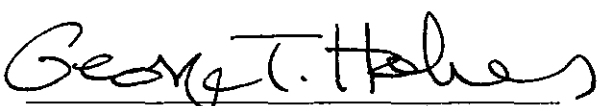
Respectfully submitted,
RODNEY SANDS

By: 

George T. Holmes,
Mississippi Office of Indigent Appeals

CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 4th day of November, 2009, mailed a true and correct copy of the above and foregoing Brief Of Appellant to Hon. Prentiss G. Harrell, Circuit Judge, P. O. Box 488, Purvis MS 39475, and to Hon. Michael Horan, Asst. Dist. Atty. , 500 Courthouse Sq., Columbia MS 39429, and to Hon. Charles Maris, Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid.



George T. Holmes

George T. Holmes, MSB No. [redacted]
MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 N. Lamar St., Ste 210
Jackson MS 39201
601 576-4200