2009-KA-01300-COAT

I. CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for the Appellant certifies that the following persons have an interest in the outcome of this case:

1. Dennis Cosby, c/o MDOC, Meridian, Ms.
2. David L. Walker, Batesville, Ms.
3. James S. Hale, Jr. Batesville, Ms.
4. Family of Wendy Cosby, deceased.

Respectfully submitted,

This the 13th day of October 2009.

David L. Walker MBN [redacted]
Counsel for Appellant

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V. STATEMENT OF THE CASE

PROCEDURAL HISTORY

The Appellant, Dennis Cosby, was indicted for murder pursuant to Section 97-3-19 (1)(a) MCA (1972) by the grand jury of Panola County, Ms. Second Judicial District on November 7th, 2008. Clerk's Record at 5. The Appellant proceeded to trial on August 3, 2009 and the petit jury returned a verdict of guilty of murder. R. at 156. A poll of the petit jury pursuant to URCCCP 3.10 indicated that the verdict was unanimous. R. at 157. The Appellant filed a motion for a new trial and in the alternative for a judgment notwithstanding the verdict and the trial court denied the same. Clerk's Record at 29. The Appellant then filed a notice of appeal of his conviction of murder. Clerk's Record at 32-33.

APPELLEE'S TRIAL WITNESSES

BRANDON HODGES

On February 10th, 2008 Brandon Hodges was a criminal investigator for the Tallahatchie County, Ms. sheriff's department. R. at 13. He received a call indicating that a body had been found floating down the river. Id. This was in Tallahatchie County, Ms. Id. This body was real decomposed. R. at 14.

Investigator Hodges contacted law enforcement in surrounding counties to determine if any missing persons fit the profile of the body. R. at 19. On July 10th, 2008 he received a call from Deputy Sheriff Mark Whitten of the Panola County, Ms. sheriff's department indicating that Wendy Cosby was missing. R. at 20. Investigator Hodges then went to the home of the Appellant in Panola County, Ms. and spoke with him. Id. The Appellant told the investigator that Mrs. Cosby had been missing since November 2007 and he identified a wedding that had been found on the body of as that of his wife. Id. He appeared to be nervous. R. at 20-21. The body was identified as that of Mrs. Cosby via a DNA test. R. at 22.

The Appellant was picked up and taken to the highway patrol station for an interview. Id. According to the Appellant his wife came home, argued with him, then packed some clothes and departed. Id. A second interview was then conducted with the Appellant. In this interview, the Appellant stated that he took the palm of his hand and hit her in the top of her head and knocked her out. R. at 23. Her body was put in the back of a pick up truck and took her to Paducah Wells Road in Tallahatchie County, Ms. Id. He said that at the time that he took the body in his arms She was still breathing. Id. He dropped her off inside the river. Id. The distance between of the Appellant's home and the bridge was approximately

15 to 20 miles. R. at 25. The deceased's body traveled 30 to 40 miles in the river over a three-month period. Id.

On cross examination Mr. Hodges testified that if one believed the Appellant's second statement, then the homicide occurred in Tallahatchie County, Ms., First Judicial District, not Panola County, Ms. Id. This is because the deceased was breathing when the Appellant was thrown off of the bridge. Id. He never inquired as to whether the Appellant had any health problems. Id. The Appellant was not charged after the first interview with investigators. R. at 28.

According to Investigator Hodge, the Appellant told him that he put the body of the deceased in the bed of the pick-up truck and drove he 15-20 miles in a drizzling rain. Her chest was still moving when he picked her up. R. at 29.

MARK WHITTEN

Mark Whitten testified that he was an investigator for the Panola County Sheriff's department and had held this position for fifteen years. R. at 34. He assisted the Tallahatchie County's sheriff's department in the investigation concerning a body that was found in Tallahatchie County, Ms. R. at 34. On July 10th, 2008 Sandy Early and one of her friends came to him and reported that he sister was missing. R.

at 35. He relayed this information to Investigator Hodges and state investigators. Id.

According to a statement that the Appellant gave in the presence of Investigator Whitten he and the deceased got into an altercation in Panola County, Ms. Second Judicial District, over money and gas for a vehicle. R. at 39. The Appellant claimed that the deceased hit him and he took the palm of his fist and hit her in the crown of her head knocking her out. R. at 39-40. He took her body and put it in the bed of a pick up truck. R. at 40.

On cross examination Investigator Whitten testified that he was sure that false confessions occur. R. at 41. The deceased started the altercation. R. at 44. The Appellant was taken into custody after the second interview. R. at 45. Investigator Whitten admitted that he attempted to make the Appellant comfortable during the interview that he conducted based upon interview schools that he had attended. R. at 46.

TIM DOUGLAS

Tim Douglas testified that he is a special agent for the Mississippi Bureau of Investigation. R. at 48. He assisted Investigators Hodges and Whitten in the investigation into the death of the deceased. R. at 49. The Appellant had advised a drug enforcement officer that the deceased was no

longer in the home. R. at 50. The Appellant was confronted by problems that the investigators had found with his original story. R. at 51. Thereafter, the Appellant gave a second interview concerning the death of his wife. R. at 52. According to the Appellant, the deceased was basically taking a thousand per month out of from the home to use for narcotics. Id. There was probably some infidelity in the marriage on the part of the deceased. R. at 52. His wife would use narcotics and stay gone from the home for seven to ten days at a time. R. at 53. The Appellant ultimately confessed to killing his wife according to Investigator Douglas. R. at 55. The interviews with the Appellant were recorded. R. at 56. No physical evidence was found in a search of the home and vehicle of the Appellant. R. at 59.

On cross examination Master Sergeant Douglas admitted that the Appellant stated during an interview that he was "just not with it." Every time the Appellant was interviewed, he had a problem getting his thoughts together. R. at 59. The Appellant stated that he "never hurt that girl. Never." This pretty much contradicted his statement that her threw her off the river bridge. R. at 59. M. Sgt. Douglas conceded that with respect to the altercation at the trailer that the Appellant hit his wife in self-defense. R. at 61. An NCIC check of the Appellant indicated that he did not have

any felonies. R. at 61.

DR. STEVEN HAYNE

Dr. Steven Hayne testified that he practiced in the field of pathology: anatomical pathology, clinical pathology and forensic pathology. R. at 65. He examined the body of an unknown female on February 11, 2008. R. at 67. The body was five feet tall and weighed 150 pounds. R. at 69. The cause of death was a stab wound to the left chest. The manner of death was homicide. R. at 74. He testified that it would possible, but unlikely for someone to be placed in the back of a truck in relatively cold and rain and not wake up. R. at 75-76. A person remaining unconscious for 30 or 40 minutes would seem unusual. R. at 76. His tests found evidence of cocaine use in the body of the deceased. R. at 77. Use of cocaine can affect one's judgment or mental capacity. Id. After redirect examination of Dr. Hayne the Appellee rested its case in chief. R. at 79. The trial court refused to dismiss this case on the basis that it had been prosecuted in the incorrect jurisdiction. R. at 84-85.

APPELLANT'S TRIAL WITNESSES

QUIDA JOYCE SMITH

Quida Joyce Smith is the sister of the Appellant. R. at 86. She was around her brother on a frequent basis. Id. He had an operation to place

veins from one leg to the other. Id. He had a lot of problems with his health. R. at 86. His health problems affects his ability to get around because a hip was deteriorating on him. R. at 87. He could not pick up one of his children who weighed 40 pounds. Id. On redirect examination, she testified that the Appellant loved his wife. R. at 90. He loved her enough to put up with her activities. Id.

DENNIS COSBY

The Appellant was born on June 5th, 1954 and secured a tenth grade education. R. at 91. He mostly worked off shore on oil rigs. Id. In 1992 he had a blood clot in his right leg and underwent an operation to take his calf off and have a vein and muscle transfer from his hips, calves on his left leg to his right leg. R. at 92. He received social security disability benefits as a result of this condition. Id. This condition affects his ability to lift and he could not lift more than thirty pounds. R. at 93. He had a tendency to fall backwards. Id.

The Appellant lived with the deceased for three or four years before he married her. Id. The deceased left home six days after the birth of their son and stayed gone for approximately ten days. R. at 95. His wife smoked marijuana and crack cocaine. Id.

On the day of the altercation with the deceased, she walked into

the marital home and told her husband "Just don't say a damn thing to me." R. at 96. He told her to clean up, get something to eat and rest. But she insisted on going to get her van that had ran out of gas. Id. She refused to go to his folks' home for dinner. Id. They went and got the van and she went to sleep on the couch. R. at 97. She woke up and needed some gas and money immediately. Id. He told her there was nothing here. Id. The following Saturday she came barreling home from another outing and the first thing on her mind was to get back to where she had come from. R. at 97-98. He told her to settle down and because they did not have any money. R. at 98. She was wound up this day and slammed the door and was hollering. Id. The van would not start because it was low on gas. R. at 99.

The Appellant sat down on the couch to give one of his children a bottle and his wife came up behind him and hit him pretty hard in the back of the head. R. at 100. When he turned around, she hit him again and clawed him twice on the top of the head. Id. She continued to hit him and eventually the baby slipped down into the floor. Id. He then hit her in the top of the head and knocked her back on the floor and she sat back there a while. Id. She sat with one leg tucked under her. Id. She never did fall back on the floor. R. at 101. She was later up and moving. They departed

the home about an hour later with the deceased riding in the cab of the truck. Id. This was at her suggestion. Id. They were going to just ride around. R. at 102. Near the county line, the deceased went back into the money situation. Id. Eventually, he slowed the vehicle to 10-12 miles per hour on a new gravel road and he heard the door click. Id. He heard her say in the dark that "I'll show you, you S.B." R. at 103. He did not know where she went. He then went back home. Id. He could not have lifted her from the floor to the back bed of a pick-up truck. R. at 105. Nor could he have picked her up from the bed of the pickup truck and thrown her into the Tallahatchie County river. Id. The investigators had put together a scenario of what he had supposedly done. R. at 108.

On cross examination the Appellant admitted that he had previously stated that the deceased had jumped out of the truck and jumped over the bridge in the dark. R. at 111. He always told his wife that he did not have any money even though he would hide some money. R. at 116. Riding in one of the family vehicles for a trip with his wife was not uncommon. R. at 116. Panic set in when he saw his wife jump off of the bridge and he did not know what to do. R. at 120. His wife committed suicide. R. at 127. He begged his wife to get help a hundred times. Id.

The Appellant then rested his case in chief. R. at 128.

VI. SUMMARY OF ARGUMENT

The trial court erred in overruling the Appellant's motion to dismiss for lack of jurisdiction and proper venue. The altercation that the Appellant and his wife had in Panola County, Ms. Second Judicial District had resolved and any homicide that occurred in this case took place in Tallahatchie County, Ms. First Judicial District when the deceased resumed the argument with the Appellant over money.

The trial court erred in overruling the Appellant's motion for a judgment notwithstanding the verdict.

The trial court erred in overruling the Appellant's motion for a judgment for a new trial.

VII. ARGUMENT

At the conclusion of the Appellee's case in chief the trial court asked the Appellant whether he had a motion at that time and he responded that the Appellee had proved that the death of Ms. Cosby occurred in the First Judicial District of Tallahatchie County, Ms. and therefore the trial court sitting in the Second Judicial District of Panola County, Ms. had no jurisdiction to hear this case and therefore it should be dismissed. R. at 80. He argued to the trial court that the proof indicated that his wife was a living person at the time she was thrown off of the bridge into the Tallahatchie River at Paducah Wells in the First Judicial District of Tallahatchie County, Ms. Id. Additionally, the Appellant noted to the trial court that whatever occurred in Tocowa in the Second Judicial District ended there. Id. If a murder occurred, it occurred in the First Judicial District of Tallahatchie County, Mississippi when the wife was thrown into the Tallahatchie River. R. at 81. There was no intent to commit a homicide in Panola County, Ms. Second Judicial District. The Appellant acted in self-defense when he hit his wife on the top of the head to stop her from hitting him. M. Sgt. Douglas testified that with respect to the altercation at the trailer that the Appellant hit his wife in self-defense. R. at

61. His wife was breathing when he threw her off of the bridge. R. at 25. The Appellant renewed this motion at the conclusion of the proof of the parties. R. at 129

The Appellant included this alleged error in his motion for a new trial and in the alternative for a judgment notwithstanding the verdict. Clerk's Record at 28. Thus, this issue is properly before the reviewing Court and no procedural bar exists to preclude its review. **Fears v. State**, 779 So. 2d 1125, 1127 (Miss. 2000). Additionally, the Appellant raised this issue in a timely manner with the trial court and is not raising the issue for the first time on appeal. **Burnett v. State** , 876 So.2d 409 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66 (Miss. 2004). A reviewing court sits to review alleged errors committed at the trial court level and not to adjudicate the merits of claims not previously presented to the trial court for resolution. **Nichols v. State**, 868 So. 2d 361 (Miss. App. 2003).

The Appellant argued to the trial court that he has a state and federal constitutional right to be tried in the county the offense was committed. R. at 81. The Sixth Amendment to the United States Constitution and Article III, Section 26 of the Mississippi Constitution of 1890 provide for this right. See **Fairchild v State** , 459 So. 2d 93

(Miss. 1984) and **Hughes v. State** 735 So. 2d 238 (Miss. 1999, cert. denied 528 U.S. 1083, 120 S. Ct. 807, 148 L. Ed. 2d 680 (2000). R. at 81.

The Appellee responded to this argument by citing the trial court to to the continuing crime statute. R. at 82. Section 99-11-19 MCA indicates that when an offense is committed partly in one county and partly in another, or where the acts, effects, means, or agency occur in whole or in part in different counties, the jurisdiction shall be in either county in which said offense was commenced, prosecuted or consummated, where prosecution shall be first began. The Appellee theory was that the crime began in the Second Judicial District of Panola County, Mississippi. R. at 82. The Appellee noted to the trial court that whether or not we are listening to the Appellant's version of it, whether or not she was alive or not alive, quite frankly cannot be definitively proven where she died. Id. The Appellee's theory was that the Second Judicial District of Panola County is a proper venue because of the commencement of the crime beginning at Tocowa. Id. The Appellant rebutted this argument by the Appellee by advising the trial court that no crime occurred in Panola County, Ms. Second Judicial District. A marital spat occurred. The acted in self-defense by knocking his wife unconscious. Then the marital spat was over. R. at 83.

The trial court indicated that believed that the Appellee's theory was

right. Id. It noted whether the Appellant acted in self-defense was a jury question. R. at 84. The trial court agreed that the marital spat was over. Id. However, it was of the opinion that when the Appellant loaded up his wife and put her in the back of the pick up truck and hauled her to another county to find a place to deposit the body or crippled injured person, the crime was a continuing transaction. Id. The trial court conceded that the prosecution could have been brought in the First Judicial District of Tallahatchie County, Ms. Id. The trial court therefore overruled the motion. Id.

The Appellee has to meet its burden of proving proper venue based upon a beyond a reasonable doubt. **McBride v. State** 934 So. 2d 1033 (Miss. Ct. App. 2006) and **Hill v. State** , 797 So. 2d 914, 916 (Miss. 2001). If one accepts the Appellee's proof as true, as the petit jury did, the mortal stroke or other cause of death occurred in the First Second Judicial District of Tallahatchie County, Ms. See Miss. Code Ann. Section 99-11-21 (Rev. 2000). The marital spat that occurred in the Second Judicial District of Panola County, Ms. was over and new argument ensued in the First Judicial District of Tallahatchie County, Ms. concerning money and the Appellant threw the very alive wife into the Tallahatchie River (accepting the Appellee's version of the facts as true for argument).

The trial court erred in overruling the Appellant's motion for a judgment notwithstanding the verdict. The Appellant filed a post-trial motion for a judgment notwithstanding the verdict. Clerk's Record at 27-28. A hearing was heard on this motion on August 4th, 2009 and the trial court overruled the aforesaid motion. Clerk's Record at 29. This motion challenges the sufficiency of the evidence. **Lima v. State** 7 So. 3rd 903 (Miss. 2009). In reviewing a challenge to the sufficiency of the evidence, a reviewing court may reverse and render if the facts and inferences point in favor of the Appellant on any element of the offense with such sufficient force that reasonable persons could not have found beyond a reasonable doubt that the Appellant was guilty. Id. The relevant question is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. **Lima** at 909. If the evidence is insufficient to sustain the verdict, then the criminal defendant should be discharged. **May v. State**, 460 So. 2d 778, 781 (Miss. 1984).

A murder conviction must be set aside when the evidence is legally insufficient to sustain the verdict of the petit jury. **Daumer v. State**, 381 So. 2d 1014 (Miss. 1980). The Appellant will concede that he obviously rendered several different versions of the events that occurred concerning the death of his wife. However, the burden of proof was upon

the Appellee to prove beyond a reasonable doubt that the Appellant was in fact guilty of murder. Jury Instruction C-8. Clerk's Record at 14. The Appellee failed to do so. If one accepts the Appellee's version of facts as true with respect to the altercation that occurred at the mobile home of the Cosbys, then the Appellant acted in self-defense when he hit the deceased on the top of the head and then later threw her corpse into the Tallahatchie River. The Appellee conceded that it could not definitively prove where the Appellant's wife died. R. at 82.

The trial court erred in denying the Appellant's motion for a new trial. The Appellant also included a motion for a new trial in his post-trial motions filed herein. Clerk's Record at 27-28. The trial court overruled this motion as well. Clerk's Record at 29.

A motion for a new trial challenges the weight of the evidence. **Lima** at 908. In reviewing a challenge to the weight of the evidence, a reviewing court may overturn a petit jury verdict only when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. **Lima** supra. A reversal is warranted only if the lower court abused its discretion in denying the aforesaid motion. **Wooten v. State**, 811 So. 2d 355 (Miss. App. 2001). The Appellant acknowledges that the reviewing court in determining

whether a petit jury verdict is against the overwhelming weight of the evidence for purposes of a new trial, the court must accept as true the evidence favorable to the Appellee. **Wooten** , supra.

If the deceased died after being struck on the top of the head by the Appellant at the mobile home of the parties, then the Appellee failed to prove that the Appellant had any intent to commit the murder of his wife. The proof presented at the trial of this case is that the Appellant clearly acted in self defense in the altercation that occurred at the mobile home of the parties. In the alternative, if the focus is on the events that occurred in Tallahatchie County, Ms. First Judicial District when a new marital spat ensued over money, then a new trial should be conducted in the proper venue and jurisdiction- the First Judicial District of Tallahatchie County, Ms. Thus, the trial court abused its discretion in denying the aforesaid motion and the Appellant requests the Court to grant him the remedy of a new trial. **Collier v. State**, 711 So. 2d 458, 461 (Miss. 1998).

VIII. CONCLUSION

In conclusion, the Appellant would urge the Court to determine that venue and jurisdiction of this prosecution should have been in the First Judicial District of Tallahatchie County, Ms. and to grant him a new trial. the evidence presented at the trial of this is insufficient to prove beyond

a reasonable doubt that the Appellant is guilty of the murder of his wife.

Respectfully submitted,

This the 13th day of October 2009.

David L. Walker MBN [redacted]
Counsel for the Appellant
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POB 719
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662-563-2514

IX. CERTIFICATE OF SERVICE

I, David L. Walker, counsel for the Appellant, hereby certify that I have this day either mailed or hand-delivered a copy of the Appellant's Brief to Hon. Jim Hood, attorney general, Hon. James S. Hale, Jr., counsel for state, and Hon. Andrew Baker, circuit court judge, at their usual business addresses.

This the 13th day of October 2009.

David L. Walker