IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2009-KA-01799-COA

DANNY JERARD JACKSON — APPELLANT

VS.

STATE OF MISSISSIPPI — APPELLEE

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 disqualification or recusal:

Mr. Danny Jerard Jackson, Appellant;

Jim Davis, Esq., trial attorney;

Julie L. Howell, R. Smith McNeal, and Phillip W. Broadhead, Esqs., Attorneys for the Appellant, Criminal Appeals Clinic, University of Mississippi School of Law;

Richard Joel Smith, and George Huffman, Esqs., Assistant District Attorneys, Office of the District Attorney;

Jim Hood, Esq. Attorney General, State of Mississippi;

Honorable Roger T. Clark, presiding Circuit Court Judge; and

Harrison County Police/Sheriff's Department, investigating/arresting agency.

Respectfully submitted,

PHILLIP W. BROADHEAD, MSB #[redacted]
Clinical Professor, Criminal Appeals Clinic

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STATEMENT OF ISSUES

ISSUE ONE:

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT GRANTED THE STATE'S JURY INSTRUCTION PLACING A TIME LIMIT ON DELIBERATE DESIGN AND REFUSED THE DEFENDANT'S JURY INSTRUCTION ON THE MEANING AND APPLICATION OF THE LESSER-INCLUDED OFFENSE OF "HEAT OF PASSION" MANSLAUGHTER.

ISSUE TWO:

WHETHER THE TRIAL COURT ERRED WHEN IT ALLOWED THE PROSECUTION TO USE IMPERMISSIBLE, HIGHLY PREJUDICIAL, AND IRRELEVANT IMPEACHMENT TACTICS ON DEFENSE CHARACTER WITNESS TERRY KING BY ALLOWING THE STATE TO USE A PRIOR DRUG CONVICTION IN VIOLATION OF MISSISSIPPI RULE OF EVIDENCE 609.

ISSUE THREE:

WHETHER THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENSE MOTION FOR A DIRECTED VERDICT AT THE END OF THE STATE'S CASE-IN-CHIEF ON THE CHARGE OF MURDER, THEREBY REFUSING TO ALLOW THE CASE TO PROCEED ON THE LESSER-INCLUDED CHARGE OF MANSLAUGHTER, AS WELL AS REFUSING TO GRANT THE DEFENSE MOTION TO SET THE JURY'S VERDICT ASIDE AND GRANT A NEW TRIAL

BASED ON ALL OF THE EVIDENCE ADDUCED AT TRIAL.

STATEMENT OF INCARCERATION

Danny Jerard Jackson is presently incarcerated in the Mississippi Department of Corrections.

STATEMENT OF JURISDICTION

This honorable Court has jurisdiction of this case pursuant to ***Article 6, Section 146 of the Mississippi Constitution*** and ***Miss. Code Ann. 99-35-101 (Supp. 2001)***.

STATEMENT IN SUPPORT OF ORAL ARGUMENT

This case is very fact-intensive and the Appellant, through counsel, would respectfully request this Court to grant oral argument to present conflicts in the rulings of the trial court based on the evidence and testimony presented at trial that are alleged by the Appellant to be erroneous.

STATEMENT OF THE CASE

For months Danny Jackson chased his wife and his marriage, desperately trying to avoid losing both to another man. Searching in vain for the affections of his wife, passionate re-attachment of displaced love, and, eventually, cool reason, Danny became someone capable of acts unknown to him in his life. Tragically, before he could bring his wife home,

he found provocative pictures of her and her lover engaged in sex acts, her car parked at another apartment complex, and, on the night in question, the man from the pictures in a chance encounter at a convenience store. When Danny first came face-to-face with the man stealing his wife, his desperation overtook him, and he blindly committed an act of extreme and uncontrolled violence.

Danny and Angela Jackson were married in 2004. (T. II. 241) The Jackson's had four children together, and Angela cared for them. (T. II. 238) Danny worked at Gulf Coast Prestress on the coast. (T. II. 241) Angela was Danny's first wife. (T. II. 241) However, after a few years, they began to have problems when Angela began receiving late night phone calls that upset Danny. (T. II 242) She told Danny that it was only her friends calling, but he suspected that these calls were coming from old boyfriends. ***Id.*** Danny would pretend to be asleep, but in reality he was listening to his wife's late night conversations. (T. II. 243)

Danny accused Angela of "running the streets." (T. II. 242) She blamed their problems on him. ***Id.*** Sometimes, Angela would leave their home, and Danny would follow her. (T. II. 235) In early 2007, while they were living in Alabama, Angela asked for a divorce. (T. II. 235) Sometime later, they moved backed to Mississippi and were living together (T. II. 246)

In February 2007, Danny bought his wife a new cellular phone. (T. II. 245) She used it to take pictures of herself engaged in sex acts with a man Danny didn't know. (T. II. 245) Danny found these pictures and other suggestive text messages in early June of 2007. (T. II. 244) From these text messages, Danny got a name of the man sending them - "Neco." (T.

II. 244) From a co-worker, he received information about this man, Neco, including a description of this man's car - a Cadillac, similar to Danny's. (T. II. 246) Danny drove around near his home and found a car fitting the description at River Ten Apartments sometime before the end of June of 2007. (T. II. 247)

On June 27, 2007, Danny came home after work about 6:15 p.m. (T. II. 245-46) Angela brought him some food. ***Id.*** Danny took a bath, but by the time he got out, Angela was gone. ***Id.*** So, Danny went looking for his wife's van and found it at River Ten Apartments, parked beside the same care he thought belonged to "Neco." (T. II. 247) Danny started knocking on doors, looking for his wife. (T. II. 248) At approximately 9:30, Jack Powell, a security guard at the apartment complex, saw Danny knocking on doors. (T. I. 77) Powell told Danny to stop. (T. I. 78) Danny said that he was looking for his wife, whom he suspected was cheating. ***Id.*** Powell sympathized with Danny, but told him he needed to leave. (T. I. 79)

Danny had no designs on Neco's life when he went to River Ten Apartment and had no weapon. (T. II. 248) So, he left, sure that his wife was nearby with another man. (T. II. 249) Danny went to a nearby convenience store on Creosote Road to purchase some beer and rubbing alcohol. (T. II. 249)

There, as he was leaving, he saw the man - Neco - recognizing him from the obscene pictures on his wife's cellular phone. ***Id.*** Danny heard his wife's voice coming from the man's phone, as they passed. (T. II. 250) Danny had a knife in his car, left over from their move from Alabama. ***Id.*** He confronted the man, asking his name, before things escalated.

(T. II. 251) After an argument and physical altercation, Danny stabbed Neco in front of multiple eye-witnesses. ***Id.*** Neco Strickland stumbled across Creosote Road, and Danny followed behind him in his car. ***Id.*** A witness, Michael Hale, saw Danny stab Neco again. (T. I. 124) When the witness approached Danny, he got in his car and drove away. (T. I. 127)

That night, Detective Ron Kirkland detained Danny and took a statement from him. (T. I. 148) In the statement, Danny admitted to stabbing Neco Strickland (Exh. D-4). On December 17, 2007, Danny Jackson was indicted in Harrison County Circuit Court for the murder of Neco F. Strickland (C.P. 8, R. E. 17).

At his trial, the State's case-in-chief consisted of testimony from eye-witnesses and a DNA expert (T. II. 214) After the State rested its case, the defense moved for a directed verdict as to the charge of murder, and that the case proceed on the lesser-included offense of manslaughter. (T. II. 221) However, the trial judge denied this motion. ***Id.*** The defense began its case with Danny's wife, Angela, who admitted to her affair with Neco. (T. II. 227) Following her testimony, Danny took the stand in his own defense. (T. II. 240) Adding to his confusion of the events of the previous weeks, Danny gave inconsistent statements to police regarding his encounter with Neco at the gas station, but Danny was consistent that he happened upon Neco Strickland accidentally. (T. II. 263; 280) Finally, the defense concluded its case with character witnesses on behalf of Danny. (T. II. 284-97) Both sides debated jury instructions, which were then given to the jury by the trial judge, including an instruction placing a time limit on deliberate design, but excluding the defense's heat of passion

instruction. (T. III. 312; 315) (CP. 93, 107; RE. 46, 47). Subsequently, the jury returned a verdict of guilty on the charge of murder, and Danny was sentenced to life in prison in the custody of the Mississippi Department of Corrections. (T. III. 344-45) The defense filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. (T. III. 348-61, R.E. 48-63) (CP. 125-29, RE. 20-24) However, the trial court denied this motion. (T. III. 361) (CP. 138, RE. 25-26) Feeling aggrieved by the verdict of the lower court, the Appellant filed this timely appeal to the Mississippi Supreme Court on November 2, 2009. (CP. 139, RE. 27-28)

SUMMARY OF THE ARGUMENT

Mr. Jackson was denied a fair consideration of the evidence, which clearly showed him to be a desperate man without any premeditation or a deliberate design to murder Neco Strickland. The State's case-in-chief was totally devoid of direct evidence and included only scarce circumstantial evidence attempting to establish Mr. Jackson's state of mind in the moments before Mr. Strickland was stabbed. Meanwhile, the defense cross-examination during the State's case showed substantial evidence of Mr. Jackson's tormented state of mind, his chance encounter with Mr. Strickland at a convenience store, and - as a reasonable inference - his lack of deliberate design in the killing of his wife's paramour, Neco Strickland. Through the errors committed by the trial court as set out below, the State was able to portray Mr. Jackson as a hardened criminal, even though he had never before been violent, while

obscuring those facts that revealed him to be a hurt and anguished man who lashed out at the circumstances beyond his control.

Mr. Jackson first contends the trial court erred when it refused the defense jury instruction concerning the application of the lesser-included offense of "heat of passion" manslaughter. An accused is entitled to a jury instruction presenting his theory of the case, so long as the instruction does not incorrectly state the law, is not fairly covered elsewhere in the instructions, and is not without foundation in the evidence. All of these requirements were met in the instruction offered by the defendant. The trial court abused its discretion when the prosecution's manslaughter instruction was granted and the proposed defense jury instruction was denied, and, as a result, the jury was not allowed to fairly and accurately consider Mr. Jackson's claim of "heat of passion" mitigation to the indicted charge of murder.

Moreover, Mr. Jackson contends that the impeachment tactics employed in the cross-examination of Terry King, a character witness for the defense, violated Mississippi Rule of Evidence 609. The State used a minor drug conviction to attack King's character for truthfulness, which was improper evidence since dishonesty or a false declaration was not implicated through this injurious cross-examination. Mr. Jackson was prejudiced by this error, as the jury presumably discounted the evidence of his peaceful reputation and, instead, associated him with a convict based on his friendship with the witness.

Lastly, Mr. Jackson contends that the prosecution did not present a legally

sufficient case on the charge of deliberate design murder, nor did the overwhelming weight of the evidence support the jury's guilty verdict for the crime of deliberate design murder. The State presented no direct evidence to signify that Mr. Jackson was deliberate or that he had malice aforethought in this killing and presented only minimal circumstantial evidence. Mr. Jackson has been convicted in the killing of his wife's paramour, whom the uncontested evidence shows Mr. Jackson accidentally met for the first time at the scene of the crime. The only circumstantial evidence that tends to support deliberate design theory of prosecution is the testimony of an eyewitness who saw Mr. Jackson follow the deceased a short distance and stab him again. Even in the light most favorable to the prosecution, no rational juror could find beyond a reasonable doubt from this slight indicia of proof that Mr. Jackson was not acting in the "heat of passion." And, in the alternative, the defense case sufficiently rebutted this slight circumstantial evidence of premeditation to such a point that the overwhelming weight of the evidence is not supportive of the jury's conviction of deliberate design murder.

Mr. Jackson was found guilty of murder, despite the overwhelming evidence clearly proving that he acted in the "heat of passion," and a complete lack of conclusive proof that he formulated a deliberate design to kill. Further, his trial was also riddled with procedural errors, which deprived him of a fundamentally fair trial. Therefore, for the above reasons, this honorable Court should reverse and render this case, thereby discharging the Appellant from custody or, in the alternative, reverse and

remand this case for a new trial, with proper instructions to the lower court.

ARGUMENT

ISSUE ONE:

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT GRANTED THE STATE'S JURY INSTRUCTION PLACING A TIME LIMIT ON DELIBERATE DESIGN AND REFUSED THE DEFENDANT'S JURY INSTRUCTION ON THE MEANING AND APPLICATION OF THE LESSER-INCLUDED OFFENSE OF "HEAT OF PASSION" MANSLAUGHTER.

Danny Jackson's desperate behavior on the night he stabbed Neco Strickland was an act that illustrated the fine, but distinct, differences between the legal elements of the separate crimes of murder and manslaughter. Juries must have a complete and accurate statement of the law that simply, plainly, and clearly explains the legal significance of facts without over-weighing any individual principle of law through duplication. In this case, a jury without sufficient instructions might weigh too heavily the gruesome nature of the killing of another without making intellectually and emotionally difficult decisions about Danny Jackson's state of mind. The Appellant respectfully contends that the trial court instructed the jury in a way that was overly preferential to the prosecution and deprived Danny Jackson of an opportunity to fully present his theory of the case.

The appellate review of jury instructions is well-known and summarized as follows:

> 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.

Agnew v. State, 783 So. 2d 699, 702 (¶6) (Miss. 2001).

Under this standard the trial court erred when it refused Danny Jackson's instruction, D-10. (C.P. 107, R.E. 47) This error was compounded by the trial court when it granted the State's improper jury instruction, S-9. (C.P. Supp, R.E. 46)

> Defense proposed instruction D-10 read, in part:
>
> > [I]t is a jury question whether or not there has been enough time for the Defendant to cool off from his initial state of mind that would be raised to 'heat of passion.' ... Men's temperaments also very [sic] greatly ... and ... we must determine the questions of deliberate design in each case, not by the standard of an ideal 'reasonable man,' but by that of the party to whom the deliberate design is imputed.

(C.P. 107, R.E. 47) (*quoting* ***Haley v. State***, 85 So.129, 132-33, 123 Miss. 87, 85 (Miss. 1920)). This instruction meets every element of this Court's requirements for jury instructions, and, therefore, it was an abuse of discretion for the trial court to exclude it for the jury's deliberations on whether Danny Jackson had a deliberate design to kill or, as was the defense theory of the case, whether he acted in the "heat of passion."

First, the defense instruction was an accurate statement of the law. The Mississippi Supreme Court in ***Haley*** declared the precise language set out in the proposed instruction. Though the case is from an era long past, it has been neither overruled nor distinguished. Specifically, Jackson was robbed of an express and accurate statement that "the duration of hot blood" is a subjective consideration, differing between and among individual persons. Jury members might have,

erroneously, considered Danny Jackson's actions of crossing the road without placing proper weight on his subjective state of mind (the only evidence offered for which was Jackson's testimony that he blacked out - testimony supportive a "hot blood"). (T. II. 251)

There is no doubt that "heat of passion" has some objective boundaries. The State's heat of passion instruction, S-5, accurately instructed, "The passion felt by the person committing the act should be induced by some insult, provocation, or injury, which would naturally and instantly produce, in the minds of ordinarily constituted men, the highest degree of exasperation." (C.P. 93, R.E. 45) (quoting ***Barnett v. State***, 563 So. 2d 1377, 1379 (Miss. 1990)). However, this defense instruction would have accurately and clearly instructed the jury that they ought to consider the specific defendant's tendencies and history in deciding the issue of the duration "heat of passion." Furthermore, it expressly charged the jury that "heat of passion" was the subject of their province.

Additionally, D-10 is neither duplicated elsewhere in the instruction nor without foundation in the evidence. No where else is the subjective nature of "heat of passion" discussed. No where else is the jury specifically charged with the legal principle that "heat of passion" is a question of fact to be answered by the jury during their deliberations. And, further, no where else is the impact of quick "cooling time," also a question of fact that must be guided by the very principles contained in ***Haley***, discussed for the jury. It is error for the trial court to refuse a defense instruction when

the State presents an incomplete statement of the law and an accurate supplement is presented by the defense. *See* ***McGee v. State***, 820 So. 2d 700 (¶ 15-18) (Miss. App. 2000) (where the State's instruction was accurate, except for excluding the burden of proof on self-defense).

In denying the defendant's proposed instruction, D-10, the trial court refused an instruction that was not inaccurate, duplicative, or without foundation. This statement of the law was liable to have influenced the jury's consideration of the facts in favor of the defendant. And, furthermore, the prejudice against Danny Jackson was compounded by the trial court's grant of the State's cumulative instructions on "deliberate design."

The State's instruction S-9, read, in part: "'Deliberate design' to kill a person may be formed very quickly and perhaps only moments before the act of killing the person. However, a 'deliberate design' can not be formed at the very moment of the fatal act.'" (C.P. Supp., R.E. 46) (S-9 was mistakenly left out of the record and, subsequently, supplemented on motion by the Defendant). First, the instruction is cumulative to other prosecution instructions dealing with deliberate design. The State also defined deliberate design in its instruction S-3. (C.P. 92, R.E. 44) In contrast, only S-5 defined the elements of "heat of passion." (C.P. 93, R.E. 45) This grant of duplicative instructions had the effect of emphasizing the key element of murder over the key element of manslaughter, thereby improperly impacting the preconceptions of the jury and skewing the essential elements of proof in their deliberations on the

separate crimes of murder and manslaughter.

The State may not place a time limit on deliberate design. ***Duvall v. State***, 634 So.2d 524, 525 (Miss. 1994). The specific language objected to by defense counsel at trial ("...may be formed very quickly and only moments before the act ...") has roots in Mississippi law. ***Gossett v. State***, 660 So. 2d 1285, 1293 (Miss. 1995). In a vacuum it might be appropriate. However, whether or not each distinct thought in an instruction is an accurate statement of the law is not the end of the inquiry.

The State's instructions were more likely to confuse the jury because they bifurcated discussions of "deliberate design" and "heat of passion," leaving the jury able to assume that both might exist in the mind of the defendant at the time. The defense instruction properly set the two concepts apposite from one another ("...in the 'heat of passion,' and not with 'deliberate design'..."). (C.P. 107, R.E. 47) The State's instructions could have led reasonable jurors to consider deliberate design before considering heat of passion, instead of considering both equally and contemporaneously. Further, the defense instruction properly instructed that some provocations "rankle in the breast for days," which could have altered a reasonable juror's interpretation of a key fact in the State's case for design - that Jackson crossed the road while still in the heat of passion to stab again. (C.P. 107, R.E. 47)

By over-emphasizing the elements of murder and offering incomplete instructions on the elements of manslaughter, the jury was more likely to obscure the legal distinctions between an act of desperate, irrational madness and an act of cold,

deliberate murder. Therefore, the Appellant respectfully requests this Court to reverse and remand this case to the lower court with proper instructions for a new trial.

ISSUE TWO:

WHETHER THE TRIAL COURT ERRED WHEN IT ALLOWED THE PROSECUTION TO USE IMPERMISSIBLE, HIGHLY PREJUDICIAL, AND IRRELEVANT IMPEACHMENT TACTICS ON DEFENSE CHARACTER WITNESS TERRY KING BY ALLOWING THE STATE TO USE A PRIOR DRUG CONVICTION IN VIOLATION OF MISSISSIPPI RULE OF EVIDENCE 609.

The Appellant, a man distraught and confused by his wife's infidelity, sought to prove his theory of the case that this killing was not murder through the testimony during trial of his character for peacefulness by the testimony of persons acquainted with his personality. Mr. Jackson's character was improperly tarnished by a highly improper impeachment tactic used by the State against Mr. Jackson's main character witness. This action led to the jury discrediting the very witness testifying directly to Mr. Jackson's character for peaceful nature and further associated him with a convicted drug user.

For a nonparty, non-prosecutorial witness' credibility to be impeached through cross-examination, ***Mississippi Rule of Evidence 609*** requires that conviction of a crime that tends to negate veracity or one that involves dishonesty must be used. ***MRE 609;White v. State***, 785 So. 2d 1059 (Miss. 2001). Simple possession of a controlled substance is not a crime that would in any meaningful way shed light on a character witness' ability to testify truthfully about an accused reputation for peace or violence.

Martin v. State, 872 So. 2d 713 (¶23) (Miss. Ct. App. 2004).

Terry King, a vital character witness for Mr. Jackson, had previously been convicted of the minor drug charge of possession, and when the prosecution began to ask Mr. King about a prior conviction, the defense objected. (T. III. 292, R.E. 35) The then prosecutor represented to the trial judge that:

> **Mr Huffman**: Your Honor, if I may respond, this is not a party witness. It is a non-party witness of which any felony conviction is admissible under 609.
>
> **By the Court**: All right the objection will be overruled.

Id. (emphasis added).

In effect, the State used this simple possession conviction to impermissibly impeach King in a bald-faced attempt to discredit him to the jury, and for no other purpose under the rule cited by the prosecutor in this statement to the trial court. (T. III. 291, R.E. 34) Furthermore, this tactic was improper, as a minor drug charge has been held to not be a crime allowed under Rule 609 as it does not involve dishonesty or any relevance for a defense witness' truth and veracity, nor is it punishable by imprisonment in excess of one year. In addition, the possession conviction occurred in 2002, which was merely seven years prior to the trial, eliminating the "ten-year" requirement. ***Jefferson v. State***, 818 So. 2d 1099 (¶26) (Miss. 2002). The ***Jefferson*** case further reiterated the well-established rule regarding the right of the accused to confront and cross-examine the witnesses brought against him that:

The Court stated the ultimate rule as follows:

> Given the constitutional right of a criminal defendant to confront those testifying against him, we interpret ***M.R.E. 609(a)(1)*** as allowing full impeachment of prosecution witnesses without the requirement of a balancing test, except in extreme situations such as where the prosecution witness has a prior conviction that is both highly inflammatory and completely unrelated to the charges pending against the accused.

Id at ¶26 (internal citations omitted) (emphasis added) (citing ***Young v. State***, 731 So. 2d 1145 (Miss. 1999)).

Although the rule was amended in 2002 to differentiate the scrutiny of prior convictions of nonparty and party witnesses, this long-standing constitutional principle is explicit in the rule to prosecutorial witnesses, and is still subject to ***MRE 403*** balancing. King was not a witness for the prosecution, thus there was no constitutional right to cross-examine him for all convictions. ***Id.*** Certainly, if King had been a witness for the prosecution, the defendant constitutionally would be allowed to cross-examine him on even a prior conviction that was unrelated to his veracity (again subject to the ***MRE 403*** probative value/prejudicial effect findings). ***White v. State***, 785 So. 2d 1059 (Miss. 2001). However, the present case is clearly distinguishable from ***White***, as the witness in that case was a main witness for the prosecution and the defendant was not allowed to impeach the witness with a minor drug conviction unrelated to veracity. ***Id.*** at ¶4-5. While ***White*** dealt with a denial of the accused's right, the case at bar presents a violation of a right due to improper admittance of evidence and the prejudicial effect of the prosecution's insinuation of an improper association with the witness for the defense, which is treated markedly different under ***MRE 609*** than impeachment of the

accused for prior conviction of crime. *See generally,* ***MRE 609(a)*** and Official Comment; ***Graves v. State***, 914 So. 2d 788 (Miss. Ct. App. 2005) (prejudicial effect of cross-examination of two nonparty prosecution witnesses probationary status outweighed any probative value that evidence might have had). Instead of having an untarnished witness presented to the jury as in ***White***, the present case led to information being improperly exposed to the jury and tarnishing not only a witness for the defense, but also the accused through mere association. This is exactly the prejudicial type of non-probative evidence that ***MRE 609*** prohibits when it states:

(a) General Rule. For the purpose of attacking the character for truthfulness of a witness,

> (1) evidence that (A) a nonparty witness has been convicted of a crime shall be admitted subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and (B) a party has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the party; and
>
> (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of punishment.

MRE 609(a) (emphasis added).

Thus, Mr. King's conviction circumvented the plain language of ***MRE 609(a)(1)(A)***, and evidence of his conviction could then only have been presented to the jury in cross-examination by the State through the ***MRE 403*** balancing test necessary under the rule for a weighing of probative value versus prejudicial effect. (T. III. 292,

R.E. 35) The Appellant does not contend here that Mr. King personally suffered prejudice through this prosecutorial act as it would be irrelevant for this non-party witness. ***Moore v. State***, 787 So.2d 1282 (¶26) (Miss. 2001); ***Young v. State***, 731 So.2d 1145, 1151 (Miss. 1999). However, Mr. Jackson does in fact argue that he himself, the accused, suffered substantial prejudice as a result of this tactic. While ***Young*** unequivocally provides that when specifically considering the prejudice affecting a non-party witness, it should be deemed irrelevant, it fails to consider the actual prejudice suffered by the accused. ***Young***, at 1150. Further, ***Young*** and ***Moore*** are both clearly distinguishable from the case at bar as the witness in ***Young*** was the prosecution's key witness, and while the impeachment in ***Moore*** involved a witness for the defense, he was a fellow inmate of the accused who testified to discredit the accused's informant. ***Id.***; see also, ***Moore***, at ¶11. Conversely, Mr. King's unitary purpose in testifying was to give simply an account of the accused's nature for peace or violence. His role as a character witness definitively distinguishes this case as the jury's entire, undivided focus in weighing King's testimony rested on Mr. Jackson's character, and not on any other factual concern. Consequently, the tarnishing of Mr. King's entire testimony by the State's improper tactic severely and negatively impacted the jury's view of Mr. Jackson.

The improper impeachment tactic used by the State against Mr. King was not simply harmless error, as King was a vital witness in Mr. Jackson's presentation of character, a key element of the theory of defense. King unequivocally testified that Mr.

Jackson had a reputation for peacefulness and was not known to be aggressive. (T. III. 290, R.E. 33) Further, no evidence was even attempted to be offered by the State to refute the fact established through King's testimony that Mr. Jackson had a peaceful nature, thus this otherwise evidence central to the defense's claim that the Appellant had no deliberate design to kill was negated in the jury's mind by the State's improper character assassination by associating Mr. Jackson with a convicted drug user, whose sole testimonial purpose was to vouch for Mr. Jackson's character. While the prejudice to Mr. King himself would be considered "irrelevant" under ***Young*** and ***Moore***, it is the actual defendant who suffered the prejudice as a result of this improper impeachment tactic. Further, no claim to admissibility "subject to" ***MRE 403*** was made by the prosecutor, only the blanket statement that the rule allows nonparty witnesses to be impeached by prior conviction of crime without any limitation.

The only evidence regarding Mr. Jackson's character presented at trial by either side was that he was peaceful in nature and had no previous encounters of aggression. Without this improper use of a minor drug charge to attempt to elicit doubt regarding King and Mr. Jackson's credibility, the sole evidence presented would have stood untarnished in front of the jury. However, since it did not, the jury improperly characterized Mr. Jackson and certainly negated his positive past behavior when making its determination in this case. Therefore, the Appellant respectfully submits that the conviction and sentence rendered in this case should be reversed and this matter remanded to the lower court with proper instructions for a new trial.

ISSUE THREE:

WHETHER THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENSE MOTION FOR A DIRECTED VERDICT AT THE END OF THE STATE'S CASE-IN-CHIEF ON THE CHARGE OF MURDER, THEREBY REFUSING TO ALLOW THE CASE TO PROCEED ON THE LESSER-INCLUDED CHARGE OF MANSLAUGHTER, AS WELL AS REFUSING TO GRANT THE DEFENSE MOTION TO SET THE JURY'S VERDICT ASIDE AND GRANT A NEW TRIAL BASED ON ALL OF THE EVIDENCE ADDUCED AT TRIAL.

The events of June 27, 2007, leading to the death of Neco Strickland were hurried, frenetic, and irrational. Before any eyewitness could even begin to process the events that were happening in front of them, the act of killing Neco Strickland was, essentially, over. The eyewitness reports formed the great portion of the State's attempt of proof beyond a reasonable doubt on the issue of deliberate design. The State presented absolutely no direct evidence attempting to prove that Mr. Jackson took deliberate steps leading up to the death of Mr. Strickland. Rather, the proof presented conclusively established that the killing of Neco Strickland was a result of Danny Jackson's desperation, and that he acted in the heat of passion. Recognizing that the issues of the legal sufficiency of the prosecution's case and whether the overwhelming weight of the evidence is supportive of the jury's verdict are separate and distinct arguments, the Appellant would present both in this single issue argument.

A. Legal Sufficiency

In examining the legal sufficiency of the State's case-in-chief, the Court reviews facts presented in the light most favorable to the prosecution. ***Holloman v. State***, 656 So. 2d 1134, 1142 (Miss. 1995). The standard of appellate review for challenges to the

legal sufficiency of the evidence is also articulated in ***Bush v. State,*** 895 So. 2d 836 (¶ 17) (Miss. 2005) (citing ***Jackson v. Virginia***, 443 U.S. 307, 315 (1979)). In ***Bush***, the Court restated that "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ***Id.*** The Court also emphasized that "[s]hould the facts and inferences considered in a challenge to the sufficiency of the evidence '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 proper remedy is for the appellate court to reverse and render." ***Id.*** (emphasis added) (citing ***May v. State***, 460 So. 2d 778, 781 (Miss. 1984)). If these facts - so reviewed - do not establish all the elements of the convicted crime, then the State's case is not legally sufficient to support the conviction. If the trial judge determines that any element of the crime so lacks evidentiary support that no reasonable trier of fact could reach that element beyond a reasonable doubt, then the trial judge should issue a directed verdict. ***Id.*** Here, the trial judge should have issued a directed verdict with regard to the charge of murder because the evidence was not sufficient to prove the essential elements of deliberate design murder beyond a reasonable doubt.

Deliberate design is a vital distinction between murder and manslaughter and is required to conclusively prove the former. ***Woodham v. State***, 800 So. 2d 1148 (¶ 22) (Miss. 2001). The concept of deliberate design, generally, implies the careful and

unhurried consideration of the consequences of one's actions in the killing of another. ***Gossett v. State***, 660 So. 2d 1285, 1293 (1995). Deliberate design need not exist in the mind of the defendant for any definite period of time. ***Pittman v. State***, 297 So. 2d 888, 892 (1974). "Malice aforethought" is the same thing as forming a "deliberate design" to kill. ***Id.*** While legislative amendment and subsequent Supreme Court decision has blurred the line between murder and manslaughter with the addition in 1995 of "depraved heart murder," Danny Jackson was not indicted on that crime, the jury was not instructed on those elements of murder, and, therefore, the subsequent negative treatment of ***Pittman*** is irrelevant under the facts of this case. *See generally,* ***Outlaw v. State***, 797 So. 2d 918 (¶¶14, 15) (Miss. 2001).

Here, the State produced no direct evidence attempting to prove that Danny Jackson had the requisite deliberate design to kill Neco Strickland. The eyewitness who saw Danny at River Ten Apartments said that Danny was in a heightened emotional state, but not that Danny had any sort of a weapon in his possession or was making any threats to kill anyone. (T. I. 79) And, because he allowed Danny to leave without contacting the police, one could reasonably infer that Danny exhibited, at that time, no observable characteristics of a man considering murder. ***Id.***

During the State's case, no eyewitnesses testified about any significant characteristics of Danny's behavior supportive of a deliberate design to kill before the stabbing took place. Afterwards, some eyewitnesses described Danny's demeanor as "calm" (T. I. 124), which is an inappropriate affect for someone who intended to and

carried out a murder. Furthermore, the very fact that Danny stabbed Neco Strickland in front of so many eyewitnesses tends to indicate circumstantially that he was not considering the consequences of his actions in a cool, deliberate fashion. Killing under the bright lights of a convenience store in front of multiple eyewitnesses seems more like the act of a man so desperate that he has wholly disregarded the consequences of his behavior and is not in control of his emotions - in short, acting in the heat of the moment instead of a "careful and unhurried consideration of the consequences" of one's actions in the killing of another. ***Gossett***, *supra*, 660 So. 2d at 1293

Perhaps the trial judge considered Jackson's subsequent crossing of Creosote Road and second stabbing as circumstantial evidence of some sort of a deliberate design. This fact may be interpreted as a deliberate act, extending beyond the state of mind of a "heat of passion," however, consider the alternative possibility - what if Danny Jackson had fled the scene of the stabbing at the convenience store instead of getting into his car, following Neco Strickland across the street, then stabbing him again? This would have been the more rational and measured choice, the decision of a man deliberately weighing the consequences of his actions. Only a man under the cloud of uncontrollable rage and illogical confusion would imperil his safety by staying longer at the scene of a stabbing that he just committed. The true interpretation of this circumstantial fact is, at best, equivocal. Further, this circumstantial evidence - standing alone as the sole fact presented by the State attempting to prove deliberate design - cannot in the interests of justice be considered dispositive of this element of

proof even when viewed in the light most favorable to the State's case.

It must, then, have been the State's theory of prosecution for murder that Danny developed the deliberate design to kill Strickland in the moments leading up to the actual violence at the convenience store. However, there was no evidence - direct or circumstantial - to support this theory. Such an inference could only be reasonably drawn from the facts surrounding the act itself. If the act itself can stand alone as evidence sufficient to reasonably infer a deliberate design to kill, then the legal distinction between the essential elements of proof between murder and manslaughter will have been practically eliminated.

Furthermore, long lines of case law support the contention that the "paramour-killing" is more often "heat of passion" manslaughter. If a man catches his wife in adultery with another man and then and there slays her paramour, the provocation is so great that it extenuates his crime from murder to manslaughter. ***Denham v. State***, 67 So. 2d 445, 447 (1953). In this case although Danny did not "catch" Neco Strickland in bed with his wife, it is undisputed from the evidence presented at trial that Danny had viewed cellphone photographs of the two lovers together. (T. II. 245) This fact could certainly be viewed in the light of the court in ***Denham*** speaking of the "catching in the act" as provocation sufficient to constitute the elements of manslaughter, not murder.

Whether or not Danny caught the two of them in the act does not settle the question of premeditation. The trial judge in evaluating whether the State's evidence proved premeditation, should have considered whether the provocation evident from

the testimony was sufficiently similar to the well-established provocation standard of ***Denham***. In Jackson's case, he testified that after all-but catching Strickland with his wife, he encountered the paramour by accident at a convenience store. (T. II. 250) Further, he testified that when he passed Neco, he heard his wife's voice coming from Neco's cell phone. (T. II. 250) While he did not "catch" his wife with Neco, he heard her, and, while he did not catch them in bed, he accidentally met his wife's lover fresh from their adultery.

In 1956, a California court considered provocation that might be analogous to the "catching in the act," where a husband encountered the man he knew to be sleeping with his wife at the home of his mother-in-law. ***California v. Bridghouse***, 303 P. 2d 1018, 1019 (Cal. 1956). The sight of the paramour in the mother-in-law's home was "a great shock to the defendant, who had not expected to see him there or anywhere else." ***Id.*** at 1022. Similarly, Danny Jackson could not have expected or prepared himself for the great shock of encountering his wife's lover so soon after Neco Strickland left Mrs. Jackson in his bed. (T. II. 250) It must have been a terrible, emotional, and humiliating experience, dangerously aggravating Danny's feelings of helplessness and hopelessness in his wife's adultery.

Taking all the evidence - or, rather, the lack thereof - together, the Appellant urges that the trial judge should have issued a directed verdict to the indicted charge of deliberate design murder at the close of the State's case, recognizing that sufficient evidence had not been offered to establish malice aforethought (or deliberate design).

(T. II. 221, RE. 29) Then, the trial judge could have allowed the case to go forward on the issue of "heat of passion" manslaughter alone, which the evidence and testimony presented by the prosecution clearly supported. Testimony shows that Danny Jackson had no murderous intent at the home of the victim, and the State's most compelling circumstantial evidence is, at best, ambiguous and subject to two equally sensible interpretations. Since the State was able to produce no evidence whatsoever that conclusively established a deliberate design to kill in the moments before the stabbing, the State's case-in-chief is not legally sufficient. Furthermore, the defense offered significant evidence that rebutted the State's claim of deliberate design, and the judge had a second opportunity to reconsider the legal sufficiency of the prosecution's case in denying the defense motion for Judgment Notwithstanding the Verdict. (T. III. 361, R.E.48-63) (C.P. 138; RE. 25-26) Therefore, the Appellant respectfully requests this Court reverse the refusal of the trial judge to direct a verdict in favor of the defense as to the charge of deliberate design murder and render this matter, thereby discharging the Appellant from the custody of the Mississippi Department of Corrections, or, in the alternative, to reverse and remand this case to the lower court with proper instructions for a new trial on the proper charge of manslaughter.

B. Weight of the Evidence

The familiar standard of review for the denial of a post-trial motion seeking a new trial is abuse of discretion. ***Dilworth v. State***, 909 So. 2d 731 (¶17) (Miss. 2005). A motion for a new trial challenges the weight of the evidence presented at trial.

Dilworth, 909 So.2d at ¶ 20. A reversal is warranted only if the lower court abuses its discretion in denying a motion for new trial. ***Id.*** When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, an appellate court will only disturb a jury's verdict when it is so contrary to the overwhelming weight of the evidence that allowing it to stand would sanction an "unconscionable injustice." ***Bush v. State***, 895 So. 2d 836 (¶18) (Miss. 2005). In a hearing on a motion for a new trial, the trial court sits as a "thirteenth juror," but the motion is addressed to the discretion of the court, which should be exercised with caution, and the power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict. ***Id.*** The evidence should also be weighed in the light most favorable to the verdict. The ***Bush*** Court stated:

> A reversal on the grounds that the verdict was against the overwhelming weight of the evidence, unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict. Rather, as the "thirteenth juror," the court simply disagrees with the jury's resolution of the conflicting testimony. This difference of opinion does not signify acquittal any more than a disagreement among the jurors themselves. Instead, the proper remedy is to grant a new trial.

Id.

In the context of a defendant's motion for new trial, although the circumstances warranting disturbance of the jury's verdict are "exceedingly rare," such situations arise where, from the whole circumstances, the testimony is contradictory and unreasonable, and so highly improbable that the truth of it becomes so extremely doubtful that it is repulsive to the reasoning of the ordinary mind. ***Thomas v. State***, 92 So. 225, 226

(1922). Though this standard of review is high, the appellate court does not hesitate to invoke its authority to order a new trial and allow a second jury to pass on the evidence where it considers the first jury's determination of guilt to be based on extremely weak or tenuous evidence, even where that evidence is sufficient to withstand a motion for a directed verdict. ***Dilworth***, 909 So.2d at ¶ 22.

In the case at bar, the Appellant contends that in weighing the evidence presented by both the State of Mississippi and Danny Jackson, a reasonable, fair-minded juror could have concluded that the random events and the irrational actions that lead to the killing of Neco Strickland were manslaughter, but certainly not murder.

On direct, Danny Jackson testified - and this fact went uncontested - that his encounter with Neco Strickland at this convenience store was completely accidental and unplanned. (T. II. 250) This undisputed fact conclusively established that he could not have possibly developed a deliberate design to murder Neco Strickland because Danny did not know that the two of them would coincidentally meet at the convenience store. The State offered no direct, circumstantial, or impeachment testimony (or any other evidence for that matter) that would cause a reasonable juror to doubt that claim.

Danny also offered uncontested and undisputed testimony that his strained relationship with his wife had placed him in a heightened emotional state from which he could not escape. (T. II. 242) Through late night phone calls and unexplained absences from home, Danny's wife was flaunting her infidelity before her helpless husband. ***Id***. She used the cell phone he had purchased for her to send and receive

sexually explicit messages and photographs, including a photograph of Neco Strickland engaging in sex acts with her. (T. II. 244) There would have been no way for Danny to forget these circumstances when he first came face-to-face with Neco Strickland at the store. Then, when he heard his own wife's voice coming through the receiver on Neco Strickland's cell phone, Danny snapped. (T. II. 250)

All of this uncontested evidence carries great weight. Danny was helpless to end the affairs his wife had been having. He was desperate as his family was tearing apart. He knew that his wife was cheating, and he had been, literally, a few feet from catching her. And the final provocation was as unintentional as it was tragic. Neco Strickland had no clue who Danny Jackson was. (T. II. 251) Danny had no clue that the two of them would meet at this convenience store. And there is no indication that Angela Jackson knew that Danny would hear her voice coming from her lover's cell phone. However, the overwhelming weight of the evidence shows, that these circumstances aggravated Danny Jackson so that he abandoned all reason and consideration of consequences. Danny Jackson's testimony further tipped a scale that already strongly indicated a lack of deliberate design.

Denham, *supra*, stands firmly for the proposition that catching a spouse in the act of adultery is sufficient provocation, however the Appellant contends that this Court ought not feel restricted by this example of provocation, lest the distinction between murder and manslaughter further blur into a single morass of confusion. The trial court's twin errors here in refusing to recognize that all killings are not murder continue

to blur that distinction, and unfairly places the responsibility of distinguishing these two obscure legal concepts upon the jury, which is neither equipped for nor charged with that responsibility. Misplacing these roles of law interpreter and fact-finder deprived Danny Jackson of a fundamentally fair trial and a just verdict based on the evidence presented at trial. For the reasons above, the Appellant moves that this Court finds error in trial court's refusal to find either that the State's case was legally insufficient or that the total weight of the evidence was not in accord with the verdict. Accordingly, the Appellant further moves this honorable Court to reverse and to remand this case to the lower court with proper instructions for a new trial on the proper charge of manslaughter.

CONCLUSION

The Appellant herein submits that based on the propositions cited and briefed hereinabove, together with any plain error noticed by the Court which has not been specifically raised, the judgment of the trial court and the Appellant's conviction and sentence should be reversed and vacated, respectively, and the matter remanded to the lower court with instructions to the lower court for a new trial. In the alternative, the Appellant herein would submit that the judgment of the trial court and the conviction and sentence as aforesaid should be vacated, this matter rendered, and the Appellant discharged from custody, as set out hereinabove. The claims of error in this case are brought by the Appellant under ***Article 3, Sections 14, 23, and 26 of the Mississippi***

Constitution and the ***Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution***. The Appellant further states to the Court that the individual and cumulative errors as cited hereinabove are fundamental in nature, and, therefore, cannot be harmless.

Respectfully submitted,

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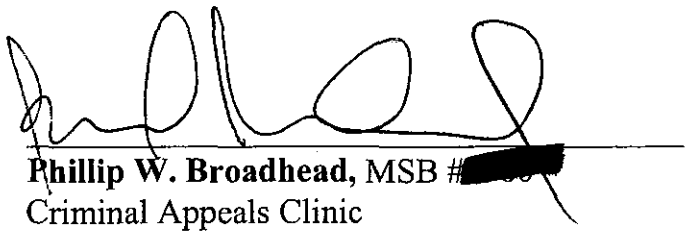

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CERTIFICATE OF SERVICE

I, Phillip W. Broadhead, Criminal Appeals Clinic Professor and attorney for the Appellant herein, do hereby certify that I have this day mailed postage fully pre-paid/hand delivered/faxed, a true and correct copy of the foregoing Brief of Appellant to the following interested persons:

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This the 9th day of April, 2010.

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