

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**JAMES RICHARD CONNERS, JR.**

**APPELLANT**

**V.**

**NO. 2011-KA-0406-SCT**

**STATE OF MISSISSIPPI**

**APPELLEE**

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**BRIEF OF THE 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.

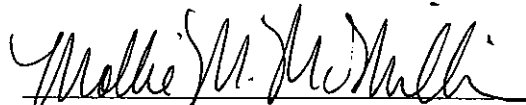
1. State of Mississippi
2. James Richard Connors, Jr., Appellant
3. Honorable Dewitt (Dee) T. Bates, Jr., District Attorney
4. Honorable Michael M. Taylor, Circuit Court Judge

This the 3<sup>rd</sup> day of August, 2011.

Respectfully Submitted,

OFFICE OF STATE PUBLIC DEFENDER

BY:



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**STATEMENT OF THE ISSUES**

Issue One: Connors's Constitutional Right to Confrontation was violated by the admission into evidence of two forensic reports prepared by forensic scientists but introduced into evidence through a sheriff's department investigator.

Issue Two: James Richard Connors, Jr., received constitutionally ineffective assistance of counsel at trial, evidenced by his attorney's failure to object to the State's introduction of forensic evidence through a sheriff's department investigator, failure to object to highly prejudicial information regarding Connors's past criminal activity and gang affiliation, and failure to object to gruesome, prejudicial, and cumulative photographs of the victims.

**STATEMENT OF THE CASE**

James Connors, Jr., was indicted by a Pike County Grand Jury on September 1, 2010, for two counts of murder in the deaths of his brother, Kenneth Connors (Kenneth) and sister-in-law, Sandra Connors (Sandra). (C.P. 4-7, R.E.1-4). The indictment also charged Connors with two counts of possession of a firearm by a convicted felon and one count of possession of stolen property related to a motorcycle found at his home. (C.P. 4-7, R.E. 1-4).

A jury found Connors guilty of both counts of murder and both counts of possession of a firearm by a convicted felon. (C.P. 68, R.E 6). The trial court granted a directed verdict on the

possession of stolen property charge. (C.P. 67). The trial court sentenced Connors to two life sentences for the murder convictions and two ten-year sentences for the firearms charges, all to be served consecutively. (T. 587, C.P. 81-82, R.E 15-16). Further, Connors was charged with court costs of \$1217.00. (T. 587, C.P. 81-82, R.E. 15-16).

Connors is currently in the custody of the Mississippi Department of Corrections. Connors filed a motion for JNOV or, alternatively, for a new trial, which the trial court denied. (C.P. 77, 89, R.E. 11 ). Connors timely filed his notice of appeal on March 15, 2011. (C.P. 83).

### **STATEMENT OF FACTS**

Sheriff's deputies were called to the Connors home after Sandra's granddaughter was unable to contact Sandra for a couple of days. (T. 227). Deputy Mike Milholen of the Pike County Sheriff's Department testified that he arrived at the Connors's home on January 22, 2010, after receiving a call for a "welfare concern." (T. 227). Deputy Milholen knocked on the door of the home to no response. (T. 228). Deputy Milholen testified that the only noise he heard from the inside of the trailer was a television on the back side of the trailer. (T. 228). The door to the trailer was locked. (T. 228). Deputy Milholen was able to find an unlocked window, which he opened and looked through. (T. 228). From that window, Deputy Milholen could see a body in the living room, just in front of the front door. (T. 228). Deputy Milholen closed the window and waited on investigators to arrive. (T. 228).

Jackie Young, who lives approximately fifty to seventy yards from the Connors home, testified that on January 20, 2010, she heard four gunshots. (T. 236). Young testified that the shots came from the direction of the Connors home and came in quick succession. (T. 236). She did *not* hear a single shot before hearing the four shots together. (T. 236). Young heard the shots at



around 4:30 or 5:00 in the afternoon while she was sitting on her front porch. (T. 236). Young did not hear anything unusual before or after the shots were fired, and she testified that after hearing the shots, she put her cigarette out and "went out." (T. 236).

On cross-examination, Young testified that she could see the Connors home from her porch. (T. 241). Despite her vantage point, she did not see anything unusual at the home when the shots were fired. (T. 241).

Elizabeth Bowen, who also lived near the Connors home, testified that she was able to see from inside her home that Kenneth checked his mailbox on the morning of Wednesday, January 20, 2010, at around 10:30 or 11:00 a.m. (T. 249). At around 5:00 the same evening, Bowen heard four gunshots. (T. 249). Bowen thought nothing of the shots, assuming "the boy called T" was hunting. (T. 249). She did not hear or see anything out of the ordinary before or after she heard the gunshots. (T. 249). Bowen testified that she tried to reach Sandra by phone several times on Thursday and Friday, but got no answer. (T. 250-51).

Jennifer Brooks testified that she did not know Kenneth and Sandra, but she was asked by Sandra's granddaughter, who lived in Houma, Louisiana, to check on Sandra. (T. 255). Brooks lived close to the Connors home. (T. 255). Brooks knocked on the trailer and called out for Sandra, but never heard anything from inside the home other than the dog barking. (T. 258). Brooks did not go onto the porch of the trailer or try the front door. (T. 258). Brooks then contacted Sandra's granddaughter, Kathleen, and told her that there was a van at the trailer, but she was unable to get an answer after knocking and calling for Sandra. (T. 259). She offered to call the police, but Kathleen stated that she would drive up there herself. (T. 259).

Kathleen Theriot, Sandra's granddaughter, testified that she spoke with Sandra around 9:00 a.m. on Wednesday, January 20th. (T. 273). Sandra asked if she could call Kathleen later, and

Kathleen never heard back from her grandmother. (T. 274). Kathleen tried to reach Sandra by telephone several times Wednesday, Thursday, and Friday. (T. 274). After hearing from Brooks that there was no answer at the trailer, Kathleen decided to drive up with her husband and uncle to check on them. (T. 275-76).

When they arrived at the Connors home, Kathleen took a set of keys out of the RV parked on the property because they usually kept a key to the trailer with that set of keys. (T. 277). Kathleen gave the keys to her uncle to begin trying to unlock the door, and Kathleen proceed to knock on the trailer and try to look into the windows. (T. 276-77, 286). Kathleen testified that she could hear a television which was turned up to a high volume coming from the area of James Connors's room. (T. 278). Kathleen testified that she could hear footsteps inside the trailer and the dog barking. (T. 277). They decided at that point to call police. (T. 277).

Chief Detective Davis Haygood of the Pike County Sheriff's Department testified that he was called to investigate after Deputy Milholen discovered a body in the trailer. (T. 297). Detective Haygood testified that none of the other officers had entered the trailer prior to his arrival at the scene. (T. 297). Because the door was locked, the investigators decided to force the door open by kicking it. (T. 297).

When they entered the home, investigators found Kenneth's body face down. (T. 300, Ex. 10). The position of Kenneth's body led Detective Haygood to conclude that Kenneth's body had been moved from another location. (T. 300). Investigator Haygood believed that Kenneth was shot on the front porch of the trailer and then dragged back into the home. (T. 306).

Sandra's body was found in the kitchen of the home, approximately six feet away from Kenneth's body. (T. 309). Sandra had sustained a single gunshot wound to her back. (T. 309). A Mossberg 12-gauge shotgun was found on a table in the front room of the trailer, along with an

empty 12-gauge shell casing. (T. 307).

Investigators collected some clothing from James Connors's bedroom which investigator Haygood testified were damp. (T. 323-24). They also found a stain that appeared to be blood on the door leading into the defendant's bedroom. (T. 324). That stain was later determined to be Kenneth's blood. (T. 324). Detective Haygood also testified regarding the Mississippi Crime Laboratory's analysis of the shotgun shells found at the scene. According to Haygood's interpretation of the crime lab's report, the spent shell casings and the pellets recovered from the victim's bodies were consistent with being fired from a 12-gauge shotgun, but could not be conclusively tied to the 12-gauge shotgun found at the scene. (T. 343, State's Exs. 96, 97). Haygood also testified regarding the firearms analyst's determination that the 12-gauge shotgun found at in the trailer was a functioning weapon. (T. 363, State's Ex. 99). The firearms analyst who prepared the reports did not testify at trial.

Detective Haygood also testified regarding the results of the crime lab's toxicology report on the blood taken from Connors. (T. 367). According to Haygood's reading of the report, Connors's blood tested positive for caffeine, oxycodone, and opiate metabolites when he was found in the trailer. (T. 367). Notably, the toxicologist who performed the analysis of Connors's blood did not testify at trial.

When Connors was released from the hospital on January 26th, a deputy picked him up and took him to the sheriff's department for questioning. (T. 344). Haygood and another officer questioned Connors, and the interview was recorded. (T. 345, State's Ex. 84). The interview lasted approximately three hours, and the entire video was played at trial for the jury. (T. 345-46). Connors made repeated references in the interview to his criminal history and his membership in the Bandidos Motorcycle Club. (State's Ex. 84). Connors's defense attorney did not object to these

portions of the statement being played for the jury.

Dr. James W. Rawlins, a professor at the University of Southern Mississippi, testified that he analyzed the gunshot-residue samples taken from James Connors. (T. 431). According to Rawlins, he identified several particles in the samples, including aluminum, potassium, silicon, chlorine, sulfur, and calcium. (T. 431). Rawlins testified that the findings were consistent with gunshot residue, but that other sources for the particles could not be excluded. (T. 432, State's Ex. 101). Rawlins also testified that the three major primer elements – lead, barium, and antimony – which are usually all three present in gunshot residue, were not detected in the samples taken from the defendant. (T. 433, State's Ex. 101).

Kathryn Moyse, a DNA analyst with Scales Biolab in Brandon, Mississippi, testified for the State regarding evidence found at the scene. Moyse testified that she did not find blood stains to analyze on the clothing taken from the defendant's bedroom. (T. 445-46). Moyse determined that the blood sample taken from the defendant's bedroom door came from Kenneth. (T. 448). However, she was not able to obtain a DNA profile from the blood found on the gloves and rags officers took from a kitchen garbage can. (T. 448). Lastly, Moyse testified that she was able to obtain DNA from the handle and trigger of the shotgun police took from the scene. (T. 450-51). However, Moyse testified that the sample was mixed, meaning it came from more than one person. (T. 451). Therefore, she was unable to match the DNA profile to any individual, although she did testify that she could not exclude the defendant as being one of the donors of the DNA. (T. 451).

Investigator Bruce Fairburn testified that he was at the scene when Kenneth and Sandra's bodies were found. (T. 456). Fairburn observed the defendant lying in his bedroom watching television when investigators arrived. (T. 457). According to Fairburn, Connors explained to the investigators that he was disabled as a result of several motorcycle accidents. (T. 458). Further,

Fairburn testified that Connors admitted to being a former member of the Bandidos Motorcycle Club, and his membership had caused him to be shot several times over the years. (T. 458). Connors additionally told Fairburn that there was a handgun in the drawer of his nightstand. (T. 458). Fairburn found the weapon, made sure it was safe, then returned it to the drawer so it could be photographed later. (T. 458). The gun was a Smith & Wesson semi-automatic 9-millimeter handgun. (T. 459).

Fairburn stated that there was no evidence of a disturbance in the defendant's room. (T. 459). Further, there was a pet Chihuahua living in the home who appeared to be cared for. (T. 461). Fairburn testified that the dog had food and water, as well as a dog bone, and had not had any accidents in the home. (T. 461).

According to the statement he gave to sheriff's deputies, Connors awoke to police officers standing over his bed in the home he shared with his brother and sister-in-law in the early evening hours of January 22, 2010. (State's Exhibit 84 ). Connors informed the officers that he had been in a drug-induced sleep since two days earlier, when drug dealers from New Orleans came to the home and killed his brother and sister-in-law. (*Id.*). Connors informed police officers that the men then assaulted him with the butt of a shotgun and forced crushed-up pills down his throat, causing him to pass out until officers arrived two days later. (*Id.*).

Dr. Thomas Deering testified at trial that he performed the autopsies on Kenneth and Sandra Connors. (T. 477). Dr. Deering stated that Sandra's cause of death was a gunshot wound to the back. (T. 481). Dr. Deering testified that Kenneth's cause of death was multiple shotgun wounds. (T. 489). Dr. Deering was unable to determine the exact number of shotgun wounds Kenneth received, but estimated that there were at least four separate shotgun wounds, and possibly a fifth. (T. 489).

The defense called Dr. Olukunle Ajagbe, a doctor at Southwest Mississippi Regional Medical Center in McComb to testify. (T. 506). Dr. Ajagbe testified that he treated James Connors in the early morning hours of January 23, 2010. (T. 507, 522). Connors arrived at the hospital with low blood pressure and kidney failure. (T. 508). Dr. Ajagbe sent Connors to the ICU. (T. 508). In addition to the kidney failure and low blood pressure, Dr. Ajagbe noticed some pancreatitis as well as some pneumonia looking at Connors's CAT scans. (T. 508). Connors informed Dr. Ajagbe that he had been hit in the chest with the butt of the shotgun and that he had also been hit in the head. (T. 509). Dr. Ajagbe testified that he did not identify any bruises on Connors's chest, but suggested that bruising may have been obscured by Connors's many chest tattoos. (T. 509).

The defense rested following Dr. Ajagbe's testimony. (T. 505 ). Connors did not testify at trial. The defense and the State stipulated that Connors was a prior convicted felon. (C.P. 47, T. 505). Further, the trial court granted Connors a directed verdict of not guilty on Count IV of the indictment, possession of stolen property. (T. 527, C.P. 67). The other charges were submitted to the jury for deliberations. (T. 579).

### **SUMMARY OF THE ARGUMENTS**

James Connors's right to confront the witnesses against him was violated when the State presented forensic evidence through a sheriff's department investigator. The investigator did not prepare the forensic reports and was not qualified through voir dire to offer that type of scientific evidence. Because the evidence was presented through a sheriff's investigator rather than the forensic analysts themselves, Connors was unable to cross-examine the analysts regarding the methods used to reach the conclusions, the chain of custody of the evidence analyzed, or the education and qualifications of the analysts to make those determinations. The admission of this evidence, while not objected to, constitutes plain error.

Secondly, Connors received Constitutionally ineffective assistance of counsel. Connors's trial counsel failed to object to the admission of the forensic reports through the sheriff's investigator, failed to object to gruesome crime scene photographs, and failed to object to evidence of Connors's prior motorcycle gang affiliation and prior criminal history, especially since trial counsel agreed to a stipulation regarding Connors's prior criminal convictions.

### **ARGUMENTS**

#### **ISSUE ONE: CONNORS'S CONSTITUTIONAL RIGHT TO CONFRONTATION WAS VIOLATED BY THE ADMISSION INTO EVIDENCE OF TWO FORENSIC REPORTS PREPARED BY FORENSIC SCIENTISTS BUT INTRODUCED INTO EVIDENCE THROUGH A SHERIFF'S DEPUTY.**

##### **i. Standard of Review**

The standard of review for the admission of evidence is abuse of discretion. *Smith v. State*, 839 So. 2d 489, 494 (Miss. 2003)(citing *Farris v. State*, 764 So. 2d 411, 428 (Miss. 2000)). However, when a question of law is raised, the applicable standard of review is de novo. *Biglane v. Under the Hill Corp.*, 949 So. 2d 9, 14 (Miss. 2007)(citing *Cummings v. Benderman*, 681 So. 2d 97, 100 (Miss. 1996)).

Although Connors failed to raise an objection to the admission of the forensic reports at trial, this Court may review the errors under the plain-error doctrine because it affects a fundamental right. This Court explained the plain-error doctrine in *Smith v. State*, 986 So. 2d 290, 294 (¶10) (Miss. 2008), stating:

Under the plain-error doctrine, we can recognize obvious error which was not properly raised by the defendant on appeal, and which affects a defendant's "fundamental, substantive right." See *Debrow v. State*, 972 So. 2d 550 (Miss.2007) (recognizing as plain error that the admission of evidence of defendant's blood alcohol content was in violation of his Sixth Amendment right to confrontation); *Sanders v. State*, 678 So.2d 663, 670 (Miss.1996) (quoting *Gray v. State*, 549 So.2d 1316, 1321 (Miss.1989) ("It has been established that where fundamental rights are violated, procedural rules give way to prevent a miscarriage of justice")). Plain-error

review is properly utilized for “correcting obvious instances of injustice or misapplied law.” *Newport v. Fact Concerts*, 453 U.S. 247, 256, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981).

*Id.* This Court also held in *Smith* that “a violation of the Confrontation Clause is a violation of a ‘fundamental, substantive right.’” *Smith*, 986 So. 2d at 294. Therefore, this Court should review the violation of Connors’s rights under the Confrontation Clause under the plain error doctrine.

**ii. Connors has a constitutional right to confront the witnesses against him.**

Part of the Sixth Amendment of the United States Constitution, the Confrontation Clause provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him.” U.S. Const Amend. VI. Due to its incorporation via the Due Process Clause of the Fourteenth Amendment, this procedural right applies to both federal and state prosecutions. *See Pointer v. Texas*, 380 U.S. 400 (1965). The right to confrontation is an essential right of criminal defendants, noted by the United States Supreme Court as a “bedrock constitutional guarantee.” *Crawford v. Washington*, 541 U.S. 36, 42 (2004).

**iii. The information contained in the crime lab’s reports is testimonial in nature and should not have been admitted through the sheriff’s deputy.**

At trial, the State offered State’s Exhibits 96, 97 and 99 through Detective Haygood. Exhibit 97 is a report from the Mississippi Crime Laboratory Firearms/Toolmarks section. That report lists the items that were received by the lab and an explanation that the detectives wanted a determination of whether the cartridges submitted were fired from the gun submitted with the evidence. Rather than call Carl Fullilove, the forensic scientist who signed off on the report, and have him be subject to cross-examination, the State introduced the report into evidence through Detective Haygood’s testimony. Fullilove’s report summarized the results of the analysis as follows:

The shotgun shells in Submissions 30 through 34 bear some similarities in class characteristics consistent with those produced by the gun in Submission 24.



However, the shotgun shells in Submissions 30 through 34 could not be positively included or excluded as having been fired in the gun in Submission 24 to the exclusion of all other firearms bearing the same class characteristics.

(State's Exhibit 97, T. 343).

State's Exhibit 96 summarizes Fullilove's analysis of the shotgun pellets and his finding that all of the shotgun pellets and wadding were consistent with being fired from a 12-gauge shotgun. (T. 343, State's Exhibit 96). State's Exhibit 99, also prepared by Fullilove, states that the 9mm pistol taken from the trailer had been fired and checked for safety. According to Detective Haygood's interpretation of Fullilove's analysis, the report states that the 9mm pistol was a functioning weapon. (T. 363).

In addition to the firearms analyst's reports, the State also introduced a toxicology report prepared by Alyssa Pursell, a forensic scientist at the Mississippi Crime Lab, through Detective Haygood. (T. 367, State's Ex. 103). Again, rather than have the scientist who performed the analysis and prepared the report introduce the evidence, the State used the Detective to read it into evidence. (T. 367). Pursell's report stated that James Connors had oxycodone and opiate metabolite in his system when he was taken from the trailer to the hospital. (State's Exhibit 103).

The United States Supreme Court's holding in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009) forbids this method of introducing forensic evidence at trial. The Supreme Court in that case stated, "In short, under our decision in *Crawford* the analysts' affidavits were testimonial statements, and the analysts were 'witnesses' for purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to 'be confronted with' the analysts at trial." *Melendez-Diaz*, 129 S. Ct. at 2532 (citing *Crawford*, 541 U.S. at 54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)).

The Court in *Melendez-Diaz* recognized the importance of confronting the forensic analysts who prepare reports for the purposes of prosecution. The Supreme Court explained:

Confrontation is one means of assuring accurate forensic analysis. While it is true, as the dissent notes, that an honest analyst will not alter his testimony when forced to confront the defendant . . . the same cannot be said of the fraudulent analyst. . . Like the eyewitness who has fabricated his account to the police, the analyst who provides false results may, under oath in open court, reconsider his false testimony. . . And, of course, the prospect of confrontation will deter fraudulent analysis in the first place.

*Id.* at 2536-37, 174 L.Ed. 2d 314.

Because the conclusions in the forensic reports were testimonial in nature and not subject to cross-examination, Connors was denied his right to confront the witnesses against him. This error was prejudicial to Connors because it denied him the opportunity to cross-examine the forensic scientists regarding the methods they used to make their conclusions. Connors also never had the opportunity to question the scientists regarding their education and training in their scientific field. The other scientists/experts called at Connors's trial *were* subject to such cross-examination and their qualifications were presented to the jury to make a determination of their credibility and what weight to give to their testimony.

Because Connors was denied his Sixth Amendment right to confront certain witnesses against him, this Court should reverse Connors's conviction and remand this case for a new trial.

#### **I. CONNORS RECEIVED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.**

James Connors would respectfully show unto this Court that he was denied effective assistance of counsel due to his counsel's errors in (1) failing to object to testimonial evidence from the firearms examiner and toxicologist being introduced through a detective rather than through the actual witness; (2) failing to make objections to the introduction of highly prejudicial and gruesome

photographs of the victims; and (3) failing to object to the State's introduction of State's Exhibit 84, the video recording of Connors's statement to police and to Detective Fairburn's testimony that Connors's was a former Bandido.

**i. Standard of Review.**

The Mississippi Supreme Court has recognized that the "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Ransom v. State*, 919 So. 2d 887, 889 (Miss. 2005) (citing *Strickland v. Washington*, 446 U.S. 668, 686, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984)). To prevail under *Strickland*, an appellant "must show that (1) his counsel's performance was deficient, and that (2) the deficiency prejudiced him. . . . Additionally, there is a strong but rebuttable presumption that his counsel's decisions were sound trial strategy." *Johnson v. State*, 29 So. 3d 738, 745 (¶20) (Miss. 2009) (citing *Leatherwood v. State*, 473 So. 2d 964, 968-69 (Miss. 1985)). In order to rebut the presumption that counsel's actions were part of trial strategy, the appellant must show that but for his counsel's errors, a different result would have occurred in the trial court. *Id.*

**ii. Trial Counsel's failure to object to the admission of forensic reports without the witness present for cross-examination deprived Connors the opportunity to cross-examine and confront certain witnesses against him and constitutes ineffective assistance of counsel.**

As discussed above in Issue One, Connors had a Constitutional right to confront the witnesses against him, including the forensic scientists who prepared the toxicology and firearms reports. Because trial counsel failed to object to the introduction of the evidence without calling the scientists as witnesses, Connors was prejudiced. Because of the United States Supreme Court's holding in *Melendez-Diaz*, *supra*, the trial court would have been compelled to either exclude the

damaging evidence or require the State to call the scientists to testify and introduce the evidence.

Trial counsel's omission in this regard was both deficient and prejudicial to Connors.

**iii. Trial counsel's failure to object to the admission of crime scene photographs inflamed the jury and prejudiced Connors's defense.**

The State entered thirty-six photographs of Kenneth and Sandra's bodies taken both inside the trailer and at the autopsies. The photographs were gruesome, repetitive, and served no purpose other than to inflame the passions of the jury. Several of the photos were close-up shots of an image already given to the jury and several others showed exposed internal organs and close-ups of the injuries to the victims. Defense counsel never objected to a single photograph. (T. 264).

State's Exhibits 5 and 10-13 depict Kenneth's body in the position in which sheriff's deputies discovered him. (T. 234, 264, 300-303). State's Exhibits 14-20 depict Kenneth's body after it was moved by investigators and show his various injuries, including close-up photographs of his exposed intestines and a gunshot injury to his face and throat. (T. 264, 303). State's Exhibits 21-24 depict Sandra's body as sheriff's deputies discovered it in the kitchen of the trailer. (T. 264, 308-09). State's Exhibits 25-29 depict Sandra's body after it was moved by investigators and include a photograph of her shotgun wound, two separate close-up photographs of the same wound, and a third close-up of the wound after investigators pulled the victim's shirt up to expose her back and bra. (T. 310-11).

In addition to the crime-scene photographs of the victims' bodies, the State also introduced photographs from the victims' autopsies. The autopsy photographs of Kenneth, particularly State's Exhibits 122 through 132 are cumulative to the photographs already shown from the crime scene. Further, they are repetitive, showing close-up images of injuries the jury had already seen, such as the close-up of Kenneth's exposed intestines, which were visible in Exhibit 123 as well as in the

crime scene photographs.

Generally, the admission of photographs into evidence is within the discretion of the trial court and will only be reviewed on appeal for an abuse of discretion. *Barfield v. State*, 22 So. 3d 1175, 1181 (¶14) (Miss. 2009) (citing *Chamberlin v. State*, 989 So. 2d 320, 340 (Miss. 2008)). The appellate court must consider whether the photographs were “so gruesome and inflammatory as to lack any evidentiary purpose and, therefore, be inadmissible.” *Id.* (citing *McFee v. State*, 511 So. 2d 130, 134-35 (Miss. 1987)).

All that is necessary for a photograph to be admissible is “[s]ome probative value.” *Id.* (quoting *Chamberlin*, 989 So. 2d at 340). However, the Mississippi Supreme Court has stated that “gruesome photographs which have no evidentiary purpose and which only arouse the emotions of a jury should not be admitted.” *Id.* (quoting *Sharp v. State*, 446 So. 2d 1008, 1009 (Miss. 1984)). In *McIntosh v. State*, 917 So. 2d 78, 83 (¶13) (Miss. 2005), the supreme court stated that photographs are considered to have evidentiary value when they: “(1) aid in describing the circumstances of the killing; (2) describe the location of the body and cause of death; (3) supplement or [clarify] witness testimony.”

In *Hewlett v. State*, 607 So. 2d 1097, 1102 (Miss. 1992), the Mississippi Supreme Court stated:

Photographs of a victim should not ordinarily be admitted into evidence where the killing is neither contradicted nor denied, and the corpus delicti and the identity of the deceased have been established. Photographs may nevertheless be admitted into evidence in criminal cases where they have probative value and where they are not so gruesome or used in such a way as to be overly prejudicial or inflammatory. *Sudduth v. State*, 562 So.2d 67, 70 (Miss.1990).

Further, the supreme court advised trial judges in *McNeal v. State*, 551 So. 2d 151, 159 (Miss. 1989), to consider the circumstances surrounding the photographs before admitting them into

evidence. The Court in McNeal instructed trial judges to “specifically consider whether the proof is absolute or in doubt as to the identity of the guilty party, as well as whether the photographs are necessary evidence *or simply a ploy on the part of the prosecutor to arouse the passion and prejudice of the jury.*” *Hewlett*, 607 So. 2d at 1102 (citing *McNeal*, 551 So. 2d at 159) (emphasis added).

In this case, the killing is not contradicted and the identity of the victims had already been established by other witnesses without the use of crime scene photographs. *See Hewlett*, 607 So. 2d at 1102. The photographs at issue in this case serve none of the purposes set forth in *McIntosh*. Rather, these photographs merely inflame the passions of the jury. The circumstances of the killing were not at issue in this case. The issue for the jury to resolve in this case was *who* killed the victims, not *how*. The defendant himself stated to police officers that someone came into the home and shot them both. There was no reason to show the gruesome photographs of the bodies to the jury.

Trial counsel should have objected to the admission of the photographs into evidence because they were cumulative and only aroused the emotions of the jurors. Had trial counsel objected, many of the photographs would likely have been excluded from evidence.

**iv. Trial counsel’s failure to object to evidence revealing Connors’s gang affiliation and prior criminal record.**

The videotaped interview with Connors conducted by sheriff’s investigators the day Connors was released from the hospital was played in its entirety at trial. In the video, Connors rambles to the investigators regarding his past membership in the Bandidos Motorcycle Club, a notorious motorcycle gang. (Ex. 84). Further, Connors discusses his past criminal activities and arrests. He even delves into a discussion regarding the Irish Mob in New York City. Trial counsel should have

objected to these portions of the interview being played for the jury. The information was irrelevant to the case. The State never suggested that Connors's criminal history or his membership in the Bandidos played any role in the murders of Sandra and Kenneth.

In addition to the videotaped interview, Detective Fairburn testified that when he spoke with Connors after deputies found him in bed in the trailer, Connors talked openly about being a former Bandido and about his prior criminal record. (T. 458). Defense counsel never objected to the admission of this prejudicial evidence.

The admission or exclusion of evidence "is within the discretion of the trial court and, absent an abuse of that discretion, the trial court's decision will not be disturbed on appeal." *Ellis v. State*, 856 So. 2d 561, 565 (Miss. App. 2003). Had defense counsel objected to the admission of the evidence at trial, the trial court likely would have excluded the evidence as irrelevant and highly prejudicial.

In *Randall v. State*, 806 So. 2d 185, 220 (Miss. 2002), the Mississippi Supreme Court held that, "Standing alone, any alleged gang membership or affiliation is not relevant." The Court went on to state, "[t]his is not to say that it might not become so for rebuttal purposes depending on circumstances in the next trial. Consequently, unless a proper foundation is laid . . . which would make gang membership relevant, this information has no reason to be before the jury." *Id.*

In the case before the Court, the evidence of Connors's former gang membership was not relevant to the determination of whether Connors killed Kenneth and Sandra. Defense counsel should have made sure that the evidence did not come before the jury.

Secondly, the videotaped statement references Connors's criminal record. Because Connors agreed to stipulate that he was a prior convicted felon for the possession of a firearm by a convicted felon charges, the State had no reason to present evidence of Connors's prior criminal activity and

convictions.

In *Williams v. State*, 991 So. 2d 593, 605-06 (¶40) (Miss. 2008), the Mississippi Supreme Court addressed the United States Supreme Court's holding in *Old Chief v. United States*, 519 U.S. 172, 191-92, 117 S. Ct. 644, 136 L.Ed.2d 574 (1997), dealing with trial court's denial or acceptance of a defendant's offer to stipulate to a prior conviction. The *Williams* Court stated:

Where evidence of a prior conviction is a necessary element of the crime for which the defendant is on trial (i.e., possession of a firearm by a convicted felon), but evidence of the specific nature of the crime for which the defendant was previously convicted (i.e., armed robbery), is not an essential element of the crime for which the defendant is on trial, as it is in DUI cases, the trial court should accept a defendant's offer to stipulate and grant a limiting instruction.

*Williams*, 991 So. 2d at 605-06 (¶40). The Court in *Williams* stated that a trial court's failure to allow a defendant who was on trial for possession of a firearm by a convicted felon to stipulate as to his prior convictions was error, though in that particular case it was considered harmless. *Id.* at (¶41).

In this case, defense counsel and the State did enter a stipulation regarding Connors's status as a prior convicted felon. (T. 505). Despite entering the stipulation, defense counsel failed to object to testimony regarding Connors's criminal history or to the portions of the video statement in which he admits his criminal history. Because defense counsel stipulated to the prior convictions, presumably in an effort to keep the details of the convictions from the jury, his failure to object was prejudicial to Connors.

In *Timms v. State*, 54 So. 3d 310, 316 (¶20) (Miss. Ct. App. 2011), the Mississippi Court of Appeals reversed Eddie Timms's conviction for possession of a firearm by a convicted felon and for possession of a stolen firearm on the basis that Timms's defense counsel was ineffective for, among other things, failing to enter a stipulation regarding Timms's prior convictions. *Id.* If trial counsel



can be ineffective for failing to enter a stipulation regarding prior felonies in a possession of a firearm by a convicted felon prosecution, then it follows that entering a stipulation and then not objecting to evidence of other crimes is also ineffective.

Connors was prejudiced by evidence of his gang affiliation and his criminal history. Had trial counsel objected to the testimony and evidence, the trial court could have prevented the jury from hearing such inflammatory and prejudicial evidence.


### CONCLUSION

The Appellant herein submits that based on the propositions cited and briefed above, 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 convictions and sentences should be reversed and the matter remanded to the lower court for a new trial on the merits.

Respectfully submitted,

OFFICE OF STATE PUBLIC DEFENDER  
Indigent Appeals Division  
For James Richard Connors, Jr., Appellant

By:



MOLLIE M. MCMILLIN, MISS. BAR NO [REDACTED]  
STAFF ATTORNEY

**CERTIFICATE OF SERVICE**

I, Mollie M. McMillin, Counsel for James Richard Conners, Jr., do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

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Circuit Court Judge  
Post Office Box 1068  
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This the 3<sup>rd</sup> day of August, 2011.

  
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