

COPY

IN THE CIRCUIT COURT OF JEFFERSON DAVIS COUNTY, MISSISSIPPI
FIFTEENTH JUDICIAL DISTRICT

STATE OF MISSISSIPPI

VS.

Criminal Action, File No. 2002-0061E

CORY J. MAYE

AMENDED
MOTION FOR JUDGMENT *NON OBSTANTE VERDICTO* OR,
IN THE ALTERNATIVE,
FOR A NEW TRIAL

COMES NOW Defendant Cory J. Maye, by and through counsel, and, pursuant to the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution, to analogous sections of Article 3 of the Mississippi Constitution and to Rule 10.05 of the Mississippi Rules of Circuit and County Court Practice, hereby moves this Court to enter its order setting aside the jury verdict as returned in this action and enter a judgment of "Not Guilty" in favor of Defendant Maye and thereby discharge him from custody of the MS Department of Corrections. Or, in the first alternative, Defendant Maye requests that this Court enter its order setting aside the said jury verdict and granting him a new trial. In the second alternative, Defendant Maye requests that this Court enter its order setting aside the death penalty as returned in this action and granting him a new penalty phase. In support of this Motion, Defendant Maye would set forth grounds as follow.

FILED
JERI L. LANDRY
CIRCUIT CLERK
DATE 11-27-05
BY [Signature]
DEPUTY CLERK

I.

INCORPORATION OF MOTION FOR NEW TRIAL

All allegations and averments set forth in Defendant's Motion for New Trial as filed in this action on February 02, 2004, are incorporated and averred herein.

II.

SUFFICIENCY OF EVIDENCE

The verdicts of the jury at both the guilt and penalty phases are contrary to the law and thus insufficient to support a conviction. The State's evidence presented at both said trial phases failed to show beyond a reasonable doubt that Cory Maye committed capital murder and that he did so under such circumstances that each and every legally essential element of the offense existed.

The Mississippi Supreme Court, quoting from *Jackson v. Virginia*, 443 U.S. 307, 315, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), stated in *Bush v. State*, 895 So.2d 836, 843 (Miss. 2005), the following:

"Instead, 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."

As such, the Court erred when it failed to sustain Defendant's motion for a directed verdict at the conclusion of the State's case in chief. Because of this error Defendant should be granted a new trial.

III.

WEIGHT OF EVIDENCE

The jury's verdict is strongly against the weight of the evidence. In *Pharr v. State*, 465 So.2d 294, 302 (Miss. 1984), the Court stated: "A greater quantum of evidence favoring the [S]tate is necessary for the [S]tate to withstand a motion for a new trial as distinguished from a J.N.O.V." The weight of all evidence, both prosecution and defense, presented at trial was not sufficient to support the jury verdict. And when taken in conjunction with the discussion herein below in Paragraph (4) regarding

exculpatory evidence that, though readily available to Defendant's counsel was not used on Defendant's behalf at trial, the weight of the evidence becomes even more overwhelming against the jury's verdict.

IV.

**THE COURT ERRED WHEN IT OVERRULED DEFENDANT'S REQUEST TO
RE-ASSERT HIS FUNDAMENTAL RIGHT TO BE TRIED
IN JEFFERSON DAVIS COUNTY, MS**

Pursuant to Amendments 6 and 14 of the Constitution of the United States and to Article 3, § 26 of the Mississippi Constitution, Defendant has a fundamental right to be tried in the district and county wherein the offense with which he is charged is alleged to have been committed.

In *State v. Caldwell*, 492 So.2d 575 (Miss. 1986), the Mississippi Supreme Court, when referring to the fundamental right to be tried where the offense occurred, said: "The importance of these provisions were addressed by the U.S. Supreme Court in *United States v. Johnson*, 323 U.S. 273, 65 S.Ct. 249, 89 L.Ed. 236 (1944), in which Justice Frankfurter wrote, 'Questions of venue in criminal cases, therefore, are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed. '"

On February 21, 2003, Defendant's trial counsel, without first adequately and properly consulting with Defendant and fully informing him of the ramifications of such a venue change, filed a Motion for Change of Venue of his Jefferson Davis County trial that was then scheduled to be held on March 17, 2003. Subsequently and without Defendant being present, trial counsel agreed to change the trial venue to Lamar County, MS.

When Defendant himself realized that the trial venue available to him in Lamar County was overwhelmingly different from that available in Jefferson Davis County, Defendant chose to re-assert his fundamental right to be tried in Jefferson Davis County and informed his trial counsel of his decision. As such, trial counsel again moved for a change of venue back to Jefferson Davis County, the

original venue. The Court refused said request but, instead, changed venue a second time to Marion County, MS, where Defendant's trial was held. Each motion for venue change was filed some time prior to the scheduled court dates.

Because Defendant was not fully and completely informed by his trial counsel of his fundamental right to have his trial held in Jefferson Davis County, MS, Defendant did not and could not have made a knowing, voluntary and informed consent to waive his said right. As such, this Court erred when it refused to allow Defendant to assert his fundamental right to be tried in Jefferson Davis County when said right had never made any such knowing, voluntary and informed consent.

V.

DISCOVERY OF NEW, EXCULPATORY AND MATERIAL EVIDENCE

New, exculpatory and material evidence has been discovered since the verdict that would probably produce a different result at a new trial. Although such evidence should have been discovered if Defendant's trial attorney had exercised reasonable diligence, to Defendant's extreme prejudice such evidence became known to Defendant only after he obtained the Court's post-verdict release of his trial attorney and retained his present counsel for appellate purposes. Said evidence specifically regards the single bullet that struck and caused the death of Officer Ron Jones, the decedent in this case, and the path that said bullet followed as it struck and penetrated Officer Jones' abdomen.

According to §§ 3 and 15 of the Report of Post Mortem Examination of Ron Jones (AME12-L3-01) [a copy of which is attached hereto as an exhibit] as completed and signed on December 27, 2001, by State's witness Dr. Steven T. Hayne, M.D., F.C.A.P. of the Mississippi State Medical Examiner's Office, Haynes' autopsy examination resulted in certain of Haynes' medical conclusions about said bullet and its course (trajectory) as it struck Officer Jones including the following:

§3

- 1) lethal, distant and *consistent with reentry* gunshot wound;
- 2) entrance wound is *slightly ovoid* in configuration;
- 3) entrance wound is *slightly irregular in configuration* suggestive an (sic) *irregular reentry*;
- 4) projectile...course[d] through the *abdominal wall*...perforating the *small bowel four times...through the aorta*.
- 5) consistent with *reentry*.
- 6) anterior to posterior at approximately *30 to 35 degrees*;
- 7) superior to inferior at approximately *20 degrees*; and
- 8) left to right.

§15

Consistent with *reentry*.

On July 19, 2005, Defendant's present appellate counsel did, after numerous unsuccessful attempts over several weeks and after finally having to serve Dr. Hayne served with a witness subpoena and a subpoena *duces tecum*, finally manage to converse by phone with Hayne at his office. During said conversation Hayne explained the medical meaning of some of the terms used in the phrases set forth in his autopsy report of Ron Jones to which referred herein above.

When queried about his definition of the term "consistent with reentry", Hayne stated that the term indicated that the bullet had, prior to striking decedent, had struck and entered something other than decedent's abdomen. Since the said autopsy report indicates only one (1) bullet wound, whatever the said bullet went through prior to striking decedent was not another part of decedent's body.

When the term "slightly ovoid" was mentioned, Hayne opined that the definition of this term was akin to egg shaped rather than circular. He also stated that this usually indicated that the flight path of the bullet was at an angle. Of course, the angles to which he referred are mentioned herein above also.

"Slightly irregular in configuration" meant to Hayne that the bullet entrance wound was produced as a result of the bullet, after having struck and gone through some object prior to striking and penetrating decedent, having acquired some sort of rotation or flight that resulted in an irregular reentry.

And when told by Defendant's appellate counsel that the subject bullet which cause decedent's death could not, because of its condition, be unquestionably linked to Defendant's gun, Hayne opined that such a result was not unexpected because of the condition of the bullet when it was recovered by him from decedent's body. Hayne also stated that such damaged condition would not normally be expected of a bullet that had penetrated only soft tissue such as decedent's abdominal wall, small bowel and aorta. Said autopsy report made no mention of the subject bullet hitting bone or any other such hard material. He continued that such would be especially unusual if the two (2) bullets positively identified by the State as having been fired from Defendant's gun had been taken from wood or other such hard substances.

If the autopsy report had been, on Defendant's behalf before or even during his trial, thoroughly studied for factual information to buttress Defendant's proof or particularly to disprove some of the State's direct inferences that were obtained from Hayne's trial testimony, the result of Dr. Hayne's trial testimony and the verdict itself would have been drastically different.

For example, the State elicited from Hayne's the following testimony directly pertinent to Defendant's written statement about the incident charged:

P.357, LL. 9-14, 18-23 & 26-29 pertaining specifically to the bullet's entry wound and trajectory;

P. 359, LL. 3-18 pertaining to the “expected” location of the shooter based on the trajectory of the bullet;

P. 360, LL. 4-13 pertaining to trajectory and location of shooter;

P. 491, LL. 8-17 (“He said—and this is a **MAJOR THING**) [emphasis added] pertaining to Defendant’s testimony compared with Hayne’s testimony and bullet trajectory diagram;

P. 494, LL. 24-29 pertaining to Hayne’s angle of projectiles and Defendant’s statement about what happened.

As the State correctly opined in its closing argument (P. 491, LL. 8-9), this is a major thing. Because the trajectory of the bullet was undoubtedly affected by whatever it hit and passed through **before** its “re-entry” into decedent’s body and because this testimony could and should have been elicited from Hayne on Defendant’s behalf at trial and yet was not, Defendant’s credibility was subjected to “scientific” scrutiny with no credible rebuttal that was certainly available. Because trial counsel failed to so do, Defendant was deprived of a fair trial.

VI.

INEFFECTIVE ASSISTANCE OF COUNSEL

Under the totality of circumstances, the trial performance of Defendant’s counsel was deficient. That deficient performance deprived Defendant of a fair trial.

a.

Counsel’s Qualifications

To Defendant’s best knowledge, his trial counsel had, prior to the trial of his case, no trial experience in which trial counsel alone conducted a capital murder defense. As such, she was too inexperienced to adequately represent Defendant in this action. As such, Defendant’s federal and state

rights to due process, confrontation and counsel and his federal and state rights against infliction on him of cruel and unusual punishment were abrogated.

b.

Failure to Adequately Explore Potential Jurors' Qualifications to Serve on a Death Penalty Jury

Defendant's trial counsel was ineffective because she failed to ask any "reverse *Witherspoon*" questions. In *voir dire*, trial counsel asked no questions seeking to insure that all jurors who could not fairly consider a life sentence once they had found Defendant guilty of capital murder.

The right to *voir dire* prospective jurors, particularly in a death penalty case, is fundamental to a fair trial and secured by Article 3, §§ 26 and 31 of the Mississippi Constitution. *See Balfour v. State*, 598 So.2d 731, 755-56 (Miss. 1992). The defense attorney's failure to properly *voir dire* the venire also violated the Fourteenth Amendment to the Constitution of the United States. *Morgan v. Illinois*, 504 U.S. 719 (1992).

"*Morgan* provides that it is a violation of a defendant's due process rights to prevent him, in a capital case, from inquiring whether prospective jurors would automatically impose the death penalty upon conviction.'" *Duplantis v. State*, 644 So.2d 1235, 1245 (Miss. 1994). Moreover, an inadequate *voir dire* cripples a defendant's ability to intelligently exercise peremptory and cause challenges. *See Knox v. Collins*, 928 F.2d 657 (5th Cir. 1991); *Jones v. State*, 133 Miss. 684, 98 So. 150 (1923)(counsel must have latitude in searching the minds and consciences of jurors in order to be able to exercise juror challenges intelligently); *Odom v. State*, 355 So.2d 1381, 1383 (Miss. 1978)(where attorney's questioning is limited, he is left uninformed and unable to elicit facts necessary to reach an informed decision on exercising peremptory and cause challenges).

Morgan states that a defendant is entitled to have a juror who will automatically vote for the death penalty in every case of murder challenged for cause and removed from the venire. Such a juror

fails to meet the requirements of impartiality as set forth in the Sixth and Fourteenth Amendments and may be challenged for cause. *Id.* at 729.

The *Morgan* court concluded that “[b]ecause the ‘inadequacy of *voir dire*’ leads us to doubt that petitioner was sentenced to death by a jury empanelled in compliance with the Fourteenth Amendment, his sentence cannot stand.” 504 U.S. 739 (citation omitted). No less can be said of the case *sub judice*. It matters not whether it is error on the part of the trial court by preventing *voir dire* or, as here, the defense attorney’s incompetence. The result, denial of a fundamentally fair sentencing proceeding, is the same. The failure of defense counsel to exercise this fundamental right in trying to seat a fair jury is constitutionally deficient and was extremely prejudicial to Defendant.

c.

Failure to Invoke *Batson* Challenges

Although Defendant is of the Black race and the venire present for jury selection was predominantly of the Caucasian race, defense counsel failed to invoke Defendant’s protections from an unbiased jury and to a fair trial as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States as set forth in *Batson v. Kentucky*, 476 U.S. 79 (1986) and in Article 3, §§ 14, 26 and 28 of the Mississippi Constitution.

Because defense counsel did not invoke the said *Batson* protections, 6 of the State’s 9 peremptory strikes were of the Black race. Said Black strikes were Hazel Lenoir, Lillie McNair, Yoshekia Rawls, Roberta Jefferson, Betty Carney and Bernice Harris. As such, Defendant, whose trial jury consisted of only two (2) Blacks, lost his right to insure that the prosecution did not use its challenges to discriminate on the basis of race.

d.

**Failure to Adequately Investigate Crime Charged and
Secure Expert and Other Support Testimony**

Defense counsel's theory presented during the guilt phase of trial was that Defendant was acting in justifiable self defense when he shot the decedent. Yet the only witness presented to testify in support of this defense was Defendant himself. And because of defense counsel's failure to cross-examine Steven Hayne and to otherwise investigate as hereinabove set forth in Paragraph (4), Defendant was denied effective assistance of counsel.

e.

Failure to Seek Independent Autopsy

Although Defendant requested that defense counsel move for an autopsy of decedent by someone other than Stephen Hayne, defense counsel failed both to obtain and to request same.

f.

Failure to Submit or Otherwise Request Adequate Juror Questionnaire

Although the juror questionnaire used by the Court in this case was grossly insufficient to obtain the information needed for Defendant to make an informed decision about jury challenges, defense counsel did not request any remedy by way of another questionnaire or any other method.

g.

Failure to Present Available Pictures of Bullet Holes

Although defense counsel, as a result of discovery procedures, obtained certain pictures that purport to show two (2) bullet holes in the wall and/or door facing of the room in which decedent's death occurred, defense counsel did not show said pictures, or any of them, to the jury by way of buttressing Defendant's trial testimony.

h.

Failure to Obtain Mental Evaluation of Defendant

Although the State is precluded from seeking the death penalty against a defendant who has an intelligence quotient of less than 75, no such mental evaluation, though requested of trial counsel by Defendant, was done.

i.

Failure to Adequately Consult With Defendant

Between Defendant's preliminary hearing and his trial, a span of approximately two (2) years, defense counsel personally met with Defendant no more than 2-3 times.

j.

Failure to Seek Independent Testing of Bullet

Defense counsel made no effort and presented no evidence to suggest that the bullet recovered from decedent's body was fired from Defendant's gun.

k.

Failure to Object When Prosecutor Cried During Closing

During the prosecution's closing argument when Mr. McDonald was referring to "...a thin blue line...", he became tearful and otherwise emotional. Defense counsel failed to object.

l.

Failure to Prepare Jury Instructions for Penalty Phase

Defense counsel presented to the Court no jury instructions pertaining to the penalty phase of Defendant's trial.

m.

Changing Composition of Venire by Moving Trial Venue

Defense counsel, in requesting that Defendant's trial be moved from Jefferson Davis County, the 2000 population of which was approximately 57.9% Black, to Marion County, the 2000 population of which was approximately 32.2% Black, reduced the likelihood of Defendant, a Black, having a representative sample of Blacks on his trial jury. Population figures are attached hereto as exhibits.

n.

Failure to Develop and Present Mitigation Evidence

At the sentencing phase, defense counsel called just two (2) witnesses. Said witnesses were Mavis Brown and Dorothy Maye Funchess, the grandmother and mother, respectively, of Defendant. Defense counsel neither met with nor otherwise prepared either witness prior to the said witnesses attempting to give mitigation testimony on Defendant's behalf. Defense counsel also failed to interview any of Defendant's other family members or friends or otherwise attempt to develop any other type of mitigation evidence.

"It is critical that mitigating evidence be presented at capital sentencing proceedings." *State v. Tokman*, 564 So.2d 1339 (Miss. 1990) (citing *Leatherwood v. State*, 473 So.2d 964, 970 (Miss. 1985)). Thus, in a capital trial, counsel has a duty to unearth all relevant mitigating evidence. *Caro v. Calderone*, 165 F.3rd 1223, 1227 (9th Cir. 1998). "At a minimum, counsel has a duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." *Tokman* at 1343.

Essential to the rendition of constitutionally adequate assistance...is a reasonably **substantial, independent investigation** into the circumstances and the law from which potential defenses may be derived." *Lockett v. Anderson*, 230 F.3rd 695 (5th Cir. 2000) (emphasis added); *Neal v. Puckett*, 286 F.3rd 230, 235 (5th Cir. 2002) ("The Sixth Amendment requires defense counsel to conduct a reasonably

thorough pretrial inquiry into the defenses that might be offered in mitigation of punishment.”); *Kenley v. Armontrout*, 937 F.2d 1298, 1304 (8th Cir. 1991) (“Failing to interview witnesses or discover mitigating evidence relates to trial preparation and not trial strategy.”)

In *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 2536-37 (2003), the Supreme Court found counsel’s decision to limit the scope of their investigation deficient and unreasonable. Citing ABA guidelines, the Supreme Court found that investigations into mitigating evidence “should compromise efforts to discover **all reasonably available** mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.” *Id.* at 2537 (emphasis added).

The *Wiggins* Court found counsel’s investigation deficient and unreasonable in light of the fact that even the limited investigation conducted revealed facts about Kevin Wiggins’ life that should have been explored and “any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses.” *Id.* This even though Wiggins’ trial counsel presented an expert witness yet failed to develop a social history or to present details of his life. *Id.* The Court characterized this as a “half-hearted” mitigation case. *Id.* at 2538.

In *Williams v. Taylor*, 120 S.Ct. 1495, 1525 (2000), the Supreme Court found counsel ineffective in part because of the failure to present evidence “...of friends, neighbors and family...who would have testified that he had redeeming qualities.”

In *Neal v. Puckett*, 286 F.3d 230 (5th Cir. 2002), the U.S. Court of Appeals for the Fifth Circuit reviewed a Mississippi death penalty case. The Court noted that “Neal’s evidence of mitigating factors presented during sentencing consisted of the testimony of only two witnesses, Neal’s mother who gave an overview of Neal’s troubled background, and a psychologist, Dr. Dana Alexander, who testified about Neal’s mental and emotional difficulties. Reviewing this testimony does not take long.” *Neal* at 237. The mother’s testimony was nine pages. The doctor’s was 24. *Id.*

At Cory Maye's trial, Mavis Brown's direct testimony consists of 2½ of the court reporter's pages. Re-direct consists of an additional ½ page. Dorothy Maye Funchess's direct testimony consists of 7 of the court reporter's pages. No re-direct testimony was given.

Trial counsel never discussed with Defendant's family members or friends any type of mitigation evidence. Yet these were the exact persons who would have had knowledge of such. Attached hereto as exhibits are affidavits from Mavis Brown and Dorothy Maye Funchess reciting the lack of any advance preparation with trial counsel about what type things were needed as mitigation, what type of questions to expect, how the legal process worked when they testified or any other such matter. Neither lady was even approached about testifying during the penalty phase until after the jury had returned its guilty verdict.

Also included herewith as exhibits are affidavits from Robert C. Brown (father), Joyce Coleman (aunt), Latoya Smith (sister) and Vanessa Thompson (sister). Neither they nor anyone else, to their knowledge, was contacted or interviewed by trial counsel about providing mitigation evidence in the event that the jury returned a guilty verdict.

Given the case law and the wealth of mitigating evidence that counsel never sought, must less presented, trial counsel was grossly deficient.

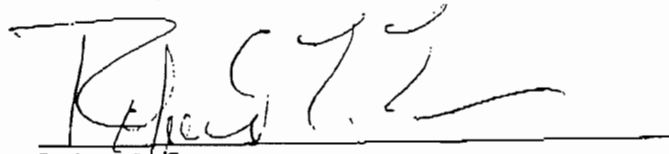
WHEREFORE, PREMISES CONSIDERED, Defendant Cory Maye hereby moves this Court to enter its order setting aside the verdict of the jury in this action and enter its judgment of "Not Guilty" in Defendant's favor and thereby discharging him from the custody of the Mississippi Department of Corrections. Or, in the alternative, Defendant moves this Court to enter its order setting aside the

verdicts of the jury and granting to him a new trial.

Respectfully submitted,

CORY J. MAYE

By:

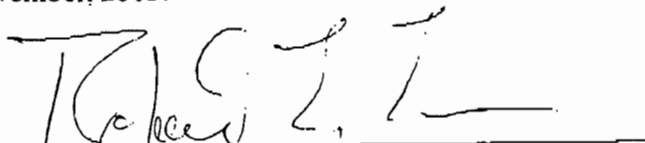


Robert E. Evans
Attorney for Cory J. Maye

CERTIFICATE OF SERVICE

I, Robert E. Evans, attorney of record for Cory J. Maye, do hereby certify that I have this date served counsel for the State of Mississippi with a true and correct copy of the above and foregoing Amended Motion for Judgment *Non Obstante Verdicto* or, in the Alternative, For a New Trial by putting said copy in the U.S. Mail in an envelope with adequate prepaid first class postage affixed thereto and addressed to Hon. Doug Miller, Ass't. District Attorney, 500 Courthouse Square, Suite 3, Columbia, MS 39429.

SO CERTIFIED on this, the 07th day of November, 2005.



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