IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

Case Number: 2013-KA-02121-SCT

BRIAN HOLLIMAN **DEFENDANT-APPELLANT**

vs.

STATE OF MISSISSIPPI **APPELLEE**

Appeal from the
Circuit Court of the Lowndes County, Mississippi
Criminal Case No. 2009-0112-CR1

BRIEF OF BRIAN HOLLIMAN, THE DEFENDANT-APPELLANT

Oral Argument is Requested

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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 the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal:

Trial Judge:

Honorable Lee J. Howard
Circuit Court Judge
Post Office Box 1387
Columbus, Ms 39703-0031

Attorneys for State of Mississippi:

Honorable Jim Hood
Attorney General
Post Office Box 220
Jackson, Mississippi 39205-0220

Honorable Forrest Allgood
District Attorney
Post Office Box 1044
Columbus, Mississippi 39701

Victims:

Laura Godfrey Holliman (deceased)
770 North Wolf Road
Caledonia, Mississippi 39740

Curtis Tyler Godfrey (brother of deceased)
766 Lakeshore Boulevard
West Point, Mississippi 39773

Katie Godfrey (sister of deceased)

Freda Stacy (grandmother of deceased)
22601 Highway 82, West
Gordo, Alabama 35466

Defendant:

Brian Douglas Holliman
770 North Wolf Road
Caledonia, Mississippi 39740

***Defendant's Attorney*:**

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THIS, this 10th day of NOVEMBER, 2014.

s/Steven E. Farese, Sr
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M.R.A.P. RULE 34 STATEMENT REGARDING ORAL ARGUMENT

Brian Holliman, the Defendant-Appellant, respectfully requests oral argument.

The evidence in this case is that Brian Holliman was holding a shotgun which was pointed at his wife's head when his wife, Laura Holliman, hit or slapped the shotgun, which discharged and resulted in Laura's death. On the basis of this evidence, the jury found Brian Holliman guilty of first degree murder. Brian Holliman respectfully submits that under the evidence, the death of Laura Holliman was a horribly tragic accident, or was at most, manslaughter due to culpable negligence.

The Mississippi Supreme Court has previously stated that "[d]eliberate design may not be presumed, and we overrule our prior cases to the extent that they conflict with this principle." *Reith v. State*, 135 So. 3d 862, 867 (Miss. 2014). *Reith* recently stated that presumed intent can no longer be submitted to the jury when intent is an essential element of the crime accused. *Id*. at 865. In the case at bar, the state instructed the jury as to presumed intent and also argued in closing arguments that deliberate design or malice aforethought could be presumed from the defendant's actions. The only significant difference between the case at hand and *Reith* is that the jury in this matter was instructed as to the new degrees of murder that were introduced in July of 2013. Also, the trial court used presumed intent as the basis for overturning the defendant's proposed circumstantial evidence instruction.

Since the law as to presumed intent and its relationship with the new degrees of murder under Mississippi law and the circumstantial evidence instruction are in need of clarification after the *Reith* decision, oral argument will assist this Court in bringing the facts of this case and the applicable law into sharp and clear focus.

I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

Brian Holliman, who was the Defendant in the trial court, and who is the Appellant in this appeal, presents the following issues for review:

1. The first assignment of error. The motion for JNOV should have been granted because the evidence is legally insufficient to support the jury's murder verdict.

2. The second assignment of error. The jury was not properly instructed.

3. The third assignment of error. The trial court erred by admitting into evidence certain hearsay statements made by the victim that lacked the required indicia of trustworthiness.

4. The fourth assignment of error. The trial court erred in allowing two written statements taken from Brian Holliman into evidence.

5. The fifth assignment of error. The trial court erred in not quashing the indictment.

II. STATEMENT OF THE CASE

A. *THE NATURE OF THE CASE, THE COURSE OF THE PROCEEDINGS, AND THE DISPOSITION IN THE COURT BELOW*

Brian Holliman was indicted and charged with the "deliberate design" murder of Laura Godfrey Holliman (who was his wife); notably, the indictment merely cites that the act was "in violation of MISS. CODE ANN. §97-3-19."[1] [E. 1.] The indictment was docketed as Criminal Case Number 2009-0112-CR1 in the Circuit Court of Lowndes County. [E.2.]. The initial trial of Brian Holliman occurred from November 30, 2009 until December 4, 2009 with the jury returning a verdict of murder. On December 1, 2011, the Mississippi Supreme Court overturned the jury's verdict and remanded the case to the circuit court for a new trial, *Holliman v. State*, 79 So. 3d 496

[1]In this brief, citations to the Record will be denominated as "R." followed by the appropriate page number, citations to the Record Excerpts will be denominated as "E." followed by the appropriate page number, and citations to the trial Transcript will be denominated as "T." followed by the appropriate page number.

(Miss. 2011). Following the Supreme Court's ruling, an Order Changing the Venue was approved by the trial judge (Sixteenth Circuit Court District Judge Lee J. Howard) and entered with the Lowndes County Circuit Clerk on January 30, 2013. The case was tried before an Oktibbeha County jury from Monday, August 12, 2013, through Thursday, August 15, 2013, whereupon the jury returned the following verdict: "We, the Jury, find the Defendant guilty of first degree murder as charged." [R. 140, 141. E. 3. T. 643.] The trial court entered its *Order* on August 15, 2013, wherein Brian Holliman was sentenced to a term of imprisonment for life. [R. 141. E. 4. T. 645.]

Brian Holliman filed a *Motion for Judgment of Acquittal Notwithstanding the Verdict or in the Alternative a New Trial*, and following a hearing, the trial court denied the motion. [R. 145, 156. E.5. E. 12.] Thereafter, Brian Holliman filed his *Notice of Appeal*. [R. 158. E. 13.]

B. *STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW*

Brian and Laura Holliman were married in December 2005 and lived together in a small home near the Town of Caledonia in Lowndes County.[2] [T. 99, 218.] Both Brian and Laura had a child born prior to their marriage, and in the Fall of 2008 there were three children living in the home full-time. Raleigh Parker [T. 100.], Laura's daughter by Ray Parker, lived with Brian and Laura. Brianna, Brian and Laura's daughter together, also lived with them. [T. 100.] Laura's younger sister, 14-year-old Katie Godfrey, had also begun to live with Brian and Laura full-time in early August of 2008 (after Laura and Katie's mother, Gayla Godfrey, began serving a ten year prison sentence for embezzlement) [T. 103.] A fourth child, Brooks (Brian's son from a previous marriage with Holly

[2]The address of the marital home was 770 North Wolf Road, Caledonia, Mississippi 39740 [T. 103]. Brian Holliman may be referred to herein simply as "Brian," while Laura Holliman may be referred to simply as "Laura." Notably, several witnesses during the trial referred to Laura Holliman as "Laura Lee."

Holbrook), visited every other weekend and some holidays. [T. 101.] In the Fall of 2008, Raleigh and Brooks were both five-years-olds, while Brianna was three-years-old.[3] [T. 101.]

Laura Holliman died on Saturday, October 25, 2008, at the age of 24 as a result of a single shotgun wound to the left side of her face. [T. 220, 509, 525.] Angela Jones, a witness for the State, testified that she spoke with Laura via cellphone at 3:56 p.m. that day when Laura called Jones about Raleigh going with Jones to a"Fall Festival." [T. 226.] Laura told Jones that Raleigh did not want to go. Jones testified:

> Laura stated Raleigh didn't want to come and she was in the closet. I asked her if she was okay and she said yes, she was fine and looking for something to wear. She said Brian was being a butt so she was just going to go watch the ballgame.
>
> And I told her that was fine, there will be other times Raleigh and Bridgette could get together and do things ... By this time she sounded upset but I didn't know why. I said, either I'll call you or you call me. ***I told her bye, but she never said bye***. ***She always said bye before she hung up the phone***. [T. 226-227 (emphasis added).]

The emergency call relating to Laura's death was received by the Lowndes County E-911 dispatcher at 4:01 p.m. – approximately five (5) minutes after Angela Jones had spoken with Laura.[4] [T. 244-245.] The person who made the E-911 call was Brian Holliman. [See Exhibit S-2.]

Steve Hatcher, a Lieutenant with the Lowndes County Sheriff's Department, was the first responder to arrive at the scene at the Holliman's home. [T. 253-254.] When Hatcher arrived, he saw Brian Holliman "to the right of the driveway off in the grass with his pick up truck standing at the door of it" and "he was talking on his cell phone." [T. 245-255] Hatcher described Brian as "crying" and "excited in his demeanor". [T. 256-257]. Hatcher testified:

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[3]Brian's date of birth is August 5, 1981, and in the Fall of 2008 he was 27-years-old. Laura's date of birth is April 5, 1984, and in the Fall of 2008 she was 24-years-old.

[4]A recording of the E-911 call, duplicated onto a CD, was admitted into evidence as"Exhibit S-2 and was played to the jury during the trial. [T. 247.]

> [Brian] said that he was in the backyard playing with his kids. He heard a loud noise or boom come from the house. He said he entered the household and went to the back bedroom and found his wife Laura Lee had shot herself. [T. 256.]

Later that evening (*i.e.*, at 10:03 p.m.), Brian Holliman gave a hand-written statement to the investigating officers which stated, *inter alia*, that Brian had "been outside", "heard a loud sound," "ran into the house," saw Laura "laid out with my gun," and called 911.[5]

The lead investigator into Laura's death was Eli Perrigin, a detective with the Lowndes County Sheriff's Department, who had a total of only eight (8) years experience in law enforcement, and who had been detective "since 2007" or only one year at the time of the incident. [T. 358.] This was the first homicide investigation Perrigin had ever conducted. [T. 431.] On Monday, October 27, 2008, an autopsy was performed. [T. 410.] Upon completion of the autopsy, Perrigin decided to talk to Brian a second time because Brian was now a suspect in Laura's death. [T. 410.] On Tuesday, Perrigin called Brian's cellphone (reaching Brian while Brian was at Walmart) and asked Brian to "come down [to the sheriff's department] to speak with me." [T. 411.] Brian met with Perrigin and Tony Perkins (a Lieutenant with the Lowndes County Sheriff's Department), who acted in tandem in interrogating Brian. [T. 411.] As a result of this interrogation, a second statement (which was type-written by Tony Perkins) was obtained. This statement, which was taken on Tuesday, October 28, 2008, was admitted into evidence at the trial over Brian's objection as Exhibit S-34. [T. 415-416.] At the trial, Perrigin read the statement:

> I was at home, my wife, three children, and sister-in-law sometime after lunch. Me and Laura Lee was fussing with each other about where we – where she was going and it did get a little loud. My sister-in-law, Katie wanted to go to Megan's house. Laura Lee wouldn't take her and I couldn't take her. I let Katie drive my car to there. After that I went into the backyard to play with the kids, and Laura Lee stayed in the

---

[5]Brian's handwritten statement, dated October 25, 2008, was entered into evidence as Exhibit S-29 and during the trial was read to the jury by Lowndes County Sheriff's Office Detective Eli Perrigin. [T. 398-399. E. 14-15]

> bed in our bedroom. My youngest daughter wanted to see her mother - - I apologize. Instead of the baby waking her up, I went in there to check to see if she was awake. I opened the bedroom door up and I didn't see her. So I called her name, and she didn't answer. I checked the bathroom and she wasn't there and the rest of house. I went outside to see if she was at her truck and she wasn't there. I went in the back bedroom and I noticed my shotgun in the crack between my gun cabinet and the wall. I usually keep it there or under my bed. I thought I had put it under the bed the day before. So when I saw it in the corner after she had said the day before I was concerned about it being out of place. I've always kept that gun and only that gun with a shell in the chamber with the safety off. ***I picked the gun up*** and I heard clothes rattling in the closet. ***I had the gun in one hand***. In the other hand I was opening the closet door. I saw that Laura Lee had her cellphone in her hand. At this point, the gun was pointed up. I opened the door, and Laura Lee was in there. I then asked her what she was doing, and I told her this is not going to happen. In the process of talking, I was bringing the gun down leveling it off with both hands pointed towards her. ***The barrel touched her upper body, and she grabbed hold of the barrel***. ***She pushed the barrel away from her and the gun went off***. ***I didn't mean to pull the trigger and I didn't realize my finger was on the trigger***. She then fell and I - - second page - - dropped the gun. The gun landed crossways on her body. I then threw the gun toward her feet. I then tried to call my mom on my cellphone and I then called 911 on my house phone. The lady told me to check her for a pulse. I touched her nose, hand and then shook her. The lady asked was she breathing and I told her no. She asked me if my kids were there and I told her yes. She told me to keep them out of the house. In the general time I picked the shotgun back up and placed it on her body. I put it back on her body to make it look like a suicide because I didn't want people to think that I had shot her. By that time Brianna came in the bedroom door. I took her outside, still talking to 911. She told me that she had people in route, and I needed to keep my kids outside so that is what I did. I went back inside to check on her. I just checked on her and went back outside with the kids. I was still on the phone with 911 the whole time until Steve Hatcher arrived on scene.[6] [T. 416-418 (emphasis added). E. 16-17. See also Exhibit S-34.]

Again, the statement was taken at a time when Perrigin, after discussing the autopsy with the pathologist, was no longer treating Laura's death as a suicide and at a time when Brian was considered a suspect in her death. The next day (*i.e.*, Wednesday, October 29, 2008) a warrant was issued for the arrest of Brian Holliman. [T. 418.] After Brian had been placed in jail, Perrigin was asked to come to the jail and talk to Brian. [T. 419-420.] Perrigin, along with Tony Cooper (another

[6]In Brian's statement, he says he found Laura in the closet with her cellphone "in her hand." This portion of Brian's statement dovetails perfectly with the testimony of Angela Jones, who testified that she talked to Laura via cellphone at 3:56 p.m. [T. 226.]

detective), went to the jail where Brian said, "I do want to talk to y'all", at which point Brian was given a *Miranda* warning. [T. 420-422] Even though Brian was considered a suspect prior to the interrogation the day before (Tuesday), the *Miranda* warning given to Brian at the jail late on Wednesday night was the only time Brian was advised of his Constitutional rights. The type-written statement taken from Brian at the jail on Wednesday (October 29th) was admitted into evidence as Exhibit S-36 and was read to the jury by Perrigin. [T. 428-429.] The statement relates:

> When I went to the bedroom, I was looking for Laura. I didn't see her and I heard clothes rattling. I opened the closet door, I had the gun in my hands. I was pointing in the air and I was upset because Laura wouldn't tell me where she was going. I was asking her where she was going. On purpose, I pointed the gun at Laura to scare her to tell me where she was going. She said that she was going to Sulligent. I don't know the girl's name who owned the house in Sulligent. I told her I wanted to know where my wife was going if I was going to be home with the kids. ***As I was lowering the gun, Laura shocked up and it hit her in the upper body***. Laura was standing about 2 foot from me and the end of the barrel was touching her. ***I don't remember how she did it, but I remember she hit the gun and I was jarred and the gun went off***. When I put the shotgun back in Laura's hands, I put her finger on the trigger and placed the gun back on her to make it look like a suicide. I had gone back in the house to check on Laura and 911 was still talking to me. My girls were coming in the house and I got them back outside. While I was talking to 911, I was thinking that even if it was an accident, I was going to get locked up. I told the lady on 911 to hold on a second. I laid the phone down and I picked the gun up to Laura's hand. I think I touched at least one of Laura's fingers to the trigger, so there would be a fingerprint on it. I laid the gun back down. I touched her on the nose and told her I was sorry. I then picked the phone back up and I was talking to 911. I then left the house. I went outside and tried to find my kids. I found one in the backyard and the other two of them in the front yard. And Steve Hatcher arrived. He told me to put the kids in the truck. I put them in the truck and asked 911 if I needed to stay talking to her or Steve. She told me to talk with Steve and I hung up. Mr. Ben Kilgore showed up. The gun was not in the gun cabinet but was in the corner. The night before (Friday), the kids and I had taken Laura to Longhorn Steak House in Becker. Before we went, she gave me some paperwork showing she had contacted a lawyer about a divorce. Laura had discussed that she was tired of hurting and wanted an easier way out. She said she wanted a bullet so she would be out. I laid there the rest of the night thinking about it. Everything else I said in the previous statement was true. End of statement 23:55. [T. 428-429 (emphasis added). E. 18. See also Exhibit S-36.]

The face of the statement indicates that Perrigin and Cooper began questioning Brian at "22:32 hrs" (*i.e.*, 10:32, p.m.) and that the statement concluded at "23:55 hrs." (*i.e.*, 11:55 p.m.) – thus, Perrigin

and Cooper questioned Brian for almost an hour and a half (from 10:32 to 11:55). [E. 18. See Exhibit S-36.]

The jury, by its verdict, found that Brian Holliman was "guilty of first degree murder." [T. 643. E. 3.] The State's case rests almost entirely upon the three statements admitted into evidence: the October 25th statement (Exhibit 29); the October 28th statement (Exhibit 34); and the October 29th statement (Exhibit 36). [E. 14-15, 16-17, 18.] However, when the statements are considered together with all of the evidence, the truth becomes evident that Laura's death was either a horribly tragic accident or, at worst, was manslaughter due to culpable negligence.

The medical examiner who conducted the autopsy, Dr. Lisa Funte testified regarding the gunshot wound to Laura's body:

> ... So in this case, this complex wound, the entrance wound and the exit wound are connected by a gaping defect. So that tissue is gone. Part of that entrance wound is gone. You can look at this wound, this defect, in the tissue. It's kind of - - forms a V shape in the tissue. You'd follow that where you - - to posteriorly or back where you see another cone-like semi-circular type defect. That would be where the pellet mass exits. So you have an entrance - - well, part of an entrance defect and part of an exit defect. Then you have a big wound connected the two. [T. 516.]

A photograph of the wound, taken during the autopsy, was admitted into evidence as Exhibit S-39. [T. 510-511.]

Dr. Funte testified that a wedge-shaped dark coloration on the side of Laura's lip running toward her cheek is "the deposition of burnt gunpowder". [T. 512]

Perhaps the most significant portion of Dr. Funte's testimony is her testimony reading the "ring finger" of Laura's right hand:

> Q. ... What was the unusual thing about that particular injury? What other than the fact that the finger was almost blown off, what was the unusual fact about that particular finger?
>
> A. Okay. The remarkable thing about this injury once you re-approximated, which means bring together, the pieces of the finger was that there was a

> linear deposition of that gray, black discoloration of soot on this finger, that ring finger, as well as some gray, black discoloration on the surface of the third digit. But there was a nice linear pattern of soot deposition on that ring finger. [T. 521-522.]

A photograph, taken at the autopsy, showing the injury to Laura's "ring finger" was admitted into evidence as Exhibit S-41. [T. 520-521.]

Before further discussion of the injury to Laura's "ring finger", it will be helpful to understand the particular configuration of the shotgun involved in this case, which is a "Remington 12 gauge shotgun, 870 Express super magnum." [T. 562.] Steve Byrd, the firearm and tool mark examiner at the Mississippi Crime Lab, testified "as soon as the trigger's pulled, something's headed towards the muzzle end of that barrel", and that the time between pulling the trigger and gas coming out the end of the barrel would be "nanoseconds." [T. 566.]

Dr. Funte testified that the injury to the "ring finger" is consistent with an injury to the finger from gas and gunshot residue emitted from the muzzle of the gun at the time the gun was shot. [T. 523.] Dr. Funte explained:

> Q. Now, in conjunction with the other injuries that you have seen on this woman's body, what does that particular wound represent to you?
>
> A. In relationship to the gun, knowing a little bit about the gun, this linear deposition matches a gas vent on a part of the muzzle breaker or choke that's on the rifle. It lines up with that gas vent, which means that this ring finger was next to that gas vent or touching that gas vent.
>
> Q. Now, do you have an opinion based on training and experience in your field to a reasonable medical certainty as to whether or not that injury would be consistent with the hand of Laura-Lee Holliman actually being in contact with the barrel at the time it discharged?
>
> A. Yes, that is consistent with that.
>
> Q. In order for the soot to have been deposited on her hand, what would have had to happen? Explain that for the ladies and gentlemen of the jury.
>
> A. Okay, So soot is the burning - - the burnt gunpowder. So that gun would

have had to have been fired. And her hand would have had to have been at that muzzle breaker, that vent - - that gas vent at the time of discharge of that weapon.

[T. 522-523.]

Q. You said she'd be - - had she grabbed the gun completely around the muzzle, what would you've expected to find?

A. Well, with the force of the gases that come through that vent, you'd see a lot more destruction of the hand itself, possibly complete amputation of those fingers; plus you'd have extensive soot deposition on the tissue that's left as well as on the hand and possibly even on the arm.

[T. 544-545 (emphasis added).]

Here it should be remembered that no where in any of the alleged statements from Brian Holliman is there a claim that there was a "struggle for the weapon." In truth and in fact, the October 28th statement states that "she grabbed hold of the barrel" and that "she pushed the barrel away from her and the gun went off", and the October 29th statement states that "I don't remember how she did it, but I remember she hit the gun and I was jarred and the gun went off." [T. 417, 428. E. 16-17, 18. See also Exhibit S-34 and Exhibit S-36.] Nothing in Dr. Funte's testimony significantly or substantially contradicts the statements. While Dr. Funte does seem to say that it is doubtful that Laura was "grabbing the gun," Dr. Funte specifically testified that the injuries were consistent with Laura "striking that gun barrel with the back of her hand" [T. 523-524.] Again, both the October 28th and October 29th statements relate that Laura "pushed the barrel away" and that Laura "hit the gun." Furthermore, when asked the distance of the muzzle from Laura's body when the gun discharged, Dr. Funte testified that 'the distance of the barrel was within a few inches to a few feet away" [T. 525.] This, again, is consistent with the October 28th statement ("The barrel touched her upper body and she grabbed hold of the barrel."). [T. 417. E. 16-17. See also Exhibit S-34.] Also, the October

29th statement relates "she hit the gun and I was jarred and the gun went off." [T. 428. E. 18. See also Exhibit S-36.]

Thus, again, nothing in Dr. Funte's testimony significantly or substantially contradicts the statements, and when the statements are considered together with all of the evidence (such as Dr. Funte's testimony), the truth becomes evident that Laura's death was either a horribly tragic accident or, at worst, was manslaughter due to culpable negligence.

Steve Byrd, the firearm examiner from the Mississippi Crime Lab, testified similarly:

> Q. I've asked you before that if I swiped at this weapon - - if you'd hold it this way - - and grabbed it like that, it could unintentionally discharge causing the pull on the trigger by the holder?
>
> A. If the gun were loaded in the battery position and the safety off, and the person had their finger on that trigger, yes, that is a possibility.

[T. 566.]

Again, the October 28th statement relates that "[t] he barrel touched her ... body and she grabbed hold of the barrel" and that "***[s]he pushed the barrel away from her and the gun went off***." [T. 417 (emphasis added). E. 16-17. See also Exhibit S-34.] Also, the October 29th statement relates "***she hit the gun and I was jarred and the gun went off***." [T. 428 (emphasis added). E. 18. See also Exhibit S-36.] Brian told the E-911 dispatcher that Laura had shot herself. [See Exhibit S-2.] Later that night, Brian gave the handwritten statement which states he "heard a loud sound" and ran inside to find Laura "laid out with my gun." [T. 399. E. 14-15. See also Exhibit S-29.] Of course, the other two statements (*i.e.*, Exhibit S-34 and Exhibit S-36) contain admissions from Brian that he was actually holding the shotgun when it discharged – which makes the original hand-written statement appear to be a desperate and clumsy lie. Thus, the question arises: Why did Brian lie initially, especially if the shooting was simply a horrible accident? The answer to this question is actually found in both the October 28th and October 29th statements. First, the October 28th statement

relates: ... I picked the shotgun back up and placed it back on her body. I put it back on her body to make it look like a suicide because I didn't want people to think that I had shot her. [E. 16-17. See Exhibit S-34.]

Next, the October 29th statement relates: "While I was talking to 911, ***I was thinking that even if it was an accident, I was going to get locked up***." [E. 18. See Exhibit S-36 (emphasis added).]

In Brian Holliman's October 28th and 29th statements, he alludes to Laura expressing suicidal thoughts. The suicide claim was not created out of whole cloth, because there is significant evidence that in the days and weeks prior to her death Laura had, in fact, been expressing suicidal ideation. For example, it should be remembered that Angela Jones, who talked to Laura within five (5) minutes of Laura's death, testified:

Q. How did she sound during this conversation?

A. By then she sounded like she was upset. And I didn't know what she was upset - - I didn't know what she was upset about.

Q. So what happened?

A. I told her, I said, well, I'll call you or you call me later. And I told her bye, and she never said bye.

Q. You said she never said bye. Why - -

A. She always said bye before she hung up the phone.

[T. 227]

Next, the October 28th statement relates:

> I went in the back bedroom and I noticed my shotgun in the crack between my gun cabinet and the wall. I usually keep it there or under my bed. I thought I had put it under the bed the day before. So when I saw it in the corner ***after she had said the day before*** I was concerned about it being out of place. [sic] [T. 416-417 (emphasis added). E. 16-17. See also Exhibit S-34.]

What Brian meant by saying "after she had said the day before I was concerned about [the shotgun] being out of place" can be understood after reading the October 29th statement, which relates:

> Before we went [out to dinner at the Longhorn Steak House in Becker on Friday, October 27, 2008], she gave me some paperwork showing she had contacted a lawyer about a divorce. Laura had discussed that ***she was tired of hurting*** and ***wanted an easier way out***. ***She said she wanted a bullet so she would be out***. I laid there the rest of the night thinking about it. [T. 429 (emphasis added). E. 18. See also Exhibit S-36.]

The State also introduced evidence of marital discord existing between Laura and Brian, apparently in an effort by the State to demonstrate "malice aforethought" on the part of Brian prior to Laura's death. However, all of the evidence of marital discord can also lend credence to Brian's statements that Laura expressed suicidal ideation. It is also significant to note that the State never produced divorce papers or anyone who could testify to serving or drafting divorce papers on behalf of Laura Holliman.

Katie Godfrey (Laura's teenage sister who had moved in with Laura and Brian in early August of 2008) testified that during the time she lived in the home there was "lots of arguing about money and her going out" and that the arguing was "kind of rough" but never mentioned any physical altercations occurring. [T. 102.] Katie, who was 14-years-old at the time of the closet incident, testified that Brian, Raleigh, and Brianna were all home at the time, as well as Katie's 15-year-old friend, Megan Swells. [T. 106-109.] Katie testified that Laura and Brian had begun arguing, that Megan had called her mother to come and get her [T. 107.], and that Katie went inside to tell Laura that she was going to leave with Megan and her mother. [T. 108.] Katie testified:

> When I walked in the bedroom, I saw that he was pulling the computer desk in front of the door and she was in there. And then next thing I know Sarah Holliman[7] comes in the bedroom. [T. 108.]

Katie testified that Laura was in the closet because "[s]he started taking her clothes out of the closet and throwing them in the back of the car," that "they started arguing...", and that's when Laura had

[7]Sarah Holliman is the mother of Defendant-Appellant, Brian Holliman.

gone back into the closet that Brian was "pulling the computer desk in front of the door" while Laura was inside. [T. 107-108.] Katie testified:

> Q. Where were they physically in the house?
> A. They were in their bedroom. When I walked in the bedroom, I saw that he was pulling the computer desk in front of the door, and she was in there. And she kept screaming to let her out, and he kept screaming back at her.
> Q. What were they screaming back and forth to each other?
> A. She was screaming as loud as she could to let her out, and he kept telling her no.
> Q. Now, what did you do?
> A. I didn't know what to do. I was scared. He was sitting there standing between me and the closet door, and I didn't know what to do.

[T. 108-109.] Katie testified that she was at the bedroom door and when Sarah Holliman came in. [T. 109.] Katie also testified that Laura could not have been locked in the closet because it didn't have a lock on it. [T. 147.]

Katie agreed in her testimony that the computer desk was made of wood and was covered with papers, a computer, laptop, the main computer, and the printer, all of which was plugged in. [T. 146-147.] Additionally, photographs admitted into evidence which depict the computer desk, the area around the computer desk, and specifically, the floor area between the computer desk and the closet, are completely devoid of any evidence or indication that the computer desk had been, or could have been, moved in months. [See the photographs admitted into evidence as Exhibits S-3F, S-3, S-7, and S-10-13] .

It is extremely noteworthy that during Katie's testimony she never mentioned physical blows ever occurred when Brian and Laura argued. The entirety of the record is utterly devoid of any evidence sufficient to support a verdict of "deliberate design"murder, yet the jury returned a first degree murder verdict.

III. SUMMARY OF THE ARGUMENT

1. The first assignment of error. The motion for JNOV should have been granted. Under the specific facts of this case, Laura Holliman's death was either a horribly tragic accident or, at most, culpable negligent manslaughter. Therefore, the evidence is legally insufficient to support the jury's first degree murder verdict, and the murder verdict should be reversed.

2. The second assignment of error. The jury was not properly instructed. The State was allowed to argue presumed intent through the introduction of *Instruction S-4*. The Court also erroneously refused to grant the Defendant's proposed circumstantial evidence instruction, *Instruction D-2*, because the Defendant admitted to a significant element of the offense. Also, the language of *Instruction S-3* and *Instruction S-6* are in irreconcilable conflict, and Brian Holliman was prejudiced by the improper instructions because the jury returned a verdict of murder where the evidence, at most, demonstrated only "culpable negligence" manslaughter.

3. The third assignment of error. The trial court erred in admitting statements pursuant to Mississippi Rule of Evidence 804(b)(5) which did not carry the required indicia of trustworthiness in order to be properly admitted into evidence.

4. The fourth assignment of error. The trial court erred in allowing two written statements taken from Brian Holliman into evidence because Brian's Sixth Amendment right to counsel was violated.

5. The fifth assignment of error. The face of the indictment indicates that it was inexplicably and improperly altered, and the trial court erred in not quashing the indictment and having the case resubmitted to the grand jury.

IV. ARGUMENT

ISSUE I: The trial court committed reversible error when it denied Brian Holliman's motion for a directed verdict of acquittal at the close

> **of the State's case-in-chief, the trial court committed reversible error when it denied Brian Holliman's motion for a directed verdict of acquittal at the close of all of the evidence and testimony, and the trial court committed reversible error when it failed to grant Brian Holliman's motion for a judgment of acquittal notwithstanding the verdict (JNOV) or a new trial.**[8]

The evidence in this case does not support a murder conviction. Simply stated, the evidence is legally insufficient to support the jury's verdict. Therefore, Brian Holliman's JNOV motion should have been granted and the trial court's order denying the motion should be reversed. The Mississippi Supreme Court has stated that a motion "for a directed verdict and judgment notwithstanding the verdict (JNOV) challenge the ***legal sufficiency*** of the evidence supporting the guilty verdict," that the "standards of review for a denial of directed verdict and JNOV are identical," and that reversal is warranted where, viewing the evidence in the light most favorable to the verdict, a reasonable and fair-minded juror could only find the accused not guilty. *Croft v. State*, No. 2007-KA-01331-SCT, 992 So.2d 1151, 1157 (¶ 24) (Miss. 2008) (emphasis added). Furthermore:

> To determine whether the evidence is sufficient to sustain a conviction in the face of a motion for directed verdict or for judgment notwithstanding the verdict, the critical inquiry is whether the evidence ***shows*** "***beyond a reasonable doubt*** that accused committed the act charged, and that he did so under such circumstances that ***every element of the offense existed***; and ***where the evidence fails to meet this test it is insufficient to support a conviction***." *Carr v. State*, 208 So.2d 886, 889 (Miss.1968) (emphasis added). 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***.

Jones v. State, No. 2003-CT-00083-SCT, 904 So.2d 149, 153-154 (¶ 12) (Miss. 2005) (emphasis added).

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[8]This assignment of error was presented to the trial court in the Defendant's *Motion for Judgment of Acquittal Notwithstanding the Verdict or in the Alternative a New Trial* (¶ 8). [R. 145-151. E. 5. E. 38]

Brian Holliman was put to trial pursuant to an indictment which recites, *inter alia*, as follows, to-wit:

> Brian Holliman ... did ... unlawfully, willfully, and feloniously, ***with the deliberate design to effect death***, did kill and murder a human being, Laura Godfrey Holliman, without authority of law and not in necessary self defense .... [E. 1-2. (emphasis added)]

Thus, the face of the indictment purports to charge Brian Holliman with the "deliberate design" murder of Laura Holliman in violation of MISS. CODE ANN. § 97-3-19(1)(a). Notably, the face of the indictment reflects that, at some point, several words were marked out. [E. 1-2.]

At the close of the trial, the State offered jury instructions on both deliberate design or first-degree murder and depraved heart or second-degree murder. See *Instruction S-2A and Instruction S-4* [R. 102 and 104-105. E. 19, 21]. *Instruction S-4* informs the jury that "[i]f you fail to find the Defendant guilty of Second-Degree Murder, you may proceed in your deliberations to determine if the Defendant is guilty of the lesser-included offense of Manslaughter ...." [R. 104-105. E. 21.] Thus, the jury's "choice of verdict among murder, manslaughter, or acquittal turned on fact questions of [Brian Holliman's] intent" when the shotgun discharged, killing Laura. See, *e.g.*, *Steele v. State*, No. 2000-KA-01561-COA, 852 So.2d 78, 81 (¶ 14) (Miss. App. 2003).

The only evidence regarding what may have occurred when the shotgun discharged and killed Laura comes from the October 28th and October 29th statements the State claims were freely and voluntarily given by Brian and which were type-written by the investigators. [E. 16-17, 18. See Exhibit S-34 and Exhibit S-36.] According to the October 28th statement, Brian stated:

> ... I went in the back bedroom and I noticed my shotgun in the crack between my gun cabinet and the wall. ... I have always kept that gun and only that gun with a shell in the chamber with the safety off. ***I picked the gun up*** and I heard clothes rattling in the closet. ***I had the gun in one hand*** and the other hand I was opening the closet door. I saw that Laura Lee had her cellphone in her hand. ... I then asked her what she was doing, ... In the process of talking I was bringing the gun down leveling it off with both hands pointed towards her. ***The barrel touched her upper body and she***

> ***grabbed hold of the barrel***. ***She pushed the barrel away from her and the gun went off***. ***I didn't mean to pull the trigger and didn't realize my finger was on the trigger***. ....[9] [T. 416-417 (emphasis added). E. 16-17. See also Exhibit S-34.]

According to the October 29th statement, Brian stated:

> When I went to the bedroom, I was looking for Laura. I didn't see her and I heard clothes rattling. I opened the closet door, I had the gun in my hands. I was pointing in the air and I was upset because Laura wouldn't tell me where she was going. I was asking her where she was going. On purpose, I pointed the gun at Laura to scare her to tell me where she was going. ... I told her I wanted to know where my wife was going .... ***As I was lowering the gun, Laura shocked up and it hit her in the upper body***. Laura was standing about 2 foot from me and the end of the barrel was touching her. ***I don't remember how she did it, but I remember she hit the gun and I was jarred and the gun went off***. .... [T. 428 (emphasis added). E. 18. See also Exhibit S-36.]

Thus, according to both statements, the gun discharged accidently because Laura "pushed the barrel away" and because "she hit the gun" which "jarred" Brian as he was holding the gun. Notably, the pathologist, Dr. Funte, testified that the injuries to Laura's ring finger were "consistent with" her hand being in contact with the barrel of the weapon at the time it was fired. [T. 522-23.] Steve Byrd, the firearms examiner from the Mississippi Crime Lab, agreed that the gun could be accidently discharged if Laura slapped the gun, causing Brian to tighten his grip on the shotgun. [T. 566.]

Again, the record in this case is utterly devoid of any evidence of any intentional and purposeful malevolent act or intent by Brian Holliman which caused Laura's death. The evidence demonstrates that Laura's death was nothing more than a horrible accident. Remember, Laura's younger sister, Katie Godfrey (who actually lived in the home with Laura and Brian and who testified that there was "lots of arguing about money and [Laura] going out"), but never mentioned

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[9]According to the statement, Brian said he found Laura in the closet with her cellphone "in her hand." This portion of the statement dovetails perfectly with the testimony of Angela Jones, who testified that she talked to Laura via cellphone at 3:56 p.m. [T. 226.]

any physical altercations occurring when Laura and Brian argued. The prosecutor tacitly admitted during closing arguments that the evidence would not support a conviction for "deliberate design" murder by stating that the "thing we call intent is something that's rarely susceptible to any kind of direct proof." [T. 600]. The prosecutor goes on to repeat in his closing statement the mantra of implied intent and the fact that the defendant "intended the natural consequences of his actions." [T. 600, 603, 606, 637].

The prosecutor stated to the jury that "the only thing you have to resolve when you go back into that jury room" was to determine what was going on in the mind of Brian Holliman. [T. 600.] Notably, the prosecutor was unable to actually identify any direct evidence which may have demonstrated that Brian had "express malice" and killed Laura with "malice aforethought," but instead the prosecutor invited the jury to engage in speculation and conjecture. [T. 600.]

Brian Holliman respectfully submits that pursuant to the holding in *Tait v. State*, No. 92-KA-01228-SCT, 669 So.2d 85 (Miss. 1996), the murder verdict returned by the jury in this case must be reversed. With regard to the moment of the fatal incident, both the case *sub judice* and *Tait* are quite similar. In *Tait*, the defendant ("Tait") was indicted for "murdering Christopher Canon ... while Tait was engaged in acts imminently dangerous to others and evincing a depraved heart, regardless of human life, although, without any premeditated design to effect the death of any particular person," in violation of MISS. CODE ANN. §97-3-19(1)(b). Following a trial, the jury returned a verdict finding Tait guilty of murder. The facts demonstrated that Tait and Canon, who were friends, had been "playing with a gun" all day, and that late in the afternoon Tait picked up a bracelet and asked Canon if he could wear it. Canon told Tait no, and the two started joking around and horseplaying. Tait grabbed the gun, cocked it, put it to Canon's head, and the gun went off. Immediately, Tait "fell to the ground and started crying", and when the first police officer arrived,

Tait was holding his head, sobbing, and saying, "I killed him. Oh, my God, I killed him. I shot him." *Tait*, 669 So.2d at 87. On appeal, Tait argued that his actions in killing Canon did not evince a depraved heart and that, at most, his conduct constituted negligent manslaughter. The Supreme Court, in an opinion by Justice Smith, agreed, holding:

> The evidence in this case does not support a murder conviction. However, the overwhelming evidence does support manslaughter by culpable negligence. Tait's actions "show a conscious, wanton and reckless disregard of the likely fatal consequences of his willful act which created an unreasonable risk."

Tait, 669 So.2d at 91.

Similarly, in *Burge v. State*, 472 So.2d 392 (Miss. 1985), the defendant, while engaged in an argument, pulled out his gun, pointed it at the victim (who was also armed, with a knife), and cocked it. As the argument continued, the defendant pushed the victim, and the victim hit the gun with her hand, causing the gun to discharge. The defendant immediately placed the victim in his car and attempted to rush her to the hospital. The Supreme Court stated that drawing a gun, cocking it, and aiming it at the victim indicated a reckless indifference to human life and supported the jury's verdict of manslaughter.

The Mississippi Court of Appeals (which may hereinafter be referred to simply as the "COA") has observed:

> The distinction between depraved heart murder and culpable negligence manslaughter can be murky. One attempt at a most logical description of the relationship was set out by the Mississippi Supreme Court in *Windham v. State*, 602 So.2d 798, 801 (Miss.1992):
>
> > Depraved-heart murder and culpable-negligence manslaughter are distinguishable simply by degree of mental state of culpability. In short, depraved-heart murder involves a higher degree of recklessness from which malice or deliberate design may be implied.

Steele v. State, No. 2000-KA-01561-COA, 852 So.2d 78, 80 (¶ 10) (Miss. App. 2003). The COA further observed:

> ... under *Windham*, the proper guiding principle is not whether the killing was unintentional or accidental; rather, ***it is the degree of recklessness employed by the defendant***. [Citation omitted.] That degree of recklessness can be reconciled in the cases by resolving the question of the defendant's intent as to the underlying act (*i.e.*, the shooting), rather than the intent as to the killing. In each of the previously cited cases, the killing was unintentional. However, in cases involving shootings, the courts have consistently ***upheld convictions of depraved heart murder where the evidence suggested that the firing of a weapon was intentional***, not accidental. *See, e.g., Turner v. State*, 796 So.2d 998 (Miss. 2001); *Evans v. State*, 797 So.2d 811 (Miss. 2000); *Clark v. State*, 693 So.2d 927 (Miss. 1997).

Steele, 852 So.2d at 80-81 (¶ 12) (emphasis added). Inversely, where the evidence suggested that the firing of a weapon was accidental and not intentional, the courts have declined to find the defendant was guilty of murder – as in *Tait*.

Again, in his closing argument in support of the murder accusation, the prosecutor told the jury that "he pointed a loaded shotgun that he knew was not safe at another human being" and that this was, in fact, proof "of malice, of intent to kill." [T. 603.] The prosecutor's argument, however, is contrary to a long line of decisions. In *Robertson v. State*, 153 Miss. 770, 121 So. 492 (Miss. 1928), the defendant, who had shot and killed his nephew, was tried for murder but convicted of manslaughter. On appeal, the Mississippi Supreme Court stated:

> It is hard to conceive of a clearer cut demonstration of what is termed "culpable negligence" than for a person to point, aim, and discharge a loaded pistol at another; and, where this negligence results in the death of the human being at whom the pistol is pointed, the crime of manslaughter is completely made out and established.

Robertson, 121 So. at 493.

In *Jernigan v. State*, 305 So.2d 353 (Miss. 1974), the defendant, tried for murder and convicted of manslaughter, claimed that he thought the gun was empty, that he and the victim frequently "pranked" with each other, and that he simply pulled the gun out of his shirt pocket and the gun went off by accident. The Supreme Court, citing *Robertson*, held that pointing a loaded pistol at a human being is culpable negligence. In *Towner v. State*, No. 97-KA-01176 COA, 726

So.2d 251 (Miss. App. 1998), the 15-year-old defendant, who purposely and intentionally pointed a handgun at the head of a 12-year-old girl which discharged and killed the girl, was tried for murder and convicted of manslaughter. The COA, citing *Jernigan* and *Tait*, affirmed the manslaughter conviction. In *Harried v. State*, No. 98-KA-00586-COA, 773 So.2d 966 (Miss. App. 2000), the defendant, who was charged with murder but convicted of manslaughter, admitted in his testimony that he purposefully pointed the loaded weapon in the direction of the victim, and the COA, affirming the defendant's conviction for manslaughter, cited *Robertson*, stating that the defendant's "actions show a conscious, wanton and reckless disregard of the likely fatal consequences of his willful act which created an unreasonable risk." *Harried*, 773 So.2d at 969 (¶ 7). In *Bruce v. State*, 349 So.2d 1068, 1071 (Miss. 1977), the defendant and his friend, who had been drinking beer and smoking marijuana all morning, engaged in a game of "Russian Roulette", pointed the gun at his friend, and pulled the trigger, causing the gun to fire, killing the friend. The defendant was tried for murder but found guilty of manslaughter. The Supreme Court, citing *Robertson*, affirmed because the Court held that "pointing a deadly weapon at [the victim] and deliberately pulling the trigger" was an act "of wanton disregard of human life, culpable negligence." *Bruce*, 349 So.2d at 1071. And in *Strode v. State*, 406 So.2d 820 (Miss. 1981), where the defendant, while playing with a gun he believed was unloaded, pointed the gun at the victim and pulled the trigger, killing the victim, the Supreme Court, citing *Jernigan*, affirmed the jury's verdict of culpable negligence manslaughter.

During the trial of Brian Holliman, the State never produced a scintilla of evidence to indicate (let alone prove) that Brian ever had any intent or "deliberate design" to kill Laura, and, further, the State never produced a scintilla of evidence that Brain actually committed an act which demonstrated that Brian acted with malice aforethought, deliberate design, or with a depraved heart.

Therefore, the evidence is legally insufficient to support the jury's murder verdict, the trial court erred in not granting Brian's motion for JNOV, and the verdict must be reversed.

ISSUE II: The trial court committed reversible error by failing to properly instruct the jury.[10]

The jury was improperly instructed by *Instruction S-3, S-4*, and *Instruction D-2* was improperly refused. Under the specific facts of this case, Brian Holliman's conviction should be reversed because of these instructions. Under *Instruction S-2A* the jury had to consider whether Brian Holliman "did ... [w]ith malice aforethought kill and murder" Laura Holliman. [R. 102. E. 19]. In *Instruction S-4*, the jury was also to consider whether Brian killed Laura "while engaged in the commission of an act imminently dangerous to others and evincing a depraved heart ...." [R. 104. E. 21.] Additionally, *Instruction S-4* informed the jury that if it did not find Brian guilty of murder it should "determine if the Defendant is guilty of the lesser-included offense of Manslaughter in either of its forms." [R. 104. E. 21.] The jury was instructed under *Instruction S-5* that it might find Brian guilty of "heat of passion" manslaughter, and under *Instruction S-7* the jury was instructed it might find Brian guilty of "culpable negligence manslaughter." [R. 106, 108. E. 23, 25.] Thus, the jury had five options to chose from: (1) "deliberate design" (or "malice aforethought") murder; (2) "depraved heart" murder; (3) "heat of passion" manslaughter; (4) "culpable negligence" manslaughter; and, (5) not guilty.

The improper instruction given to the jury, *Instruction S-4* states:

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[10]This assignment of error was presented to the trial court during the actual trial as well as in the Defendant's *Motion for Judgment of Acquittal Notwithstanding the Verdict or in the Alternative a New Trial* (¶¶ 6-7). [R. 145-151. E. 5. T. 582.] However, *Instruction S-3 and S-4*, which are complained of herein, were not actually objected to during the trial and were not specifically set forth in the motion for JNOV. This assignment of error may still be considered on appeal under the "plain-error doctrine" because the conflicting jury instructions given in this case create an obvious injustice and demonstrate misapplied law. See, *e.g.*, *Smith v. State*, No. 2006-KA-02149-SCT, 986 So.2d 290, 294 (¶ 10) (Miss. 2008).

> The Court instructs the Jury that if you find from the evidence in this case beyond a reasonable doubt that the Defendant, Brian Douglas Holliman, did on or about October 25, 2008, in Lowndes County, Mississippi, unlawfully, willfully, and feloniously kill Laura Godfrey Holliman, ***while engaged in the commission of an act imminently dangerous to others and evincing a depraved heart, disregarding the value of human life, whether or not he had any intention of actually killing Laura Godfrey Holliman, by pointing a loaded shotgun with the safety off at Laura Godfrey Holliman***, without authority of law and not in necessary self-defense, then you should find the Defendant guilty of Second- Degree Murder. [R. 104 (emphasis added). E. 21].

The instruction listed above is an improper statement of Mississippi law following the recent Supreme Court decision of *Reith v. State*, 135 So. 3d 862 (Miss. 2014). In *Reith*, the Court disallowed the use of presumptive intent to prove deliberate design in murder prosecutions. *Id*. at 865. Specifically, the Court found it was error to grant a jury instruction which read that "[d]eliberate design may be presumed from the unlawful and deliberate use of a deadly weapon." *Id*. The Court stated that "instructions which allow the jury to presume guilt on an essential element of an offense run counter to our most basic tenet of criminal law." *Id*. quoting *Newell v. State*, 451 So. 2d 743, 757 (Miss. 1984).

There are noticeable differences between *Reith* and the case at bar, but these differences do not give rise to harmless error beyond a reasonable doubt. The exact jury instruction given in *Reith* was not given here, and Brian Holliman was found guilty of the newly enacted First-Degree Murder, although this remains the traditional "deliberate design" or "malice aforethought" form of murder. These differences do not excuse the fact that the state argued presumed intent throughout closing arguments. *Instruction S-4* clearly shows the argument of presumed intent with regard to Second-Degree Murder, but the state argued "implied malice" throughout closing arguments. [T.599, 600, 603, 606, 636, and 637].

During closing arguments, the prosecutor stated multiple times that "people intend the natural consequences of their actions." [T. 600, 637]. This phrase is essentially the same as the jury

instruction found to be impermissible by this Court in *Williams v. State*, 111 So. 3d 620 (Miss. 2013). In *Williams*, the Defendant was convicted of murder after admitting to shooting her ex-boyfriends new love interest, but as in this case, urged that the shooting was an accident. *Id*. at 622. The jury was instructed that "a person is presumed to have intended the natural and probable consequences of his voluntary and deliberate acts." *Id*. at 623. This Court found that this language impermissibly shifted the burden of proof to the Defendant to prove her innocence. *Id*. at 624. The Court also stated that the language of the instruction was in conflict with two United States Supreme Court holdings, *Sandstrom v. Montana*, 442 U.S. 510 (1979) and *Francis v. Franklin*, 471 U.S. 307 (1985). Both of these cases revolved around instructions indistinguishable from the one given in *Williams*, which was the phrase argued to the jury in the case at bar, and in both cases the United States Supreme Court "emphatically held that the instruction violated the Due Process Clause in that it shifted the burden of proof to the defendant on an essential element of the charged offense." *Williams*, 111 So. 3d at 624 quoting *Sandstrom*, 442 U.S. at 521; *Francis*, 471 U.S. at 325. The Williams Court also found that the error was not harmless because the Court could not conclude "beyond a reasonable doubt that [the impermissible jury instruction] did not contribute to the verdict." *Williams*, 111 So. 3d at 626 quoting *Conley v. State,* 790 So. 2d 773, 793 (Miss. 2001).

In allowing the use of presumptive intent through *Instruction S-4* and in closing arguments, the court not only caused the burden of proof to be shifted impermissibly to the Defendant, but the Court erred in not allowing the Defendant's circumstantial evidence instruction, *Instruction D-2*. [R. 130. E.26. T. 582]. The instruction reads "[t]he case before you is one of circumstantial evidence. In order for you to find Brian D. Holliman, guilty of murder, you must first find him guilty not only beyond a reasonable doubt, but also to the exclusion of every reasonable hypothesis consistent with innocence." [R. 130. E. 26].

In refusing the instruction, the Court agreed with the prosecutor that "an admission to any element of defense is sufficient to take the case out of circumstantial evidence." [T. 582]. At trial the state cited *Garrett v. State*, 921 So. 2d 288 (Miss. 2006) as authority that the case was not one of circumstantial evidence.[11] [T. 582]. In *Garrett*, the court concluded that the case was not one based on circumstantial evidence alone because the defendant was an eyewitness to the case because she admitted to shooting her husband, making her an eyewitness to the offense. *Id*. at 292. The Court also cited *Swinney v. State*, 829 So. 2d 1225 (Miss. 2002) stating that "confession to a shooting could be direct evidence to an underlying felony for capital murder purposes where defendant admitted to pointing the gun at the victim and stated the gun accidently fired." The Court's decision in *Swinney* should be overruled given the more recent cases of *Reith* and *Williams*. Furthermore, the Court should rule that an admission to an accidental shooting where the Defendant is the only witness to the crime does not prohibit the granting of a circumstantial evidence instruction. The rule presently in place creates a situation where the state is allowed to present evidence of intent based purely on circumstantial evidence without the Defendant having the benefit of the circumstantial evidence instruction. This situation could also be viewed as making it necessary that the Defendant testify at trial since they are in fact the only witness to the crime and the Defendant's testimony is the only means of putting forth direct evidence of the offense to the jury. This is a direct violation of the Defendant's Fifth Amendment right against self incrimination.

Another improper instruction given to the jury, *Instruction S-3* states:

> The Court instructs the Jury that the term "malice aforethought" as used in these instructions means intent to kill without authority of law and not being legally justifiable, legally excusable, or under circumstances that would reduce the act to a lesser crime. Malice aforethought cannot be formed at the very moment of the fatal

[11]The trial transcript cited the case as *Merritt v. State*, but the case is in fact styled *Garrett v. State*.[T. 582].

> act; however, malice aforethought need not exist in the mind of the Defendant for any definite period of time. If there is malice aforethought, and it ***exists in the mind of the Defendant but for an instance before the fatal act***, this is sufficient malice aforethought to constitute the offense of First-Degree Murder.[12] [R. 103 (emphasis added). E. 20.]

It is the last sentence in *Instruction S-3* which makes the instruction fatally defective, because as written *Instruction S-3* is, in practical application, semantically and linguistically the same as the jury instruction found in *McDonald v. State*, 78 Miss. 369, 29 So. 171 (Miss. 1901), to-wit:

> The court instructs you, for the state, that, while premeditation and malice aforethought are necessary ingredients in the crime of murder, this does not mean hatred or ill will, but means the same in law as deliberate design, and need not exist in the mind of the slayer for any definite time, – not for days or hours, or even minutes; but, if the design to kill ***exists but for an instant at the very time the fatal blow was struck***, this is sufficient premeditation to constitute the offense.

(Emphasis added.) The Court criticized the instruction in *McDonald*, stating:

> The ... instruction ... is fatally erroneous. The words "the offense," in the instruction, mean murder; and the effect of the instruction is to tell the jury that, if "the design to kill" existed but for an instant at the very time the fatal blow was struck, the appellant was guilty of murder. ***Now, manifestly, the design to kill might exist, and the killing be merely manslaughter***. This instruction pares away the rights of defendant, and requires the jury to convict of murder, no matter what the provocation, and even though the killing was done in the heat of passion and on sudden provocation. Its vice is, it eliminates manslaughter as a possible finding from the case, if only the design to kill existed as stated, etc.

McDonald v. State, 29 So. at 171-172 (emphasis added). The only real difference between *Instruction S-3* and the instruction in *McDonald* is that the instruction in *McDonald* stated that "deliberate design" could "exist[] but for ***an instant at the very time*** the fatal blow was struck" whereas *Instruction S-3* states that "malice aforethought" could "exist[] in the mind of the Defendant

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[12]The indictment charged Brian Holliman with the "deliberate design" murder of Laura Holliman, but the jury instructions employed the term "malice aforethought." Under the law of Mississippi, "malice aforethought, premeditated design, and deliberate design all mean the same thing." *Jones v. State*, No. 95-KA-01313-SCT, 710 So.2d 870, 876 (¶ 21) (Miss. 1998).

but for ***an instance before*** the fatal act." (Emphasis added.) Again, semantically and linguistically "an instant at the very time" and "an instance before" are, in practical application, the same thing.

Instructions such as *Instruction S-3* have been criticized and condemned for over 100 years, starting at least as early as the 1901 decision in *McDonald*. In *Pittman v. State*, 297 So.2d 888 (Miss. 1974), wherein a similar jury instruction ("if the deliberate design to kill exists but for an instant at the very time the fatal blow was struck, this is sufficient premeditation and deliberation to constitute the offense of murder") was considered, the Court stated:

> The vice of the instruction is that ***it requires the jury to convict the defendant of murder if it finds that*** premeditation or ***deliberate design to kill the deceased existed at the time the killing occurred***. The instruction fails to inform the jury that there are instances in which a deliberate design to kill may exist at the moment the fatal blow was struck and yet the homicide may be justifiable or excusable. ... ***In addition thereto, the deliberate design to kill might exist and the killing be manslaughter***. This instruction pared away the rights of the defendant and required the jury to find him guilty of murder even though the killing might have been justifiable by reason of self-defense. ***One may have a deliberate design to kill and yet not be guilty of murder***.

Pittman v. State, 297 So.2d at 893 (emphasis added). The Court reversed the murder conviction in *Pittman* solely because of the improper jury instruction. Again, the Court in *Pittman* recognized that "[o]ne may have a deliberate design to kill and yet not be guilty of murder," *Id.*, 297 So.2d at 893. See also, *e.g.*, *Windham v. State*, 520 So.2d 123, 126 (Miss. 1987) ("... it is possible for a deliberate design to exist and the slaying nevertheless be no greater than manslaughter."), and *Newell v. State*, 308 So.2d 71 (Miss. 1975) ("... there can be a deliberate design to kill arising ... in the heat of passion which is not murder, or intent to murder, since it is unaccompanied by malice aforethought.").

Because of the last sentence in the instruction (*i.e.*, "If there is malice aforethought, and it exists in the mind of the Defendant but for an instance before the fatal act, this is sufficient malice

aforethought to constitute the offense of murder."), *Instruction S-3* is also in conflict with *Instruction S-6*, which, in pertinent part, instructed the jury:

> [I]f you find from the evidence in this case beyond a reasonable doubt that the Defendant, Brian Douglas Holliman, was induced by some insult, provocation, or injury which would naturally and instantly produce in the mind of a normal person a sudden impulse of violent passion; and further that in such state of mind, the Defendant shot Laura Godfrey Holliman resulting in her death, then the shooting was done in the "heat of passion". [R. 107. E. 20. E. 24.]

Under *Instruction S-6*, if Brian, acting on "a sudden impulse of violent passion," intentionally shot Laura, "then the shooting was done in the 'heat of passion'," but this instruction is contradicted by *Instruction S-3* under which, if the jury found that Brian "but for an instance before the fatal act" had "malice aforethought" (*i.e.*, "deliberate design") to kill Laura, then the act would "constitute the offense of murder." Again, it has been clearly stated that "[i]t is not accurate to state to the jury that malice aforethought or deliberate design can be formed at the immediate second of the fatal act because this is not in line with the concept of contemplation or conjecture." *McGee v. State*, No. 1999-KA-00892-COA, 820 So.2d 700, 705 (¶ 11) (Miss. App. 2000).[13]

As previously noted, in *Pittman* a murder conviction was reversed solely because of the improper jury instruction, the Court stating that:

> [A]ll the instructions [given] cannot be read together and make a consistent whole. The instruction under consideration is in irreconcilable conflict with other instructions. The defendant's self-defense instructions did not cure the error because they are in hopeless conflict with the last clause of this instruction.

Pittman v. State, 297 So.2d at 893.

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[13] In *McGee*, the COA held it was reversible error for the trial court to give an instruction which stated that "if the defendant ***at the very moment of the fatal shot*** did so with the deliberate design to take the life of the deceased, and not in necessary self defense, real or apparent, then it was malice aforethought." *McGee*, 820 So.2d at 704-705 (¶ 8) (emphasis added).

The same situation exists in the case *sub judice*: *Instruction S-3* and *Instruction S-6* are "in irreconcilable conflict" with one another, and, just as in *Pittman*, reversal of the conviction of Brian Holliman is required. Again, the State never produced a scintilla of evidence which tends to indicate (let alone prove) that Brian ever had any intent or "deliberate design" to kill Laura, and, further, the State never produced a scintilla of evidence that Brain actually committed an act which demonstrated that Brian had a "depraved heart." Yet the jury returned a murder verdict against Brian Holliman. Under the specific facts of this case, the irreconcilable conflict between *Instruction S-3* and *Instruction S-6* resulted in prejudice to Brian Holliman.

ISSUE III: The trial court committed reversible error in admitting certain hearsay statements into evidence over the objection of Brian Holliman.

The trial court erred in allowing multiple hearsay statements into evidence over the Defendant's objection. The statements were allowed into evidence by way of the catchall hearsay rule, Mississippi Rule of Evidence 804(b)(5) which states "[a] statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence." The Defendant would submit that these statements lacked the "guarantees of trustworthiness" required to be admitted into evidence.

The statements in question were all made by the victim, Laura Lee Holliman, to numerous witnesses. The Defense was furnished with notice of the impending statements pursuant to M.R.E. 804(b)(5). [R. 30]. The Defense was granted a continuing objection to hearsay during the testimony

of Katie Godfrey, the victim's sister. [T. 110]. Additionally a statement made during the testimony of Lee Ann Tucker was allowed into evidence over the objection of the Defendant that Laura Lee stated Brian had locked her in the closet. [T. 172-176]. Also, a similar statement from Angela Jones was allowed into evidence over the objection of the Defendant. [T. 226-227]. These statements were used to suggest that Brian had been violent towards Laura Lee in the past. These statements lacked the sufficient guarantees of trustworthiness and should not have been allowed into the record.

The statements listed above were used to corroborate the testimony of Katie Godfrey, who was in the home the night the alleged closet incident.[T. 108]. Also, the statements lacked the guarantees of trustworthiness because the Court had notice from previous testimony of Katie Godfrey that Laura Lee had a tendency to exaggerate facts as to her medical condition. [T. 166]. The trial court erred in allowing these statements over the objection of the Defendant, and this error requires reversal of the jury's verdict.

ISSUE IV: The trial court committed reversible error by allowing two written statements allegedly made by Brian Holliman into evidence.[14]

The trial court erred in allowing two written statements allegedly taken from Brian Holliman into evidence, to-wit: Exhibit S-29 (the October 25th statement) and Exhibit S-34 (the October 28th statement. Also, the October 29th statement (Exhibit S-36) and its contents should be viewed with extreme skepticism given the facts made known in a recent decision by this Court. Notwithstanding the fact that audio and video recording equipment was available, no recording whatsoever was made of the process of taking any of the statements. [T. 457-458.] An individual's Sixth Amendment right to counsel attaches when the individual becomes "a person of interest" in an investigation, and

[14]This assignment of error was presented to the trial court in the Defendant's *Motion for Judgment of Acquittal Notwithstanding the Verdict or in the Alternative a New Trial* (¶ 5) and during the hearing on the motion. [R. 145-151. E. 5. T. 648.].

at that point a *Miranda* warning should be given. See, *e.g.*, *Barnes v. State*, No. 2008-KA-00684-SCT, 30 So.3d 313, 317 (¶ 10) (Miss. 2010). Because Brian Holliman was not given a *Miranda* warning prior to interrogation on either the October 25th or October 28th, the statements should not have been admitted into evidence, and this error by the trial court requires reversal. Furthermore, Brian Holliman would urge this Court to declare that as a matter of fundamental fairness pursuant to the MISSISSIPPI CONSTITUTION OF 1890 (Art. 3, Sec. 26, which provides, *inter alia*, that an accused "shall have a right ... to be confronted by the witnesses against him") that a mandatory prerequisite to the admissibility of a statement given by an accused is that the process of the taking of the statement was both audio and video recorded, unless good cause can be shown by the State for the failure to have done so. Brian Holliman would submit that in a day and age when high quality audio and video recordings can be produced by almost any cellphone, there is no good reason to allow law enforcement officers to question a suspect without making an audio and video recording of the process. Such a requirement would be a natural evolution of the rule laid down in *Agee v. State*, 185 So.2d 671, 673 (Miss. 1966) (where the court stated that, under certain circumstances, "the State must offer all the officers who were present when the accused was questioned and when the confession was signed, or give an adequate reason for the absence of any such witness."). This would preclude the Court and juries from having to take the word of law enforcement, especially ones who intentionally mislead the Court and members of the press. [T. 443-460, 479].

The Defendant would further submit the case of *Jennings v. State*, 127 So. 3d 185 (2013) to support his belief that the statements should not have been admitted and that the Supreme Court should require law enforcement to record the statements of defendants unless good cause can be shown. The parallels between *Jennings* and the case at bar are staggering. In *Jennings*, detectives Eli

Perrigin and Tony Perkins interviewed a 16 year old Defendant accused of statutory rape and assaulting a police officer. The Court will remember that Eli Perrigin is the same detective who interviewed Defendant Brian Holliman on all three occasions and typed his third statement. [T. 428-429. Exhibit S-36].In *Jennings*, the Court had the luxury of an audio tape of the interview to determine that detective Perrigin violated the defendant's constitutional rights as well as ignored any corrections that the defendant asked to be added to the typed statement. *Id*. at 189.

At trial, Defendant Holliman argued extensively that Detective Perrigin had lied in the initial arrest affidavit. [T. 443-460]. Also, the Defendant argued that certain words had been added to the statement in order for the statement to conform with the arrest affidavit filed earlier that day. [T. 457, 474-475, 480-481]. Also, Perrigin denied on the stand that he told the Defendant that he would need to sign the waiver of rights in order to receive a bond. [T. 460]. According to *Jennings*, ignoring revisions to typed statements and using bond as a motivator to speak to police are common occurrences with detective Perrigin. *Id*. However, Defendant Holliman did not have the luxury of an audio or video recording of the interview because the detectives chose not to video tape even though they had the capabilities. [T. 457].

This Court has previously seen how the Lowndes County Sheriff's Department has treated criminal defendant's when the interview is recorded, so to argue that Defendant Holliman's statement could have been tampered with and his statements misrepresented is not a stretch of the imagination. Furthermore, the state was able to use the third statement as their basis to argue presumed intent because the statement stated that the Defendant purposely pointed the gun at the victim even though the Defendant argues that the word purposely was included in the statement erroneously. [T. 428-429, 480-481. Exhibit S-36.]. The statements in question allowed the state to put forth a case for murder even though there was no scintilla of evidence that the shooting was done

intentionally. Also, the state was allowed to argue presumed intent and to use the statements in conjunction with other circumstantial pieces of evidence without the Defendant having the benefit of a circumstantial evidence instruction. For the foregoing reasons, the trial court erred in allowing the statements to be read into evidence, and this error requires reversal of the jury's verdict.

ISSUE V: The trial court committed reversible error when it failed to quash the indictment.[15]

The face of the indictment reflects that the indictment was altered. [E. 1-2.] Brian Holliman would respectfully assert that the trial court erred when it failed to grant Brian Holliman's motion to quash the indictment and have the matter resubmitted to the grand jury[16]. [E. 28 E. 37] Rule 7.09 of the Mississippi Uniform Rules of Circuit and County Court Practice ("M.U.R.C.C.C.P.") governs the amendment of indictments and specifically states that only amendments "as to form but not as to the substance of the offense charged" are permitted and that alteration and amendment of an indictment "shall be allowed only if the defendant is afforded a fair opportunity to present a defense and is not unfairly surprised." See also *Jones v. State*, No. 2006-KA-01994-COA, 993 So.2d 386, 394 (¶ 20) (Miss.App. 2008) ("Amendments to an indictment may be made only if the amendment is immaterial to the merits of the case and the defense will not be prejudiced by the amendment.").

No definitive determination made, nor testified to, as to what the deleted language was, or if the alteration was made before or after the case was presented to the Grand Jury, or before or after the indictment was signed by the foreman of the Grand Jury. [T. 194-201.] Section 27 of the

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[15]This assignment of error was presented to the trial court in the Defendant's *Motion for Judgment of Acquittal Notwithstanding the Verdict or in the Alternative a New Trial*. [R. 145-151. E 12.] Also, argument was made prior to Defendant's first trial and made a part of that trial record. The complete copy of that evidentiary hearing is included in the Defendant's excerpts in order to aid the Court in making its decision on this issue.

[16]On August 13, 2013 the trial court entered an Order stating that all prior motions and decisions from the initial trial were to be adopted in the second trial. [E. 27]

MISSISSIPPI CONSTITUTION OF 1890 provides that a person, such as Brian Holliman in this case, may not be prosecuted except by an indictment, and the purpose of an indictment is "to inform the defendant with some measure of certainty as to the nature of the charges brought against him so that he may have a reasonable opportunity to prepare an effective defense." *Moses v. State*, 795 So.2d 569, 571 (Miss. App. 2001). M.U.R.C.C.C.P. Rule 7.06 requires that an indictment "shall be a plain, concise and definite written statement of the essential facts constituting the offense charged and shall fully notify the defendant of the nature and cause of the accusation." Rule 7.06 also requires that an indictment be signed by the foreman of the Grand Jury. Because the State was never able to definitively establish that the indictment in this case, which was clearly altered, was not altered after it had been signed by the foreman of the Grand Jury, this Court erred in not quashing the indictment, and this error requires reversal of the jury's verdict.

VI. CONCLUSION

The only evidence regarding what occurred at the moment of the fatal incident which resulted in Laura Holliman's death is found in the October 28th and October 29th statements (Exhibit S-34 and Exhibit S-36, respectively) taken from Brian, wherein Brian related that Laura "grabbed hold of the barrel," "pushed the barrel away," and "hit the gun" which caused the gun to discharge. According to the statements, Brian "didn't mean to pull the trigger" and "was jarred and the gun went off." This evidence does not support a jury verdict of murder, but instead indicates that Laura's death was a horribly tragic accident. Therefore, Brian's murder conviction should be reversed pursuant to *Tait v. State*, No. 92-KA-01228-SCT, 669 So.2d 85 (Miss. 1996).

Furthermore, Brian's murder conviction should be reversed because, from the totality of the record, Brian did not receive a fair and impartial trial. First, the trial court should have quashed the indictment, which had been obviously altered, and resubmitted the case to the grand jury. Second,

the jury received jury instructions that are in irreconcilable conflict and which may have caused the jury to reject a possible "culpable negligence" manslaughter verdict in favor of a murder verdict. Finally, the state was allowed to argue presumed intent and to put forth a purely circumstantial case for intent without the Defendant receiving the benefit of the circumstantial evidence instruction.

An injustice was done when the jury returned a verdict finding Brian Holliman guilty of first degree murder. The verdict should be reversed.

RESPECTFULLY SUBMITTED, this, the 10th day of NOVEMBER, 2014.

BRIAN HOLLIMAN, *Defendant-Appellant*

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CERTIFICATE OF SERVICE

I, Steven E. Farese, Sr., hereby certify that on November 10, 2014, I electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to the following: Hon. Lee Howard, Hon. Jim Hood and Hon. Forrest Allgood and I hereby certify that I have mailed by United States Postal Service the document to the following non-ECF participant(s): Brian Holliman

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