No. 2001 KA 01826

In the Supreme Court of Mississippi

BLAINE BROOKS,

Appellant,

vs.

STATE OF MISSISSIPPI,

Appellee.

Appeal from the Circuit Court of Pike County, Mississippi
No. 01-179-KB
The Honorable Mike Smith, Judge Presiding

APPELLANT'S REPLY BRIEF IN SUPPORT OF APPEAL

PAUL LUCKETT
1121 Delaware
McComb, Mississippi 39648
(601) 250-1144
Bar No. 10224
Attorney for Appellant

RICHARD M. GOLDWASSER
LAW OFFICE OF
RICHARD M. GOLDWASSER
20 North Clark Street
Suite 1700
Chicago, Illinois 60602
(312) 372-3300
Admitted *Pro Hac Vice*
Attorney for Appellant

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

REPLY

I

THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S MOTIONS TO BAR IDENTIFICATION TESTIMONY.

Clearly the most egregious error in connection with the identification testimony was the the denial of defendant's Sixth Amendment right to have counsel present at his pretrial lineups and the introduction at trial of the identification made at the February 28, 2001, lineup.

As detailed in defendant's opening brief, by the time Detective Holmes conducted the two lineups of defendant on February 27 and 28, 2001: (1) defendant had been charged with the decedent's murder; (2) defendant had been in custody since at least February 24, 2001;[1] (3) defendant had stated that he did not wish to speak to law enforcement officials without an attorney; and (4) defendant had not been presented for his initial appearance. Detective Holmes admitted that he purposefully conducted the two lineups before defendant was appointed counsel.

In fact, Holmes testified that:

> I felt I had just a limited amount of time, before [defendant] was appointed an attorney to try to conduct a physical lineup. And that's what I did.
>
> ***
>
> After I had talked to [defendant] in February 2001, advising him what he was being charged with, he informed me then, also that he did not have an attorney. So at that point in time, I used my advantage. I conducted a physical lineup on the 27th and 28th before he was appointed an attorney.

(R. 122-24).

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[1] Defendant testified that he had been in custody since about February 24 or 25, 2001. (R. 133). Detective Holmes testified that defendant had been in custody for about a week or so before the lineups. (R. 129).

In the face of these uncontroverted facts, the State now contends that defendant waived his right to counsel. The State's claim that defendant waived his right to counsel fails for two very fundamental reasons. First, the State's claim is premised on a finding that the trial court never made. Notwithstanding the State's assertion that it cited enough record evidence to support the trial court's finding that defendant waived his right to counsel, the trial court never found that defendant waived his right to counsel. Second, there simply was no waiver.

THE TRIAL COURT NEVER FOUND THAT DEFENDANT WAIVED HIS RIGHT TO COUNSEL.

The trial court never found that defendant waived his right to counsel. Moreover, the State does not cite to any portion in the record to support its claim that the trial court found that defendant had waived his right to counsel. Rather, the State makes the naked assertion that it "cited sufficient record evidence in support f the trial court finding that Brooks waived his right to counsel." (See State's Brief at 18). Only there was no such finding.

Near the conclusion of the hearing on defendant's motion to suppress, the court did, however, raise the issue. After hearing Detective Holmes testify, the court stated: "Well, if he gave him – if he asked him if he wanted to and told him that he didn't have to participate if he didn't want to, and he went ahead and participated, then he's waived his right." (R. 131). Defense counsel then informed the court that he intended to call defendant as his next witness. (R. 131). The court responded by stating that Sandra Graham identified defendant in court at a previous hearing and "so as far as your motion I don't care what he says when he gets on the stand right here. As far as suppressing her in court identification of him, I'm not going to do it." (R. 132).

Defense counsel nonetheless presented defendant's testimony for the purpose of making a record. (R. 132). Defendant testified that he requested an attorney as soon as he arrived in Mississippi around February 24th or February 25th. (R. 133). He testified that he told Holmes that he did not have an attorney and he did not want to speak with him. (R. 133). Defendant further testified that neither Holmes nor anyone else told him that he was going into a lineup. (R. 133). Finally, defendant testified that Holmes never read him his *Miranda* rights or told him that he had a right to refuse to participate in the lineup. (R. 133).

After defendant finished testifying, the trial court denied his motion to suppress. The court stated:

> On the Motion in Limine to suppress the in court identification, I'm not going to do that. [Graham] testified very clearly as to – and stated in the record. Saw the profile. Saw him put a cigarette up to his face. To where she was and whatnot. And for the findings, I adopt the same findings I made the other day.[2] She positively identified him from being on the side of the road and seeing him in the car as he came by. And she described it in very specific detail. So as far as the Motion to Suppress the in court identification, I'm not going to do that. Okay. (Emphasis added).

(R. 136).

As the above excerpts from the record demonstrate, the trial court never found that defendant waived his right to counsel. Clearly, the basis for the court's denial of defendant's motion to suppress Graham's identification testimony was its consideration of the factors set out in *Neil v. Biggers*, and its conclusion that Graham had a basis, independent of the illegal lineups,

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[2] The trial court was referring to the findings it made on defendant's first motion to suppress based on the unduly suggestive nature of the photographic show up.

on which to identify defendant. It is equally clear that the court had merely acknowledged the issue of waiver by its previous comments. After all, the court was ready to rule without hearing from defendant as to whether he waived his right to counsel.

The State's claim that the trial court had made a finding of waiver, without a reference to the record, without citation to legal authority and without offering any legal analysis, strains credulity. Defendant has raised a significant constitutional error – the denial of his Sixth Amendment right to counsel – and has set forth in considerable detail the ready admission of Detective Holmes and the lengths to which the State exploited the fruits of the illegal lineup at trial. It is no answer for the State to baldly assert a nonexistent finding of waiver by the trial court.

DEFENDANT DID NOT WAIVE HIS RIGHT TO COUNSEL.

Moreover, the record clearly reflects that contrary to the State's claim, rather than waiving his right to counsel, defendant asserted his right to counsel. Detective Holmes acknowledged that upon defendant's arrival in Mississippi defendant informed him that he did not want to speak to him without an attorney. Under questioning by the State, Holmes testified at the suppression hearing, as follows:

> **Q** Investigator Holmes, do you recall when the defendant was extradited back from – from Illinois or Indiana, rather? Was it Indiana back to Mississippi?
>
> **A** Yes, I do.
>
> **Q** Okay. And when he was brought back did you have an opportunity to interview him?
>
> **A** I informed Mr. Brooks of his charges and I asked him if he'd like to speak with me? <u>And he said, no, he did not.</u>

He wanted to wait until he have an attorney for him.
(Emphasis supplied).

(R. 126-27). It clear from the testimony of Detective Holmes that defendant asserted his right to counsel at the first opportunity upon arriving in Mississippi. It should also be noted that the circuit court of Illinois extradited defendant to Mississippi along with a written order stating that defendant did not wish to speak to any law enforcement officials from Mississippi.[3]

Considering that Detective Holmes readily admitted that defendant invoked his right to counsel, it is curious that the State now asserts waiver. But in doing so, the State provides no analytical framework to support its position. The State's failure is glaring, especially in view of well-settled law on the issue of waiver.

The State has the burden of establishing a waiver of a defendant's Sixth Amendment right to counsel and all doubts must be resolved in favor of protecting a defendant's right to counsel. *Michigan v. Jackson*, 475 U.S. 625, 633, 106 S.Ct. 1404, 1409, 89 L.Ed.2d 631 (1986).

Moreover, as the United States Supreme Court in *Michigan v. Jackson* noted, a defendant's right to counsel does not turn on his request for counsel, although such a request is "an extremely important fact in considering the validity of a subsequent waiver in response to police-initiated interrogation." *Jackson*, 475 U.S. at 633, 106 S.Ct. at 1409, 89 L.Ed.2d 631. (Emphasis supplied). The United States Supreme Court in *Jackson*, held that a defendant's assertion of the right to counsel in a Fifth Amendment context, such as during an interrogation,

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[3] While it appears that Holmes may not been aware of the Illinois order (R. 130), the knowledge of one state actor is imputed to other state actors. *Michigan v. Jackson*, 475 U.S. 631, 634, 106 S.Ct. 1404, 1410 (1986). In any event, Holmes testified that defendant, himself, told him that he did not wish to speak to him without an attorney.

is sufficient to assert his right to counsel in a Sixth Amendment context. *Jackson*, 475 U.S. at 633, 106 S.Ct. at 1409, 89 L.Ed.2d 631. In so doing, the Supreme Court quoted the Michigan Supreme Court:

> Although judges and lawyers may understand and appreciate the subtle distinctions between the Fifth and Sixth Amendment rights to counsel, the average person does not. When an accused requests an attorney, either before a police officer or a magistrate, he does not know which constitutional right he is invoking; he therefore should not be expected to articulate exactly why or for what purposes he is seeking counsel. . . . The simple fact that the defendant has requested an attorney indicates that he does not believe that he is sufficiently capable of dealing with his adversaries singlehandedly.

Jackson, 475 U.S. at 633, 106 S.Ct. at 1409, 89 L.Ed.2d 631. Although a defendant's right to counsel does not depend on his request, when a defendant requests counsel, it is presumed that the defendant requests the lawyer's services at every stage of prosecution. *Jackson*, 475 U.S. at 633, 106 S.Ct. at 1409, 89 L.Ed.2d 631.

In the present case, defendant's assertion of his right to counsel upon arriving in Mississippi meant that he had invoked his right to counsel for every stage of the prosecution, including the two lineups.

Once a defendant invokes his right to counsel, police initiated discussions must cease and any subsequent waiver of that right, even if voluntary, knowing and intelligent, is invalid if obtained pursuant to a police initiated interrogation. *Jackson*, 475 U.S. at 636, 106 S.Ct. at 1411, 89 L.Ed.2d 631. Advice of rights and acquiescence in police-initiated conduct cannot establish a valid waiver after a defendant has invoked his right to counsel. *Jackson*, 475 U.S. at 634, 106 S.Ct. at 1410, 89 L.Ed.2d 631.

In the present case, defendant clearly invoked his right to counsel when he informed Holmes that he did not want to speak without an attorney. To overcome defendant's assertion, the State bears the burden of establishing that defendant initiated a subsequent discussion and during that discussion waived his right to counsel. A waiver resulting from a discussion initiated by Holmes cannot produce a valid waiver. Even under the most generous interpretation of Detective Holmes' testimony, there is no basis to conclude that defendant initiated a discussion leading to a waiver. Moreover, the State does not even assert that defendant initiated such a discussion. The State merely asserts that before the lineups Holmes gave defendant the option of participating and that defendant gave no response. Assuming *arguendo* that the State's characterization of Holmes's testimony is accurate, it is still not enough to overcome defendant's earlier assertion of his right to counsel. The lineup confrontation was police-initiated.

Moreover, the State's characterization is not accurate. Holmes's testimony was inconsistent, ambiguous and evasive, and it is not at all clear that he even gave defendant a choice of participating. At times Homes testified that he couldn't recall whether he advised defendant of his rights before he participated in the lineup, and at other times he testified that he recited defendant's rights to him and that defendant stated he did not want to talk to him. Upon questioning by the State, Holmes's testified:

> **Q** And did you advise him of his rights before he participated in the – in the line up?
>
> **A** I can't recall.
>
> **Q** No, what I'm asking you was. Was the advising of his rights, did it occur before or after he participated in the lineup?

Defense Counsel: Your Honor –

State: Just a minute. Let – may I object and let this – witness answer the question.

The Court: Yes, sir.

Q Answer.

A I recall – I recall when I had spoken with Mr. Brooks. Before I had spoken with Mr. Brooks, I recited his rights to him while we were in the detention facility in the jail, that's when I informed him of what he was being charged with.

Q Okay. Do you have – do you have rights form with you?

A No, sir. By him not wanting to talk to me or anything, I did not fill one out. No sir, I did not.

Q Did you advise him that he had a right to an attorney?

A Sure. He even told me he was waiting for everything, until he got an attorney. (Emphasis supplied).

(R. 127-28).

The above colloquy appears nowhere in the State's response brief. Rather, the State picks up at the very next line in the colloquy.

Q Did you advise him that he had a right to an attorney.

A Yes, sir I did.

Q Okay. And did he, at any time, request an attorney to be present at the lineup?

A No, sir. He didn't even have to participate. If he felt that he wanted to wait for an attorney, he did not have to participate at all.

Q Did you tell him that he didn't have to participate.

(R. 128).

Rather than answering this question in a direct manner, either yes or no, Holmes gave the following answer:

> **A** I tell everyone they don't have to participate if they have an attorney.

(R. 128).

It bears repeating here that defendant had not yet been presented for his initial appearance or arraignment and had not been appointed counsel. Holmes testified that he tells "everyone" that if they have an attorney they do not have to participate. Assuming that Holmes told this to defendant, it would be irrelevant. Defendant did not have an attorney. The questioning continued:

> **Q** And what was his response, the defendant's response, when you when you asked him if he wanted to participate in a lineup?

(R. 128).

Here, it should be noted that Holmes never testified that he asked defendant if he wanted to participate or told defendant that he did not have to participate; Holmes merely testified that defendant did not have to participate. Holmes answered:

> **A** There was no response.
>
> **Defense counsel:** Objection to leading, Your Honor.
>
> **State:** I'm sorry.
>
> **Court:** He asked what was his – what was his response. I'm going to allow that.
>
> **Q** What, if any, response did he make when you asked him if he wanted to participate in the lineup?

A There was no response.

Q Did he – did he at any time, refuse to participate in the lineup?

A No, sir.

Q Has he ever requested the – of you that an attorney be present either during the lineup or when you questioned him at all?

(R. 128-29).

Holmes, who previously testified that defendant had requested an attorney, then stated:

A No, sir.

Q How long had he been in jail before you conducted the lineup.

A I think maybe a week.

Q Okay. All right. Did he – did he have an arraignment in Justice Court?

A I can't recall the dates that he had arraignment, but –

Q Was that before or after the lineup?

A It was after a lineup.

(R. 129).

Then on redirect examination, Holmes testified:

Q A few moments ago you stated that when he came down, you wanted to speak to him, and he asked he said, I'm going to wait for an attorney, correct?

A After I recited his Miranda rights first.

Q All right. He was going to wait for an attorney, correct, is what he said.

A Correct.

Q All right.

A That was to speak to me. Before he made any statement to me.

(R. 130).

Then under questioning by the court:

Q Did you ask him if he objected to being in a lineup?

A No, sir I did not. The only thing I mirandized him and informed him of the lineup. And at that time, if he did not want to be – participate, he didn't have to participate.

Q You told him that if he didn't have to participate in the lineup, he didn't have to?

A I tell each and every person I do in a lineup that.

Q And what did he tell you after that?

A No response.

Q Well, he had a right – did you give him the right to object to being in the lineup?

A At – once I told him about participating, that is his right. If he don't want to participate, he doesn't have to participate. (Emphasis supplied).

(R.130-31).

The only time Holmes gave a direct yes or no answer as to whether he asked defendant if he objected to being in the lineup was when the court posed the question to him and he answered, "No, sir." Despite being given many opportunities, he never testified that he gave defendant the choice of whether to participate in the lineup. Each time the question was asked, Holmes answered, "I tell everyone."

In any event, defendant had previously invoked his right to counsel and whatever is made of Detective Holmes's testimony does not establish that defendant initiated the discussion or the lineup. *Cf. Anderson v. State*, 413 S. 2d 725, 729 (Miss. 1982) (finding of waiver where defendant had "demanded the lineup immediately after being taken to the police station.") The State has not and cannot show either that defendant waived his right to counsel or that such a waiver would have been valid. The State's contention of waiver therefore fails.

The violation of defendant's right to counsel was egregious. After defendant had invoked his right to counsel, Holmes admitted that he intentionally scheduled two lineups before defendant was appointed an attorney. In between the time defendant arrived in Mississippi and invoked his right to counsel and the time defendant should have been presented for an initial appearance, Holmes was busy "using his advantage" and conducting the illegal lineups in the absence of counsel. According to Holmes, as much as one week passed before the lineups were conducted, during which defendant stood against the State without counsel. The State failed to explain why defendant was not presented for his initial appearance in accordance with the law during this time.[4] The State, by delaying defendant's initial appearance, and Detective Holmes, by intentionally taking advantage of the delay, violated defendant's right to counsel.

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[4] The United States Supreme Court in *Maine v. Moulton*, 474 U.S. 159, 170-71, 106 S.Ct. 477, 479, 88 L.Ed.2d 481(1985), stated:

> Once the right to counsel has attached and been asserted, the State must of course honor it. This means more than simply that the State cannot prevent the accused from obtaining the assistance of counsel. The Sixth Amendment also imposes on the State an affirmative obligation to respect and preserve the accused's choice to seek his assistance.

Not only did the illegal lineups taint Sandra Graham's in court identification, but without counsel present at the lineups, defendant was effectively precluded from cross-examining Graham as to her identification. In its response brief, the State actually makes defendant's point. The State noted: "While Holmes did mention that there were two lineups, he was not questioned about this. There was no testimony from Graham or Officer Holmes about viewing two separate lineups, much less, if she did, why this was necessary." (State's Brief at 15). The State is correct; there was no testimony at trial on this point. The reason, however, was that defendant did not have an attorney present at the lineups representing his interests; the very reason a defendant has a right to counsel at a lineup in the first place. See *United States v. Wade*, 388 U.S. 218, 229-32, 87 S.Ct. 1926, 1933-35, 18 L.Ed. 2d 1849 (1967)("as is the case with secret interrogations, there is serious difficulty in depicting what transpires at lineups and other forms of identification confrontations . . . For the same reasons, the defense can seldom reconstruct the manner and mode of lineup identification for judge or jury at trial . . . . In short, the accused's inability effectively to reconstruct at trial any unfairness that occurred at the lineup may deprive him of his only opportunity to meaningfully attack the credibility of the witnesses' courtroom identification.")

In this regard, the Supreme Court's comments in *Wade* are extremely apt:

> The lineup is most often used . . . to crystallize the witnesses' identification of the defendant for future reference. . . . Counsel is then in the predicament Wade's counsel found himself – realizing that possible unfairness at the lineup may be the sole means of attack upon the unequivocal courtroom identification, and having to probe in the dark in an attempt to discover and reveal unfairness . . . .

Wade, 388 U.S. at 240-41, 87 S.Ct. at 1939. In the present case, defense counsel was without

knowledge as to what transpired at either lineup, and found himself in the dark unable to challenge either Graham's lineup or in court identification. The State was therefore able to present Graham's testimony as unequivocal.

The State took full advantage. At trial, through the testimony of two witnesses, the State twice recreated the illegal lineup in which Graham identified defendant, making no mention that another lineup had been held as well. Graham's identification – an identification based on viewing a passenger in a truck for three or four seconds as it passed her on the street and which was inconsistent with defendant's actual appearance – became one of the two converging paths of evidence which the State argued established defendant's guilt. The trial court erred; the error was of constitutional dimension and the erroneously admitted evidence was the foundation of the State's case. Based on the foregoing, defendant should be granted a new trial.

II

THE TRIAL COURT ERRED WHEN IT ALLOWED SHERRY MAXINE HODGES SMITH TO TESTIFY AS TO A HEARSAY STATEMENT FROM TOWANDA NOBLES.

In response to this point, the State cites to several cases to support its contention that the hearsay statement fell within the excited utterance exception. None of the cases relied upon by the State, however, involve a delay of more than 24 hours between the time of the startling event and the time of the excited utterance. That is the issue in this case. The alleged startling event occurred prior to defendant leaving Mississippi on May 14, 1999. The alleged utterance was made on May 16, 1999, between 7:00 and 7:30 p.m. The State conceded the interval could have been as much as three days, but in any event was much greater than twenty four hours. And while the State is correct that no specific time limit exists for excited utterances, "this Court has not allowed the admission of an excited utterance exception when the time frame was more than twenty four hours." *Smith v. State*, 733 S.2d 793, 799 (Miss.1999).

The State's contention that Detective Holmes's testimony that an iron was found at the decedent's home is corroborative of the hearsay statement attributed to Ms. Nobles lacks merit. According to the State, Ms. Hodges told Detective Holmes that Ms. Nobles had told her that defendant had stated that he had been hit with an iron. (State's Brief at 21-22). The problem with the State's contention, however, is that Ms. Hodges never testified that Ms. Nobles made this statement. The State's assertion is based on the testimony of Detective Holmes which is itself hearsay. In essence, the State attempts to cure the hearsay problem with even more hearsay.

The State's next contention that the hearsay statement could have been admitted as a statement against interest is again without any merit. The statement at issue is the supposed statement of Ms. Nobles that defendant had admitted stabbing the decedent, not what Ms. Nobles told defendant. The statement that defendant had admitted stabbing the decedent was not against Ms. Nobles's penal interest.

Based on the foregoing, the hearsay statement attributed to Ms. Nobles should have been suppressed. Defendant should be granted a new trial.

III

THE TRIAL COURT ERRED WHEN IT ADMITTED GANG AND OTHER CHARACTER EVIDENCE AT TRIAL.

In its response to this point, the State merely sets forth gang related testimony without demonstrating any relevance to the charged offense. That defendant admitted past gang involvement or that someone heard him discuss gangs is no basis for its admission. The question is whether that evidence is relevant. Just as the State failed to demonstrate its relevance at trial, so the State fails to offer a coherent explanation of its relevance in its response.

Specifically, the State does not explain the relevance of introducing evidence of defendant's nickname, Lunatic G. The State does not explain the relevance of calling a gang expert to give a seminar of the history of gangs and their migration from Chicago to Mississippi. The State does not explain the relevance of defendant's tatoos, including one tatoo which according to the gang expert represented "my crazy life." See *United States v. Thomas*, 321 F.3d 627, 631 (7th Cir. 2003)("we have found tattoos inadmissible when they are only admitted to show membership in a gang, because 'the possibility that a jury will attach a propensity for committing crimes to defendants who are affiliated with gangs or that a jury's negative feelings toward gangs will influence its verdict.'") The State does not explain the relevance of the collage depicting a man looking through the scope of a rifle and defendant holding a pistol. And the State does not explain, and barely addresses, the relevance of the rap lyrics which included the statement that "murder is the mother fucking agenda." In regard to the rap lyrics, the State does not respond to defendant's argument that there was no foundation laid to establish that

defendant had even written the lyrics.[5] The prejudice of having such lyrics read to a jury is extreme. Defendant stood accused of murder and without any foundation or relevance, lyrics extolling murder were passed off as defendant's words and read to the jury. This, in and of itself, was reversible error.

Clearly, the gang related and character evidence was introduced to demonstrate that defendant was heavily involved in gangs, wrote about murder and had a propensity to commit crime. This is the very reason it was error to admit the evidence. The law is clear on this point. Evidence of gang activity and other bad acts may not be introduced to establish that a defendant has a propensity to commit crime.

That such evidence exists is not reason to admit it. And that is essentially what the State has argued. In its response the State asserts:

> Brooks argues that the trial court erred in admitting testimony about gang activity. Brooks believes that the prosecution could not establish any connection between any tatoos , gang paraphernalia, or gang related song lyrics and the murder scene or the murder victim.
>
> To the contrary, the record reflects that Brooks admitted he had been active in gangs. Likewise, he admitted that he knew that the drawings found in his room were gang related and that he had

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The rap lyrics as set forth in defendant's opening brief were taken from the testimony of Detective Holmes, as he read the lyrics to the jury. The lyrics as read to the jury and transcribed in the record do not perfectly reflect the spelling of the lyrics as they were written. As read and transcribed, the lyrics read in part: "So' I'm try deep, to cleva, me, a lunatic . . ." The actual written lyrics read: "So' I'm tri-deep, 2 cleva, me, an Luna-t-i-c . . ." (Emphasis supplied). This phrase shows that defendant was referred to in the third person and was not the author of the lyrics. (See Defendant's Brief at 47-48). In any event, it was the State's burden to lay a foundation for the admission of the lyrics. The State failed to lay any foundation.

been involved in "Gangster Disciples" gang activity.

Throughout its response, the State continues with this theme: Brooks admitted that the name "Lunatic G" was his nickname; "Lunatic G" was tattooed on his abdomen; there was evidence that Brooks talked with his cousin about his activity gang. Perhaps the State misses the defendant's point. Defendant does not argue that there was no gang evidence admitted at trial. On the contrary, defendant argues that it was the introduction of a tremendous amount of gang and character evidence that prejudiced his right to a fair trial.

Apparently, the State tries to establish the relevance of the gang and character evidence by arguing that it can be inferred that defendant murdered the decedent, because the murderer chose the serving fork, among all the other utensils in the kitchen, as a symbol of his gang. This argument is too attenuated, especially in view of the severe prejudice occasioned by the admission of the gang related and other character evidence. The State's evidence suggests an argument and a fierce struggle starting in the decedent's bedroom and ending in the kitchen. The evidence does not suggest someone intended to leave a calling card, or that someone stopped and selected a deadly weapon based upon its similarity to any gang symbol. The serving fork simply does not tie defendant to the decedent's death, and neither does the litany of gang and character evidence admitted at trial.

And finally, the State completely fails to respond to defendant's argument that the State's own gang expert testified that defendant would not leave his gang symbol upside down as a calling card. The State's own expert rebutted the very theory the State advanced for the admission of the gang and character evidence.

Based on the foregoing, defendant should be granted a new trial.

IV

THE STATE FAILED TO PROVE DEFENDANT GUILTY BEYOND A REASONABLE DOUBT AND THE COURT ERRED WHEN IT DENIED DEFENDANT'S MOTIONS FOR A DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT.

Certainly cases can be proven with no fingerprint, DNA, or other physical evidence. But in this case, it is not just the absence of physical evidence that compels reversal. It is the absence of any competent evidence.

The State argued to the jury that two converging paths of evidence proved defendant guilty beyond a reasonable doubt. Neither path of evidence should have been admitted at trial; not the identification testimony of Sandra Graham and not the hearsay statement attributed to Ms. Nobles. Without any physical evidence, without the identification testimony, without the hearsay statement, the State has no evidence with which to prove defendant guilty beyond a reasonable doubt. Based on the foregoing, defendant's conviction must be reversed.

CONCLUSION

Based on the foregoing reasons, defendant, Blaine Brooks, respectfully requests that this Honorable Court reverse his conviction and sentence, or in the alternative, reverse his conviction and sentence and remand the case for further proceedings, not inconsistent with the Court's opinion, including for a new trial.

Respectfully submitted,

RICHARD M. GOLDWASSER
LAW OFFICE OF
RICHARD M. GOLDWASSER
20 North Clark Street
Suite 1700
Chicago, Illinois 60602
(312) 372-3300
Admitted *Pro Hac Vice*
Attorney for Appellant

PAUL LUCKETT
1121 Delaware
McComb, Mississippi 39648
(601) 250-1144
Bar No.10224
Attorney for Appellant

PROOF OF MAILING

I, Richard M. Goldwasser, attorney for appellant Blaine Brooks, certify that I have this day filed this Brief with the clerk of this Court, and have served a copy of this Reply Brief by United States mail with postage prepaid on the following persons at these addresses:

Clerk of the Supreme Court
Clerk of the Supreme Court of Mississippi
P.O. Box 249
Jackson, MS 39205
(An original and three copies)

Attorney for Appellee
Jean Smith Vaughan
Special Assistant to the Mississippi Attorney General's Office
P.O. Box 220
Jackson, Mississippi 39205
(One copy)

Prosecuting Attorney
Honorable Danny Smith
District Attorney
223 East Bay Street
Magnolia, Mississippi 39652
(One copy)

Trial Court Judge
Honorable Mike Smith
Circuit Court Judge
P.O. Box 549
McComb, Mississippi 39649
(One copy)

This the 20th day of October 2003.

Richard M. Goldwasser, Attorney for Appellant