EXHIBIT "A"

Defendant's Motion for Judgment Notwithstanding the Verdict or, in the Alternative a New Trial

IN THE CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

STATE OF MISSISSIPPI	**PLAINTIFF**
v.	**CASE NO. 20-0577**
ANTHONY GERALD FOX	**DEFENDANT**

DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERATIVE, FOR A NEW TRIAL

The Defendant, Anthony Gerald Fox ("Mr. Fox") submits the following in support of his motion:

A. INTRODUCTION:

Mr. Fox formerly worked as a police officer with the City of Jackson Police Department ("JPD). On January 13, 2019, Mr. Fox, and fellow officers Desmond Marcellous Barney, and Lincoln Chalmers Lampley were on duty investigating the early morning carjacking and murder of a Jackson, Mississippi pastor. The officers were Jones Avenue to arrest a suspect in the pastor's murder, Mr. Fox observed what looked to be a hand-to-hand drug transaction between a man who was later identified as George Robinson ("Mr. Robinson"). Mr. Robinson was sitting in the driver's seat of his white Chevy Impala. According to Mr. Fox, a woman was standing at the Mr. Robinson's driver side window. She was clutching cash in her right hand and handed the money to Robinson. Mr. Fox then approached Mr. Robinson's vehicle. The woman walked away quickly. Mr. Robinson turned to his right and began reaching with his right hand between his seat and the center console. Mr. Fox perceived this movement to be an immediate threat. According to Mr. Fox and the other officers, Mr. Fox gave loud and clear commands for Mr. Robinson "to show his hands"

but Mr. Robinson failed to comply. Lampley came and assisted Mr. Fox in removing Mr. Robinson from the vehicle. Mr. Robinson continued resisting and shifted his weight forward so that he ended up face first on the ground. Mr. did this because there was a" tab" in his hand and he was trying to get it into his mouth. Once he mouthed the tab, he stopped resisting, and the officers were able to handcuff him. At this point, the officers could see that Mr. Robinson had suffered an abrasion on his forehead while he was resisting. Mr. Fox called AMR which reported to the scene, but Robison refused to cooperate and adamantly refused treatment. AMR placed a bandage on his forehead, Mr. Fox field released Mr. Robinson and he drove off in his car.

Later that night, AMR received a 911 call from the Mustang Inn in Jackson seeking medical assistance for Mr. Robinson who had suffered a seizure. At the University of Mississippi Medical Center ("UMMC"), a CT scan revealed that Mr. Robinson suffered from a subdural hematoma[1] and doctors performed an emergency craniotomy to relieve pressure on the brain caused by the bleeding. However, Mr. Robinson never recovered and was pronounced dead on January 15, 2019.

Mr. Robinson's family would not cooperate with police. A social worker at UMMC notified police of Mr. Robinson being in the hospital. Sgt. Scott Albrecht, Mr. Fox's S.W.A.T.supervisor. Albrecht approved Mr. Robinson's field release recognized that it was the same person. He attempted to contact Mr. Robinson's sister at UMMC, but she would not talk

[1] A subdural hematoma is a collection of blood between the covering of the brain (dura) and the surface of the brain. Subdural Hematoma, MEDLINE PLUS, http:// www.nlm.nih.gov/medlineplus/ency/article/000713 htm (last visited 8/21/22). It does not have to result from severe trauma and can present as a minor scalp contusion from a fall from the bed. See, e.g., *Sw. Emergency Physicians, P.C. v. Nguyen,* 767 S.E.2d 818, 819 (2014), aff'd, 779 S.E.2d 334 (Ga. 2015).

with him. Albrecht learned Mr. Robinson was picked up by ambulance at the Mustang Inn. He went there and spoke with Constance Johnson, who gave little information.

An autopsy was performed by Dr. J. Brent Davis, who gave a preliminary ruling of homicide. This was based on the hospital records referencing Constance Johnson telling the paramedic Robinson said he had been roughed up by the police. (The AMR run report listed the incident as unintentional.) Dr. Davis left Mississippi before the final autopsy report was finished. Dr. Mark Lavaughn completed the report. He listed the cause of death as blunt force injuries and manner of death as homicide.

The FBI conducted a thorough investigation, interviewing numerous witnesses. In August 2020, United States Attorney D. Michael Hurst, Jr., informed the lawyers for the officers that there were not implicated in any wrongdoing.[2]

Officers Lampley and Barney were tried separately from Mr. Fox. Their trial took place prior to Mr. Fox' trial.[3] The state called three eyewitnesses in the Lampley/Barney trial: Connie Bolton, Ronald Arnold,[4] and Samuel Rawl. All three testified that they saw the officers not only slam Robinson down but also *beat him with the hands and flashlights and kick him with their feet.* Rawl stated that there were about five officers beating Robinson,

> A. I saw the officers trying to -- I don't know what exactly they were trying to do or anything. You know, some was throwing hits, and some was kicking and hitting. It's like they was fighting him, but I didn't see him fighting. But, you know, I don't -- if you say he had something, but I ain't see nothing.
>
> Q. Now, when you say, "I didn't see him fighting," who are you saying you didn't see fighting?

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[2] See Letter from U.S. Attorney Michael Hurst, attached hereto.

[3] The case was tried before the Hon. Faye Peterson. At the end of the State's case in chief, Judge Peterson directed a verdict in favor of the officers.

[4] Robinson was incarcerated for a drug charge at the time of trial. Mr. Fox had been the arresting officer.

A. I didn't see George fighting.

Q. Okay. But you saw some officers fighting George?

A. Yes.

According to Rawl, the paramedic did not speak to Robinson. When asked to identify any of the officers, Rawl looked around the courtroom and pointed at someone who was not one of the defendants.

The autopsy report, however, conclusively showed nothing on Robinson's body that indicated that he had been beaten with hands or feet. There was merely the abrasion on his forehead and the subdural hematoma.

Based on the discrepancy between then medical evidence and the witness' testimony, the Stated moved to amend Mr. Fox' indictment a week before Fox's trial to remove the allegation that Mr. Fox body slammed Mr. Robinson and that officers were striking and kicking Mr. Robinson multiple times in the face and chest. Dkt. 85 The defense objected to the amendment since it was substantive. Dkt. 98. The Court granted the State's motion. Mr. Fox was found guilty of culpable negligence manslaughter and sentenced to twenty (20) years in prison with fifteen (15) years suspended and five (5) years to serve.

LAW AND ARGUMENT:

Point One. The Evidence was Insufficient to Support the Verdict or in the Alternative, the Verdict was Against the Overwhelming Weight of the Evidence.

If Mr. Robinson was harmed during his interaction with Fox, Barney, and Lampley, it was most likely because of his bumping or scraping his head against the road while resisting arrest. Robinson had recently had a stroke, suffered from hypertension, and diabetes, and was taking Plavix and aspirin to thin his blood. Expert testimony established that would not take much contact to the head for him to suffer a subdural hematoma. The mere fact that Mr. Robinson ended up

dying a few days later does not make a legal use of force by Officer Fox into a criminal use of force.

"[T]he right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham v. Conner,* 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L.Ed.2d 443 (1989). Therefore, all claims of excessive force are analyzed under the Fourth Amendment and its reasonableness standard. The "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" considering the facts and circumstances confronting them, without regard to their underlying intent or motivation. *Graham,* 490 U.S. at 394–97, 109 S. Ct., at 1871–72, 104 L.Ed.2d at 454–56. Excessive force requires "(1) an injury, which (2) resulted directly and only from the use of force that was clearly excessive to the need; and the excessiveness of which was (3) objectively unreasonable." *Spann v. Rainey,* 987 F.2d 1110, 1115 (5th Cir.1993). In gauging the objective reasonableness of the force used by a law enforcement officer, the amount of force must be balanced against the need for that force. *Id.*

The evidence in this case is very much like that in *Brown v. State*, 304 So. 3d 692, 693–95 (Miss. Ct. App. 2020), wherein a security guard was convicted of culpable negligence manslaughter when a person he was trying to physically remove from a bar fell unconscious, was transported to a hospital, and died. The facts showed that Brown was trying to remove Quiney from the dance floor, Quiney resisted, and it looked as though Quiney wanted to hit Brown. Brown brought Quiney to the floor and was trying to handcuff him when Quiney fell unconscious. Brown then performed CPR, but Quiney later died. *Brown,* 304 So.3d at 694. Dr. LeVaughn testified that "Quiney's cause of death was determined to be complications of hypertensive cardiovascular disease associated with a physical altercation. The manner of death was found to be homicide."

Id. Brown was convicted of culpable negligence manslaughter. His conviction was reversed and rendered.

> .... Brown's singular act of attempting to remove Quiney from the club does not meet the high burden of culpable negligence. While the act may have been negligent, there was no evidence of severe trauma or trauma in multiple locations that could constitute gross negligence. The only injuries were a few lacerations, which could have been the result of medical intervention, and petechia in the eyes, which could have been caused during resuscitation attempts. Nor was there evidence of an extensive struggle between the two men. Indeed, some witnesses completely missed seeing the event. In summary, these facts were insufficient to demonstrate "negligence so gross as to be tantamount to a wanton disregard of, or utter indifference to, the safety of human life."

Brown, 304 So. 3d at 696–97. In its opinion, the Court noted that juries "are overinclined to convict on proof of what is in fact no more than simple negligence, and as a result there have been more reversals in this class of cases than perhaps in any other that comes before us." *Brown*, 304 So.3d at 697 quoting *Phillips v. State*, 379 So. 2d 318, 320 (Miss. 1980).

This is just such a case. The facts show that Mr. Fox was investigating a probable crime and then attempting to arrest George Robinson and in the struggle that ensued, Mr. Robinson suffered an abrasion to his forehead. Because of Mr. Robinson's physical condition, the bump that caused the abrasion may have caused a subdural hematoma (although it is equally plausible that he could have suffered another blow later that evening at The Mustang Motel). The fact that Mr. Robison died because of the incident does not turn a lawful use of force into excessive force[5]. Nor does it make Mr. Fox guilty of culpable negligence manslaughter. For these reasons, the Court should find that Mr. Fox is set aside the judgment of guilt, notwithstanding the verdict.

[5] Mr. Robinson's family filed civil suits against the officers. United States District Court Judge Carlton Reeves ruled the officers were entitled to qualified immunity and dismissed the case against them. The Robinson family did not appeal this decision.

The due process clauses of both the State and Federal constitution forbid a conviction where the reliable evidence fails to show the Defendant's guilt of each element of the offense beyond a reasonable doubt. *U. S. Const.*, Amends. VI and XIV; *Miss. Const*, Art. 3, Sections 14 and 26; *Jackson v. Virginia*, 443 U.S. 307 (1979); *Carr v. State,* 208 So.2d 886, 889 (Miss.1968). 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. *Jackson v. Virginia,* 443 U.S. at 315.

One Court has described the *Jackson* standard for sufficiency of the evidence as follows:

> The Court of course does not mean that whenever the record supports conflicting inferences, no matter how weak, the prosecution wins, for not only would this be no more stringent than the standard of review in a civil case but also the prosecution would only fail in its proof where there was a total absence of probative evidence, which is the "no evidence" standard rejected in *Jackson*. If *Jackson*'s beyond a reasonable doubt standard is to have any meaning, we must assume that when the choice between guilt and innocence from "historical" or undisputed facts reaches a certain degree of conjecture and speculation, then the defendant must be acquitted. *Ulster [v. County Court v. Allen*, 442 U.S. 140 (1979)] clarifies that this degree of inferential attenuation is reached at the least when the undisputed facts give equal support to inconsistent inferences. In short, we read the quoted passage from *Jackson* to mean that the simple fact that the evidence gives some support to the defendant does not demand acquittal. However, if the evidence fails to give support to the prosecution sufficient to allow a reasonable juror to find guilt beyond a reasonable doubt, a verdict must be directed despite the existence of conflicting inferences.

Cosby v. Jones, 682 F.2d 1373, 1383 n.21 (11th Cir. 1982).

In addition, the verdict of the jury is against the overwhelming weight of the evidence. A motion for new trial challenges the weight of the evidence. A reversal on the grounds that

the verdict was against the overwhelming weight of the evidence, unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict.

Although the circumstances under which this Court will disturb a jury's verdict are "exceedingly rare," such situations arise "where, from the whole circumstances, the testimony is contradictory and unreasonable, and so highly improbable that the truth of it becomes so extremely doubtful that it is repulsive to the reasoning of the ordinary mind [internal citations omitted]." *Dilworth v. State*, 909 So. 2d 731, 737 (Miss. 2005). Despite this high standard, "[t]his Court has not hesitated to invoke its authority to order a new trial and allow a second jury to pass on the evidence where it considers the first jury's determination of guilt to be based on extremely weak or tenuous evidence [,] even where that evidence is sufficient to withstand a motion for a directed verdict [internal citations omitted]." *Dilworth*, 909 So. 2d at 737.

In this case, the state's own expert witness, Michael LeVaughn could not rule out that death was caused by Robinson's scrapping his head while resisting arrest.

Given that all of the so-called eyewitnesses were discredited since they claimed that Robinson had been beaten and kicked by several officers - all of which was completely belied by the autopsy – and the fact that Robinson's death was consistent with the defense's theory (the defense's theory of defense instruction was denied by the Court) that he died from a bump to the head while resisting arrest, the prosecution failed to prove the case beyond a reasonable doubt and the verdict should be vacated. Alternatively, the evidence was insufficient to support the jury's verdict and this Court should reverse for a new trial.

Point Two. The culpable negligence instructions numbers S-12 and S-21 were erroneous.

The trial Court gave the jury an instruction with the elements of culpable negligence manslaughter and another defining the term "culpable negligence. They were as follows:

If you find unanimously that the State has failed to prove the elements of the crime of Second-Degree Murder, you may then proceed in your deliberations to consider the lesser charge of Manslaughter.

If you find from the evidence in the case beyond a reasonable doubt that:

1. Anthony Fox
2. On, about, and between the 13th day of January 2019 and the 14th day of January 2019,
3. In the First Judicial District of Hinds County
4. Unlawfully and with culpable negligence killed George Robison, a human being
5. By using physical force on George Robinson to physically remove him from his vehicle, and slamming his head into the roadway pavement;

Then you shall find Anthony Fox guilty of Manslaughter.

If the State has failed to prove any of the above listed elements beyond a reasonable doubt, then you shall find Anthony Fox not guilty of Manslaughter.

First, the instruction failed to follow both the statute and the law when it failed to include the element that the killing was done *without authority of law*. M.C.A. § 97-3-47. See *Edwards v. State*, 737 So. 2d 275, 294 (Miss. 1999), "without authority of law is a statutory element …and should be contained within the instructions. "The instruction should have included a requirement that the jury find that the force was **not** used lawfully while George Robinson was resisting arrest. *Reddix v. State*, 731 So. 2d 591, 595 (Miss. 1999).

The other instruction, an attempt to define culpable negligence, is equally flawed.

Culpable negligence is negligence of a degree so gross as to be tantamount to a wanton disregard of, or utter indifference to, the safety of human life. Negligence is doing something that a reasonably careful person would not do under similar circumstances or failing to do something that a reasonably careful person would do under similar circumstances.

> Depraved heart murder and culpable negligence manslaughter are distinguishable by the degree of mental state of culpability. In short, depraved heart murder involves a higher degree of recklessness from which malice may be implied.

The instruction on culpable negligence manslaughter failed to give the jury any guidance as to the type of conduct required for someone to be convicted of this crime. As the Supreme Court has repeatedly cautioned, jury instructions should be tied to the specific facts of the case, and where the totality of the jury instructions fail to present the applicable law, reversible error occurs. *E.g., Downtown Grill, Inc., v. Connell*, 721 So.2d 1113, 1118 (Miss. 1998) (Reversing for failure of jury instructions to instruct on the law). Instructions which do not set forth facts upon which the jury can apply the rule of law leave to the jury's discretion how the instruction should be interpreted. As the Supreme Court pointed out in *Kidd v. State*, 258 So.2d 423, 429 (Miss. 1972), one problem with confusing and unclear instructions is they make it "possible to have twelve different interpretations of the abstract principles of law, assuming that the jurors understood and were sufficiently skilled in determining legal questions to apply the instruction correctly." *See also, Film Transport Co. v. Crapps*, 214 Miss. 126, 135, 58 So.2d 364 (1952) ("the decisions of the Supreme Court condemning the giving of contradictory and conflicting instructions are too numerous to require citation"); *Jackson v. Leggett*, 186 Miss. 123, 131-32, 189 So. 180 (1930) (citing cases); *Edwards v. State,* (jury instructions must define terms sufficiently clearly to ensure that jurors reach a unanimous verdict based on which facts constitute the legal elements of the offense).

Here the jury was given no instructions which gave jurors a principled basis for distinguishing between depraved heart murder and manslaughter. And even had they been correctly instructed in other instructions; an incomplete or erroneous concrete instruction may not be cured by other instructions even though they may correctly state the law. The reason being that the appellate court cannot tell which of the two instructions the jury followed in

reaching a verdict. Such an error requires reversal in every case. *Harper v. State*, 83 Miss. 402, 35 So. 572 (1904).

Point Three. The Trial Court Erred in Giving State's Instruction No. 13, an Erroneous Instruction on the "Eggshell Plaintiff".

The jury was given an eggshell plaintiff instruction:

> The Court instructs the jury that the consequences of an act, which is the efficient cause of death of another, are not excused by the preexisting physical condition of the person killed or by his low vitality, which rendered him unable to withstand the shock of the wound or blows inflicted, This may be so even though without the predisposed condition the blow would not have been fatal, provided that a causal connection between the blow and the fact of death is shown.
>
> The alleged act or omission of accused need not be the sole cause of death. The test of responsibility is whether the alleged unlawful act of accused contributed to the death, and, if it did, he is not relieved of responsibility by the fact that other causes contributed. Moreover, responsibility also attaches where the injury material accelerates the death, although the death is proximately occasioned by a pre-existing cause.

Although the eggshell skull rule applies to claims of excessive force such that a preexisting condition does not automatically defeat causation, plaintiffs must show that the condition would not have independently caused the injury. *Darden v. City of Fort Worth*, 880 F.3d 722, 728 (5th Cir. 2018). Moreover, "an unknown preexisting injury cannot transform what would otherwise be a reasonable use of force into an unreasonable one." *Windham v. Harris Cty., Texas*, 875 F.3d 229, 242 n.18 (5th Cir. 2017) (emphasis added). (Citing *Rodriguez v. Farrell*, 280 F.3d 1341, 1353 (11th Cir. 2002). What would ordinarily be considered reasonable force does not become excessive force when the force aggravates (however severely) a pre-existing condition the extent of which was unknown to the officer at the time.

Indeed, in Mississippi civil cases, the eggshell plaintiff instruction is given only where the particular harm is foreseeable. In *City of Jackson v. Est. of Stewart ex rel. Womack*, 908 So. 2d 703 (Miss. 2005), the plaintiff suffered a stroke and died when she fell after being escorted from a

city van. A doctor testified that a stroke was an extremely uncommon result from minor head trauma. Given this testimony, the eggshell plaintiff theory was not applicable since it was not foreseeable that the plaintiff would have a stroke merely from falling. *City of Jackson*, 908 So.2d at 75.

The concept that Mr. Robinson's death could not turn non-excessive force into excessive force is an important caveat that was not given to the jury. The mere fact that Mr. Robinson suffered brain bleeding and then death from a minor blow to the head does not make Mr. Fox liable for Robinson's death. On the facts here, where Mr. Robinson's condition was so precarious that a mere scrape of his forehead on pavement could cause his death, "eggshell instruction" was not warranted based on the totality of the facts in this case. See *Brown*, supra.

Even if an "eggshell instruction" was remotely support by the facts of this case, which it was not, the instruction given in this case was improper. The Instruction in *Schroer v. State*, 250 Miss. 84, 160 so. 2d 681 (Miss. 1964) is far different than what the State requested and was granted in this case. The Mississippi Supreme Court has consistently opposed abstract statement of the law that provide no guidance to the jury in deciding questions of fact. In *Schroer*, supra, the "eggshell" charge appears below:

> Instruction No. 3, which instruction is couched in the following language: "The Court instructs the jury for the State that if you believe from the testimony in this case, beyond a reasonable doubt, that the defendant, Albert J. Schroer, Jr., on the 6th day of February 1963, attacked the deceased, James A. "Bub" Thompson, while said deceased was sitting on a stool at the Golden Bell, without any sudden and sufficient provocation for such attack on the part of the deceased, and that the defendant then willfully, unlawfully and feloniously struck the deceased with his fists, and that the deceased, as a result of defendant's blow or blows, fell on the floor of the cafe, striking his head thereon, and that he died as a result thereof; and if you further believe from the evidence beyond a reasonable doubt, that the defendant willfully, unlawfully, and feloniously struck said James A. "Bub" Thompson in the manner as aforesaid, without authority of law, and not in necessary self-defense, in the heat of passion, without malice, then it is your sworn duty to find the defendant guilty as charged in the indictment".

Schroer, page 1.

By contrast, the State offered an abstract and generalized statement of law. It was not tailored to the facts and gave the jury no guidance as the instruction if *Schroer*.

Point Four. The Court errored by granting State Instructions numbered 14, 15, and 20.

The State requested and was granted Instructions 14, 15 and 20 which are abstract and confusing "black letter" statements of law. These Instructions do not set forth facts tied to the case and give the jury no guidance. These Instructions were not proper in this case. Lastly, this Instruction was not supported by the facts of this case, Brown *v. State*, 304 So. 3d 692, 693–95 (Miss. Ct. App. 2020).

Point Five. The trial court erred in giving the jury an instruction on second degree murder that operated as a constructive amendment of the indictment.

The indictment charged Officer Fox with a violation of *M.C.A.* 97-3-19(1)(b) which states as follows:

> (1) The killing of a human being without the authority of law by any means or in any manner shall be murder in the following cases:
> * *
> (b) When done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual, shall be second-degree murder;
> *Miss. Code. Ann.* § 97-3-19 (West).
>
> The indictment states that Officer Fox
>
> did kill George Robinson, a male human being, without the authority of law by evincing a depraved heart, regardless of human life: to-wit: Anthony Gerald Fox, while serving as a city of Jackson police officer and/or while acting in concert and/or aiding, assisting or encouraging City of Jackson Police Officer Lincoln Chalmers Lampley and/or Desmond Marcellous Barney, used physical force on George Robinson, causing George Robinson's death, which included physically removing him from

> his vehicle, body slamming George Robinson headfirst into the roadway pavement as well as striking and kicking and/or cumulatively, that were eminently dangerous to George Robinson and evincing a depraved heart, regardless of human life.

From the beginning of this prosecution and one would assume that this included the seeking of an indictment from a grand jury, the state has maintained that three JPD officers killed George Robinson by removing him from his vehicle, slamming him to the ground, and then proceeding to repeatedly kick and punch him while he lay on his stomach on the ground. The state maintained this position even though the autopsy report indicated only a slight injury to Mr. Robinson's right forehead.

Two of the officers, Lampley and Barney were tried first. The judge in that case directed a verdict once the State rested. A week prior to Fox's trial, the state moved to amend the indictment to remove all allegations that Fox stomped or beat George Robinson and to remove the word "body" from the phrase "body slammed." The trial court granted the motion to remove the word body from the phrase "body slammed."

The jury instruction on Second Degree Murder, however, failed to contain the allegations that Fox was striking and kicking George Robinson. The instruction states, in pertinent part, that the jury would have to find that Fox used "physical force on George Robinson to physically remove him from his vehicle and slamming his head into the roadway pavement." This amounted to a constructive amendment of the indictment.

The problem with this is that the State's case has always been that the death of Robinson was caused by intentional acts of the officers (albeit without necessarily intending to cause death) – stomping and beating. Stomping and beating are intentional acts regardless of whether intended to merely injure or to kill. The Defendants had categorically denied doing any such thing to Mr. Robinson. As far as the "body slamming," the Defendants have always maintained that after

observing a drug transaction, they attempted to arrest George Robinson – some 200-pound individual sitting in the driver's seat of his vehicle. He refused to be arrested and instead appeared to be trying to secrete something in the car. Officers were forced to remove him from the car by pulling him out of the car and laying him stomach down on the ground to handcuff his wrists behind him. Robinson actively resisted arrest. He was trying to put something that was in his hand into his mouth. Once he had accomplished this act, he stopped resisting and allowed himself to be handcuffed. During this struggle, it may well be that Mr. Robinson hit his head on the pavement causing the abrasion seen by AMR employees after the arrest and that caused the bleed that ended his life. Robinson had been hospitalized with a stroke a week before he died and was released with several prescriptions none of which he took. In other words, his medical condition was such that a head injury could kill him.

An indictment cannot be amended to remove intentional acts and to allow the jury to convict based to mere reckless conduct without being first considered by the grand jury.

In *Quick v. State*, 569 So. 2d 1197 (Miss. 1990), the defendant was indicted for aggravated assault under a subsection requiring purposeful and willful and knowing actions, but he was convicted upon jury instructions permitting conviction for recklessly causing serious bodily injury under circumstances manifesting extreme indifference to value of human life was entitled to reversal of conviction. *Quick v. State*, 569 So. 2d 1197, 1200 (Miss. 1990). And while Robinson was not convicted of the charge for which he was indicted, the lesser included instruction on culpable negligence manslaughter suffered from the same deficiencies. Anthony Fox had been indicted for intentional conduct – beating and kicking – but tried on reckless conduct of slamming Robison into the ground while Robinson was resisting arrest. This was not the charge on which Officer Fox was indicted and, undoubtedly, not the facts upon which the grand jury relied when it indicted him. This substantive constructive amendment of the indictment without first having the

grand jury pass on the evidence deprived Officer Fox of due process and a fair trial and requires that he be given a new trial.

Point Six. The trial court erred in denying Defendant's accident instruction – D-9.

The defense requested an instruction embodying one of its theories - that George Robinson's death was an accident. The trial court denial of that instruction was fundamental error. The defense has an absolute fundamental right to every lawful defense he asserts. *O'Bryant v. State,* 530 So.2d 129, 133 (Miss.1988). And even if the court allows evidence regarding that theory or theories, there is no way for the jury to give effect to the theory if not instructed on it. This right to an instruction is so fundamental that the court must give an instruction on the defendant's theory even when it is highly unlikely and there is only meager evidence to support it. *Kuebler v. State*, 204 So. 3d 1220, 1226 (Miss. 2016).

D-9 read as follows:

> The Court instructs the jury that if George Robinson's death was a result of an accident or misfortune while Anthony Fox was engaged in a lawful act by lawful means, with usual and ordinary caution, and without unlawful intent, then you shall find the Defendant, Anthony Fox, "not guilty" and you shall return your verdict as follows: "We, the Jury, find the Defendant, Anthony Fox, not guilty."

In *Kuebler, supra,* the defense claimed that the deceased was shot when she lifted a gun to kill herself and she and the defendant struggled over the gun. The trial court refused to grant the defendant's accident instruction. In finding this was reversible error, the Mississippi Supreme Court stated that the right to be instructed on the defense's theory of the case is of such significant importance that "[t]his Court will never permit an accused to be denied this fundamental right." *Kuebler*, 204 So.3d at 1226 citing *Chinn v. State*, 958 So.2d 1223, 1225 (Miss. 2007). "Because the defendant's right to have his theory of the case presented to a jury is so fundamental,

even minimal evidence warrants granting the defendant's proposed jury instruction." *Kuebler*, 204 So.3d at 1226.

Here, as in *Kuebler,* the Court's failure to grant an instruction on Anthony Fox's accident defense was error.

Point Seven. Allowing the State to Amend the Indictment was Improper and violated Mr. Fox' State and Federal Constitutional Right to Due Process and a Fair Trial

The trial court erred allowing the State's motion to amend the indictment. The original indictment alleges that Mr. Robinson's death was the result of an intentional vicious beating, i.e., from being body slammed to the ground, and then being kicked and punched multiple times. The State has the burden on itself to show that Mr. Robinson's death was part of an intentional vicious beating evidencing a complete disregard or indifference to Mr. Robinson's life. In the previous trial of Officer Desmond Barney and Officer Lincoln Lampley, the state's three fact witnesses, on Jones Street that evening, testified that Mr. Robinson was either body slammed to the ground and kicked and punched. But the problem with this testimony is that it is contrary to the medical evidence which shows that there was no beating.

Only if the proposed amendment is not material to the case and does not prejudice Officer Fox's defense, may the amendment be granted. An indictment can be amended to correct a variance in name or surname, or both. *Miss. Code Ann.* § 97-13-17; *Van Norman v. State*, 365 So.2d 644, 647 (Miss. 1978) (finding that the State's allegation of adultery was a matter of substance and the trial court erred in permitting an amendment to the indictment). But here again, that is not what is happening with this proposed amendment. The removal of Officer Barney's and Officer Lampley's names are substantive changes that affect both the merits and defense of this case. The state knows that these were the two officers who assisted Officer Fox during his arrest of Mr. Robinson. As it stands now, the State must prove that Officer Fox aided, assisted, encouraged, and/or helped Officer Barney and Officer Lampley body slam Mr. Robinson and then kicked and punched Mr. Robinson. Removing two

defendants who were indicted with Officer Fox for the same crime as Officer Fox is a substantive change to the indictment. Rather than being required to prove that Officer Fox—along with Officer Lampley and Officer Barney—body slammed Mr. Robinson to the ground then proceeded to punch and kick him, the State is asking this Court to change the indictment so that it only has to prove that Officer Fox slammed Mr. Robinson's head to the ground.

The State did not request to simply change a name, a date, a word that was added due to scriveners' error, or a repetitive word. Instead, the Court allowed the State to remove words. The grand jury indicted Mr. Fox on the basis that he "body slammed," "beat," "kicked," and "punched" Mr. Robinson. Throughout the trial of the other officers, witness' described how the officers "body slammed," "beat", and "kicked" Mr. Robinson. After losing that trial via directed verdict, the State sought to remove essential facts that would change the substance of the offense. Furthermore, allowing this amendment resulted in an unfair surprise to Mr. Fox's defense as the same facts and circumstances have already been litigated in the trial of his fellow officers.

Point Eight. The trial court erred in allowing the State's witness to testify to what he heard Robinson said on the scene, while none of the defense witnesses were allowed to provide the remainder of Robinson's statements. The Court's rulings denied Mr. Fox due process and a fair trial pursuant to both the Mississippi and Federal Constitutions

Various witnesses allegedly heard Mr. Robinson make statements before, during and after the arrest. Over the defense's hearsay and Sixth Amendment right to confrontation objection, State witness Ronald Arnold was allowed to testify that Mr. Robinson, when asked by Mr. Fox to get out of his car, told Mr. Fox that he had had a stroke and was moving slow. However, when Mr. Fox testified in his defense, the trial court refused to allow him to repeat what Mr. Robinson said including this statement after he was handcuffed: "Fox, man you know I respect you, bro . . . man, that's my bad . . . I didn't mean to do all of that . . . so, I just swallowed the tab." Lampley also heard this statement but he, too, was not permitted to tell the jury.

The trial court's rulings the denied Officer Anthony Fox his right to due process and a fundamentally fair trial. *See, e.g., People v. Sturm*, 129 P.3d 10, 26 (Cal. 2006) (reversing penalty phase where trial court's treatment of the prosecution and the defense was not evenhanded). It is incumbent on the Court to allow the full story of the events on the night of Mr. Robinson's arrest and possible injuries.

Point Nine. All other errors appearing in the record.

The Motion for JNOV and/or New Trial should be granted for all other errors that appear in the record. Alone or cumulatively, they require either an acquittal or that Anthony Fox be given a new trial. There may be other issues or errors that become apparent after the Court Reporter has prepared the transcript in this cause of which present appeal counsel is currently unaware.

The cumulative error doctrine stems from the doctrine of harmless error, codified under M.R.C.P. 61. It holds that individual errors, which are not reversible in themselves, may combine with other errors to make up reversible error, where the cumulative effect of all errors deprives the defendant of a fundamentally fair trial. *Byrom v. State,* 863 So.2d 836, 847 (Miss.2003). Relevant factors to consider in evaluating a claim of cumulative error include whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged. *See, e.g., Leonard v. State,* 969 P.2d 288, 301 (Nev.1998). That is, where there is not overwhelming evidence against a defendant, the court is more inclined to view cumulative errors as prejudicial. *Ross v. State*, 954 So. 2d 968, 1018 (Miss. 2007).

The only evidence that Mr. Fox acted recklessly in his encounter with Mr. Robinson came from two so-called eyewitnesses, one of whom was in jail because Mr. Fox arrested him. They described a brutal beating by multiple officers using their hands, flashlights, and feet – evidence completely belied by the medical records, expert medical testimony, and autopsy report. Given the

lack of credible evidence, the errors in this case, individually or cumulatively, require that Mr. Fox's conviction be vacated or, at the very least, that he be granted a new trial.

B. CONCLUSION:

George Robinsons' death was tragic, but this Court should enter an order of acquittal notwithstanding the verdict. In the alternative, the Court should grant Anthony Fox a new trial for the reasons set forth above.

Respectfully submitted,

BY: */S/ Mérrida (Buddy) Coxwell*
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CERTIFICATE OF SERVICE

I, Mérrida (Buddy) Coxwell, counsel for Defendant, Anthony Gerald Fox, do hereby certify that I have this day electronically filed the above and foregoing *Defendant's Motion for Judgment Notwithstanding The Verdict Or, In The Alterative, For A New Trial* with the Clerk of Court using the ECF system, which sent notification to all parties.

This the 26th day of August 2022.

/S/ Mérrida (Buddy) Coxwell
MÉRRIDA (BUDDY) COXWELL

U.S. Department of Justice
United States Attorney
Southern District of Mississippi
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August 18, 2020

Francis Springer
Springer Law Office PLLC
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RE: Desmond Barney, Lincoln Lampley, and Anthony Fox

Dear Mr. Springer:

This is to advise you that based on the evidence developed to date, your clients, Desmond Barney, Lincoln Lampley, and Anthony Fox, are not considered targets of a criminal investigation into federal civil rights violations relating to the death of George Robinson in January 2019. Barring any newly discovered evidence, this status will not change.

Please feel free to contact me or my office if you have any questions. Thank you.

Sincerely,

D. Michael Hurst, Jr.
United States Attorney

DMH/dmh