Serial: **164984**

IN THE SUPREME COURT OF MISSISSIPPI

No. 2008-CT-01977-SCT

RAY THOMAS GORE

v.

STATE OF MISSISSIPPI

ORDER

This matter is before the Court sitting en banc on the Petition for Writ of Certiorari filed by counsel for Ray Thomas Gore. The petition was granted by order of the Court entered on July 22, 2010. After due consideration, the Court finds that the petition was improvidently granted and should be dismissed.

IT IS THEREFORE ORDERED that the Petition for Writ of Certiorari filed by Ray Thomas Gore, is hereby dismissed as improvidently granted.

SO ORDERED, this the 14th day of October, 2010.

/s/ George C. Carlson, Jr.

GEORGE C. CARLSON, JR.,
PRESIDING JUSTICE

TO DISMISS: WALLER, C.J., DICKINSON, RANDOLPH, LAMAR, CHANDLER AND PIERCE, JJ.

NOT TO DISMISS: GRAVES, P.J.

KITCHENS, J., OBJECTS TO THE ORDER WITH SEPARATE WRITTEN STATEMENT.

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KITCHENS, J., OBJECTS TO THE DISMISSAL OF PETITION FOR WRIT OF CERTIORARI WITH SEPARATE WRITTEN STATEMENT:

¶1. With respect, I disagree that our having granted certiorari in this case was improvident, mainly because my review of the record leads me to conclude that Gore's theory of the case was not among the options presented to the jury for decision. While we may see this case again, in the event that Gore should seek deliverance by means of a petition for post-conviction collateral relief, I believe that this issue could and should have been resolved by this Court at this time, i.e., sooner, rather than later.

¶2. With the possible exception of the decedent's 5-year-old child, who did not testify at trial, Gore himself is the only surviving witness to the fatal shooting. In his signed statement to police officers, which was read to the jury, Gore maintained that the shooting was accidental. He said that he, the decedent's small child, and a man named Freddie were at Gore's apartment on the night the female victim, Jackie Ford, was shot and killed. According to Gore's statement,

> Around 12:30 or 1:00 Jackie and Freddie left and went back to the store. They stayed gone for a while. I waited until about 20 minutes to 4 and I went to [Jackie's] apartment to tell her to come get her son. When I got there I knocked on the door and she answered it. When she opened the door, she told me "we ain't doing nothing." I told her to just come and get her child. I went

> back to my apartment. She came to get her child and she started arguing with me. She walked to the kitchen to get a knife. I then went to the closet and got this old gun out of it. I pointed it at her and hit the safety and the gun went off. When the gun went off I saw her fall and I threw the gun back in the closet and went for help. I went to [a neighbor's] house and told her to call 911. On my way back to the apartment [the apartment manager] and Sonny came up and she asked me where did I shoot her. I told her "in the head." We then went to the apartment and went inside, and I told [the neighbor] not to touch her then she left. I was walking back out of the apartment when the police showed up and put handcuffs on me.

¶3. The neighbor and the apartment manager testified at trial; and, with regard to the times that each was present, they corroborated Gore's version of events. According to the neighbor, Gore came to her apartment and asked her to "call 911 because I done shot Jackie." The apartment manager testified that Gore had said to him that Jackie was "dead" and "I killed her. I shot her."

¶4. The prosecution submitted a heat-of-passion manslaughter instruction, numbered S-4.[1] During the instruction conference, the following exchange occurred among the trial court and counsel for the prosecution and the defense:

> Trial judge: S-4?
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> Defense counsel: No objection.

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[1]The proposed instruction read:

> The Court instructs the Jury that if you fail to find the defendant guilty of the felony crime of murder, then you should continue your deliberations to consider the elements of the felony crime of manslaughter.
>
> If you find from the evidence in this case beyond a reasonable doubt that the Defendant, Ray Thomas Gore, did kill Jacqueline Ford, a human being, without malice, in the heat of passion, but in a cruel or unusual manner, or by the use of a dangerous weapon not in necessary self-defense and without authority of law, then you shall find the Defendant guilty of manslaughter.

Trial judge: Are you offering S-4?

Prosecutor: Yes, Your Honor.

Trial judge: I'm not going to grant it. There's absolutely no evidence of manslaughter in this case. The only evidence in this case is deliberate design or *acts of misfortune.* There's no — no evidence of manslaughter. I'm going to refuse it.

(Emphasis added.)

¶5. Although the transcript reads "acts of misfortune," this very likely is a scrivener's error, as the seasoned judge who presided over Gore's trial, Honorable Marcus D. Gordon, is undoubtedly aware that this is not a term that appears in Mississippi's legal vocabulary. However, the words *accident and misfortune* comprise a well-worn phrase that is quite familiar to our state's jurists and criminal law practitioners. It has, from time immemorial, been a defense to homicide, and is codified as Mississippi Code Section 97-3-17 (Rev. 2006):

> The killing of any human being by the act, procurement, or omission of another shall be excusable:
>
> (a) When committed by *accident and misfortune* in doing any lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent;
>
> (b) When committed by *accident and misfortune,* in the heat of passion, upon any sudden and sufficient provocation[.]

(Emphasis added.)

¶6. This terminology also is prominent in numerous decisions by this Court. We recently reiterated that, "[w]hether or not a killing was the result of an accident [or] misfortune is a question for the jury to decide after proper instruction." ***Brown v. State,*** 39 So. 3d 890, 899 (Miss. 2010) (quoting ***Miller v. State,*** 677 So. 2d 726, 730 (Miss. 1996)). *See also* ***Day v.***

State, 589 So. 2d 637, 643 (Miss. 1991) ("it is for the jury to decide what constitutes 'accident' or 'misfortune'"). In the instant case, the trial court did not task the jury with that function; no accidental-shooting instruction was requested by Gore's counsel, and none was given the jury by the trial court.

¶7. At no time did defense counsel request an accident instruction, not even after the trial judge had rightly observed, and clearly recognized, that the defendant's theory of the case, indeed, his defense, was that the shooting was an accidental, unintentional discharge of the rifle. This early representation by Gore, coupled with the extremely dilapidated appearance of the gun in question (Trial Exhibit S-9), should have impelled Gore's counsel to tender an accidental-shooting jury instruction to the trial court. Failing in that, in these circumstances the court ought to have directed counsel to prepare such an instruction, or prepared one itself, to assure that the jury was thoroughly and correctly instructed as to the applicable law and Gore's defense.

¶8. This Court repeatedly has recognized that it is the trial court's responsibility to instruct the jury. *See e.g.,* ***Brown,*** 39 So. 3d at 900 ("The ultimate responsibility of assuring that the jury is properly instructed on all relevant issues of law in a case falls upon the trial judge.") We also have said, "[t]here is no doubt that the trial court is ultimately responsible for rendering proper guidance to the jury via appropriately given jury instructions, even *sua sponte*." ***Kolberg v. State,*** 829 So. 2d 29, 45 (Miss. 2002).

¶9. It is neither for us nor for the trial court to speculate whether Gore's claim of an accidental discharge was truthful, or even whether it was reasonable. It is, however, as a matter of due process of law, incumbent on the judiciary to ensure that each and every party's

theory of a case is properly laid before the jury for its decision. U.S. Const. amend XIV; Miss. Const. art. 3, § 14. "It is, of course, an absolute right of an accused to have every lawful defense he asserts, even though based upon meager evidence and highly unlikely, to be submitted as a factual issue to be determined by the jury under proper instruction of the court. This Court will never permit an accused to be denied this fundamental right." ***Chinn v. State***, 958 So. 2d 1223, 1225 (Miss. 2007) (quoting ***O'Bryant v. State,*** 530 So. 2d 129, 133 (Miss.1988)).

¶10. Here, despite Judge Gordon's astute recognition that this shooting either was deliberate or it was accidental, the jury was not given the option of finding that it was an accident. Gore has never retracted or retreated from that claim. Even though it was presented to the jury, almost in passing, by means of the defendant's statement to the investigating officers, it was not mentioned in the court's jury instructions and it was not argued by Gore's counsel.

¶11. Moreover, it does not appear that any effort was made to investigate or develop an accidental-discharge defense, even though it is arguable that the instrument of death appears to an untrained eye to be more capable of an accidental discharge than of an intentional one. There is no indication that defense counsel ever submitted the rifle to a firearms expert for a determination of its functionality, or the lack thereof, notwithstanding Gore's statement to the police that it was an "old gun," and that he had "hit the safety and the gun went off." During his closing argument, the defense attorney remarked to the jury, "for $50.00 they could have sent the gun to the crime lab and had it – had it looked at and to see if it really was damaged, but they chose not to do that." Similarly, the defendant would have been

entitled to such testing, had his attorney made a proper and timely request. ***Johnson v. State***, 529 So. 2d 577, 589 (Miss. 1988).

¶12. In the absence of an accident instruction, Gore's defense was not effectively presented to the jury, and he was denied a fundamentally fair trial. For this reason, I respectfully object to the dismissal of his petition for writ of certiorari.