IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

Copy

SEAN ANTONIO KING — APPELLANT

VS. — NO. 2005-KA-00916-COA

STATE OF MISSISSIPPI — APPELLEE

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APPEAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

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BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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BRIEF OF APPELLANT

CERTIFICATE OF INTERESTED PARTIES

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 this Court may evaluate possible disqualification or refusal:

1. Sean Antonio King, Appellant
2. Honorable Jim Hood, and staff, Attorney General, Counsel on Appeal
3. Honorable W. Swan Yerger, Circuit Court Judge, Trial Judge
4. Rebecca Wooten a/k/a Rebecca Mansell, Assistant District Attorney, prosecutor at trial
5. Stanley Alexander, Assistant District Attorney, prosecutor at trial
6. Eleanor Faye Peterson, District Attorney
7. Sanford E. Knott, Defense Attorney at trial
8. Julie Ann Epps, Attorney for King on appeal

This, the 8th day of October, 2007.

S/JULIE ANN EPPS
COUNSEL FOR APPELLANT

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STATEMENT OF THE CASE

(i) Course of the Proceedings and Dispositions in the Court Below:

Sean Antonio King was indicted in the Circuit Court of the First Judicial District of Hinds County, Mississippi, for deliberate design murder of Andrew J. Brooks on November 20, 2001. C.P. 7.

He was tried by jury and was convicted by "verdict of the jury" signed October 1, 2004. C.P. 82. The indictment was subsequently amended on motion of the prosecution, and King was charged and sentenced as an habitual to life in prison without parole pursuant to §99-19-83, Mississippi Code Annotated. C.P. 16, 28, 84. The trial court overruled King's motion for new trial and judgment notwithstanding the verdict. C.P. 88. King timely appealed the conviction. C.P. 89-90.

STATEMENT OF INCARCERATION

King has been continuously confined by the Mississippi Department of Corrections since December of 2001. Tr. 40.

(ii) Statement of Facts:

On November 20, 2001, Andrew Brooks (aka/ QP) was shot to death in front of the Boyz on Main Tire Shop in Jackson, Mississippi. Brooks had gone with Clifton Summers (aka Little Bay Bay) and Willie McCarty (aka Cash Money) to a nearby shop run by Derrick Fields in order to sell a stolen truck or motor. The trial court excluded evidence that they were there to sell stolen property although the information was obviously relevant to disclose a reason for the witness to believe that the decision on whether or not to prosecute them at the time they made allegedly incriminating statements might depend on how well they incriminated King. Tr. 394. *See,* Proposition VI, *infra.*

At some point, Sean King became a suspect because just a few days before on November 16th, Omar Thompson, who was King's uncle, had been shot and killed. Tr. 389. The State's theory was that rather than let the Jackson Police handle the matter, King took matters into his

own hands and gunned down Brooks because he erroneously believed Brooks had shot his uncle.[1] Tr. 298-99.

The police questioned numerous people who were in the vicinity at the time of the murder about whether Sean King had been involved. Eventually, four of those witnesses, James Russell, Willie McCarty, Derrick Fields and Clifton Summers testified at King's trial in 2004. In their initial statements given right after the murder, none of these witnesses implicated King in the crime. However, after being told by police that they would be prosecuted as accessories to the murder, the witnesses gave unsworn statements that the state argued at trial contradicted their trial testimony where the witnesses essentially reverted to their original statements—none of which incriminated King.

Clifton Summers, who was sixteen at the time he gave his second statement, gave an unsworn statement that Sean King shot Brooks. Tr. 51-52, 67. As in their first statements, Russell, McCarty and Fields in their second statements did not directly implicate King. McCarty testified he did not see who shot Brooks. The prosecution never introduced any evidence that he had ever said he had.

Fields testified that he saw the person who shot Brooks, but that person was **not** King. He never identified King as the person who shot Brooks in any of his prior statements. He testified at trial that he saw a black Ford Expedition or Explorer with what may have been an Alcorn College tag leave the scene after the shooting. King's wife owned a black Expedition with an Alcorn tag. Fields, however, did not see King in that vehicle. The prosecution played a 911 tape

[1] The State's theory is somewhat confusing because Ledrick Simmons, aka Monkey, was arrested by JPD on November 19, 2001, the day before Brooks' murder, for the murder of Thompson. R.IV/389. Later, in closing argument, the State argued that King killed the wrong man—presumably a reference to the fact that Simmons, not Brooks, had killed Thompson. Tr. 1098. Thus, it is unclear why King had a motive to kill Brooks if Simmons had already been arrested for the murder of Thompson.

by Fields at the time of the crime when he told James Russell that "They were on your lot, that nigger that just left out of here." Tr. 575.

Numerous people fled the scene on foot and in their cars, including Brooks' friends, Summers and McCarty. Tr. 570, 784. Moreover, one of the investigating officers testified that it was not unusual for people to flee a crime scene. Tr. 956.

Prior to trial, Summers retracted his second statement to police in which he stated King shoot Brooks and denied at trial that he saw King shoot Brooks. Tr. 751. Although at first, he denied making the statement saying King shot Brooks, under cross-examination he admitted he made the statement. Consequently, none of the state's "eye-witnesses" testified at trial that they saw King shoot Brooks. None placed him at the scene at the actual time Brooks was shot. No physical evidence connected King to the crime.

Lacking any reliable substantive testimony at the trial to show King's guilt, the state relied on the allegedly inconsistent prior statements of its witnesses as substantive evidence of King's guilt although when first questioned by police, Fields, Summers, McCarty and Russell all failed to directly incriminate King. It bears repeating that it was only after being picked up by the police and threatened with incarceration as an accessory to the murder did any witness give a statement to the prosecution that even remotely incriminated King. Tr. 788-89. Under the guise of impeaching their witnesses, the prosecution used their allegedly inconsistent statements as substantive evidence at King's trial to impeach their trial testimony that he had not been involved and argued that because the witnesses were so scared of King they contradicted their statements, the jury should find King guilty.

Further complicating the trial was the fact that trial counsel, Sanford Knott, had interviewed all four witnesses after each had made the statements the prosecution argued incriminated King and had obtained statements which essentially clarified or recanted their

second set of statements obtained after they were threatened by police with prosecution. Essentially, McCarty, Fields, and Summers provided Knott with statements reiterating what they had said in their first statements made shortly after the crime. Russell denied making a statement to police that Sean King had threatened him. Knott had provided the new witness statements and further discovery regarding what the witnesses would say to the prosecution well in advance of the trial. In other words, at the time the prosecution called the four witnesses at the trial, the prosecution had received discovery from defense counsel and knew that each of the four witnesses had recanted the portions of statements to police that might even arguably be said to incriminate King. Tr. 51-89, 116.

SUMMARY OF THE ARGUMENT

The bottom line is that the only evidence which even remotely implicated King in the murder of Brooks came from prior inconsistent statements of the witnesses. Most of this evidence was either improperly admitted or, if properly admitted, was wrongly used by the prosecution as substantive evidence or as evidence of the bad character of King. Since the only reliable substantive evidence tying King to the crime is his presence at the Tire Shop at or near the time of the offense, the evidence is insufficient to support his guilt. Alternatively, the evidence is so flimsy and unreliable, this Court should grant a new trial.

Next, the trial court and prosecution committed numerous errors regarding the admission of the alleged prior inconsistent statements. Finally, other prosecutorial misconduct and overreaching in examining witnesses and improperly instructing the jury as to the facts and law so infected the trial that this Court should reverse the case because King was denied a fair trial and due process of law.

ARGUMENT

I. THE PROSECTION COMMITTED REVERSIBLE ERROR WHEN IT INTRODUCED PRIOR INCONSISTENT STATEMENTS OF

NON-PARTY WITNESSES WITHOUT SHOWING SURPRISE OR UNEXPECTED HOSTILITY.

Although the admissibility of evidence generally rests within the discretion of the trial court, a trial court abuses its discretion where its decision to admit evidence results from legal error. In that case, a *de novo* standard of review applies. *Jones v. State,* 856 So.2d 389, 393-94 (Miss.App. 2003).

Unsworn prior inconsistent statements are generally not admissible as substantive evidence in a criminal case. M.R.E. 801(d)(1)(A). They may, however, may be used to impeach a witness' credibility. M.R.E. 613(b) states:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. . . .

Subject to certain exceptions, such statements are hearsay. One of those exceptions is that a prior identification may be admissible as substantive evidence where the person making the identification had an opportunity to view the person being identified. M.R.E., 801(d)(1)(c).

Where a defendant is convicted on the basis of unreliable hearsay evidence, his due process rights to a fair trial and his Sixth Amendment rights to cross-examination and confrontation are violated. Unreliable statements do not satisfy the constitutional demands for admissibility so both the due process and confrontation clauses require exclusion. *E.g., Idaho v. Wright,* 497 U.S. 805, 821 (1990).

King's counsel objected to the substantive admission and improper use of the prior statements by way of motion *in limine*, throughout the trial, and during opening and closing statements. In addition, the trial judge overruled King's request for a cautionary instruction at the time any prior inconsistent statements were admitted. Tr. 53, 89. King's objections to the admission and/or substantive use of the statements were repeatedly overruled. Tr. Supp. 32, Tr.

70, 87-89, 661-89[2]. In addition, King also objected to impeachment of the witnesses on collateral matters, objections to which were again overruled. Tr. 685, 687-98, 1008.

Notwithstanding King's counsel's repeated objections and the well-established prohibition against the misuse of prior inconsistent statements as substantive evidence, the prosecution repeatedly did so in its case against King. In fact, the only prior inconsistent statement which was even arguably admissible as nonhearsay substantive evidence in King's trial was the prior statement which Summers made identifying King as the shooter.[3]

The state, however, argued that all the prior inconsistent statements of witnesses were evidence of King's guilt. *See, Opening and Closing Statements of the prosecution and discussion infra on the misuse of the statements as substantive evidence.*

This case was continued numerous times at the request of the State before being set for trial in July of 2004. At that time, Derrick Fields and James Russell, who had been subpoened by the prosecution, failed to show up, and the case was again continued. Tr. 39. Both were subsequently arrested as material witnesses. Because they were incarcerated at the time of the trial, they were available for the trial which eventually took place in October of 2004. Tr. 44.

Over repeated defense objections to hearsay and the improper use of impeachment evidence as substantive evidence, the prosecution at trial called five witnesses whom it was

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[2] Because of space limitations, King cites to only a few examples of his objections to the testimony and argument. If the state wants argue that King waived his objections to the prior inconsistent statements, he will discuss further examples in his reply brief. King, however, cannot imagine that the state would want to go down that road.

[3] The circumstances of this statement, however, make it so unreliable that its probative value is outweighed by its unreliability. Summers first denied seeing the shooting. After being picked up and questioned by police a second time and told that if he did not incriminate King, he would be charged as an accessory to the murder, the then sixteen year old gave officers an unsworn statement that King was involved. Tr. 937, 941. Under oath at trial, Summers subsequently denied he had a clear view of the killer and that he had said it was King saying that he had been intimidated by the police. Tr. 744, 750, 784. In addition, at the time Summers gave the police the statement about King, he had other pending criminal charges and could in fact have been charged

allowed to impeach with allegations that they had made prior inconsistent statements. Supp Tr. 77, 80, Tr. 70, 97-89.[4] The prosecution then used its version of those statements as substantive evidence of King's guilt. Four of the witnesses were present in the vicinity of the crime at the time of the offense. Those witnesses were, Willie McCarty, James Russell, Derrick Fields and Clifton Summers.

The fifth witness was Rodney Clark, a jail house snitch. In the case of Clark, the prosecution attempted to show that Clark had given a statement to police that King at his preliminary hearing had admitted killing Brooks. Clark steadfastly denied that he had given a statement to police to that effect, and the prosecution never introduced evidence that he had. Notwithstanding, the prosecution argued that the jury should find King guilty because he had confessed to Clark, but Clark was obviously too scared of King to testify to that at trial. Tr. 1092, 1098, 1126.

Even on the written record, the testimony of these witnesses is extremely confusing because over objections by the defendant, the prosecution failed to follow proper procedures for impeaching a witness with a prior inconsistent statement. Rather than allowing the witness to testify and then impeaching with the prior inconsistent statement, the prosecution simply began with its oral version of the allegedly inconsistent statement.[5] Frequently, the prosecution asked

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as an accessory to either the theft or receipt of the stolen truck he, Brooks, and McCarty were trying to sell to Fields on the day of the murder.

[4] Because there can be no doubt that King objected to the introduction and misuse of the prior inconsistent statements so that waiver cannot credibly argued as an issue, King will not cite ever instance where he objected. Since virtually the entire state's case was dependent on prior inconsistent statements, King objected throughout the entire trial. The record cites to his objections would be virtually endless in this eleven volume record.

[5] *See, e.g.*, questioning of McCarty where rather than allow McCarty to testify, the prosecution asks a series of "Did you tell him [referring to a detective] . . . ?" questions. With the exception of Derrick Fields and Clifton Summers, the prosecution never actually introduced any of the written or recorded version of the statement alleged to be inconsistent. In the case of Fields, the prosecution played the 911 tape of Fields calling the police after the murder. Rather the prosecution in the case of Russell called a police officer prior to Russell's testimony to say he

the witnesses questions in such a way that the prosecutor became an unsworn witness. Reading from statements and asking the witness and asking "do you recall me asking you" or "did you tell me" has been widely condemned as placing the credibility of the prosecutor before the jury. *United States v. Puco,* 436 F.2d 761, 762 (2nd Cir. 1971). Moreover, the practice of asking a witness if he made a statement and when he denies it, not introducing evidence that he did has likewise been repeatedly condemned. *Walker v. State,* 740 So.2d 873, 884 (Miss. 1999); *Flowers v. State,* 733 So.2d 309, 329 (Miss. 2000).

For example, the prosecution asked McCarty: "Word on the street is that you got some money from Sean. Have You?" King's objection was overruled. McCarty said he had not; however, the implication was that he was lying. Tr. 430. When McCarty said he did not read well, the prosecution asked him, if he remembered talking to the prosecutor and his investigator and asked "Didn't you read the part about the black Expedition and tell us that I don't remember saying that?" Tr. 434. The prosecution embarked on a series of questions based on an out of court conversation he had with McCarty that morning by telephone about coming to court. Tr. 435. "Now, what did I tell you this morning to get you to come to court?" Tr. 435. "So your sister didn't say, 'Let me go get him out of the bed.'" Tr. 437.

In the case of Russell, the prosecution elicited testimony that he did not come to court because "[s]ome people" told him not to come to court." Tr. 451. "Now the first statement you didn't tell them that Sean King had come to your shop, did you?" Tr. 454. He asked Russell a series of questions about a phone call Russell allegedly received recognizing him and the statement he had given to the police about the call. Tr. 459. He asked Russell a series of

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said he received a call from King; in the case of McCarty, the prosecutor himself testified to statements McCarty made to him which he claimed were inconsistent with his trial testimony; in the case of Summers and Russell, the prosecution called police officers to testify about alleged inconsistences but did not introduce their actual statements to the officers. Also, as to Summers,

questions about a conversation Russell supposedly had with the prosecutor and his investigator. After Russell denied that King had called to threaten him, the prosecutor testified "Do you remember telling me and him that he did call and threaten you?" Tr. 462. "Did you say that Sean King said if I know what is best for me I will play right?" Tr. 462. The prosecutor then over objection and despite the fact that Russell never denied making the statement, was allowed to read the second statement Russell made to police sentence by sentence and asked him if the information therein was true. Tr. 476, *passim. State v. Moffett,* 456 So.2d 714, 719 (Miss. 1984) [cannot utilize extrinsic evidence of statement where admits statement]. The prosecution then embarked on a series of "Didn't you say . . ." questions about his statement that he had received threatening phone calls. Tr. 483, *passim.*

Moreover, the prosecution was allowed to declare the witnesses to be hostile and lead them. As a result, it is difficult to sort through what the witnesses' actual substantive testimony was because the testimony about what the statements actually were is ambiguous and because the methodology employed by the state implied that the prior inconsistent statements were admitted for their truth.

However, once the testimony of all of the witnesses is reduced to its substantive essence, not a single witness testified **under oath** that King shot Brooks. The best the prosecution could do was to show that Summers had previously in an unsworn out of court statement said King shot Brooks after police had threatened the sixteen year old with being charged as an accessory to the murder. Russell's testimony placed King at Russell's shop near where Brooks was shot about fifteen to twenty to fifteen minutes earlier. Fields' testimony placed someone coming from near Russell's shop at the time of the shooting and a car resembling King's wife's car leaving after the shooting. Finally, the State proved that somebody

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the prosecutor played a tape recording that Summers made to defense counsel which the

[probably Monkey] had shot King's uncle Omar Thompson prior to the time Brooks was shot although at the time Brooks was killed police had already arrested Monkey for the shooting. Fields saw a black Expedition like one owned by King's wife drive off after the shooting.

That direct reliable substantive evidence of King's involvement was in fact lacking is important because King will later argue that the evidence was insufficient to support the conviction. He points this out now so that the Court can bear this argument in mind when reviewing the evidence on the procedural issues of the erroneous admission of the prior inconsistent statements.

King, therefore, will attempt to briefly summarize the substance of the five witnesses testimony and distinguish between what was a prior inconsistent statement and what was actual substantive trial testimony:

WILLIE MCCARTY aka Cash Money:

The first of what, for want of a better term, might be called the four quasi-eye-witnesses was Willie McCarty aka Cash Money. Willie testified that he had been convicted and was serving time for receiving stolen goods. Tr. 410-11. On November 20th, he, Clifton Summers and Andrew Brooks, the deceased, went to the Tire Shop, Boyz on Main Street, at 1619 Terry Road, to sell a truck or a motor.[6] They left and came back a second time with Brooks and Summers in the truck. Willie followed in his Daewoo. Tr. 416.

Neither at trial, nor in any of his statements did McCarty ever say he saw Sean King at the crime scene or at the business located at 1613 Terry Road which was owned by James Russell. Tr. 419. In fact, he specifically denied to police seeing King or his brother at the scene of the crime. Tr. 425.

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prosecution claimed was inconsistent.

[6] The trial court precluded testimony that the truck had been stolen. Tr. 113.

The prosecution's purpose in calling McCarty was to show that in a statement to police given on December 5, 2001, after being threatened with prosecution as an accessory to the murder, he had said he had seen a black male walk toward Brooks at a fast pace and that the man had come from around the corner "at the other business." Tr. 419. At trial, McCarty denied saying he saw a man coming from around the corner of the other business. Tr. 419.

The prosecution implied that this ambiguous reference to the "other business" was a reference to James Russell's shop which was located at 1613 Terry Road—a reference to the proximity of Russell's business to the shop where Brooks was shot. Tr. 419. The prosecution asked the jury to draw this inference because Russell testified that King had been in his shop about fifteen to twenty minutes before he heard the shots. Tr. 455. Neither at trial nor in any statement, however, did McCarty ever identify the black male as Sean King. At trial, he again emphatically denied seeing Sean King the day of the crime. Tr: 442.

Notwithstanding that McCarty in his direct testimony had not denied that he saw someone coming from around the corner of the other business, over hearsay objection by King,[7] the prosecution was allowed to declare McCarty a hostile witness and question him about his December statement to police. The prosecutor also questioned Brooks about whether he had said in that statement to police that he saw someone walk up to Brooks and ask him "who killed him." Tr. 419-21. McCarty denied saying he heard anyone ask Brooks "who killed him" Tr. 421. Tr. 419-20, 441.

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[7] Prior to the trial and numerous times throughout the course of the proceedings, the defendant moved to exclude the prior inconsistent statements because they were hearsay and denied King his rights constitutional rights to cross-examination and confrontation. The trial judge, however, based on the prosecution's arguments that Rule 611, M.R.Evid. rather than Rule 607 governed the admission of prior inconsistent statements. According to the prosecution, Rule 611 allowed the trial judge to declare a witness hostile and permit leading questions, and since the witness was subject to impeachment, the witness could be questioned about prior inconsistent statements without first showing surprise. Although the prosecution's argument has no support in law or

At this point, the prosecutor diverged from showing that McCarty had made statements which were even arguably inconsistent with his trial testimony with the prosecutor threatening threatening McCarty with perjury charges. Tr. 421. The prosecutor further engaged in a colloquy with the witness designed to show that the prosecutor had seen the witness talking to somebody in the hall who had been sitting in front of King earlier; thereby, implying that McCarty was lying about seeing somebody who had come around the corner at the other business because he was being intimidated by a friend of King's. Tr. 423. There was no evidentiary support at all for questioning McCarty on this subject because there was no foundation that the person with whom McCarty was talking had spoken to King or even knew King.

McCarty testified consistently with all his statements that he told the police he did not see either Sean or Charlie King at either business that day. Tr. 425. The prosecutor then attempted to impeach McCarty's testimony about why he said Sean King was not there when the detective only asked about Damien. Again, this question lacked evidentiary foundation since there was no evidence that King that the detective only asked about Damien. The prosecutor then asked if the witness was trying to cover up for Sean King and if he was afraid of King. Tr. 430.

The prosecutor then asked McCarty: "Word on the street is that you got some money from Sean. Have you?" The defendant's objection was overruled, and McCarty answered, "No." Tr. 430-31.

Acting as an unsworn witness, the prosecutor then asked McCarty what the prosecutor and investigator talked about and implied that McCarty was lying about what they talked about. Tr. 432-34.

Finally, the prosecutor asked if McCarty was supposed to show up in court the day before and asked if he, the prosecutor had called him and then asked: "Didn't I tell you that if you didn't

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logic, the trial judge allowed the witnesses to be "impeached" by their alleged out of court

come, the sheriff would come and pick you up?" Tr. King's objections to this obvious were overruled. Tr. 437. The prosecutor asked, "And you're just willing to just sit here and sell out QP [aka Andrew Brooks] right now?" Tr. 441. At last, an objection was sustained, but not before the damage was done. Despite having the objection sustained on direct, the prosecution on redirect asked again about whether or not McCarty cared about what happened to QP. Tr. 448. The trial judge again sustained the objection, but not before a lengthy discussion before the jury. Tr. 448. Again, the damage was done.

To summarize, shorn of the confusion, McCarty's substantive evidence at trial then was that he did not see Sean King shoot Brooks; nor did he see anyone come from near Russell's shop and question Brooks about a shooting.

JAMES RUSSELL

James Russell was the owner of a shop located at 1613 Terry Road. He testified that he was in jail because he refused to come to court in July. Tr. 450. Some people on the street told him not to come. He did not know if they were associated with Sean King. He testified that he did not come to court in July because he did not want to be involved.[8] Tr. 451-52.

The gist of Russell's substantive testimony was that he owned an upholstery shop which was close to the Tire Shop, Boyz on Main Street. Tr. 452. Several weeks prior to the shooting of either Brooks or Omar Thompson, King's uncle, King had brought Russell a car to be repaired. On the day of the shooting, King had come by and paid Russell some money toward the repairs. King had been in before that day on other occasions to bring money or leave parts for his repair job. Tr. 455, 492. King left sometime between fifteen to twenty minutes prior to the time Russell heard the gunshots. Tr. 455.

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inconsistent statements. Tr. 70, 87-89.

[8] King's objection to this testimony was overruled. Tr. 114-15.

Notwithstanding that Russell on direct examination testified that King was in his shop and had never denied that King was there in any of his statements, the prosecution was allowed to "impeach" Russell by questioning him about unsworn out of court statements he had made to police on two prior occasions. Despite the lack of evidence that police had ever asked Russell if Sean King was in his shop that day, the prosecution was first allowed to cross-examine Russell about why in his first statement to the police given the day of the shooting he did not say Sean King was in the shop that day. Russell testified that he did not tell the police about King being in the shop because nobody asked if King was in the shop. As for the second time he talked to police, he told them about King after they asked him. He did not know what kind of car King was driving that day. Tr. 454-55. Russell's trial testimony, therefore, is not even inconsistent with his statements, and there was no need to impeach the witness with a prior inconsistent statement. Consequently, the entire line of questioning involving the so-called inconsistency between his first statement not naming King and his second statement was inadmissible. *See, Jones v. State,* 856 So.2d 389, 393-94 (Miss. App.), *cert. denied* 856 So.2d at 1223 (2003). As the Court in *Jones opined,* where the witness acknowledges making the inconsistent statements and explains the inconsistency, there is "no reason for the judge to admit the statement, which would be superfluous or extrinsic evidence." *Id.*

Notwithstanding the lack of inconsistency, the prosecution engaged in an extended colloquy under the guise of "impeachment" and to show King's "state of mind" which ultimately resulted in the admission of hearsay evidence in the form of a "prior inconsistent statement" allegedly made by Russell to police in which the prosecution claimed that Russell allegedly said that Sean King had made a threatening telephone call to him from the Hinds County Jail. Tr. 114-16. After the prosecution asked him if he had made such a statement to police, Russell denied telling police that he received a telephone call from Sean King. He said he told police he

had received a telephone call from **someone** about 1:00 or 2:00 a.m. saying that "if he kn[e]w what is best, he would play right." Tr. 484.

Russell testified at trial that he himself did not believe the phone call was from Sean King because King was in jail at the time, and the call he got was a direct call to his cell phone. Tr. 501. From his own experience, he knew that an inmate could not make a direct call from the jail without the caller being informed the call was from a jail and could not use the phone at any time he wanted.[9] Tr. 505. Russell denied that King or any of his people ever told him not to come to court. He did not come to court because he did not see anything and did not have anything to do with it, and it was not his business. Tr. 507-08.

In short, Russell's substantive testimony was that King was in the shop fifteen to twenty minutes before the shooting.

DERRICK FIELDS

Derrick Fields testified that he too had been in jail since August 31st for failing to appear for the trial in July. Tr. 549. He told the prosecutor, Stanley Alexander, at the time that he was not coming to court because he was afraid of Detective Richardson. Tr. 549. On cross-examination by the defense, he denied being scared of Sean King. Tr. 622-23.

At the time of his first interview on the day of the shooting, he told Richardson that his name was Phillip Liddle because he had some outstanding warrants and was scared.[10] Tr. 550. He does not know Sean King. Tr. 551.

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[9] Later testimony from one of the jailers at Hinds County established that it was possible for inmates to sneak out of a pod at night and make a call from one of the jailer's phones if security was lax at the time. Tr. 1035-38. There was no evidence that anyone had made such a call from the jail on the day in question.

[10] He might also have been scared because he was trying to buy stolen goods from Brooks and the others; however, the jury was not told that. Rather the prosecution asked the jury to draw the inference that Fields was scared of King.

As with the other witnesses, rather than allowing Fields to testify and then question him about any inconsistencies, the prosecutor again asked the "Didn't you say . . . ?" questions. R. 448, *passin.* Then through a series of questions about what Fields had told the investigator and the prosecutor, the prosecution established that when Alexander and his investigator Max Mayes had come to see him in jail after he had been locked up for not coming to court, he told them that the information that was on "the piece of paper" they showed him was correct (presumably a reference to his second statement to police) because when Fields asked if he could get out of jail, Alexander told him "it was all on how he talked." Tr. 553-55. In other words, Fields had told the assistant district attorney and his investigator what he wanted to hear so he could get out of jail. Egregiously, the prosecutor then asked questions about "We never promised you anything, did we?" When Fields said, you said that it was "all on how I talk or something," the prosecutor again stated: "I never promised you anything." Tr. 554-55. Later the prosecution asked a series of questions about discussions he and Fields had had. "Do you remember the person you pointed at in the first group of pictures we showed you?" "But you couldn't identify the shooter could you?" These questions were obviously designed to imply to the jury that Fields was lying when he said he had identified the shooter recently to police. Since the trial court refused to admit evidence of the person Fields had identified, the prosecution's "testimony" that Fields had not made an identification no doubt left the jury with the impression that Fields was in fact lying when he said he had made an identification shortly before trial.

The gravaman of Fields' substantive testimony was that he worked at Boyz on the Main for Marcus aka Squirt. On the day in question, lots of people were there. He saw Brooks, Clifton Summers and Willie McCarty at the shop that day. The first time they were there, all three left together. Brooks came back in a truck. He heard shots. Tr. 558-61. He saw a Black Explorer or Expedition with tan trim and what he believed to be an Alcorn tag in the parking lot.

Tr. 563, 608, 612, 629. He called 911. In the 911 tape which was played for the jury, he said "Them Niggers was in a black Expedition." Tr. 574. He admitted he said to James Russell on the 911 tape, "They were on your lot, that nigger that just left out of here." Tr. 575. According to Russell, he did not see the person who shot Brooks come out of Russell's shop—the person came from that direction. Tr. 611.

He testified that he saw the man get shot, but he did not see him get into the Ford Expedition or Explorer. He just saw it leave. Tr. 589-90. He saw the face of the man who shot Brooks. Tr. 591. He told police at the time that he could identify that person. Sean King was not the man who shot Brooks. Tr. 599, 608. In fact, Fields had been presented with a photo spread during the week or so before trial and had identified someone else as the shooter, but he did not know who it was. Tr. 608.

Fields said he was scared when he gave his (second) statement on December 4th to the police because Detectives Richardson and Frazier came and got him and took him downtown to the police department and told him they were going to charge him as an accessory after the fact to murder if he did not tell them what they wanted to hear. Tr. 565. He testified he had never had anything more serious than traffic tickets before. Tr. 620. He admitted saying in that statement that he heard the man with the gun ask QP to tell him what he knew. He told Richardson "whatever he wanted to hear so I could go home."[11] Tr. 565.

Fields' substantive testimony was that he saw the shooter and that it was not King. He did not see anyone come from Russell's shop, and he did not see the shooter get into a Ford Expedition.

CLIFTON SUMMERS aka Little Bay Bay

[11] The police admitted telling Fields at this time that he would be charged as an accessory to murder if he did not tell them the truth about Sean King. Tr. 941.

Clifton Summers, who was sixteen at the time of the shooting, testified that he was in five years custody of the MDOC for receiving stolen goods and was subject to the RID program. Tr. 638. In all, including his trial testimony, Summers had given four statements, none of which was particularly consistent with the others.

At trial, he testified that he, Brooks (QP) and Willie McCarty went to try to sell the truck or its motor to Derrick Fields who looked at it and told them to come back in about an hour. Tr.639. They left and came back, and Derrick told them it would be about another ten minutes. Brooks parked the truck at the next shop over. Summers and McCarty were getting ready to leave in McCarty's car when Summers saw a "dude" walk up to QP with a gun. Tr. 640.

McCarty and Summers jumped in the car and left, but decided "we can't leave Q.P. up there like that: so they went back. When they got back there were a lot of cars coming out of the drive, and they stopped Squirt and asked where QP was, and Squirt said the dude had shot him. Tr. 640.

The prosecution was allowed to impeach Summers with two out of court statements he had previously given to the police. In the first one, he did not tell them who the dude was because he "couldn't get no good look at him." Tr. 641. In the second statement given on December 11, after police picked him up and told him he would be charged as an accessory after the fact to the murder if he was not "truthful", he signed a statement saying that he saw Sean King come from the front of the other business with a gun in his hand. Tr. 644, 788-89.

At trial, however, Summers denied saying that Sean King was the man and testified that he said that he saw a man come away from "around there." Tr. 644.

Summers admitted that in his statement he said that Sean King put the gun on Q.P. and asked him who did it. Tr. 647. He also admitted that police showed him a photo spread, and he initialed a photograph of Sean King. Tr. 641. He testified, however, that the police merely

asked him if he knew Sean King and asked him to identify King and that he did so. Tr. 641. At trial, Summers denied that what he said in his December 11th statement was true. Tr. 658. In other words, he denied that he saw King shoot Brooks.

The prosecution then asked Summers if he had been given money by Sean King. In his substantive testimony Summers denied being given money by King. In a pre-trial interview of Summers by Knott and subsequent follow up letter to the prosecution memorializing that interview, Summers had said he saw Sean King at the Piccadilly the day of the shooting and King had given him $140.00 but that it was not related to the murder. The prosecution expended much effort on direct and redirect at trial trying to impeach Summers about whether or not he had told Knott the truth about King giving him money and implying that the money was to keep Summers quiet about the murder. Tr. 660-782, Tr. Supp. Bench Conferences, 61-64.

King attempted to cross-examine Summers to establish that the money was not related to the murder but was for drugs; however, at the insistence of the prosecution who claimed the two year statute of limitations[12] had not run on the drug sale which had occurred in 2001, the trial judge precluded the defense from establishing that the money was not related to the murder. The judge did so on the theory that Summers would be incriminating himself on the drug crime if he so testified.[13] *Id.*

In any event, as a result of the prosecution's attempts to impeach Summers, the trial judge allowed the tape recording of Summers' out of court statement to Knott to be played before the jury to show that he had not said that the money was for the sale of drugs, and the jury was given a transcript of it. Tr. 661-89.

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[12] *See,* 99-1-5, M.C.A.

[13] Sale of drugs, however, carries a two year statute of limitations, so it appears that contrary to the prosecutors' representations to the court and the defendant, the statute had run on any drug sale committed in November of 2001. *See,* §99-1-5, Miss. Code Ann.

Finally, the court sustained the prosecution's objection to Summers testifying that what he had been trying to say was that the money he received was not related to the murder. Rather he received $140.00 from King for his half of the proceeds of the sale of drugs which he had received from King which he did no consider to be from King but rather as part of his profit for the sale. Tr. 769. The trial court sustained the objection and would not let Summers' explanation into evidence because the evidence would be potentially "detrimental" to **Summers**. Tr. 758-82. One assumes that the trial judge was referring to the possibility that Summers might somehow be prosecuted for sale of drugs that, contrary to what the prosecution said, the statute of limitations had run on.

After being threatened by the prosecution with a perjury prosecution and prosecution for thirty years for sale of drugs, Summers testified substantively that he did see a man walk up to QP, but testified he did not see the man's face because he had a hat pulled over it. Tr. 722-23. He further testified that the man put a gun on Brooks and said, "Who did it?" and that Brooks said he did not know, "he dropped Monkey off at his brother's house." Tr. 723. He also testified that he saw the shooter come from around the corner from the front of James Russell's business. Tr. 730. He then admitted he had lied to Sanford Knott when he told him he did not see the shooting. Tr. 735.

From the foregoing summary, it is clear that what Summers testified to substantively and what came in as impeaching evidence is extremely confusing. The bottom line, however, is that in his substantive testimony at trial, Summers never identified Sean King as the man who shot Brooks. Tr. 751.

RODNEY CLARK

In addition to the witnesses who were present at or near the time of the crime, the prosecution called Rodney Clark as a trial witness. Clark was an inmate at the MDOC who at the

time of the trial was serving time for drug charges. At the time the prosecution put Clark on the stand, the Clark had made it perfectly clear through his attorney that he had no intention of taking the stand to testify to anything. The prosecution's purpose behind calling Mr. Clark to show that Clark had made a prior statement that King had confessed to him. Clark refused to so testify, and the prosecution never got in Clark's alleged prior statement even as impeachment although the prosecutor later argued in closing that the jury should convict King because Clark was so scared of King that he refused to testify that King had confessed. Tr. 1090, 1093, 1098.

Prior to placing Clark on the stand, the prosecution represented to the court that shortly after King's preliminary hearing, Clark, who was at the hearing on his own charges on that day, contacted the prosecutor's office and offered to testify that King had admitted "dropping that bitch" in return for a reduced sentence on his pending charges. The prosecutor who was handling the case at that time declined Clark's offer because Clark appeared to be capitalizing on information he had heard at the hearing to incriminate King and that his claim that King had confessed would not be credible.

The present assistants District Attorney, Stanley Alexander and Rebecca Wooten Mansell, not being quite as fastidious as the previous assistant, sought to secure Clark's testimony. As it turned out, Mansell had previously prosecuted Clark on a rape charge. Clark forcefully declined to testify at the trial about any alleged confession: "Now you turn around and think I'm fixing to help you. Shit." Tr. 903. "I told this man, this man right here, I told this person twice I refuse to testify concerning this situation, sir. And that one back there sitting there with them shades on his head, I done told them I'm not fixing to testify for no State of no Mississippi." Tr. 900.

The prosecution's attempts to get Clark to say he was afraid of King were likewise unavailing. In response to the leading question by Ms. Mansell, "Why are you so afraid of Sean

King?" Clark responded "I could be afraid of you [Rebecca Wooten Mansell]. I could be afraid of you, you, you and that nigger sitting back there [presumably a reference to assistant district attorney Alexander]." Tr. 919. On cross, Clark emphatically denied being afraid of King or his family. Tr. 925.

Notwithstanding the fact that Clark made it clear to everyone prior to taking the stand that he was not going to testify to what the prosecution wanted him to, over King's objection, the prosecution called him anyway and engaged in an extensive colloquy about his wrongdoing, including the drug charge and a prior conviction for rape in 1988. Throughout Clark refused to admit he ever said King had confessed to him. Furthermore, the prosecution introduced no actual evidence before the jury that Clark ever said he had. Notwithstanding, the jury was no doubt left with the distinct impression that King had confessed to Clark. This si particularly true because the prosecution, not terribly bothered by the lack of evidentiary support, argued that King had confessed to Clark. Moreover, again without the evidentiary support, the prosecution argued that Clark was afraid of King that was why he would not admit King had confessed to him. The prosecution then used Clark's prior criminal record to argue convicted felons were the sort of friends King had—despite the total lack of evidentiary support to show Clark even knew King before they met at King's preliminary hearing. Tr. 551, 1090-92.

While the evidence in the case is confusing, the law is clear. Out of court statements are not admissible into evidence except as permitted by the rules of evidence. Rule 607 permits impeachment of a witness by prior inconsistent statements; however, Rule 607 does not allow the introduction of such statements unless they are relevant to a non-collateral issue and unless they can pass through the test of M.R.E., Rule 403 that they are more probative than prejudicial. *Hansen v. State,* 592 So.2d 114, 134 (Miss. 1991); *Heflin v. State,* 643 So.2d 512, 517-18 (Miss. 1994) [cases cited at 517-18].

Where a witness admits making the past contradictory statements, the witness stands impeached without the introduction of extrinsic evidence of the statement. *Moffett,* 456 So.2d 714, 719-20 (Miss. 1984); *Jones v. State,* 856 so.2d 389, 393 (Miss. App. 2003), *cert denied* 860 So.2d 1223 (Miss. 2004) [no need to admit extrinsic evidence of the statement].

Moreover, the prosecution cannot ask questions which imply the answer without offering into evidence a factual basis for doing so. *Walker v. State,* 740 So.2d 873, 884 (Miss. 1999) ["The asking of questions without a factual basis leaves an impression in the minds of jurors that the prosecutor actually had such facts in hand and that the insinuations through questioning contained some truth. This leaves false and inadmissible ideas in the minds of jurors that cannot be adequately rebutted by the testimony of witnesses or instructions of the court"]; *Flowers v. State,* 773 So.2d 309, 329 (Miss. 2000) [prosecution asked witness if she had lied when she denied the questions posed to her on cross without introducing proof of falsity].

In addition, the prosecution may not call a witness under the guise of impeachment for the purpose of introducing otherwise inadmissible hearsay in the form of prior inconsistent statements without first showing unexpected hostility or surprise. *Moffett v. State, supra; Wilkins v. State, supra.*

Finally, statements admitted pursuant to Rule 607 are **never** admissible as substantive evidence. *Moffett,* 456 So.2d at 19-20.

The prosecution's violations of these rules regarding the admission and use of the prior inconsistent statements if so fraught with error that it is difficult to organize the discussion in any orderly fashion.

First of all the way in which the prosecution sought to introduce evidence of prior inconsistent statements was improper and confusing. Rather than calling the witness, asking him what happened and then contradicting the testimony with any allegedly inconsistent statements,

the prosecution began by calling Officer Denson to the stand to have him testify that witnesses Russell and Summers had made statements supposedly incriminating King even before it called the witnesses to the stand.[14] When the prosecution called the witnesses themselves, the prosecutor started questioning the witnesses about the allegedly prior inconsistent statements, again without giving the witness the chance to testify to what happened and without introducing the actual written statement. The reason for this is obvious. The prosecution had been informed by defense counsel prior to the trial that the witnesses were not going to directly incriminate King. The problem with the prosecution's methodology, as one authority has put it, is that

> [i]f the prior inconsistent statement is admissible only to impeach and not substantively, the examiner cannot imply through her questions (and in her closing argument that the statement is true. If the examiner starts this impeachment by asserting the contradictory fact . . . , the implication arises that the inconsistent statement that asserts this very thing . . . should be understood as proving [that thing].

Carey, James; "Charles Laughton, Marlene Dietrich and the Prior Inconsistent Statement," 36 *Loyola University Chicago Law Journal* 433, at 434. The proper procedure for introducing such statements is to commit the witness to the fact to be contradicted and then to confront the witness with the alleged contradiction. If the witness denies making the contradictory statement, then extrinsic evidence of the contradictory statement is admissible. *Id.* at 435. If he admits making the statement, extrinsic evidence is not admissible. *Moffett v. State, supra.*

Furthermore, it is not proper for the prosecution merely to ask the witness if he made the statement without adducing some evidence that the statement has in fact been made. *Walker v. State, supra; Flowers v. State, Carey, James, supra* at 434. By omitting the critical step of allowing the witness to testify first, the prosecution in King's case misled the jury into using the

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[14] Interestingly, in the case of *Davis v. State,* 2006 WL 3503210, decided December 12, 2006 (Miss. App.), Ms. Rebecca Wooten Mansell, one of the prosecutors in the instant case, when arguing against the **defense** being allowed to call police officers to testify to prior inconsistent

prior inconsistent statements as substantive evidence, rather than as merely impeachment evidence bearing on credibility.

In *Flowers v. State,* 773 So.2d 309, 326 (Miss. 2000), the Court held that in questioning a witness about a prior inconsistent statement, "we have required the questions to include, 'whether or not on a specific date, at a specific place, and in the presence of specific persons, the witness made a particular statement [citations omitted]. Then with the predicate properly laid, the witness may be impeached by showing prior inconsistency with the in-court testimony, so long as the statement made in court is one relevant to the issue in the case and therefore not collateral [citations omitted]."

In King's case, the State failed to follow established procedures for introducing prior inconsistent statements with the result that the jury was misled into believing the statements were in fact made and were also evidence of King's guilt rather than merely impeachment. With the exception of Fields' 911 tape, Summers' statement to Knott, and the one statement of Russell [which came in only through improper questioning], the prosecution did not introduce the actual statements claimed to have been made, but merely questioned the witnesses about its version of what the statements said. This procedure has repeatedly been held to be error. For example, in *Flowers v. State,* 773 So.2d T 328, the Court found **plain error** for the prosecution to ask a witness if she denied making a certain statement without offering the statement or a subsequent witness in rebuttal to prove the statement.

Furthermore, it is error for the prosecutor to ask questions such as **do you recall me asking you** or **did you tell me**. This is so because the form of the questions represents that the witness had in fact made the statements. This practice has been widely condemned because,

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statements by the state's witnesses, claimed that "she had never heard of allowing one witness to testify to another's inconsistent statement." *10.

among other reasons, the prosecutor places his own credibility in the balance against that of the witness. *United States v. Puco,* 436 F.2d 761, 762-63 (2nd Cir. 1971).

As the witness summaries indicate, the prosecution frequently employed one or more of these forbidden methodologies in questioning witnesses.

Even more egregious, however, was the fact that the prosecution failed to show surprise or unexpected hostility by the witnesses before it was allowed to cross-examine witnesses about prior inconsistent statements. By the time of the trial, it had become clear that none of the witnesses in question intended to testify to the prosecution's version of events. Substantially in advance of trial, defense counsel gave the prosecution notice that McCarty, Russell, Fields, Summers and Clark had given statements which contradicted statements which they had given to the prosecution which the prosecution hoped to use to incriminate King. Finally, as to the fifth witness, Rodney Clark, Clark had informed the prosecution prior to trial and again at trial before he took the stand that he would not testify that King confessed to him. Tr. Supp. 70.

Notwithstanding defense counsel's objections to the prosecution calling the witnesses and "impeaching" them under the guise of surprise, the prosecution represented it was "surprised" (Tr. 66) was allowed to call the witnesses, declare them to be hostile and ask them questions about their prior statements which allegedly incriminated King in most instances without introducing the statement which the state claimed impeached their direct testimony.

Both before and after the adoption of the Mississippi Rules of Evidence, this Court has repeatedly held that the prosecution may not use prior inconsistent statements under the "guise of impeachment for the *primary* purpose of placing before the jury substantive evidence which is not otherwise admissible [citations omitted and emphasis in original]." *Id.* at 326. The Court has also repeatedly held that prior inconsistent statements are inadmissible unless the

prosecution shows surprise or unexpected hostility. For example, in *Moffett v. State,* 456 So.2d at 719, a pre-rules case, the Court condemned the precise procedure in this case. In that case, the Court made it clear that the foundation requirements for admission of prior inconsistent statements had not been met. The Court described the procedure in that case:

> The prosecution called Johnson to the stand as its witness as a part of its case in chief. The prosecuting attorneys knew well when Johnson was placed on the stand what his testimony would be, and, more specifically, that his testimony would be unfavorable to the State. The prosecuting attorneys knew that Johnson would repudiate his March 2, 1981 statement. They had known this for some 30 hours before Johnson was called. Under these circumstances, it was error for the trial judge to have allowed the district attorney, first, to cross-examine the State's own witness and, second, to impeach his credibility regarding his direct testimony of what did and did not happen on the evening of December 27, 1980.

Similarly *Wilkins v. State*, 603 So.2d 309 (Miss. 1992) holds that Rule 607, M.R.E. precludes the admission of prior inconsistent statements where the prosecution fails to show surprise or unexpected hostility. Specifically, the Court held:

> To remove any doubt as to the meaning of Rule 607, we hold today that in its application, just as in our pre-rules decisions, before a party will be authorized to introduce for impeachment purposes an unsworn pretrial inconsistent statement of his own witness, it will be necessary that he show surprise or unexpected hostility, and that such statement can never be used as substantive evidence. We also hold that under the "unfair prejudice, confusion of the issues, or misleading of the jury" provisions of Rule 403, the circuit judge should consider whether a cautionary instruction to the jury will be sufficient to keep the jury from treating the unsworn pretrial inconsistent statement as substantive evidence, and if not, the statement should not be introduced.

Id. at 322.

In King's case, any argument that the State was surprised that its witnesses were going to repudiate their statements to police or that they were "unexpectedly hostile" is simply disingenuous. As this Court stated in *Moffett v. State,* 456 So.2d at 719:

> On the other hand, where the witness' repudiation of his prior statement is well known to the State's attorney prior to the time the witness is called to testify, **there is in fact and in law no surprise-and hence the State's attorney cannot and may not claim surprise**. *Hall v. State*, 250 Miss. 253, 263, 165 So.2d 345, 350 (1964); see *Allison v. State*, 447 So.2d 649, 650 (Miss.1984) (state must

> establish that it was taken by surprise); *Young v. State*, 425 So.2d 1022, 1028 (Miss.1983) ("evidence indicating surprise" necessary); *Gardner v. State*, 368 So.2d 245, 248 (Miss.1979) ("unexpectedly hostile"); *Hooks v. State*, 197 So.2d 238, 239-40 (Miss.1967) (must show that evidence has "taken him by surprise); *Rutland v. State*, 170 Miss. 650, 653-54, 155 So. 681, 681-82 (1934) (must be a situation where prosecutor was "deceived or mislead by fraud or artifice") [emphasis added].

See also, Moore v. State, 755 So.2d 1276, 1280 (Miss. App. 2000) [plain error to allow out of court statements to be used as substantive evidence].

Not only then was the prosecution's method of introducing the prior inconsistent statements flawed, the State failed to satisfy the foundation requirements for admission of the statements—surprise or unexpected hostility. That the prosecution intended that the jury use the statements as substantive evidence is incontrovertible. *See, following discussion on the prosecution's use of statements.* The prosecution's primary purpose in calling the witnesses and introducing the prior inconsistent statements was to put inadmissible hearsay before the jury in the guise of impeachment evidence and to do it in such a way that the jury would be so confused that they could not sort through which evidence was substantive and which merely impeaching. The admission of the statements was reversible error.

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOWING THE PROSECUTION TO USE THE IMPEACHING STATEMENTS AS SUBSTANTIVE EVIDENCE.

Even if the prior inconsistent statements had been admissible to impeach the witnesses, the prosecution improperly used them as substantive evidence or in the case of the witnesses' denials that they had been threatened or bought off by King or "his people" to show that King was a bad person; thereby also violating M.R.E. Rules 403 and 404.[15] By now it should be abundantly clear that neither the use of the statements as substantive evidence or as evidence of bad character is permissible. *E.g., Moore v. State*, 755 So.2d 1276 (Miss. App. 2000) "rule

seems to be universal that the impeaching testimony does not establish or in any way tend to establish the truth of the matters contained in the court-of-court contradictory statement"; *Brown v. State, supra; Moffett v. State,* 456 So.2d at 719 [firmly embedded in hornbook and case law that unsworn prior inconsistent statements are admissible only for impeachment]; *Davis v. State,* 431 So.2d 468, 473 (Miss. 1983) [admissible only to impeach]; *Sims v. State*, 313 So.2d 388, 391 (Miss. 1975) [only for impeachment].

As for the prosecutors in this case, this Court has chastised them before for using non-party witness inconsistent statements as substantive evidence and for other misconduct. *Bailey v. State,* 952 So.2d 225 (Miss. App. 2006), *cert. denied* 951 So.2d 563 (Miss. 2007).

The trial judge and prosecution seemed somewhat confused over what the meaning of the principle that prior inconsistent statement were not substantive evidence of guilt.[16] Tr. 68, 1054-1084. The prosecution argued that this meant that the actual piece of paper on which the statement was written was not admissible although the witness could testify about the statement and it could be used as evidence of guilt.[17] *Id.*

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[15] *United States v. Fortenberry*, 860 F.2d 628 (5th Cir. 1988) [Even if evidence was properly admitted for some purposes, argument suggesting use for improper reasons was defective].

[16] In an extensive argument to the court, the prosecution argued that the fact that the witnesses testified to their prior inconsistent statements rather than having the written prior statements admitted meant that the testimony was not hearsay and that the prior statements were admissible as substantive evidence. Tr. 70. The prosecution also misrepresented to the judge that the fact that the officers did not testify to the statements meant that the statements were admissible as nonhearsay substantive evidence. In fact, the police officers did give the substance of some of the witnesses' out of court statements. *See,* Testimony of Keith Denson Tr. 364-409; Testimony of Ricky Richardson Tr. 927-984; Tr. 1054-84.

[17] According to the prosecution, what was condemned in Moffett was allowing the written statements into evidence. Tr. 1060. Later the prosecutor argued "[w]e never introduced the pretrial statement into evidence, and substantive evidence is something you can put your hand on, which is a piece of paper which goes to the substance. I agree. We never introduced them." Tr. 1064. In support of its argument, the state argued that it would be a "pious fraud" to give an instruction telling the jury they could consider the evidence only for impeachment. Tr. 1069. "He [Knott] wants you to let them hear the testimony and then instruct them not to consider it except for impeachment. Has been called by one scholar a pious fraud . . . and that's exactly what he wants you to do here. That's what that instruction [D-9] says." Tr. 1069. He's trying to get you to

That the prosecution called the witnesses for the purpose of using their prior inconsistent statements as substantive evidence cannot be doubted—even the prosecution admitted that its purpose was to have the jury use the statements substantively: By Rebecca Wooten Mansell: "Your Honor, **every statement** that these witnesses made are [sic] substantive evidence . . . [emphasis added]. Supp. Tr. 78.

Notwithstanding the judge's recognition of the limitations on the use of the prior statements, he nevertheless allowed the prosecution to use them as substantive evidence despite repeated attempts by King's attorney to keep them from being so used. The prosecution's misuse was thus reinforced by the erroneous rulings of the Court overruling Knott's objections to the admission of the hearsay statements and their use as substantive evidence of guilt. *See, United States v. Phillips,* 527 F.2d 1021, 1022-23 which held that a misstatement of law where the misstatement of law is "'. . . prejudicially erroneous where the jury is misinformed concerning what it can consider on the critical issue of a case **and that misinformation is reinforced by the court after the defendant challenges its accuracy**.'" [quoting *United States v. Bohle*, 445 F.2d 54, 71 (7th Cir. 1971)]. *See,* Proposition III for how the instructions contributed to the problem.

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instruct the jury that, okay, you heard some testimony, and it might have impeached that witness, but now I want to instruct you on it that you can't even consider that. That's what he's doing." Tr. 1070. Once the Court decided to give D-9, the prosecution said "if you are going to give that instruction, at least give an instruction that has been approved by the Mississippi Supreme Court in *Wilkins v. State*, supra., the case Knott had previously cited as authority for approving a prior inconsistent statement instruction and which the state had argued did not! Tr. 1076-79. The state's objection led to the granting of the state's proposed instruction which omitted language telling the jury that it could not use the statements as substantive evidence of guilt. The approval of the state's instruction which omitted that language is what allowed the prosecutor to successfully challenge King's closing argument that the jury should not use the prior inconsistent statements as evidence of his guilt. Tr. 1005-06.

To cite a few examples where the prosecution used the statements as substantive evidence,[18] in his opening statement the prosecutor told the jury that evidence from the witnesses **and** their statements would show that Sean King was the shooter. Tr. 300-302. Most particularly, in the opening statement the prosecutor said it would prove that Derrick Fields saw King with a gun in his hand pointing it at Brooks, a statement which is in addition objectionable as not supported by the evidence. Tr. 300. The prosecution continued throughout opening to relate what the prior inconsistent statements would show as if the jury could use the statements as substantive evidence. For example, he implied that the jury could find King guilty if it found that the prior inconsistent statements were true: "You are going to have to determine "which story is the truth [referring to the trial testimony vs. the statements]." Tr. 302.

The prosecution likewise made arguments that the statements could be used as evidence of guilt throughout the trial, during arguments on objections and again in closing argument. Where the witnesses in their prior statements did not specifically identify King as the shooter, the prosecution argued this failure to identify King as the shooter showed his guilt. This argument was based on the prosecution's theory that the witnesses who did not directly incriminate King either at trial or in their statements failed to do so because they were too scared.

To cite a few of the more egregious examples in closing: "Is there any doubt in your mind that these people are scared of Sean King?—an obvious reference to Russell's statement to police that he was scared (and their opinions that the witnesses were scared of King)—which asks jurors to take the out of court statement as true. Tr. 1091. "Rodney Clark is scared to testify that King had told him, "Yeah I dropped that bitch, but I was trying to get Monkey." Tr. 1092. Ironically, here what Clark refused to testify to was never testified to so this argument is also not

[18] Virtually all of the state's opening statement and closing arguments and a good portion of its arguments made to the court on objections are designed to imply that jurors should use the prior inconsistent statements as substantive evidence or bad character evidence, or both.

supported by evidence. Nonetheless, the prosecution continued: "What was it that he didn't want to admit he heard Sean King say? And I'm going to quote it. "Yeah, I dropped that bitch, but I was trying to get Monkey." Tr. 1091-92.

The prosecution in closing argument repeatedly told the jury that the prior inconsistent statements were evidence of guilt: "All the witnesses were consistent that the black man grabbed Andrew and said, 'Who did it? Who did it? Who killed **my uncle**?'[19] And what did QP say, 'I don't know, man. I don't know, man. I dropped Monkey off [emphasis added].'" Tr. 1092. The prosecution then asked the jury to infer that King was the shooter because "Who else is going to ask Andrew Brooks questions like that." Tr. 1092.

The prosecution then asked the jury to find that the out of court statements were truthful because "They would not come to court because they were scared of him, Sean King." Tr. 1093. Rodney Clark was "scared." Tr. 1098. "Is there any doubt that these people are scared of Sean King?" Tr. 1090. "Rodney Clark. Did not want to get on the stand. How many times did he turn to the Judge and say, please, Judge, this is my life . . . my family's life." Tr. 1091. "Who is he afraid of?" Tr. 1126.

"What were the consistent things they said? Black Expedition. The person asking Q.P. about who killed my – who killed Omar. Tell me who did it." Tr. 1100.

"[T]hey all changed their statements, but when they finally gave the truthful version, **they *all* said it was Sean King**. Derrick Fields said Sean King. Willie McCarty said Sean King. Clifton Summers [emphasis added]." Tr. 1101. Continuing untruthfully about what **all** the

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[19] Importantly, no witness ever testified or admitted saying that the shooter said anything about killing "my uncle." Rather they testified that the shooter asked who killed "him" or who killed "Omar." This is an example of a particularly egregious misstatement of the evidence by the prosecution designed to have the jury rely not only on unsworn statements to draw the conclusion that someone asked who shot him, but to draw the conclusion that the witnesses had given prior statements saying the shooter said "who killed my uncle" making it more likely that

witnesses had said: That the person who killed Q.P. "just walked out of James Russell's upholstery shop?"[20] Tr. 1100. Later the prosecutor said Fields in his prior statement said when asked by Russell who killed Brooks: "Them niggers that just left your shop." King's objection to lack of evidentiary support was overruled. Actually what Fields said was that he told Russell "They were **on your lot**, that nigger that just left out of here [emphasis added]." Tr. 575.

In flagrant disregard of the rule that the jury could not use the prior statements as truth, the prosecutor told the jury: "You decide who was telling the truth and **what's the truth**. Each one of those stories, those statements that Mr. Knott wants you to ignore, they fit. They make sense. There's a reason they make sense because **they're the truth**. And you alone decide the truth, and I'm perfectly satisfied with that. You decide what you want to decide. **I'm not going to tell you to disregard anything** [emphasis added]." Tr. 1134. Clearly, the prosecution again was telling the jury not to disregard the prior statements in deciding what happened in order to convict King.

Later in argument over whether the court should grant a limiting instruction on prior inconsistent statements, the prosecution made it crystal clear in response to the court's question to the state if it was contending that a prior inconsistent, unsworn statement is evidence when it responded that "[t]he State is contending that the testimony given by the witnesses from the stand, what the jury believes they actually said is evidence." Tr. 1057. There can be no doubt that prior case law condemns the use of prior inconsistent statements introduced pursuant to Rule

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the shooter was King—whose uncle had been shot. Later the prosecutor sought to reinforce this connection by again arguing that the witnesses said: "Tell me who shot my uncle." Tr. 1095.

[20] It is simply not true that all the witnesses testified that the person came out of the shop. Rather the witnesses said he came from the area of Russell's shop. Tr. 575. Moreover, Derrick Fields never identified King as the shooter. Rather he identified someone else. Tr. 579, 608, 730. Furthermore, Russell did not say he saw King there at the time of the shooting. He saw him there 10 to 20 minutes prior to that time. Tr. 479. Moreover, Clark, who was not even present, certainly never identified King as the shooter because he was not even present. McCarty likewise

607, M.R.E., as substantive evidence. The state, as the recipient of the error, has the burden of demonstrating that the error was harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18, 24 (1967). Since the other evidence in the case is impossibly weak, the prosecution cannot show that the error was harmless beyond a reasonable doubt or did not have a substantial effect on the deliberations of the jury.

III. THE TRIAL COURT COMMITTED REVERISBLE ERROR IN DENYING KING'S REQUEST FOR A JURY INSTRUCTION AT THE TIME THE IMPEACHING STATEMENTS WERE ADMITTED.

The Mississippi Supreme Court reviews jury instructions as a whole, with no one instruction to be read alone or taken out of context. A defendant is entitled to have jury instruction given which present his theory of the case—in this case that the statements could not be used as substantive evidence of guilt. *Thomas v. State,* 818 So.2d 335, 349 (Miss. 2002).

King requested that the trial judge instruct on the proper use of prior inconsistent statements at the time they were admitted. The judge declined to do so. Tr. 53. He did give an instruction at the end of trial. Even that instruction, however, created the problem that jurors would misuse the evidence.

King requested an instruction (D-9) which would have instructed the jury:

> The Court instructs the jury that if a witness recants, under oath a prior unsworn statement, that witness's credibility may then be impeached by the use of that prior inconsistent unsworn statement. However, that prior inconsistent unsworn statement cannot be considered by the jury as evidence of guilt against the Defendant. The prior inconsistent unsworn statement can **only** be used to show lack of credibility. It is not evidence against the Defendant [emphasis added].

Supp. R. filed 6/19/2007, Exhibit 3. The prosecution, however, objected to the instruction at first arguing that no instruction should be given on prior inconsistent statements because it would be an improper "comment on the evidence." Tr. 1054-55. Then, after the court rejected that

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never identified King as the shooter, either in a statement or at trial. Thus, in addition to asking the jury to misuse the evidence substantively, the argument lacks evidentiary support.

argument, the state continued to object to the instruction—this time arguing that any instruction should not include the last two sentences which would have told the jury unequivocally that the statements went only to credibility and could not be used as evidence against the Defendant.[21] Tr. 1054-84. Tr. 1054-55.

Based on the prosecution's arguments, the trial judge instead gave the prosecution's instruction which stated:

> You have heard evidence that some of the witnesses made statements prior to trial that may be inconsistent with the witnesses' testimony at this trial. If you believe that inconsistent statements were made, you may consider the inconsistency in evaluating the believability of the witnesses' testimony. You may not, however, consider the prior statements as evidence of the truth of the matters contained in the prior statement.[22]

Instruction S-5, R. I/73.

The judge relying on the prosecution's claims that the defense instruction was incorrect later sustained objections to King's closing argument when King attempted to tell the jury that the statements were not admissible to show King was guilty. Despite giving the S-5 then, the jury was left with the distinct impression that the statements could in fact be used in determining King's guilt.

For example, Knott argued that the out of court statements could not be considered for the truth. The prosecution objected and stated "I object. **That is not what the instruction says.** He needs to read the instruction as it is, and **it does not say it cannot be used as evidence**

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[21] Ironically, in a feat of illogic typical of the prosecution, the prosecutor's argument that the court should give S-5 was based on a claim that it was correct **because it had been approved** in *Wilkins v. State, supra.*

[22] In *Powell v. State,* 806 So.2d 1069 (Miss. 2001), the defendant asked for this identically worded instruction which was denied by the trial court on the basis that it was an improper comment on the evidence. In that case, the Court held that because "we have since retreated from this position in numerous cases holding denial of instructions such as this one to be reversible error. [citations omitted]." The Court overruled the case which held that prior inconsistent statement instructions "such as [the requested one] to be impermissible comments on the

of guilt [emphasis added]." "**It does not say the guilt**. It does say as you read it is correct." Tr. 1105 [emphasis added]. The judge agreed with the prosecutor. Knott then argued: "The out of court statements cannot be considered as evidence of the truth." The prosecution again objected: "He just said it again. He said the out of court **statements cannot be considered as evidence of the truth** period. **That's not what it says**, Your Honor. He left off half of the instruction [emphasis added]." The trial court instructed Knott to "just read the instruction." Tr. 1105.

Finally, the judge allowed the prosecution to tell the jury that it could use the statements however it wanted--thereby erroneously implying that they were admissible to show King's guilt. *See, Winchester v. State*, 163 Miss. 462, 142 So. 454 (1932) [Cannot tell the jury what the law is other than as contained in instructions]; *Pearson v. State*, 254 Miss. 275, 179 So.2d 792 (1965) [Prosecutor should not instruct jury and should not disparage a lawful defense]. A single misstatement of the law by the prosecutor during closing arguments can arise to the level of reversible error particularly where the error went to a vital element of the defense or the crime. *United States v. Bohle,* 445 F.2d 54, 71 (7th Cir. 1971), *overruled on other grounds, United States v. Lawson*, 653 F.2d 299, 301 (7th Cir. 1981). Tr. 302, 1134.

Rule 105, M.R.E. states:

> When evidence which is admissible as to one part or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, **shall** restrict the evidence to its proper scope and instruct the jury accordingly [emphasis added].

As this and other courts have observed, upon request, the trial judge should give a cautionary instruction when such evidence is admitted. *Id. See, Brown v. State,* 755 So.2d at 1280 [court could give an instruction on limited application of the evidence]; *Harrison v. State,* 534 So.2d 175, 179 (Miss. 1988) [trial judge could *sua sponte* instruct]; *Bailey v. State,* 952 So.2d at 238.

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evidence." *Id.* at 1080. Since that case was decided in 2001, the state's argument in 2004 that such an instruction constituted an improper comment was misplaced—to say the least.

However, at the same time, courts have observed that it is unlikely that the jury is able to compartmentalize evidence limiting the use of prior inconsistent statements to impeachment regardless of how well they are instructed. *Harrison v. State,* at 179; *Flowers v. State,* 733 So.2d at 327. For example, in *Moffet,* 456 So.2d at 720, although the trial judge instructed on the proper use, the court opined that the error was not cured. The Fifth Circuit has said, "we have acknowledged, as have many others, that the legal distinction between using a statement to destroy credibility and to establish the stated fact 'is a fine one for the lay mind to draw.' *Dowell, Inc. v. Jowers, 5 Cir.,* 1948, 166 F.2d 214, 219, 2 A.L.R.2d 442, certiorari denied 334 U.S. 832, 68 S.Ct. 1346, 92 L.Ed. 1759. " *Slade v. United States,* 267 F.2d 834, 839 (5th Cir. 1959).

Where the prosecution argues that the evidence should be used substantively, this Court has noted that even a well-instructed jury would "have had a difficult chore distinguishing between the substantive and impeachment evidence." *Brown v. State,* 755 So.2d at 341. *See also, discussion of the history of Rule 607 in Wilkins v. State, supra* at 319 [permitting a jury to hear such testimony and then instructing it not to consider it except for "impeachment" has been called by one scholar "a pious fraud." Morgan, *Hearsay Dangers and the Application of the Hearsay Concept,* 62 Harv.L.Rev. 177, 193 (1948)].

The point in this case, however, is that jurors were neither effectively nor coherently instructed on the proper use of the evidence. Even though S-5, given at the end of the case, is technically correct insofar as it goes, that the trial court effectively negated the instruction when it sustained the prosecution's objections to King's closing argument. This is particularly true because the prosecution told the jury it could consider whatever it wanted, including the prior statements, as evidence of guilt. What happened then is that the court allowed the prosecution to use an arguably **incomplete** instruction S-5 to argue an **incorrect** version of the law.

As this Court has repeatedly held, it is ultimately the duty of the trial judge to ensure that the jury is properly instructed on the law on important issues in the case. *See, Harper v. State,* 478 So.2d 1017, 1023 (Miss. 1985). The Court did not do so here, and that error is reversible because the jury used the prior inconsistent statements to determine guilt. By not instructing on a critical issue, King was deprived of his constitutional rights to present a defense and was denied a fair trial, requiring reversal of his conviction.[23]

IV. OTHER PROSECUTORIAL MISCONDUCT EITHER INDIVIDUALL OR CUMULATIVELY REQUIRES REVERSAL BECAUSE KING WAS DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS, A FAIR TRIAL AND THE RIGHT TO PRESENT AND DEFENSE AND CONFRONT WITNESSES.

The test for prosecutorial misconduct is "whether the natural and probable effect of the improper argument [or conduct] of the prosecuting attorney is to create an unjust prejudice against the accused as to result in a decision influenced by the prejudice so created." *Craft v. State*, 226 Miss. 426, 84 So.2d 531, 535 (1956). King submits the test is met with each and every instance of misconduct he has outlined in this case. While King asserts the individual instances of misconduct warrant reversal, the errors are more than sufficient for reversal when considered cumulatively. *Smith v. State,* 457 So.2d 327 (Miss. 1984); *Griffin v. State*, 504 So.2d 186 (Miss. 1987). It cannot "be said with confidence that the inflammatory material had no harmful effect on the jury" and that King's due process rights to a fair trial guaranteed by the state and federal constitutions were not violated. *Smith*, at 336, quoting *Coleman v. State*, 23 So.2d 404 (Miss. 1945). *See also,* previous footnote.

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[23] The Sixth and Fourteenth Amendments of the United States Constitution and Art. 3, §§14, 26 and 31 of the Mississippi Constitution guarantee a defendant the right to due process, a fair trial and the right to present a defense through witnesses or cross-examination. An accused's right to "establish a defense" is a "fundamental element of due process." *Washington v. Texas,* 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).

The case is replete with prosecutorial misconduct in addition to that surrounding the admission and argument on prior inconsistent statements. Most of the misconduct was objected to; however, the misconduct was so persistent and egregious that this Court, as it has done in the past, should excuse any failure to object and find reversible error based either on individual errors or the cumulative misconduct of the prosecutor. *Smith v. State,* 457 So.2d at 333-34 ["In cases where an appellant cites numerous instances of improper and prejudicial conduct by the prosecutor, this Court has not been constrained from considering the merits of the alleged prejudice by the fact that objections were made and sustained, or that no objections were made"].

First of all, the prosecution repeatedly and consistently misrepresented the facts and law to the trial judge. The prosecution's objections to giving an instruction on the use of the prior inconsistent statements is one of the most egregious examples. At first, the prosecution argued that it was improper to give such an instruction at all because it was a comment on the evidence. At the time it made the argument, the prosecution knew that this Court had approved the giving of such an instruction and later used the case it had in its possession to argue that its version (detailed in that case) was the appropriate one, not the one submitted by the defense. *See,* discussion of the facts and law in Proposition I, *supra.*

Most egregious of all in terms of disingenuous legal arguments, however, was the prosecution's claim that the prior inconsistent statements had not been admitted as substantive evidence because the written document had not been entered into evidence. Either the prosecution is incapable of reading and understanding case law established for over a hundred years in this and other jurisdictions on the issue, or the prosecution deliberately misrepresented the law. *Id.*

The prosecution similarly misstated the evidence. "But go back there and think about what **each one** of them said. There was a black Expedition with an Alcorn tag [emphasis

added]." Tr. 1099. "One vehicle in Hinds County in 2001 with ... an Alcorn tag on a black Expedition."[24] Tr. 1100. "They **all** said it was Sean King, Derrick Fields said Sean King, Willie McCarty said Sean King [emphasis added]." Tr. 1101. James Fields said, "'who killed him. . . . 'Them niggers that just left your shop.'"[25] Tr. 1131. Fields saw King with a gun pointed at Brooks. Tr. 300. *See,* further examples in discussion of witnesses' statements in Proposition I.

The prosecution repeatedly interjected inflammatory inadmissible hearsay into the proceedings. Particularly egregious was the examination of James Russell, detailed at pp. of Proposition I in which the prosecution sought to show through prior inconsistent statements that King had threatened Russell. Tr. 460-68, 484, 507-08.

Similarly egregious was the introduction of extraneous evidence through Detective Denson that Russell told him King had threatened him. Tr. 369, Supp. R. Bench Conferences/35-39. Since even the prosecution admitted that Russell had never changed his statements, there was no need at all to impeach Russell with prior inconsistent statements showing he was scared of King. *Moffett, supra.* The evidence had no relevance to anything at issue, and so was irrelevant. Rule 403, M.R.E. Moreover, the prosecution's use of the evidence to invite the jury to use the evidence to show King's guilt violated the proscription of M.R.E., Rule 404 against the misuse of character evidence as substantive evidence of guilt. Inflammatory evidence of other bad acts by an accused is presumed harmful. *Tudor v. State*, 299 So.2d 682 (Miss.1974), and it is reversible error to introduce extraneous and prejudicial matters before a jury. *McDonald v. State*, 285 So.2d 177 (Miss.1973).

The trial judge, therefore, should have sustained King's motion in limine and objections to this evidence because the evidence was more prejudicial than probative. Tr. 116,

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[24] Actually, the evidence showed that only one such vehicle had been registered in Hinds County, not that there was only one such vehicle in Hinds County. No search was ever done for Black Expeditions with Alcorn tags registered in other counties. Tr. 1003.

289. Moreover, the prosecution misused the evidence in argument as bad character evidence and substantive evidence of guilt. *See,* Propositions I and II.

Other examples of the interjection of prejudicial hearsay include when the prosecution asked Willie McCarty, "Word on the street is that you got some money from Sean. Have you?"—the implication being he had been bribed to say King was not there. King's objection was overruled. Tr. 430-31. McCarty answered no, but the damage was done because the jury no doubt inferred that the prosecutor had special knowledge of the truth of the question. *Flowers v. State,* 773 So.2d at 329.

Similarly, the prosecution elicited a statement from McCarty that he told the police that he had "heard on the street" that Clifton Summers had received money from King. Tr. 431. The prosecutor asked Derrick Fields: "Isn't it true that you told Detective Richardson that you had talked to Clifton Summers last Wednesday?" After an extensive colloquy, the judge overruled King's objection to hearsay, and Fields testified: "I asked him why did –why did that boy shoot Q.P." Tr. 595-97. The prosecutor elicited an affirmative response from Fields to the question "did you not tell Detective Richardson that Clifton Summers had some new shoes on immediately following the shooting and that he did not need money lately. Tr. 597. The prosecutor got Fields to admit he had told Stanley Alexander in an out of court conversation that he did not want to come to court to testify because he was scared. Tr. 601.

The prosecution asked Fields if it was true that he "kicked [the subpoena out the door because you said you weren't coming, didn't you" when "I put it in at the door at your feet?" Tr. 603. The prosecution then engaged in an argumentative colloquy with Fields about messages he left on Alexander's answer machine and with his secretary. Tr. 605-606. The prosecution then continued with another colloquy about what he and Fields said when Alexander

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[25] Fields testimony was "They were on your lot, that niger that just left out of here." Tr. 580.

delivered the subpoena to him." Tr. 606-08. The prosecution later argued that the jury should convict King because all the witnesses lied because they were scared of King—the implication being in the case of Fields that he did not implicate King because he was scared. Tr. 1124.

As King has discussed previously, the prosecutor repeatedly acted as an unsworn witness introducing hearsay regarding conversations the prosecutor and others had with witnesses. In addition to the other examples already mentioned, Alexander asked Summers "Did you tell your sister that Sean King was murdered because --- Sean King had murdered Q.P. because of his Uncle Omar's murder? Summers denied saying that. Tr. 659. Where the prosecutor asks questions without subsequently introducing evidence to contradict the witness' denial, he has acted improperly as an unsworn witness and has also dispensed with the burden of proof beyond a reasonable doubt in violation of King's state and federal constitutional rights to due process of law and to confront witnesses. *United States v. Puco, supra*; *Walker v. State, supra; Flowers v. State, supra.*

The prosecution repeatedly introduced hearsay evidence of alleged misconduct by Sean King and others supposedly acting on his behalf. Moreover, the prosecution asked the jury to find King guilty because of other bad acts and misconduct and because of the people he knew. For example, the prosecution argued "I think everybody we put on were convicted felons almost. These were people that knew Sean King. His friends. They knew who Sean King was." Tr. 1090. "They are dealing with people like Sean King." Tr. 1091.

The prosecution repeatedly disparaged the character of the defense attorney—on some occasions **actually accusing defense counsel of suborning perjury**! ["he didn't want to get into the other two people" (Tr. 405) [objection sustained]; "he's trying to dance around the issue"; (Tr. 406); Supp. Tr. 80; Knott is trying to get Russell to commit perjury. "I'm sure Mr. Knott is not concerned with that." (Tr. 488); Mr. Knott "is asking him to perjure himself. He's

already said what he thought. Now if he gets up there and asks him to perjure himself and make a more definite statement, that's fine with me. I'll be glad to prosecute him." (Tr. 625); "I need to get a point of clarification because right now he's leading him down a road very close to perjury. You're asking him did he ever say it on one of his statements because I don't want this young man to make a statement he's going to regret for the next ten years." (Tr. 628); "Now Mr. Knott is asking this man to perjure himself." (Tr. 757).

Throughout closing argument, implied that Knott in interviewing witnesses and obtaining statements at the very least had acted unethically. "Isn't that amazing" that after the defense attorney goes and starts interviewing witnesses in 2004, everything starts changing, and we start getting flooded with new statements." Tr. 1101-02. "Those statements stayed the same for three years, three and a half years actually, until guess who went to go visit them. Ya'll look at Sanford Knott. And who is he? The defense attorney for Sean King." *Id.* "And as much as Mr. Knott wants to change that around . . . " *Id.* "He looks at the statement, and then all of a sudden during . . . cross yesterday some drugs come up from somewhere." Tr. 1128. "The defense tried to get Russell to say, no, he wasn't there or maybe you're mistaken about the day he was there."[26] Tr. 1130.

In *Bailey v. State,* 952 So.2d 225 (Miss. 2006), *cert. denied* 951 So.2d 563 (Miss. 2007), the prosecution, again the same two prosecutors as in this case, said "[t]he interesting thing [] that you need to remember, James Pickens gave his statement before . . . the defense attorney, pulled him out of his jail cell and put him in the same room as the defendant. Does that sound a little odd to you. It does to me. *** then, he the defense counsel gives him the

[26] This statement is in no way supported by the evidence. Tr. 491. What Knott was trying to do was to clarify the date on which Russell made his statement, not to get him to say King was not there, and the prosecution knew this. Tr. 491.

defendant's statement. Let's kind of read over my guy's statement because you know, it kind of needs to—I need you to—[emphasis in original]. *Id.* at 234.

In *Bailey,* the defense argued that the prosecutor's statement implicitly suggested that defense counsel was trying to suborn perjury. The Court agreed. In that case, however, the court found that it was not reversible because the trial judge sustained the defense objection and instructed the jury to disregard the statements of the prosecution. The Court also found that the evidence of Bailey's guilt was so substantial that the court could not say that the comment standing alone was sufficient to influence the verdict. *Id.*[27]

By contrast, however, in *Edwards v. State,* 737 So.2d 275, 300-01 (Miss. 1999), the Court in a case where the disparagement of the defense was far less than here, the Court reversed because the prosecutor argued that it "boggled the mind" how anybody could stand up and argue to the jury with a straight face that the state had not proved its case. *Id. See also, United States v. Carter,* 236 F.3d 777 (6th Cir. 2001) [prosecutor committed plain error in arguing defense counsel lied about witnesses' testimony and by misstating testimony of key witness]. This Court should reversed because the statements of the prosecution were not supported by the evidence and affected a critical issue of the case—the prior inconsistent statements.

Obviously, in this case the prosecution's explicit accusations of subornation of perjury against defense counsel and the suggestions that counsel had acted unethically in interviewing witnesses are far more egregious than in any of the foregoing cases.

The prosecutor further elicited an inadmissible opinion on the guilt of the accused from a police officer:

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[27] In *Davis v. State,* 2006 WL 3593210 at *4 noting that this is the third time within less than a year alleging misconduct against the same prosecutor's office, the Court did not find the two attacks on defense counsel's character to be so egregious as to warrant reversal. However, it did caution the prosecution to "stick to the evidence [emphasis in original]." *Id.*

> Q. [To Detective Richardson] Is there any doubt in your mind that you arrested the right person for the murder of Andrew Brooks?
> A.No sir. No doubt whatsoever. Tr. 946

In *Cooper v. Sowders*, 837 F.2d 284, 286-288 (6th Cir. 1988), a police officer was allowed to opine that the defendant was guilty. In finding that the admission of the opinion violated the defendant's due process right to a fair trial, the Court explained that there was

> nothing scientific, technical or specialized about the officer's opinion. Nor was there anything in the opinion that was outside the scope of common knowledge or experience as required by the law of evidence. Furthermore, the testimony did not aid the jury in understanding the evidence. What the testimony did was give the jury an insider's opinion on who committed the crime. In other words, the officer's 'expert' testimony invaded the province of the jury. Thus, the court's comment was highly prejudicial and "was tantamount to instructing the jury on this critical subject."

Id. at 288. The same is true in this case. The admission of the opinion violated King's constitutional due process right to a fair trial because the prosecution began its final closing with the statement "First of all, the last thing Detective Richardson said to me before he left that stand was I asked him is there any doubt in your mind that you guys arrested the right man, and he said, no doubt in my mind." In the follow up remark, the prosecutor used the opinion to express his own opinion that "No, there was no doubt that he arrested the right man." Tr. 1112. A prosecutor may not express his personal opinion of the guilt of the accused.

Because the misconduct implicates the accused's constitutional rights, the burden is on the state to show they were harmless beyond a reasonable doubt. *Chapman v. California*386 U.S. 18, 24 (1967). The evidence in this case was far from overwhelming. Even if each error is not reversible standing alone, this Court should view the prosecution's misconduct cumulatively and reverse this case.

V. THE PROSECUTION COMMITTED PLAIN ERROR IN COMMENTING ON KING'S FAILURE TO CALL HIS WIFE AS A WITNESS THEREBY COMMENTING ON THE ACCUSED'S SILENCE.

Again, this is not the first occasion this Court has had to chastise this prosecution's office for making comments on the accused's failure to testify. For example, in *Davis v. State,* 2006 WL 3593210, *5, this Court reversed because the prosecution commented on the accused's failure to take the stand. In that case, during the opening statement, the prosecutor stated "[t]he interesting thing is once Douvell, he finally turns himself in to his grandmother, and he gives a big picture of where all he's been. And then the thing that he forgets to tell you is he gets himself on I-55." The Court held that the argument about what Davis "forgot" to say was an impermissible comment on his right not to testify. The Court also held that further comment about what the defendant "did not say" to police was an impermissible comment on the accused's Fifth Amendment privilege against self-incrimination. *Id.*

In the instant case, the prosecution made the following remarks in closing argument: "isn't that interesting" that Detective Richardson went to talk to King's wife who refused to talk to him about a murder investigation. Tr. 1100. "He [Richardson] talked about La Tonya King driving it all that week until he mentioned murder. **Did she take the stand**? I may have dozed off, but **I don't recall her sitting in this stand and saying anything. His wife didn't testify in his behalf. That's pretty big.**" Tr. 1133.

As early as 1885, this Court held that it is reversible error to comment on the failure of the defendant to call his wife to testify where the evidence is close. *Johnson v. State,* 63 Miss. 313, 1885 WL 3071 (Miss. 1885). *Accord, Simpson v. State,* 497 So.2d 424, 428 (Miss. 1986); *Cole v. State,* 75 Miss. 142, 21 So. 706 (Miss. 1897). Such comment violates not only the marital privilege, but also implicates the Fifth Amendment privilege against comments on the defendant's failure to testify because it causes him "to make explanations for not introducing her . . . . *Id.* at 706. Because the prosecution suggested that the defense failure to call Mrs. King as a ground for conviction, the case must be reversed. Comments on a defendant's failure to testify

are reversible regardless of the overwhelming weight of the evidence. *Livingston v. State,* 525 So.2d 1300, 1307 (Miss. 1988); *Davis v. State,* 2006 WL 3593210 at *5.

VI. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN EXCLUDING EVIDENCE SHOWING THE BIAS OF THE WITNESSES THEREBY DENYING KING HIS CONSTITUTIONAL RIGHTS TO CONFRONTATION AND CROSS-EXAMINATION, RIGHT TO PRESENET A DEFENSE AND RIGHT TO A FAIR TRIAL.

At trial, the prosecution objected to and successfully kept King from introducing evidence that at the time the witnesses made statements allegedly incriminating King, some had pending charges and others faced the possibility that they might be charged with regard to the attempt to sell the stolen truck parts. Tr. 113, 350, 394. Moreover, at the time of the trial, some faced charges. Tr. 394. 520, 578, 638, 716.

In *Davis v. State,* 2006 WL 3593210, this Court reversed because the trial court, at the behest of the same prosecutor's office as here, excluded evidence of a prosecution witness' perception about the prosecution's ability to dismiss or reduce pending charges. In doing so, the Court pointed out what is again hornbook law and that is that due process, the confrontation clause and M.R.E. 616 provide for "[w]ide open cross-examination of any matter bearing upon the credibility of the witness . . . including the possible interest, bias, or prejudice of the witness." *Id.* at *2. "Not only is this right secured by our rules of evidence . . . it is a function of the confrontation clauses of federal and state constitutions [citation and internal quotation marks omitted]." *Id.*

That a witness may believe that the prosecution has the ability to influence a pending case, has the ability to bring a case, or has the ability to reduce his sentence is plainly admissible on the question of whether statements made incriminating the accused may have been made to curry favor with police. *Davis* and cases cited at *2.

The United States Supreme Court has long held that an accused's right to "establish a

defense" is a "fundamental element of due process." *Washington v. Texas,* 388 U.S. at 19. Clearly, cross-examination concerning the partiality of a witness is always relevant. *Davis v. Alaska,* 415 U.S. 308, 316 (1974). The "permissible scope of exploration on cross-examination is not curtailed by the absence of explicit promises of leniency, for the defense may attempt to show government 'conduct which might have led a witness to believe that this prospects for lenient treatment by the government depended on his degree of his cooperation.'" *United States v. Iverson,* 637 F.2d 799, 804, 205 U.S. App.D.C. 253, 258 (D.C. Cir. 1980). *See, United States v. Croucher,* 532 F.2d 1042, 1045-46 (5th Cir. 1976) [nature of the witness's relationship with both the state and federal law enforcement officials in connection with his participation in the case and his past arrests by both authorities were relevant to his credibility as a witness].

Because the error impacts a number of King's constitutional rights, state, as the recipient of the error, has the burden of demonstrating that the error was harmless beyond a reasonable doubt. *Chapman v. California, supra.* The state cannot make such a showing because the evidence is otherwise weak. As in *Davis,* the Court committed reversible error in excluding the evidence.

VII. THE EVIDENCE IS SO WEAK AND UNRELIABLE THAT THE COURT SHOULD REVERSE THE CONVICTION.

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 and every 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, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Matula v. State,* 220 So.2d 833, 836 (Miss. 1969).

The Court reviews the denial of a motion for new trial under an abuse of discretion standard. However, as with other issues, where the decision to deny a motion is based on an error

of law, this Court employs a broader *de novo* standard of review. *Jones v. State, supra.* Because the trial court committed numerous errors in admitting and in the use of the prior inconsistent statements, among other errors, the Court should employ a *de novo* standard although even under an abuse of discretion standard, the evidence is so unreliable it should not be allowed to stand.

This case is highly unusual in that the only direct evidence adduced by the State showing King shot Brooks came from an unsworn prior inconsistent statement of Summers. At trial, Summers denied that he saw King shoot Brooks. The rest of the evidence, even that coming from prior inconsistent statements, fails to show King's guilt because at best it puts him, along with numerous other people, near the crime scene shortly before the crime and shows that he may or may not have had a motive to kill Brooks. Summer's evidence is so fraught with inconsistencies this Court should hold that it is so inherently unreliable that the case should be reversed and rendered. Alternatively, the Court should grant a new trial because the verdict was clearly the product of improper passion and prejudice.

Summers described the shooter as wearing a baseball cap, a sweater and a long pair of jeans. Tr. 787. Fields described him otherwise shortly after the shooting as being "five seven to five nine, 185 pounds, short haircut, clean face, black windbreaker pants, gray sweatshirt with a hood with black letters and gray trim with gold letters on the sweatshirt. He had one big, gold looking diamond ring on his right middle finger." Tr. 616.

At the time he made the incriminating out of court statement, Summers was sixteen and in addition to being threatened with prosecution as an accessory if he was not "truthful" about King, he was subject to prosecution arising out of his attempt to sell stolen property prior to the shooting although the trial judge precluded this latter fact from going before the jury. Tr. 638. In addition, at trial, Summers initially denied seeing the shooter at all and only admitted to seeing the shooter after the prosecution threatened him with drug and perjury prosecutions. Tr. 722-23,

753-32, 788. Furthermore, at the time of the trial, Summers was on the RID program and therefore subject to having the prosecution's determination of how long he might serve. Tr. 638. Furthermore, Summers' testimony shows he lied under oath on more than one occasion. Moreover with regard to his statements and testimony in this case, he gave at least four versions.

In a case similar to this one, the Court reversed and remanded a case where the defendant was convicted on testimony of a witness which was "full of inconsistencies, overly vague, and almost completely uncorroborated. *Feranda v. State,* 267 So.2d 305, 305 (Miss. 1972). In that case as in this case, the witness did not incriminate the defendant in his first statement. *Id.* at 306. The Court reversed because "the evidence presented as to the appellant's guilt is of such a weak nature as to create a serious question as to whether or not the state sufficiently established the guilt of the appellant." The same is true here.

Summers' testimony was not corroborated by any other witness, any physical evidence and in fact, it was contradicted by that of Derrick Fields who positively identified someone else as the killer and gave a completely different description of the clothing worn by the shooter.

Courts are not required to believe testimony which is inherently incredible or which is contrary to the laws of nature and of human experience, or which they judicially know to be unbelievable. The rule is expressed by this Court in *Teche Lines v. Bounds*, 1938, 182 Miss. 638, 179 So. 747, 749 (1939):

> 'If there be any one thing in the administration of law upon which the decisions, the texts, and the general opinion of bench and bar are in agreement, it is that evidence which is inherently unbelievable or incredible is in effect no evidence * * *. And * * * the overwhelming weight of authority throughout the country is that believable or credible evidence in civil cases is that which is reconcilable with the probabilities of the case and that bare possibilities are not sufficient. Where evidence is so contrary to the probabilities when weighed in the light of common knowledge, common experience, and common sense that impartial, reasonable minds cannot accept it other than as clearly an improbability, it will not support a verdict. *** 'An inherently incredible story is not made credible by being sworn to. * * * Courts are not required to believe that which is contrary to human experience and the laws of nature, or which they judicially know to be

incredible * * * although there may be evidence tending to support it [citations omitted].'

In *Sykes v. State*, 45 So. 838 (Miss. 1908), the Court reversed a murder case where the principal witness for the state was the wife of decedent. She had been arrested and examined twice for the crime. Both times, she denied knowing anything about the killing. After her second statement, she implicated the defendant and testified at trial that he came to decedent's house after she and decedent had retired, and killed him with an ax, after which she and accused buried the body. In that case, the Court held that her testimony was too unworthy of belief to sustain a conviction. This Court should likewise reverse King's conviction.

VIII. THE EVIDENCE IS INSUFFICIENT TO PROVE THAT KING WAS CONVICTED AND SERVED SEPARATE SENTENCES, AND HIS SENTENCE AS AN HABITUAL MUST BE REVERSED.

King was sentenced to life without parole as an habitual offender pursuant to §99-19-83, M.C.A. which requires that the prosecution prove beyond a reasonable doubt that he had been convicted and sentenced to a term of one year or more under each of two prior convictions and that each such conviction was a separate conviction and that the sentences were separately served. *Brandy v. State,* 495 So.2d 486 (Miss. 1986).

Specifically, the amendment to the indictment charged him with having been convicted of two felonies:

1. Possession of cocaine in Hinds County in Cause No. 98-1-424 on June 9, 1998;

2. Aggravated Assault in Hinds County in Cause Number 94-3-349 on July 24, 1997.

C.P.I/28.

However, at the sentencing hearing, a prosecution witness first testified that King had been convicted of possession of cocaine on December 6, 2002, and served two years and six months. Tr. 1142. The witness also testified he was convicted of aggravated assault on December

6, 2002 and received two years and six months which he served. Tr. 1143. The prosecution also tried to introduce part of a pen pack (without identification from the witness) to show King had also been convicted of sale of cocaine, a conviction not charged in the indictment. King objected, and the prosecution argued that it was not limited to the two convictions charged in the indictment and they needed to introduce the alleged sale conviction because

> The problem is much of the time that he served was served concurrently. So you could not separate one from the other because in the time that he served was served concurrent to the court ordered him to serve for the two convictions that I mentioned along with the others. So I don't know that you could separate one out of the other.

Tr. 1146. The court, however, required the prosecution to redact the sale conviction. Tr. 1153-55.

Later, the witness admitted that she had been mistaken when she said King had been convicted on both the assault and the possession charges in 2002. Rather, King had been convicted on July 24, 1997 on the assault charge (Cause No. 94-3-349). He was sentenced to ten years to serve, two suspended, eight to serve and five years probation. On December 6, 2002, he was revoked for two years and six months. Tr. 1162.

The witness then testified King was convicted on the possession charge on June 9, 1998 (Cause No. 98-1-424). Tr. 1158-60. He was originally sentenced on that charge to ten years, seven suspended and three years to serve. The order of revocation on that charge was December 5, 2002, with two years and six months revoked.

Thus, it appears that on July 24, 1997, King was sentenced in Cause No. 94-3-349 to serve ten years with eight to serve. However, on June 9, 1998, less than one year later, he received an additional ten years in Cause No. 98-1-424, with three to serve. The sentencing order in 98-1-424, however, reflects that the sentence in No. 98-1-424 was to run concurrently with the sentence in 94-3-349. *Exhibit 2, Sentencing Hearing.* Thus, the record fails to show a required element of §99-19-83, M.C.A. which is that King have "served **separate terms** of one (1) year

or more in any state and/or federal penal institution [emphasis added]." In *Ellis v. State,* 485 So. 2d 1062, 1064 (Miss. 1986), the Court held that "an essential ingredient of this section is that the defendant shall have served at least one year under each sentence."

Similarly, in *Yates v. State,* 396 So.2d 629 (Miss. 1981), Yates was charged with grand larceny as an habitual offender pursuant to §99-19-83. The evidence showed that Yates had not served separate terms as required by the statute and the case was remanded to the lower court for proper sentencing. The Court in that case held that sentencing under 99-19-83 cannot be upheld "because the record clearly reveals that the defendant had not "served separate" terms as required by the statute." *See, also* Taylor v. state, 426 So.2d 775, 780 (Miss. 1983) [state must prove service of two "separate terms"]. The same is true here, the record fails to reflect service of two separate terms. Accordingly, the maximum sentence is life with parole.

CONCLUSION

In *State v. Montgomery,* 56 Wash. 443, 447-48, 105 P. 1035 (Wash. 1909), the Court said:

> While it is important that the appellant should be punished for his crime, if guilty, it is of far greater importance that settled principles designed for the protection of life and liberty should not be overthrown; and if persons accused of crime cannot be convicted, **without using against them testimony wrung from unwilling witnesses, by threats of criminal prosecution and imprisonment**, it is better far that they should go free than that such practices should receive the sanction and approval of the courts [emphasis added].

The police admitted they obtained statements incriminating King only after threatening witnesses with prosecution. Moreover, despite threats to witnesses to prosecute them if they did not incriminate King, only Summers admitted that in a prior inconsistent statement that King was the shooter. This Court should reverse because the evidence is weak. Alternatively, prosecutorial misconduct and errors surrounding the admission of the prior inconsistent statements so prejudiced defendant that he was denied his due process right to a fair trial.

RESPECTFULLY SUBMITTED,
SEAN ANTONIO KING, APPELLANT

BY: S/JULIE ANN EPPS
ATTORNEY FOR APPELLANT

CERTIFICATE

I, Julie Ann Epps, Attorney for Appellants, do hereby certify that I have this date mailed, by placing the original and three copies of the foregoing addressed to the Clerk of this Court at PO Box 249, Jackson, Mississippi 39205-0249 in United States Mail, first class postage prepaid, and a true and correct copy in the United States Mail, first class postage prepaid, to:

Honorable Jim Hood Attorney General P. O. Box 220 Jackson, MS 39205	Honorable Eleanor Peterson District Attorney P. O. Box 22711 Jackson, MS 39205	Honorable Swan Yerger Circuit Court Judge P. O. Box 327 Jackson, MS 39205

This, the 8th day of October, 2007.

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