IN THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

EVERETT BOYD — APPELLANT

v. — No. 2006-KA-00562-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT EVERETT BOYD

ON APPEAL FROM THE CIRCUIT COURT OF HOLMES COUNTY, MISSISSIPPI

ORAL ARGUMENT REQUESTED

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EVERETT BOYD **APPELLANT**

v. **No. 2006-KA-00562-SCT**

STATE OF MISSISSIPPI **APPELLEE**

CERTIFICATE OF INTERESTED PARTIES

THE UNDERSIGNED counsel of record certify that the following listed persons and/or entities have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualifications or recusal:

1. Everett Boyd, Appellant herein;

2. Robert S. Smith
   Thompson, Smith & Nelson
   Trial attorney for Appellant herein;

3. Bernard C. Jones, Jr. and
   Laura Skeen Kuns
   Appellate Attorneys for Appellant herein;

4. Steven Waldrup
   Assistant District Attorney Twenty-First Circuit Court herein; and

5. Honorable Jannie M. Lewis
   Circuit Judge for the Circuit Court of Holmes County, Mississippi.

Respectfully submitted:

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STATEMENT OF THE CASE

A. Course of Proceedings in the Lower Court

On or about July 6, 2004, the appellant, Everett Boyd was indicted by a Holmes County Grand Jury on one count of murder while engaged in the crime of drive-by shooting. (C.P. at 5). The second count of the indictment charged Everett Boyd with the crime of shooting into an occupied dwelling. *Id.* Everett Boyd was arraigned on September 27, 2004. (C.P. at 9).

A jury trial began on February 24, 2006. (Tr. at 1). On February 25, 2006, after only twenty-four minutes of "deliberation," the jury returned a verdict finding Everett Boyd guilty as to both counts of the indictment. (C.P. at 51-52). Directly after the jury verdict was read, the trial judge sentenced Everett Boyd to life imprisonment. (Tr. at 298). On March 9, 2006, the trial court entered an order sentencing Everett Boyd to life in prison as to count one of the indictment and to ten years imprisonment as to count two of the indictment. (C.P. at 56). The appellant's post-trial motion for judgment notwithstanding the verdict, or for a new trial, was denied by the trial court on March 9, 2006. *Id.* On March 30, 2006, Everett Boyd filed his Notice of Appeal to this Honorable Court. (C.P. at 60).

B. Statement of the Facts

On May 1, 2004, Boyd was out driving with his friend Michael O'Neal [hereinafter O'Neal], and two acquaintances L.C. Gibson [hereinafter Gibson] and Charles Adams [hereinafter Adams]. (Tr. at 193). After driving around, the four went to Boyd's home to get their vehicles to go home. *Id.* While at Boyd's home, O'Neal fired shots from his .45 caliber handgun into the air. *Id.* O'Neal left for home and Boyd, Gibson, and Adams followed in Boyd's vehicle to make sure O'Neal made it home fine (testimony introduced at trial showed that

O'Neal was extremely intoxicated). (Tr. at 44, 171). Later that night, O'Neal was shot and killed by a .45 caliber handgun. (Tr. at 42-43).

During trial, Glenda Hoover [hereinafter Hoover], O'Neal's girlfriend, testified that on the night of May 1, 2004, O'Neal came home and soon thereafter, they heard a vehicle drive up and O'Neal went outside. (Tr. at 74-75). Hoover testified, without objection, that she "heard" Boyd outside her home over the television but did not "see" him. (Tr. at 75). Hoover then testified that she heard gunshots and one of the bullets entered through her window. (Tr. at 76, 87, 97, 100). No other bullets entered the home according to Hoover. (Tr. at 100, 102, 103). After trying to resuscitate O'Neal, an ambulance came and took O'Neal to the hospital. (Tr. at 79). O'Neal died later that night at the hospital. (Tr. at 79).

Hoover testified that the sheriff's department came into her home and searched the premises, but no bullets were found. (Tr. at 230). According to Hoover's testimony, two days after the incident, she found a .45 caliber bullet that was below a window in shattered glass. (Tr. at 89, 91). Hoover was the individual that retrieved the .45 caliber bullet and took it to the sheriff's department. (Tr. at 89, 91).

John Pilgrim [hereinafter Pilgrim], O'Neal's father, testified that on the evening in question, he found his son's .45 caliber handgun on the front seat of his son's vehicle. (Tr. at 117). The vehicle was right by O'Neal's body after the shooting. *Id.* Seemingly ignored is the conflicting testimony of Hoover in which she testified that the decedent's .45 was found under her car. (Tr. at 93). Pilgrim testified that after retrieving the gun from the front seat, he gave it to Glen Brown [hereinafter Brown] the next morning. (Tr. at 117). Brown is Hoover's father. (Tr. at 82).

Brown testified at trial that Pilgrim gave him O'Neal's .45 caliber handgun the **day after** the shooting. (Tr. at 127). O'Neal's gun on the morning after the shooting did not have any bullets in the chamber. (Tr. at 127). Not developed was the that fact that the family did not turn in the weapon to the police when directly questioned about weapons.

Brown testified that he knew O'Neal owned that gun. (Tr. at 127). Brown took the weapon to the sheriff's department which was later introduced as State's evidence S-7. (Tr. at 118, 127).

The State Medical Examiner, Steven Hayne [hereinafter Hayne], testified that the bullet that shot and killed O'Neal was consistent with a .45 caliber handgun. (Tr. at 39). When asked if the wound O'Neal received was not consistent with someone who shot in the air, Hayne answered in the affirmative. (Tr. at 45-46). Rather, the trajectory was from someone who was shooting straight. *See also* State's Exh. 5 at 16.

When originally questioned, the two other individuals in Boyd's vehicle that evening, Gibson and Adams, gave statements that they were too intoxicated that evening and did not hear or see Boyd shooting a gun. (Tr. at 179, 199). However, as is often the case when faced with their own prosecution, Gibson and Adams changed their stories. (Tr. at 176, 200). *See also* State's Exh. 15 at 48.

Adams testified that on the evening of May 1, 2004, he, Boyd, and Gibson followed O'Neal back to his house to make sure he arrived safely. (Tr. at 171). Adams testified that Boyd got out of the vehicle to talk to O'Neal, but Adams could not hear what was being said. (Tr. at 171). Gibson and Adams testified that Boyd got back into the vehicle and shot out the vehicle's

window up in the air. (Tr. at 172, 196). Gibson testified that Boyd put the weapon back under the front seat. (Tr. at 196).

The conflict between Hayne's testimony and Adams and Gibson's would seem to confirm that O'Neal could not have been wounded by the shot from Boyd's gun. Moreover, the only witnesses to the crime testified that Boyd shot in the air and Gibson testified that Boyd put the gun under the driver's front seat. When Boyd's vehicle was searched, a 9 mm weapon was found right under the front seat where Gibson said it would be found.

Holmes County Sheriff's Department Officer Sam Chambers [hereinafter Chambers] was the lead investigator for this case. Chamber's testimony of his memory of the night of the decedent's death raised numerous questions about the thoroughness of the investigation. (Tr. at 229). Even though this investigator had over ten years experience, there were no pictures taken of the crime scene as he believed his deputies had taken the pictures. *Id.* His written report did not have anything about shattered glass, and he testified that he did not find a .45 bullet that went though the window even though he "called myself doing it." (Tr. at 231, 239). He did not find any shell casings. *Id.* Chambers testified that even though Boyd came to the station only a few hours after the incident, no gunshot residue tests were performed on his hands. (Tr. at 232).

Chambers testified that he found no evidence that Boyd committed the crime, and he only looked at Boyd for the crime because Hoover told him to. (Tr. at 240). The officer did no sort of investigation with regard to the .45 turned in by the family the day after the incident. (Tr. at 237). According to the State, the bullet found by Hoover was the one that killed O'Neal, although no test was performed to confirm this assertion. (Tr. at 268). The .45 caliber bullet passed through O'Neal and through a window. (Tr. at 268).

During trial, Chambers testified that a .45 caliber handgun was never traced back to the defendant, Boyd. (Tr. at 196). He also testified that he found no evidence of a shooting. *Id.*

After deliberating only twenty-four minutes on Saturday, February 25, 2006, the jury found Boyd guilty of murder under Mississippi Code Annotated § 97-3-19(1)(c) and willfully shooting into an occupied dwelling as charged in the second count of the indictment.

SUMMARY OF THE ARGUMENT

Everett Boyd's conviction of murder violates the double jeopardy clause of the United States Constitution which prohibits multiple punishments for the same offense. Our drive-by shooting statute proposes to criminalize a course of conduct, gang related violence, rather than a discrete act, and therefore multiple convictions arising out of a single shooting event is a double jeopardy violation.

The State in its prosecution of Boyd failed to prove an essential element of the crime of shooting into an occupied dwelling. The State failed to prove a willful shooting into a dwelling, in fact, there was absolutely no evidence entered by the State of this required element. Rather, if there was a bullet that entered the home that night, the State proved that the shooting was accidental as the State suggested that the bullet went through the decedent first. Because this required element was absent, Boyd's conviction should be reversed.

The minuscule evidence introduced at trial was woefully insufficient to convict Boyd and the evidence overwhelmingly weighed against a conviction; therefore, to let his conviction stand would be sanctioning an unconscionable injustice. There are several factors in this case which clearly show that the evidence was insufficient and that the verdict was against the overwhelming weight of the evidence. First, the State of Mississippi put forth ample evidence that the weapon that killed O'Neal was a .45; however, the State never put a .45 caliber handgun in Boyd's hands or possession. Second, the evidence adduced at trial, through the State's own expert witness, clearly showed that Boyd could not have rendered the fatal shot while sitting in a vehicle, rather it was delivered by someone standing.

The State is afforded a wide latitude in arguing their cases to the jury and the purpose of closing argument is to sum up the evidence. The State cannot, however, make up facts that were not introduced at trial. In Boyd's case, the fiction the State wove in its closing argument had no basis in evidence or facts given during trial. This closing argument was so prejudicial that it affected Boyd's fundamental right to a fair trial.

Even though Boyd asserts that every issue above is reversible error, if this Court is not convinced, than the cumulation of errors clearly deprived him of a fair and just trial. The cumulation of errors requires reversal of Boyd's conviction.

ARGUMENT

I.

BOYD'S CONVICTION VIOLATES THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Boyd's conviction violates the Fifth Amendment of the United States Constitution's double jeopardy clause because he was punished multiple times pursuant to the state's drive-by shooting statute for engaging in a single distinct event. The Fifth Amendment to the United States Constitution was adopted on December 15, 1791, and the double jeopardy clause protects an individual against being subjected to double punishment, inasmuch as it is also is a guaranty against being twice put to trial for the same offense. The Fifth Amendment states in part, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." The prohibition against double jeopardy has been called "the most ancient" of all Bill of Rights protections and its roots have been traced back to Greek and Roman law. Peter Western and Richard Drubel, *Toward a General Theory of Double Jeopardy*, Sup. Ct. Rev. 81 (1978).

The double jeopardy clauses of the United States Constitution and the Mississippi Constitution protect an accused against suffering multiple punishments for the same offense. U.S. Const. amend.V; Miss. Const. § 22. *See also Jones v. Thomas*, 491 U.S. 376, 381 (1989); *Blockburger v. United States*, 284 U.S. 299, 303 (1932); *Barnette v. State*, 478 So. 2d 800, 802 (Miss. 1985). The multiple punishment prong of the double jeopardy clause clearly limits excessive prosecutorial discretion in charging individuals. However, this historical significance was lost in Boyd's case. Boyd was punished multiple times for one supposed offense.

The indictment under which Boyd was charged clearly violates the protection afforded by the double jeopardy clause. At the outset it must be noted that the record does not reflect

whether Boyd's trial counsel moved to quash the indictment. A party waives an objection to the form of the indictment by not objecting in a timely manner. "All indictments may be amended as to form[,] but not as to the substance of the offense charged." *Potts v. State*, 755 So. 2d 521, 523 (¶ 7) (Miss. Ct. App. 1999) (citing Unif. R. Cir. Co. Ct. 7.09). However, "this Court has squarely held that challenges to the substantive sufficiency of an indictment are not waiveable." *State v. Berryhill*, 703 So. 2d 250, 254 (¶ 16) (Miss. 1997) (citing *Copeland v. State*, 423 So. 2d 1333 (Miss. 1982); *Burchfield v. State*, 277 So. 2d 623 (Miss. 1973); *Monk v. State*, 532 So. 2d 592 (Miss. 1988)). Therefore, a challenge to substantive sufficiency of the indictment "may be raised at anytime, including on appeal." *Id.*

The Mississippi Code Section under which Boyd was indicted and found in the first count is identical to the capital murder section in which a person can be put to death, but with the underlying felonies being those in which the legislature has determined to be less heinous than the underlying felonies found in the capital murder section. Boyd's indictment in part read:

> EVERETT BOYD, did, on or about the 02nd day of May, 2004, in Holmes County, Mississippi, unlawfully, willfully, feloniously, and without authority of law, without any design to effect death, kill and murder Michael O'Neal, a human being, which the said EVERETT BOYD was engaged in the commission of the crime of Drive By Shooting, in violation of Section 97-3-109(1) of the Mississippi Code of 1972, and all being in violation of Section 97-3-19(1)(c) of the Mississippi Code of 1972 . . . .

(C.P. at 5).

While discussing the identical capital murder section, this Court stated that, "murder, as defined by statute, contemplates the interrelated commission of two separate felonies . . . ." *Berryhill*, 703 So. 2d at 255 (¶ 21) (citations omitted) (emphasis added). Further the Court of Appeals found that the "murder that this indictment charged was the form that requires that the

death occur while a different, underlying felony was being committed." *Buckley v. State*, 875 So. 2d 1110, 1112-13 (¶ 13) (Miss. Ct. App. 2004) (citing Miss. Code Ann. § 97-3-19(2)(e)) (emphasis added). Courts may not impose for one *de jure* offense more than the one lawfully prescribed punishment. *See N.C. v. Pearce*, 395 U.S. 711, 717 (1969); *Blockburger v. United States*, 284 U.S. 299, 303 (1932).

"Felony murder . . . requires by definition two felonies to be involved, the homicide being the intentional or unintentional product of the other felony. . . ." *Buckley*, 875 So. 2d at 1113 (¶ 13). For the indictment to be valid, "the indictment needed to set out a valid charge of two felonies . . . ." *Id.*

Our system does not measure the gravity of a felony by the position of the alleged defendant. We do not have "stand up" shooting, "standing by a tree" shooting, or "sitting down" shooting. These are all absurd. Our legislature clearly was reacting to rising gang violence and enacted the drive-by shooting statute to deter such activity.

This Court's objective in interpreting a statute is to give effect to the legislature's intent. Clearly, the legislature was not dictating that a felony could be predicated upon the physical positioning of the defendant, but rather, the legislature intended to punish the inherently dangerous conduct of gang related drive-by shootings.

This was not a gang related drive-by shooting. When applying the principles of statutory construction in discerning the legislature's intent, clearly the facts in this case are inapplicable. The United States Supreme Court stated that "there can be but one penalty" when a statute criminalizes a course of action rather than an individual act. *Blockburger*, 284 U.S. at 302. The Mississippi legislature proposes to criminalize a course of conduct, not a discrete act, when it

promulgated the state's drive-by shooting statute. Therefore, the Fifth Amendment to the United States Constitution compels the conclusion that Boyd's conviction of two felonies for a single shooting event subjected him to double jeopardy.

II.

THE STATE FAILED TO PROVE AN ESSENTIAL ELEMENT OF SHOOTING INTO AN OCCUPIED DWELLING.

Because the State failed to prove an essential element of the crime of shooting into an occupied dwelling, Boyd's conviction of this crime should be reversed. If one believes the facts as they were presented by the State, the bullet that came from Boyd's gun first went through O'Neal's body then it entered the dwelling. The elements of shooting into an occupied dwelling in Mississippi are found in Mississippi Code Annotated § 97-37-29 (Rev. 2000), "[i]f any person shall **willfully** and unlawfully shoot . . . a pistol . . . into any dwelling house, . . . he shall be guilty of a felony . . . ." *Id.* (emphasis added). During the prosecutor's closing argument, he stated that the bullet found just inside the house landed there because it hit the victim before hitting the house; therefore, because it hit the victim first, it slowed down, lost velocity, and landed beneath the broken window. There was some testimony presented about another bullet hole in the decedent's home. Chambers testified that he saw the hole, but he did not "see any lead." (Tr. at 229). Hoover numerous times testified that she was unaware of any other bullet entering her home. (Tr. at 100, 102, 103, 106). Clearly, the State could not rely on this "hole" as the bullet to convict Boyd of shooting into an occupied dwelling as the State never put on any evidence that this "hole" actually contained a bullet, let alone a .45 caliber bullet. (Tr. at 233, 238-39). Chambers further testified that his search returned no evidence of shooting at all. (Tr. at 232-33).

Since the bullet hit the victim first, it clearly does not meet the elements set forth by statute. The statute requires that for the crime of shooting into an occupied dwelling to have been met there must be a WILLFUL shooting into a dwelling. An accidental shooting does not meet the statutory requirements. There were no facts entered by the prosecution that the defendant shot into a dwelling at all, let alone **willfully,** Boyd's conviction of shooting into an occupied dwelling should be overturned.

III.

BOYD'S CONVICTION IS AGAINST THE OVERWHELMING WEIGHT AND SUFFICIENCY OF THE EVIDENCE.

The trial judge failed to prevent a miscarriage of justice when she overruled Boyd's motions for a directed verdict, for a judgment notwithstanding the verdict, and new trial. A motion for a judgment notwithstanding the verdict and a motion for a directed verdict attack the legal sufficiency of the evidence. *Bush v. State*, 895 So. 2d 836, 843 (¶¶ 16) (Miss. 2005). A motion for a new trial asks the Court to determine if the verdict was against the overwhelming weight of the evidence. *Id.* at 844 (¶ 18).

When determining whether the evidence is sufficient to support a conviction, "the critical inquiry is whether the evidence shows 'beyond a reasonable doubt that [the] accused committed the act charged, and that he did so under such circumstances that every element of the offense existed.'" *Id.* at 843 (¶ 16) (quoting *Carr v. State*, 208 So. 2d 886, 889 (Miss. 1968)). "[W]hen the facts and inferences 'point in favor of the defendant on any element of the offenses with the sufficient force that reasonable [jurors] could not have found beyond a reasonable doubt that the defendant was guilty'" the proper remedy is for this Court to reverse and render. *Dilworth v.*

State, 909 So. 2d 731, 736 (¶ 17) (Miss. 2005) (citation omitted). Stated more plainly, the standard is whether, if believed, the State's case is/was sufficient.

On a motion for new trial, this Court sits as a thirteenth juror. *Bush*, 895 So. 2d at 844 (¶¶ 18-19). A review of the verdict as to whether it is against the overwhelming weight of the evidence presents the Court with the distinct situation necessitating the Court sit as the "thirteenth juror." *Id.* Unlike a reversal based on insufficient evidence, a reversal on the grounds that the verdict was against the overwhelming weight of the evidence does not require an acquittal. *Id.* at 844 (¶ 18). "Rather, as the 'thirteenth juror,' the court simply disagrees with the jury's resolution of the conflicting testimony . . . [and] [i]nstead, the proper remedy is to grant a new trial." *Id.* Therefore, a motion for a new trial allows this Court a certain freedom to act as the thirteenth juror and make judgments as to the veracity of the evidence.

A. THE STATE NEVER PLACED THE CALIBER OF WEAPON THAT DELIVERED THE FATAL SHOT IN BOYD'S POSSESSION.

There are several factors in this case which clearly show that the evidence was insufficient to convict Boyd and show that the jury verdict was against the overwhelming weight of the evidence. First and foremost, the State of Mississippi NEVER put a .45 caliber handgun in Boyd's hands or possession. The State brought forth ample evidence to show that a .45 killed the decedent, but never did the State tie that caliber weapon in Boyd's possession. Chambers testified that no .45 caliber handgun was traced back to Boyd. (Tr. at 235).

However, this very lack of evidence seemed to make the police and prosecutors even more vigilant in their prosecution of Boyd. The State never looked at anyone else to see if they might have committed the crime. (Tr. at 226). The State took the decedent's girlfriends statements as true and never looked to her as the perpetrator, as the girlfriend's hands were not

tested for gun powder residue. (Tr. at 238). Also, the State did not run any tests on the decedent's hands to determine if he had, whether accidentally or intentionally, shot himself. *Id.*

The State never tested the decedent's gun to see if it was the gun that killed him. If the State had found that the decedent's gun was the weapon that killed him, the State's case of drive-by-shooting was null and void as the decedent's .45 was found in the front seat of his vehicle (or under the vehicle as Hoover and Pilgrim gave conflicting testimony).

The State did not seem to worry or care that the decedent's gun was hidden before it was turned into the police department. Why did the family feel it needed to hide the gun?

The State also had a ballistics expert testify at trial. All this person testified to was the fact that the bullet, not found by the police but by the girlfriend, was from a .45 caliber handgun. The defense asked this expert if he was qualified to determine the distance of a shot, to which he testified he was, but he had not been asked by the State to perform a distance test. Why was he not asked to perform a distance test?

The State did show that the decedent had a .45 caliber weapon, but the State never tested the bullet that killed him to determine if the decedent's gun was the deadly weapon. After all the evidence was put before the jury, we still do not know if it was the decedent's gun that killed him, or some other .45 that killed him. This crucial, vital, necessary evidence was never presented by the State.

Further, the weapon that Boyd shot into the air, and according to the testimony, was placed under his front seat and found to be a 9 mm, not a .45. Clearly, if the State did not put this evidence before the jury, the verdict is contrary to the overwhelming weight of the evidence and the evidence was insufficient to convict Boyd of these crimes.

B. BOYD COULD NOT HAVE DELIVERED THE FATAL SHOT WHILE SITTING IN A VEHICLE.

The evidence presented by the State through the medical examiner is contrary to the overwhelming weight of the evidence and was insufficient to convict Boyd. The medical examiner clearly stated that the bullet that killed the decedent had to have been aimed by someone in a standing position. (Tr. at 45-46). However, Boyd was convicted of killing the decedent while SITTING in a vehicle. If Boyd was sitting in the vehicle and did fire a weapon, he did not deliver the fatal shot. Clearly, the proof was against the overwhelming weight of the evidence and the evidence presented against Boyd was woefully insufficient.

The State never tied a .45 caliber handgun to Boyd and the medical examiner directly controverted the fact that Boyd delivered the fatal blow while sitting in the vehicle. "Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts or evidence." John Adams, argument in defense of the British soldiers in the Boston Massacre trials, December 1770.

Our appellate courts serve as the instrument of accountability for those who make the basic decisions in the lower court. The availability of the appellate process assures the defendant that the verdict in their case was not prey to the failing of the individuals who happened to render the decision. Therefore, our appellate courts are engaged in the vital position of assuring procedures of the lower courts were handled correctly, which has an immeasurable impact on our democratic ideal. Here, justice was not served. Based on the foregoing, the jury decision was against the overwhelming weight and sufficiency of the evidence; therefore, the jury's decision should be reversed.

III.

THE STATE'S CLOSING ARGUMENT RESULTED IN UNJUST PREJUDICE AS THE PROSECUTOR INVENTED FACTS THAT WERE NOT IN EVIDENCE.

In his closing argument, the prosecutor wove a tale of fiction that contained no evidence or facts given during trial. He took what was presented and twisted it to create an argument worthy of a fiction novel which allowed the jury to accept, lightening-fast, his chronicle as truth. This prejudiced twelve individuals against the defendant and caused them to reach a guilty verdict in mere minutes.

The State is afforded a wide latitude in arguing their cases to the jury, but they are not allowed to employ tactics which are "inflammatory, highly prejudicial, or reasonably calculated to unduly influence the jury." *Hiter v. State*, 660 So. 2d 961, 966 (Miss. 1995). "The purpose of a closing argument is to fairly sum up the evidence." *Flowers v. State*, 842 So. 2d 531, 553 (¶ 64) (Miss. 2003) (emphasis added). "[T]he prosecutor may comment on facts in evidence and may draw proper deductions there from." *Id.* at 554 (¶ 65) (quoting *Brown v. State*, 690 So. 2d 276, 296 (Miss. 1996)). The State's prosecuting attorney, "**cannot, however, state facts which are not in evidence**, and which the court does not judicially know, in aid of his evidence. Neither can he appeal to the prejudices of men by injecting prejudices not contained in some source of the evidence." *Flowers*, 842 So. 2d at 554 (¶ 65) (quoting *Nelms & Blum Co. v. Fink*, 159 Miss. 372, 131 So. 817, 821 (1930)) (emphasis added).

While the defense trial attorney did object at the beginning of the prosecutor's closing argument, the attorney did not object to the other obvious objectionable remarks (possibly because this jumping up and down would have been futile). Therefore, for this Court to consider the other errors within the closing argument, the Court must find that "plain error" occurred.

Where a party fails to preserve his objection for appeal, he can assert the error on appeal only by arguing that there was plain error. *Waldon v. State*, 749 So. 2d 262, 267 (¶ 14) (Miss. Ct. App. 1999). "The plain error doctrine has been construed to include anything that 'seriously affects the fairness, integrity or public reputation of judicial proceedings.'" *McClain v. State*, 929 So. 2d 946, 951 (¶ 10) (Miss. Ct. App. 2005) (quoting *United States v. Olano*, 507 U.S. 725, 732 (1993)). This Court has said "A party is protected by the plain error rule when 1) he has failed to perfect his appeal and 2) when a substantial right is affected." *Waldon*, 749 So. 2d at 267 (¶ 14). In the past, Mississippi courts have noted the existence of errors in trial proceedings affecting substantial rights of the defendants, although they were not brought to the attention of the trial court. *Grubb v. State*, 584 So. 2d 786, 789 (Miss. 1991).

The fiction the prosecutor gave in his closing argument had no basis in evidence or facts given during trial. The prosecutor stated that Boyd's guilt was proven when Boyd made the statement that O'Neal's gun "may have been a .45." (Tr. at 266). The prosecutor then went on to state that Boyd "knew it was a .45. Because he shot the man." *Id.* Wait?! Did the prosecutor state that Boyd knew O'Neal had a .45 because Boyd used O'Neal's gun to kill him? Was that the State's theory? Maybe so, as the State chose to ignore the fact that Boyd did not possess a .45. If the State was trying to prove that Boyd killed O'Neal with his own gun, how could he have shot O'Neal from his car? Remember the .45 was either in the front seat or under O'Neal's car right next to the decedent. Boyd could not have been driving or sitting in the vehicle and used O'Neal's gun!

There was absolutely **NO** evidence that Boyd used O'Neal's .45. The two State "witnesses" clearly testified that Boyd shot his gun in the air while sitting in the front driver's

seat and then put the gun he had just shot back under his seat–the gun later found by police to be a 9 mm. Also, it is very important to note that the State did not test O'Neal's weapon to see if it was in fact the gun that killed him. So, the unsubstantiated "facts" the prosecution came up with were 1) Boyd killed the decedent with the decedent's gun and 2) the decedent's gun was the weapon that killed O'Neal.

This statement by the prosecutor must have been credible to the jury as they found Boyd guilty. The State failed to show that Boyd possessed a .45, ignored testimony that he shot up in the air and also ignored the statement of the medical examiner that the person had to have been standing to deliver the shot that killed O'Neal. In this closing argument, plain error affected Mr. Boyd's fundamental right to a fair and just trial and ultimately his freedom. Therefore, Boyd's conviction should be reversed.

V.

THE CUMULATION OF ERRORS IN THIS CASE REQUIRES REVERSAL OF BOYD'S CONVICTION.

While Boyd argues that every issue presented above requires the reversal of his case, if however, this Court does not agree, Boyd argues that the cumulation of errors, while maybe not reversible error in and of themselves, combined together to deprive him of a fundamentally fair trial. Recently this Court reversed a conviction due to the cumulative effect of numerous errors at the trial court level. *Ross v. State*, 954 So. 2d 968, 1018-19 (¶¶ 138-39) (Miss. 2007). This Court stated that the cumulative error doctrine stemming from Mississippi Rule of Procedure 61 "holds that individual errors, which are not reversible in themselves, may combine with other errors to make up reversible error, where the cumulative effect of all errors deprives the

defendant of a fundamentally fair trial." *Id.* at 1019 (¶ 139) (citing *Byrom v. State*, 863 So. 2d 836, 847 (Miss. 2003)).

The cumulative error doctrine asks this Court to consider three factors including "whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged." *Id.* When the evidence is not overwhelming against a defendant this Court is "more inclined to view cumulative errors as prejudicial." *Id.*

When considering the above factors, not only is the evidence against Boyd not overwhelming, it is nonexistent. The errors that occurred here are quite substantive rather than slight. The State failed to make their case–they never proved that Boyd had a .45 caliber handgun. The State also failed to prove the underlying felony. The State, in fact, through its own expert witness, proved that Boyd could not have been in a sitting position to have fired the fatal shot.

The State also failed to prove their case in Boyd's second count of his indictment. The State did not meet and did not try to meet, the element required under our shooting into an occupied dwelling statute that Boyd willfully shot into an occupied dwelling. Since the State failed to prove any of its case during the trial, the prosecutor fabricated evidence during his closing argument to cover the fatal defects of the State's case. Again, while Boyd firmly believes every issue above was reversible error, if this Court is unpersuaded, Boyd asserts that the cumulation of error is ample justification for reversal of his conviction.

CONCLUSION

As a practical matter, the central question is of course whether the State proved the statutory elements of the crimes set forth in the indictment beyond a reasonable doubt. The answer is a resounding no.

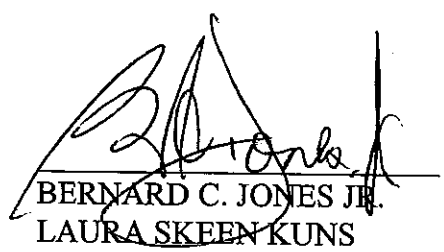
There is no tangible evidence whatsoever that Everett Boyd fired the shot that killed O'Neal. If the fatal wound was caused by a .45 caliber weapon as suggested by the State, there is no evidence that Boyd at any time owned, possessed, handled, or fired a .45 caliber weapon. The State's expert suggested that the horizontal fatal entry wound was caused by a person standing. The autopsy report confirms a horizontal entry and exit of the projectile. The States evidence establishes that Boyd fired a 9 mm handgun into the air while seated in his vehicle. There is no evidence that Boyd fired any shots while standing. There is no evidence, or even a suggestion, that a 9 mm weapon killed O'Neal.

During closing arguments, the State mislead the jury by stating that it was impossible to perform gunpowder residue tests in this case. The State's expert never said that. The State's expert testified about the inability to conduct distance determination tests. In an effort to overcome the obvious inadequacy of the investigation of this case, the State improperly argued "facts" which were not only not in evidence but also conveniently invented for the purpose of covering up the sloppy and incomplete investigation of the circumstances surrounding O'Neal's death. The State also argued in closing, contrary to the evidence the State offered during the trial, that no gun was found near O'Neal. Simply put, the "evidence" argued by the State during closing conflicts with the evidence the State itself put forth during the trial. A conviction should be based on proof, not confusion.

It is most interesting to note that law enforcement apparently never suspected Glenda Hoover. Despite the curious circumstances surrounding the discovery and subsequent handling of O'Neal's gun, the "magic bullet" allegedly found by Glenda Hoover, and numerous other inconsistencies in Hoover's account of the night O'Neal died, her possible involvement in O'Neal's death was ignored by investigators. Her testimony about O'Neal's demeanor when he arrived home is not consistent with the testimony of the State's expert, Dr. Stephen Hayne, regarding O'Neal's extreme state of intoxication on the night he died. It is hard to believe that the jury, in just twenty-four minutes of "deliberation," fairly considered these inconsistencies in light of the testimony offered by the State's witnesses.

It is absolutely impossible for a fairminded and impartial jury to find, *beyond a reasonable doubt*, that Everett Boyd killed Michael O'Neal based on the evidence offered by the State at trial. Everett Boyd respectfully requests that this Honorable Court reverse his conviction and order a new trial. Fundamental fairness requires no less.

RESPECTFULLY SUBMITTED,
EVERETT BOYD

BY: 

BERNARD C. JONES JR.
LAURA SKEEN KUNS

CERTIFICATE OF SERVICE

I, Bernard C. Jones, one of the attorneys for Everett Boyd, Appellant, do hereby certify that I have this day mailed, postage prepaid, or hand delivered, a true and correct copy of the foregoing Appellant's Brief to the following:

The Honorable Janie M. Lewis
Holmes County Circuit Judge
P.O. Box 149
Lexington, MS 39095

Charles W. Maris, Esquire
Office of the Attorney General
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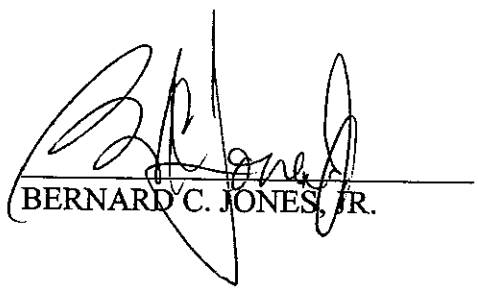
Jackson, MS 39205

This the 16th day of July, 2007.



BERNARD C. JONES, JR.