IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JAMES DWIGHT VICKERS, SR. — APPELLANT

V. — NO.2006-KA-01711-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

ORAL ARGUMENT NOT REQUESTED

MISSISSIPPI OFFICE OF INDIGENT APPEALS
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CERTIFICATE OF INTERESTED PERSONS

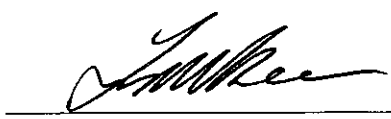
The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. James Dwight Vickers, Sr.
3. Honorable Joyce Chiles and the Washington County District Attorneys Office
4. Honorable Richard A. Smith

THIS 17th day of September 2007.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For James Dwight Vickers, Sr., Appellant

By: 

Leslie S. Lee, Counsel for Appellant

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STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Washington County, Mississippi, and a judgment of conviction for the crimes of Count One, Capital Murder, Count Two, Aggravated Assault, Counts Three and Four, Conspiracy to Commit Capital Murder, and Count Six, Possession of a Firearm by a Convicted Felon, against the appellant, James Vickers. C.P. 465, R.E. 26. The jury was unable to reach a unanimous agreement on the sentence for Count One. C.P. 464, R.E. 25. The trial judge, therefore, entered a sentence of life without parole in Count One, twenty (20) years in Count Two, to be served consecutively

to Count One, twenty (20) years on Count Three, to be served consecutively to Count One, but concurrent with Count Two, twenty (20) years on Count Four, to be served consecutively to Count One, but concurrent with Counts Two and Three, and three (3) years on Count Six, to be served consecutively to Count One, but concurrent with Count Two, Three, and Four. He was also ordered to pay court costs. C.P. 465-66, R.E. 26-27. This sentence followed a jury trial which began on May 5, 2003, and ended with a verdict on May 12, 2003, Honorable Richard A. Smith, Circuit Judge, presiding. James Vickers is presently incarcerated with the Mississippi Department of Corrections.

FACTS

According to the trial testimony, on January 12, 2002, David Vickers was shot dead in his home on Wilcox Road in Greenville, MS. Tr. 636, 640. His wife, Brenda Vickers, was shot in the abdomen during the incident. Tr. 1083, 1100. David's brother, the appellant, James Vickers, Sr. (Vickers), subsequently became a suspect in a murder for hire plot when it was discovered that someone had reported months earlier that Vickers had tried to hire him to kill his brother David. Tr. 976.

Investigators then began investigating Vickers, obtaining a court order for his home and cell phone records. Tr. 798. Investigators found several calls to an out of state number around the time of the murder. The number belonged to James Woodruff. A criminal history check showed that Woodruff was wanted for a probation violation in Louisiana. Tr. 799-800. While interviewing Woodruff, who was incarcerated in the Livingston Parish Jail at the time, investigators were given the name of Daniel Spencer. Spencer was then interviewed.

Tr. 803-04. Based on these interviews, an arrest warrant for Vickers, and search warrant for his home were obtained. Tr. 805.

Charles Allen testified that in September of 2001, he saw Vickers at the casino in Greenville. Tr. 644. Allen told Vickers he needed a job. Tr. 645. Vickers allegedly told Allen that he did not want the job he had. Vickers then went on and said he needed his brother and his brother's wife killed. Tr. 646-47. Vickers told him that if he was interested, to call him the following morning. Tr. 647. Allen then went to police to report this. Tr. 648-49. He eventually spoke with Detective Edward Crockett. Tr. 650-51. He was asked to go along with the plot for awhile, so he called Vickers the following day and Vickers told him to come by his house. Tr. 651.

Allen claimed Vickers told him he wanted his brother David killed, along with David's wife. Vickers mentioned a will dispute and wanted David killed before they went to court. Tr. 654. Allen said Vickers eventually offered him $50,000.00. Tr. 655. They meet again the following day, but Vickers did not have any cash. He had Allen go and see if he could sell Vickers's wave runner. Vickers told him not to worry, he would get some money. Tr. 656-68. Allen went back to the police station and was arrested for an outstanding warrant for contempt of court. Tr. 660, 691. Later, Allen claimed Vickers did come up with $2,000.00, but Allen did not go back to the police. Tr. 661. He heard back from police after David was killed on January 12, 2002. Tr. 662. Allen later put in for a reward for information leading to an arrest in the case. He was paid $1,500.00. Tr. 664.

Daniel Spencer testified that he met Vickers while cutting his lawn. Tr. 846. Vickers asked him if he knew anybody that would consider accepting a job to kill somebody. Tr. 847. Vickers later promised him $1,000.00 if he found someone, and paid him $600.00 on the spot. He received the rest a few days later. Tr. 848. Spencer later got Vickers to pay for a bus ticket for his friend, James Woodruff, to come to Greenville from Louisiana. He told Vickers that Woodruff might be interested in the job. Tr. 850. Spencer claimed Vickers told them he wanted the murders to look like a robbery and wanted them to get David's wallet. If anything went wrong, they were to blame David's wife, Brenda. Tr. 852. Spencer said Vickers provided them with two different weapons to do the job, a Browning .22 target pistol, and a Smith and Wesson Featherlite .38. Ex. 26 and 27.

Since Spencer and Woodruff never were able to complete the job, Vickers apparently hired someone else. Spencer and Woodruff were suppose to assist this new man in getting a car. Vickers then said he wanted this shooter killed after the job because he did not trust him. Tr. 860. Spencer claimed he was offered $150,000.00, plus $100,000.00 house, and that Vickers would help them start a business for his assistance. He was going to get all this money from the estate once it settled. Tr. 861.

Spencer went on to testify he was able to get a car from a friend and Vickers gave him a 9mm pistol. Spencer and Woodruff eventually left the car in Greenville for the shooter to pick up. Tr. 862-63. Vickers later called him on the day of the murder and said the shooter had left the car at the Stareka grocery with a flat tire. Tr. 869. Spencer claimed he saw Vickers picking up this man. He later found out the man's name was Jerome Booth. Tr. 870.

Vickers then called Spencer and told him that "the deed was done," and that Spencer needed to get rid of Booth and the car. Tr. 878.

Spencer later identified the man with Vickers as Jerome Booth in a line-up. Tr. 883, Ex. S-29. Spencer claimed Vickers told him that he paid Booth $2,000.00. Tr. 886-87. Spencer also admitted he was offered a plea deal in exchange for his testimony. The State offered him a two year deal. Tr. 892-93. Although the plea offer was for two years on two counts of conspiracy to commit capital murder, Spencer had not entered his plea at the time of his testimony. Tr. 898-99.

Woodruff's testimony was similar to Spencer's. He said Vickers offered him $50,000.00 to kill his brother and his brother's wife. Tr. 914. Woodruff claimed he tried to commit the murder on two separate occasions, but could not go through with it. Tr. 918, 927-29. In January of 2002, Vickers allegedly came up with another plan to kill David, but this time Woodruff would not have to be directly involved. Tr. 936-37. Woodruff commented he thought the 9mm Vickers gave Spencer was a joke because it was all broken up and held together by duct tape. Tr. 940. Woodruff never saw Booth until the day of the murder. He and Spencer drove by David's house and saw a man picking up pecans according to plan. Tr. 943.

After Vickers called them and told them that Booth had completed the job, they went by the Stareka grocery and saw the car with a flat. They also saw man getting into Vickers's truck. Tr. 945. Woodruff later observed Booth come back and remove a bucket containing the 9mm from the car. Tr. 947. Woodruff identified Booth from a photo line-up as the man

he saw. Tr. 953-54, Ex. S-29. Woodruff changed the tire and drove the car out of town. He then wrecked the car and left it on the side of the rode. Tr. 954-55.

Woodruff also claimed Vickers wanted David's wallet. Vickers wanted the deaths to look like an accident. At first he wanted the house burned down. He then wanted Woodruff and Spencer to shoot them and make it look like a robbery. Tr. 952. Woodruff was offered the same plea deal as Spencer. This was also to run concurrently to a probation violation in Louisiana. Tr. 970-71.

Brenda Vickers also testified to what see remembered on the day of the shooting. She stated that she saw a man struggling with her husband outside her kitchen door. This struggle continued inside the house until she heard a gunshot. Tr. 1094-96. She ran to the bedroom and tried to turn on the alarm, but since the kitchen door was open, the alarm would not activate. Tr. 1096-97. She then reached for a .380 pistol her husband keep in the bedroom, but the man who had shot her husband grabbed her hand. Tr. 1097-98. She was hit with the butt of the gun and could not move. The man left and she heard another gunshot. Tr. 1099. The man then returned to the bedroom and shot her. Tr. 1100. She was eventually able to get up and go for help. Tr. 1101-02. Brenda later identified Booth in a photo line-up as the shooter. Tr. 1104-05.

SUMMARY OF THE ARGUMENT

James Vickers was convicted of capital murder, aggravated assault, two counts of conspiracy to commit murder, and possession of a firearm by a convicted felon on legally insufficient evidence. Only a hung jury prevented Vickers from receiving the death penalty.

Even if this Court were to find the evidence minimally sufficient, the verdicts are still against the overwhelming weight of the evidence. Allowing Vickers to be convicted on essentially the testimony of accomplices with criminal records would sanction an unconscionable injustice. The trial judge did not follow clearly established legal precedent in allowing the verdicts for conspiracy to stand, when Vickers was convicted of a capital murder for hire which was the basis of the conspiracy charges in direct violation of *Stewart v. State*, 662 So.2d 552 (Miss. 1995).

The trial court further erred in refusing to allow the defense to impeach a non-party witness with 1977 conviction for burglary, as well as various arrests of the witness which resulted in no disposition. This impeachment would have shown the bias of the witness and should have been allowed. The trial court also erred in not granting a new trial based on juror misconduct. Under *Odom v. State*, 355 So.2d 1381 (Miss. 1978), the judge is required to make specific findings of fact when jury misconduct is alleged. The lower court failed to do so in this case.

Finally, various rulings by the trial court prohibited trial defense counsel from presenting a meaningful defense in violation of Vickers's due process rights. When combined with improper evidentiary rulings, cumulative error mandates Vickers receive a new trial.

ARGUMENT

ISSUE NO. 1 THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICTS ON EACH COUNT.

In trial counsel's Motion for New Trial, counsel specifically argued that the evidence was insufficient to support the verdicts on each count. C.P. 469, R.E. 28. The trial judge denied this motion. Supplemental Volume 1, pages 1-2, R.E. 32-33. The trial judge also denied Vickers's motion for a directed verdict at the close of the State's case, as well has his renewed motion for a directed verdict at the close of the defense case. Tr. 1145, 1172. This was error.

Review of a motion for a directed verdict tests the sufficiency of the evidence. *Bush v. State*, 895 So. 2d 836, 843 (¶15) (Miss. 2005). The court must determine 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; and where the evidence fails to meet this test it is insufficient to support a conviction." *Id.* at 843 (¶16) (quoting *Carr v. State*, 208 So. 2d 886, 889 (Miss. 1968)). Taking the evidence in the light most favorable to the verdict, the question is not whether the court believes the evidence established guilt beyond a reasonable doubt but whether a rational trier of fact could have found all the elements beyond a reasonable doubt. *Bush*, 895 So. 2d at 844 (¶16) (quoting *Jackson v. Virginia*, 443 U.S. 307, 315 (1979)).

A. Count One and Two

Count One charged that Vickers, acting in concert with Jerome Booth, committed the capital murder of David Vickers, "at a time when JEROME BOOTH, had been offered money by JAMES DWIGHT VICKERS, SR. for committing the murder..." C.P. 19, R.E. 16. Count Two charged that Vickers, again acting in concert with Jerome Booth, committed an aggravated assault against Brenda Vickers, by shooting her with a pistol. C.P. 19, R.E. 16. There was clearly insufficient competent evidence admitted at trial to support these charges. The State failed to show Vickers actually hired Booth to do anything.

Jerome Booth did not testify and allege that Vickers hired him. Likewise, Vickers did not confess that he hired Booth. There was absolutely no direct evidence showing any kind of money or thing of value was offered or ever exchanged hands. The only evidence that Booth was hired to kill at the direction of Vickers came from hearsay statements that Vickers allegedly made to Woodruff and Spencer.

Spencer testified that after he and Woodruff were unable to complete the job, Vickers still kept them around, paying them money, while he tried to come up with another plan. Tr. 861. Vickers then later told Spencer he got "some black guy" to do it. Tr. 860. On the day of the murder, he claimed he actually saw a black male out at David's house with the car they supplied. Tr. 867. Vickers later called him to let Spencer know he was going to pick up this guy, because the car he used had a flat. Tr. 869. This conveniently allowed Spencer to drive by the grocery where the car was parked to watch this guy get into Vickers's truck. Tr. 870.

Then Vickers tells him the guy was going back to the car to get some stuff[1]. Tr. 871. From these observations, Spencer was able to positively identify Jerome Booth as "this guy" from about 60 feet away. Tr. 883.

Spencer was only able to testify to hearsay about the exchange of money. "As far as I know, he paid [Booth] $2,000." Tr. 886. Spencer stated Vickers told him he had to give $2,000 to Booth so he could leave for Chicago. Tr. 887. The 9mm used in the murder was never recovered. Spencer had a ready hearsay answer for that, too. He testified that Vickers told him that Booth had thrown the 9mm away in a ditch alongside Main Street. Tr. 889.

Woodruff's story was similar to Spencer's. He also had no direct connection to Booth or any personal knowledge of money being offered or exchanging hands. Woodruff claimed Vickers also continued to pay him money after his two failed attempts at killing David. Tr. 933-35. In January of 2002, Spencer got Woodruff to come back to Mississippi because Vickers had allegedly come up with another plan. Tr. 936-37. Despite never having seen Booth before the day of the murder, Woodruff was also able to pick him out of the line-up after seeing him from 60 to 80 feet away. Tr. 943, 948, 953.

There was also evidence that phone calls were made from the place of Booth's employment to Vickers. Tr. 782, 984. The fact that a phone call was made is wholly inadequate to show there was a conspiracy to commit murder. Furthermore, there could have been other reasons for the calls, as no one actually heard the conversations. There was also evidence Booth had done work for Vickers in the past. Tr. 870-71, 884.

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[1] Apparently he forgot his pecans and the murder weapon.

There was also the suspicious circumstances surrounding the wallet. This was the only piece of physical evidence connecting Vickers to the murder. The murder occurred on January 12, 2002. The wallet happened to be found in Vickers's garbage on the very day police decided to execute the search warrant, on April 3, 2002, almost three months after the murder. Tr. 805-07. This was a wallet that the crime scene investigator originally reported was not stolen, but on the victim's body, but eleven months later, amended his report to state the wallet was in fact missing. Tr. 730-31, 745.

Vickers is now serving a life without parole sentence essentially based on what two co-conspirators alleged Vickers said. There was no direct evidence to prove Vickers hired Booth to commit this murder. There was no evidence showing the date or time money exchanged hands, or even that an offer to pay was ever made. This charge should have never gone to the jury on the evidence presented. The jury clearly had a problem with this count, as evidenced by the note they sent to the court during deliberations. The jury asked, "What will the first charge be if we cannot connect Booth to James Vickers? Without the connection of Booth and James Vickers, is this still capital murder?" Tr. 1327.

The appellant concedes that the State did not have to actually prove money was exchanged, but they were required to prove that an offer of money was made to support a murder for hire conviction. *Mosby v. State*, 749 So.2d 1090 (¶ 39) Miss.App. 1999). The State failed to do so. Vickers also did not have to be present when the murder was committed in order to be convicted of capital murder. *Saunders v. State*, 733 So.2d 325 (¶16) (Miss.App. 1998). However, the evidence failed to show beyond a reasonable doubt that

Vickers hired Booth to kill David and David's wife. Vickers's mere association with Booth is not enough to prove a conspiracy. *Davis v. State*, 485 So.2d 1055, 1058 (Miss.1986). Therefore, the court should have granted the motion for a directed verdict or granted the defense request for judgment notwithstanding the verdict on these two charges.

B. Count Three and Four

In Court Three, Vickers is charged with conspiring with Spencer to commit the murder for hire of David and Brenda Vickers. C.P. 20, R.E. 17. Count Four similarly alleges Vickers conspired with Woodruff to kill David and Brenda Vickers by offering Woodruff money to commit the murders. C.P. 20, R.E. 17. As argued above, these charges likewise should never been allowed to go to the jury.

It is apparent from the evidence that Vickers was a big talker. Undoubtedly, he probably threatened harm to his brother on a number of occasions. Very few of us with siblings have never done so. There was even testimony as to prior threats. Tr. 1030, 1137, 1169. However, the evidence to show an actual conspiracy to kill existed between these men was completely lacking.

As to Count Three, Spencer testified he never took any of the planning seriously. Tr. 868. Spencer heard Vickers talk frequently about this, but Spencer said he never really planned on doing anything. He never planned on killing David and Brenda. Tr. 900. Therefore, there could never be a meeting of the minds for a conspiracy to exist.

> For there to be a conspiracy, "there must be recognition on the part of the conspirators that they are entering into a common plan and knowingly intend to further its common purpose." The conspiracy agreement need not be formal

> or express, but may be inferred from the circumstances, particularly by declarations, acts, and conduct of the alleged conspirators. Furthermore, the existence of a conspiracy, and a defendant's membership in it, may be proved entirely by circumstantial evidence.

Franklin v. State, 676 So.2d 287, 288-89 (Miss. 1996) (quoting *Nixon v. State*, 533 So.2d 1078, 1092 (Miss.1987).

Clearly there was insufficient evidence to show a conspiracy existed with Spencer.

As to Count Four, Woodruff testified it was not in his nature to kill anyone. He thought he could do it, but could not follow through with it. He even began crying when he realized he could not go through with it. Tr. 918-19. During Woodruff's second attempt at committing the murders, when he entered David's house and spoke to Brenda, he knew he could not go through with it. Tr. 928. After the failure, Vickers alleged told him that he guessed he was never going to get this done. However, Vickers went on to allegedly complain he had to get it done. Tr. 932. Woodruff later said he had pretty much given up on job because they were out of ideas. Tr. 935. When hearing about the last plan, Woodruff thought it was a joke. He believed the 9mm supposedly given to Spencer by Vickers could not possibly work. Tr. 940. He never thought it would actually happen. Tr. 965. Woodruff also admitted to having a serious drug problem at the time. Tr. 961.

The evidence was likewise insufficient to show there was any serious conspiracy with Woodruff. A directed verdict should have been granted.

C. Count Six

In Count Six, Vickers was charged with possessing a firearm ("to wit: a pistol") by a convicted felon between the dates of July of 2001 to January of 2002. C.P. 21, R.E. 18.

The State's elements instruction did not give any dates, but alleged Vickers possessed a firearm "on the date testified about." C.P. 347. The defense instruction attempting to pin down a date was refused. Tr. 1245, C.P. 384a46.

Again, Spencer and Woodruff were the only witnesses to testify Vickers ever possessed a weapon. Tr. 854-55, 863. No independent witnesses ever connected Vickers to the any of the weapons the State alleged Vickers, at one time or another, possessed. The .22 pistol and the .38 pistol were recovered from his girlfriend's Lorie Poag's residence, not Vickers's residence. Tr. 1006-07. The guns legally belonged to her. Tr. 1023.

As argued above, Spencer and Woodruff were simply incredible. If their testimony is to be believed, then they should have been charged with capital murder as well. *Mosby v. State*, 749 So.2d 1090 (¶39) (Miss.App.1999) (citing Miss. Code Ann. §97-3-19(2)(d)). They were clearly accessories before the fact by providing the shooter the car and gun before the murder. Tr. 898. Both Spencer and Woodruff were prior convicted felons, yet they were never charged with illegally possessing a firearm. Tr. 899, 906, 967. Both received incredibly lenient sentences of two years for their testimony, Woodruff even serving his concurrent to a probation violation in Louisiana. Tr. 899, 970-71.

The jury, by Instruction No. 22, was allowed to convict Vickers if they found he possessed a .38 caliber pistol, or a .22 caliber pistol, or a 9mm pistol. C.P. 390. There is no way to determine if the jury unanimously found Vickers possessed any of these weapons. Because the State could not specify with any detail the dates Vickers was supposed to have possessed these weapons, and the total lack of corroborating evidence by the two

accomplices, the trial judge should have granted trial counsel's motion for a directed verdict or at least granted his motion for judgment notwithstanding the verdict on this count as well.

ISSUE NO. 2. THE VERDICTS WERE AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE

In trial counsel's Motion for New Trial, counsel again specifically argued that the evidence was insufficient and that the jury's verdict was against the overwhelming weight of the evidence. C.P. 469, R.E. 28. The trial judge denied this motion. Supplemental Volume 1, pages 1-2, R.E. 32-33. The trial judge erred in refusing to grant this motion.

"In determining whether a jury verdict is against the overwhelming weight of the evidence, this Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial." *Herring v. State*, 691 So.2d 948, 957 (Miss.1997). "Only in those cases where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal." *Id. See also Benson v. State*, 551 So.2d 188, 193 (Miss.1989); *McFee v. State*, 511 So.2d 130, 133-34 (Miss.1987).

Besides the facts already argued in Issue No. 1, it is significant to note the evidence that was never produced. Booth's name was not found on any of the documents recovered in the search of Vickers's house. Booth was never physically connected with the car supposedly used in the murders. No physical evidence existed that Booth was ever in David's house. The State's theory of the case was that Vickers wanted his brother killed for

inheritance money. Based on the evidence presented, it is incredible to believe that Vickers ever thought he was going to get any of David's estate money.

Investigators failed to thoroughly investigate Jim Parker or Parker's brother-in-law as the possible shooter, even though Parker's name was given to police as a suspect, the brother-in-law met the general description of the assailant, and the brother-in-law's car also met the description of the car used in the murder. These men were never included in any photo line-ups. Tr. 1012-15.

Finally, as argued above, the testimony of the accomplices was simply incredible. To send a man to prison for the rest of his life with no hope of probation or parole on the testimony of three prior convicted felons, one of which the jury was not even allowed to hear had a prior felony, would sanction an unconscionable injustice. Verdicts based on such weak evidence should not be allowed to stand. *Hawthorne v. State*, 883 So.2d 86 (¶13)(Miss. 2004). Vickers should be granted a new trial on all charges.

ISSUE NO. 3 VICKERS WAS IMPROPERLY PROSECUTED FOR BOTH MURDER FOR HIRE CAPITAL MURDER AND CONSPIRACY TO COMMIT CAPITAL MURDER IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES AND MISSISSIPPI CONSTITUTIONS.

Throughout the trial, the State represented that Spencer and Woodruff were engaged in a continuing conspiracy with Vickers to kill his brother and his brother's wife. In fact, this argument allowed the State to get in evidence from both Spencer and Woodruff that they were to kill Booth after the murders were completed. Tr. 829-40. The jury was allowed to consider Vickers's guilt as to capital murder in Count One, as well as conspiracy to commit

capital murder in both Count Three and Four. However, Mississippi's case law is clear, a prosecution for both murder for hire capital murder and conspiracy to commit capital murder is a double jeopardy violation.

In *Stewart v. State*, 662 So.2d 552, 560-61 (Miss. 1995), the Mississippi Supreme Court held that Mississippi's murder-for-hire capital murder charge completely encompasses the agreement or conspiracy to commit the crime.

> We find that once the State has proven murder under this definition, no other evidence must be produced in order to establish the crime of conspiracy. Conspiracy to commit murder-for-hire is completely enveloped by our definition of murder-for-hire found in § 97-3-19(2)(d) of the capital murder statute.

Id. at 561.

This issue was brought to the court attention in Vickers's motion for a new trial. C.P. 471, R.E. 30. Furthermore, even if this issue were not raised at trial, it would not be procedurally barred, as the claim does not become an issue until after conviction of both murder for hire capital murder and conspiracy to commit capital murder. *Id.* at 560.

Even if the evidence in Counts Three and Four was sufficient, under *Stewart*, Vickers should have these counts reversed and rendered by this Court. Furthermore, the appellant would submit that because of this issue, Vickers should be granted a new trial on the capital murder count. The jury may have concluded a conspiracy existed, but that there was insufficient evidence that Vickers hired Booth to complete the job.

ISSUE NO. 4 THE TRIAL JUDGE ERRED IN NOT ALLOWING A STATE'S WITNESS TO BE IMPEACHED WITH A PRIOR CONVICTION.

During the cross examination of Charles Allen, the defense sought to impeach his testimony with a 1977 conviction for burglary. Tr. 668. After an extended discussion, the trial judge held that under M.R.E. 609 (b), the conviction was too old for impeachment, and further held that trial counsel could not discuss Allen's several prior arrests with no disposition. Tr. 668-72. This ruling prohibited counsel from exploring the possible bias this witness had for the prosecution to attack his credibility under M.R.E 607 and M.R.E. 616.

It must be remembered that counsel was attempting to impeach a *non-party* witness under M.R.E. 609(a)(1)(A). The Mississippi Supreme Court has held that prejudice to a non-party is irrelevant in such a circumstance.

> ¶ 38. In *Hubbard v. State*, 437 So.2d 430, 433-34 (Miss.1983), this Court stated Article 3, Section 26, of the Mississippi Constitution grants and guarantees a criminal defendant the right to confront witnesses against him. See also *Stromas v. State*, 618 So.2d 116, 121 (Miss.1993) (stating criminal defendant is entitled to fully confront every witness against him). The right of confrontation "extends to and includes the right to fully cross-examine the witness on every material point relating to the issue to be determined that would have a bearing on the credibility of the witness and the weight and worth of his testimony." *Myers v. State*, 296 So.2d 695, 700 (Miss.1974).
>
> ¶ 39. Considering the above cases, it was an abuse of discretion for the trial judge to have excluded evidence of Ross's prior conviction under Mississippi Rule of Evidence 609. Although the trial judge did not directly address the five factors listed in *Peterson*, it is apparent from the discussion in chambers that the judge did conduct a balancing test considering at least some of the factors. What the trial judge failed to consider is because Ross is not a party in this case, any prejudice to him is irrelevant. See *Wilcher*, 697 So.2d at 1143 (Sullivan, P.J., dissenting) ("MRE 609(a)(1) refers to the 'prejudicial effect on a party.' Since [the witness] was not a party to the suit but merely a witness, the prejudicial effect on his testimony is irrelevant. In other words, when a

> defendant or party to a suit ... testifies, and a prior conviction is sought admissible for impeachment purposes, the court must weigh the probative effect of the prior conviction and its prejudicial effect on the 'party.' However, a non-party may not be prejudiced. Therefore, the extortion conviction should have been admitted.").
>
> ¶ 40. The State's argument that because Ross was its primary witness any prejudice to him would unduly prejudice the State's case is flawed. Mississippi Rule of Evidence 609 exists to protect testifying parties from being unduly prejudiced through admission of prior convictions. Since Ross is not a party, any prejudice to him is irrelevant. To deny Young the right to fully explore this aspect of Ross's credibility is to deny him the right to fully confront the witnesses against him. This point is particularly true since the State and Young were both in agreement Ross was the only witness directly linking Young to the crime. It was an abuse of discretion for the trial judge not to allow evidence of Ross's prior conviction.

Young v. State, 731 So.2d 1145 (¶38-40) (Miss.1999).

The same rationale applies to the time limit in M.R.E. 609(b). A balancing test regarding the probative value versus prejudicial effect is simply unnecessary with a non-party. *Jefferson v. State*, 818 So.2d 1099 (¶27) (Miss. 2002). The Supreme Court confirmed the principals in *Young* in *White v. State*, 785 So.2d 1059 (Miss.2001). In *White,* the trial court denied a pretrial motion to allow the defense to cross-examine the State's star witness about a drug conviction because it did not relate to the witness's veracity. *Id.* at ¶4. The Supreme Court, citing *Young*, reversed White's conviction and remanded the case for a new trial. *Id.* at ¶13.

The Court held that the plain language of M.R.E. 609(a)(1) does not require the prior conviction of a felony to involve dishonesty, false statements, or propensity for truthfulness to be admissible impeachment material on cross-examination. Again, citing *Young*, the Court

concluded that, "To deny the accused the right to explore fully the credibility of a witness testifying against him, is to deny him the Constitutional right of a full confrontation. *White* at ¶12.

The credibility of a witness may be impeached on cross-examination by showing bias, prejudice, motive or hostility. Additionally, wide latitude is to be allowed on cross-examination to show bias or motive for the purpose of affecting credibility. *Sanders v. State*, 352 So.2d 822, 824 (Miss.1977). It is obvious Vickers was not afforded such wide latitude. Vickers was on trial for his life. He was entitled to prove the bias of the witnesses against him. Under M.R.E. 616, Vickers should also have been allowed to cite the many times Allen received favorable treatment by the police. Although he was arrested on numerous occasions, he was apparently never prosecuted.

In *Zoerner v. State*, 725 So.2d 811 (Miss. 1998), the Supreme Court held it was reversible error for the defense to be prohibited from exploring past favorable treatment by the State to a prosecution witness. Trial counsel was attempting to develop these facts not simply to discredit Allen because he had been convicted of or arrested for crimes, "but to ferret out any motive or reason [the witness] might have to be such a favorable state witness." *Id.* at ¶10, citing *Bevill v. State*, 556 So.2d 699, 713-14 (Miss.1990).

> ¶ 11. In addition, "[e]vidence that a material witness has received favored treatment at the hands of law enforcement authorities, particularly where that witness is himself subject to prosecution, is probative of the witness' interest or bias and may be developed through cross-examination or otherwise presented to the jury." *Suan v. State*, 511 So.2d 144, 147-48 (Miss.1987) (citing *Malone v. State*, 486 So.2d 367, 368-69 (Miss.1986); *Hall v. State*, 476 So.2d 26, 28 (Miss.1985); *Barnes v. State*, 460 So.2d 126, 131 (Miss.1984);

King v. State, 363 So.2d 269, 274 (Miss.1978); *Sanders v. State*, 352 So.2d 822, 824 (Miss.1977)).

Zoerner, at ¶11.

As the Supreme Court held in both *Young* and *White*, Vickers's case should be remanded for a new trial allowing the defense to properly confront and cross-examine the prosecution witnesses.

ISSUE NO. 5 THE TRIAL JUDGE ERRED IN FAILING TO GRANT A NEW TRIAL BASED ON JUROR MISCONDUCT

During the hearing on Vickers's Motion for a New Trial, trial counsel presented evidence to the lower court that certain jurors had not been completely truthful during voir dire. The court reserved ruling on the motion until both counsel could submit proposed orders. Tr. 1394. Subsequently, the prosecution submitted a motion, which the court granted, to re-open the hearing on Vickers's motion for a new trial to take additional testimony on the juror issue. (The motion and the order granting the motion are contained in the record under seal).

The trial judge held a subsequent hearing on the juror misconduct issue on August 23, 2004. Tr. 1397-1465 (under seal). The trial court eventually denied Vickers's motion for a new trial on September 22, 2004, finding the jurors in question did not misrepresent any material fact during voir dire. This Order has been supplemented into the record. Supplemental Volume 1, pages 1-2, R.E. 32-33.

Without restating the detailed testimony contained in the sealed record, the appellant asserts that had the jurors in question been entirely truthful during voir dire, proper

challenges could have been made against them. The record reflects that Vickers did not use all of his available peremptory challenges. Tr. 607.

> The failure of a juror to respond to a relevant, direct, and unambiguous question leaves the examining attorney uninformed and unable to ask any follow-up questions to elicit the necessary facts to intelligently reach a decision to exercise a peremptory challenge or to challenge a juror for cause.

Odom v. State, 355 So.2d 1381, 1383 (Miss. 1978).

An appellate court's authority to reverse a trial court's ruling on a motion for new trial is limited to those instances when the trial court abuses that discretion. *Gladney v. Clarksdale Beverage Co., Inc.*, 625 So.2d 407, 415 (Miss. 1993). The question therefore becomes whether or not the trial judge abused his discretion in finding that the jurors in question did not withhold substantial information or misrepresent any material fact during voir dire. The responses these jurors gave were extensively discussed at both the August 9, 2004 hearing, as well as the August 23, 2004 hearing. The appellant submits that had the jurors properly responded, there would have been grounds to challenge them. Without the full information these jurors should have provided, Vickers was prejudiced by the inability to intelligently use his challenges. *Atkinson v. State*, 371 So.2d 869, 870 (Miss. 1979).

In the order dismissing the motion for a new trial, the trial judge did not follow the requirements of *Odom*. The Supreme Court stated in *Odom*:

> Therefore, we hold that where, as here, a prospective juror in a criminal case fails to respond to a relevant, direct, and unambiguous question presented by defense counsel on voir dire, although having knowledge of the information sought to be elicited, the trial court should, upon motion for a new trial, determine whether the question propounded to the juror was (1) relevant to the voir dire examination; (2) whether it was unambiguous; and (3) whether the

> juror had substantial knowledge of the information sought to be elicited. If the trial court's determination of these inquiries is in the affirmative, the court should then determine if prejudice to the defendant in selecting the jury reasonably could be inferred from the juror's failure to respond. If prejudice reasonably could be inferred, then a new trial should be ordered.

Odom, at 1383.

The trial court's order does not make any specific findings as to whether the questions were relevant and unambiguous, nor whether or not the jurors had substantial knowledge of the questions. The court only found the jurors did not misrepresent anything. This is not the test under *Odom*.

The Mississippi Supreme Court has reversed numerous cases where jurors failed to truthfully respond to voir dire questions. See *Brooks v. State*, 360 So.2d 704, 705 (Miss. 1978) (members of juror's immediate family was recent victim of crime), *Dase v. State*, 356 So.2d 1179, 1182-83 (Miss. 1978)(murder conviction reversed because juror did not reveal her son had been murdered), *Laney v. State*, 421 So.2d 1216, 1218 (Miss. 1982) (conviction for murder of deputy sheriff reversed because juror failed to reveal that she was related to three law enforcement officers), and *see also Marshall Durbin, Inc. v. Tew*, 381 So.2d 152, 154 (Miss. 1980) (new trial ordered where juror failed to reveal that plaintiff's attorney had represented him).

Additionally, a juror's silence regarding matters inquired about during voir dire is a violation of due process. *Williams v. Taylor*, 529 U.S. 420, 441-42 (2000)(holding juror bias evidenced where juror failed to give truthful answers on voir dire and where juror's

explanations for so doing were incredible). See also, *Smith v. Phillips*, 455 U.S. 209, 217-21 (1982), and *Donnelly v. DeChristoforo*, 416 U.S. 637, 647-48 (1974).

Accordingly, Vickers should be granted a new trial with a fair and impartial jury.

ISSUE NO. 6 THE TRIAL JUDGE ERRED IN FAILING TO ALLOW VICKERS TO PRESENT A DEFENSE.

In Vickers's motion for a new trial, trial counsel specifically noted how the trial judge repeatedly prevented counsel from mounting a vigorous defense in the case.

> 9. The defense was limited in its cross-examination of various witnesses and in the presentation of evidence, including introducing evidence of a prior conviction of Charles Allen; evidence of prior inconsistent statements and description of a vehicle and the alleged assailant by Brenda Vickers; evidence that David Vickers had children and was a payable on death beneficiary of certificates of deposit owned by Elmer Vickers and that other than the certificates of deposit there are no after tax assets of Elmer Vickers estate, which facts are within the personal knowledge of Brenda Vickers; evidence that Brenda Vickers attempted to mislead investigators by faking being placed under hypnosis and evidence of marital problems between the decedent and Brenda Vickers. Mr. Vickers reiterates all the objection he made during the trial, including the limitations placed on his examinations of Charles Allen, Kelvin McKenzie and Brenda Vickers.
>
> C.P. 470-71, R.E. 29-30.

Under both the Fourteenth Amendment to the United States Constitution and Article 3, Section 26 of the Mississippi Constitution, an accused has a fundamental right to due process, which includes an opportunity to present a meaningful defense. "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973).

The failure to afford a defendant a reasonable opportunity to defend himself is a denial of due process. *In re Oliver*, 333 U.S. 257, 273 (1948).

The trial judge prevented counsel from presenting a meaningful defense repeatedly during trial. During the cross-examination of Brenda Vickers, trial counsel attempted to show the jury that Vickers would not be entitled to any of David's estate. Tr. 1117-21. Counsel was also preventing from attempted to impeach Brenda's testimony with her prior inconsistent statements during her alleged hypnosis session. Tr. 1058-69, Ex. D-2 for ID. The State had also been granted a motion in limine prohibiting the defense from attempting to show that Brenda Vickers could have been behind David's murder. Tr. 616-19.

Trial counsel was also prohibited from cross-examining investigators about why they failed to pursue firearm charges against Woodruff. Tr. 1017. Counsel was prohibited from exploring information about the estate lawsuit. Tr. 1033. The court would not allow Brenda to be cross examined about a wrongful death lawsuit she filed against Vickers. Tr. 1115-17. Finally, the court would not allow counsel to ask David's friend if he knew who the executor was to David's will. Tr. 1157-58.

Where a trial court excludes admissible evidence and that evidence is the avenue whereby the defendant is attempting to present his view of the facts, the federal constitution is implicated. *United States v. Blum*, 62 F.3d 63, 67 (2nd Cir. 1995); *United States v. Davis*, 772 F.2d 1339, 1347 (7th Cir. 1985), *cert. denied* 474 U.S. 1036 (1985) (relying on *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Washington v. Texas*, 388 U.S. 14 (1967); *Boykins v. Wainwright*, 737 F.2d 1539, 1544 (11th Cir. 1984); *United States v. Pizarro*, 717

F.2d 336, 351 (7th Cir. 1983)). Put another way, the trial court abuses its discretion where admissible evidence which establishes a proposition supporting a defense is excluded. *United States v. Todd*, 108 F.3d 1329, 1331-34 (11th Cir. 1997); *United States v. Williams*, 97 F.3d 668, 671-72 (11th Cir. 1992); see also *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982) (where testimony of witness is relevant, material and vital to defense, Sixth Amendment secures the right to present the testimony).

Trial counsel was attempting to prove the State's motive for the murder, inheritance money, was faulty. It would certainly impact the jury's consideration of the facts if doubt was cast on the State's theory. Even assuming, *arguendo*, that implying Brenda Vickers could have been a suspect was unreasonable, a defense may be unreasonable. The defendant, nonetheless, cannot be refused the right to present that defense. *United States v. Riley*, 550 F.2d 233, 237-38 (5th Cir. 1977). Vickers should be granted a new trial where counsel is allowed to present a meaningful defense.

ISSUE NO. 7 CUMULATIVE ERROR DEMANDS VICKERS BE PROVIDED A NEW TRIAL.

The Mississippi Supreme Court has recognized that several errors not individually sufficient to warrant a new trial can require reversal when taken together. *Stringer v. State*, 500 So.2d 928, 946 (Miss.1986). Besides the issues raised above, there were several other errors committed throughout the trial. Although perhaps these errors would be harmless in isolation, when combined with the issues argued above, the appellant asserts their cumulative effect mandates a new trial.

The trial judge erred in allowing testimony regarding Vickers's alleged plan to have Spencer and Woodruff kill Booth after Booth finished with the murder of David and Brenda. The trial court denied a motion in limine regarding this evidence. Tr. 829-40. Statements made after the objectives of the conspiracy have either succeeded or failed are inadmissible. *Nixon v. State*, 533 So.2d 1078, 1091 -1093 (Miss.1987), citing *Krulewitch v. United States*, 336 U.S. 440, 442 (1949), and the comments to M.R.E. 801(d)(2)(E). Since the evidence was insufficient to show a real conspiracy ever existed with both Spencer and Woodruff, this testimony was highly prejudicial and should not have been admitted.

The trial judge also erred in allowing Charles Allen to testify he and Vickers entered into a conspiracy to kill David and Brenda in September of 2001. The lower court should have granted the defense motion for a mistrial. Tr. 697-99. Under M.R.E. 404(b), this testimony was not necessary to tell the full story of what happened. This was an entirely separate incident involving a separate alleged conspiracy. This testimony was also highly prejudicial and should not have been allowed under M.R.E. 403. The record does not indicate the court considered any balancing when making his ruling. "It is admissible for other purposes, such as intent, preparation, planning, knowledge, absence of mistake or accident.[2]" Tr. 699.

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[2] The court also found the objection and request for a mistrial untimely, but as trial counsel pointed out, the defense believed the State was going to make some tie-in with the conspiracies being tried. As the record indicates, only after the State failed to do this was the objection made.

The trial judge also erred in allowing Lieutenant Kaho's offense report concerning Charles Allen into evidence. The officer testified about it, therefore there was no need to admit it. Tr. 695. What Kaho was told by Judge Lueckenbach about why Allen would not be released was clearly hearsay and inadmissible. M.R.E. 801. Although the Mississippi Supreme Court has held in *Copeland v. City of Jackson*, 548 So.2d 970, 975 (Miss.1989), that police reports can be admissible as business records under M.R.E. 803(6), this Court has held that *Copeland* should not be construed as holding that all of the contents of the report were necessarily admissible. "Notations in such a report which are recitations of statements of others may not be admissible." *Davis v. State*, 762 So.2d 347 (¶4) (Miss.App. 2000). Trial counsel's cross examination of Kaho had nothing to do with the incident report Kaho was testifying about. Tr. 693-94. Kaho had already testified about the report. Since the credibility of the report was not attacked, it was not needed to rebut a charge of recent fabrication under M.R.E. 801(d)(1)(B). The admission of the report was unnecessary and was prejudicial.

Even if this Court were to find no reversible error in the all of the issues presented above, when the errors are viewed collectively, Vickers is clearly entitled to a new trial based on cumulative error.

> The cumulative error doctrine stems from the doctrine of harmless error, codified under Mississippi Rule of Civil Procedure 61. It holds that individual errors, which are not reversible in themselves, may combine with other errors to make up reversible error, where the cumulative effect of all errors deprives the defendant of a fundamentally fair trial. *Byrom v. State*, 863 So.2d 836, 847 (Miss.2003). As an extension of the harmless error doctrine, prejudicial rulings or events that do not even rise to the level of harmless error will not be

> aggregated to find reversible error. As when considering whether individual errors are harmless or prejudicial, relevant factors to consider in evaluating a claim of cumulative error include whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged. See, e.g., *Leonard v. State*, 114 Nev. 1196, 1216, 969 P.2d 288, 301 (Nev.1998) (citing *Homick v. State*, 112 Nev. 304, 316, 913 P.2d 1280, 1289 (1996)). That is, where there is not overwhelming evidence against a defendant, we are more inclined to view cumulative errors as prejudicial. In death penalty cases, all genuine doubts about the harmlessness of error must be resolved in favor of the accused because of the severity of the punishment. See *Walker v. State*, 913 So.2d 198, 216 (Miss.2005).

Ross v. State, 954 So.2d 968, 1018 (Miss. 2007).

CONCLUSION

Given the facts presented in the trial below, James Vickers is entitled to have his convictions reversed and remanded for a new trial. Vickers's is serving a life without parole sentence for capital murder. He is risking a great deal in asking the court to remand this case for a new trial, as it potentially gives the State another opportunity to seek the death penalty. However, Mr. Vickers is willing to take that risk to clear his name.

Respectfully submitted,
MISSISSIPPI OFFICE OF INDIGENT APPEALS
For James Dwight Vickers, Sr., Appellant

By: 

Leslie S. Lee

CERTIFICATE

I, Leslie S. Lee, do hereby certify that I have this the 17th day of September, 2007, mailed a true and correct copy of the above and foregoing Brief Of Appellant, by United States mail, postage paid, to the following:

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