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IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI

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NANCY BYRD AND
WENDY GAYLE (GAIL) BYRD MILLER

JUN 15 2007

APPELLANTS

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SUPREME COURT
COURT OF APPEALS

V.

NO. 2006-KA-02044-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF APPELLANTS

ORAL ARGUMENT IS NOT REQUESTED

✓

MISSISSIPPI OFFICE OF INDIGENT APPEALS
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APPELLANTS

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APPELLEE

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. Nancy Byrd
3. Wendy Gayle (Gail) Byrd Miller
3. Ellis J. "Bilbo" Mitchell and the Kemper County District Attorneys Office
4. Honorable Lester F. Williamson, Jr.

THIS 15th day of June, 2007.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Nancy Byrd and Wendy Gayle (Gail) Byrd Miller,
Appellants

By:



Leslie Lee, Counsel for Appellants

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF ISSUES	1
STATEMENT OF THE CASE	1
FACTS	2
SUMMARY OF THE ARGUMENT	8
ARGUMENT	8
ISSUE NO. 1: THE TRIAL JUDGE ERRED IN ALLOWING THE DEFENDANT WENDY MILLER TO BE CROSS-EXAMINED ON COMMENTS MADE BY HER ATTORNEY DURING OPENING ARGUMENT AND BY ALLOWING THE STATE TO FURTHER ARGUE ON THIS MATTER DURING CLOSING	8
ISSUE NO. 2: THE TRIAL JUDGE ERRED IN ALLOWING THE STATE TO COMMENT ON BOTH DEFENDANTS' RIGHT TO REMAIN SILENT	13
ISSUE NO. 3: THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE	15
CONCLUSION	18
CERTIFICATE OF SERVICE	19

TABLE OF AUTHORITIES

<i>Benson v. State</i> , 551 So.2d 188 (Miss.1989)	16
<i>Coleman v. State</i> , 23 So.2d 404 (Miss. 1945)	13
<i>Craft v. State</i> , 84 So.2d 531 (Miss. 1956)	12
<i>Doyle v. Ohio</i> , 426 U.S. 610, 96 S.Ct. 2240 (1976)	15
<i>Dunaway v. State</i> , 551 So.2d 162 (Miss. 1989)	12
<i>Edwards v. State</i> , 737 So.2d 275 (Miss. 1999)	12
<i>Flowers v. State</i> , 842 So.2d 531 (Miss.2003)	12
<i>Herring v. State</i> , 691 So.2d 948 (Miss.1997)	16
<i>McFee v. State</i> , 511 So.2d 130 (Miss.1987)	16
<i>McGrone v. State</i> , 807 So.2d 1232 (Miss. 2002)	15
<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966)	8, 15
<i>Smith v. State</i> , 457 So.2d 327 (Miss. 1984)	13
<i>Tubb v. State</i> , 64 So.2d 911 (Miss.1953)	12
<i>Walker v. State</i> , 729 So.2d 197 (Miss. 1998)	11
<i>Watts v. State</i> , 828 So.2d 835 (Miss.App. 2002)	12
 CONSTITUTIONAL AUTHORITY	
AMENDMENT V, UNITED STATES CONSTITUTION	14
ARTICLE III, § 26, MISSISSIPPI CONSTITUTION	14

STATEMENT OF THE ISSUES

ISSUE NO. 1: THE TRIAL JUDGE ERRED IN ALLOWING THE DEFENDANT WENDY MILLER TO BE CROSS-EXAMINED ON COMMENTS MADE BY HER ATTORNEY DURING OPENING ARGUMENT.

ISSUE NO. 2: THE TRIAL JUDGE ERRED IN ALLOWING THE STATE TO COMMENT ON BOTH DEFENDANTS' RIGHT TO REMAIN SILENT.

ISSUE NO. 3: THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Kemper County, Mississippi, and a judgment of conviction for the crime of aggravated assault against Nancy Byrd and the crime of aggravated assault and possession of a firearm by a convicted felon against Wendy Gayle (Gail) Byrd Miller (hereafter Wendy Miller), following a jury trial on October 18, 2006, Honorable Lester F. Williamson, Jr., Circuit Judge, presiding. Ms. Byrd was sentenced to fifteen (15) years with twelve (12) years suspended, followed by five (5) years probation. Ms. Byrd was given a five thousand dollar (\$5,000.00) fine, was ordered to pay seven hundred and fifty dollars (\$750.00) to the victim's compensation fund, along with court costs. Tr. 418, C.P. 74-76, R.E. 40-42. Wendy Miller was sentence to fifteen (15) years with twelve (12) years suspended, followed by five (5) years post-release supervision for the aggravated assault. Ms. Miller was also ordered to pay a five thousand dollar (\$5,000.00) fine and ordered to pay seven hundred fifty dollars (\$750.00) to the victim's compensation fund, along with court costs. Tr. 418-19, C.P. 64-67, R.E. 30-33. Additionally, Ms. Miller

was given a consecutive sentence of three (3) years, with two (2) years suspended for her conviction of being a convicted felon in possession of a firearm. Tr. 419, C.P. 69-72, R.E. 35-38. Ms. Miller was also given a one thousand dollar (\$1,000.00) fine. Both Nancy Byrd and Wendy Miller are presently incarcerated with the Mississippi Department of Corrections¹.

FACTS

According the trial testimony, on the morning of May 12, 2005, Ernest Byrd, between the hours of 9:00 a.m. and 10:00 a.m., was working out in his yard in Bailey, Mississippi. Tr. 76. Around that same time Samantha Booth with her son, Devin, arrived at the house to speak to Ernest about buying some property and a trailer from him. Tr. 77. While Ernest was sitting in his living room discussing the transaction with Samantha, he could see his daughter, Wendy Gayle Byrd Miller (Wendy) and his estranged wife, Nancy Byrd (Nancy), approaching the residence through the living room window.

Upon their arrival at the house Nancy exited the truck and came to the front door. Ernest met her at the door and Nancy informed him that she was there to get some of her clothes. Ernest testified he allowed Nancy to enter to get some of her clothes as long as she did not cause any problems. Tr. 78. According to Ernest, when Nancy entered into the house

¹Appellant counsel acknowledges both Ms. Byrd and Ms. Miller were represented at trial by different counsel. After a thorough review of the review, there appears to be no conflict of interest in representing both appellants on appeal. Their defenses did not conflict and the evidence presented by the State implicated both appellants equally. Both appellants were given the opportunity to request separate appellant counsel, but neither raised any objection.

she started calling Samantha foul names and cursing at her. During this time Wendy remained in the vehicle parked out front. At that time, Ernest called the sheriff's office to tell him he was having a problem. Nancy then got back into the car and left. Ernest watched the vehicle drive out of sight to the highway. Tr. 80. Ernest made another call to the sheriff's department to inform them that Nancy and Wendy had left, and there was no need to hurry. He asked the sheriff's department to send someone to escort Samantha Booth out. Tr. 82. Mr. Byrd then finished his transaction with Samantha and then went outside, while Samantha remained inside. Tr. 83.

About five minutes later, while putting some trash in his truck, Ernest heard a horn blowing and saw Nancy again coming down the road. Ernest testified he could not remember whether he locked the door or if he instructed Samantha to lock the door. Nancy stopped the vehicle between the front door and Ernest's truck. Both women exited the vehicle and moved toward the porch while shouting expletives at Samantha Booth. Tr. 83-84.

Ernest claimed that Wendy pulled out a pocket knife and attempted to stab him. Tr. 84. According to Ernest, Wendy then grabbed a mop handle and attempted to hit him at the same time she was attempting to stab him. Tr. 86. Ernest picked up a framing hammer to keep Wendy at bay. Tr. 87. During this time Nancy had picked up an axe handle and proceeded to use the handle knock the window out. After breaking the window, Nancy began to hit Ernest in the head with the axe handle. Tr. 88. Ernest claimed that Nancy then reached around him and broke the glass on the storm door. While Ernest subdued Nancy,

Wendy broke through the locked door and ran into the house. Tr. 89. Ernest alleged that while inside the house, Wendy grabbed a gun that was kept by Ernest's chair. Wendy then ran back to the porch with the gun. Tr. 90.

Ernest then claimed he grabbed Nancy around the neck to shield himself. He alleged Nancy instructed Wendy to shoot him. Tr. 90-91. Nancy then bent forward to give Wendy a clear shot, but Ernest bent down with her. Wendy fired a shot, but missed. Ernest testified he then ran off the porch into the yard, as Wendy fired a second shot in his direction. While running toward the back of the house, Wendy fired a third shot, also missing him. Tr. 91. Ernest hid behind a tree. Tr. 92. He saw the women coming around the edge of the house. He claimed he saw Wendy give the gun to Nancy. Tr. 93-94. Ernest claimed he still had the axe handle he had taken from Nancy. He threw the axe handle at Nancy. This is when he claimed Nancy shot him. Tr. 97. Ernest was shot in the arm. Tr. 98.

Ernest claimed he ran five or six steps and fell to the ground. Nancy then walked up and tried to fire the pistol again, but "it snapped." Tr. 99. He then claimed he acted dead. Tr. 100. Once the women were out of sight, Ernest said he crawled into the woods. Tr. 101. Ernest then waited in the woods until law enforcement arrived. Tr. 102.

On cross-examination, Ernest admitted his statement was actually written by another daughter, six days after the incident. Ernest did not mention in his statement that he threw the axe handle at Nancy immediately before she fired the gun at him. Ernest claimed that he was mistaken, claiming to be disoriented from medication after leaving the hospital. Tr. 134.

Ernest also admitted his statement did not include his claim that Nancy tried to shoot him a second time but the gun failed to fire. Tr. 135.

Ernest claimed Wendy knew where the gun was because he always kept his gun to the right of his chair, regardless of the chair's location in the room or who was in the house. Tr. 138. Ernest denied striking either woman, but just poked at them to keep them at bay. Tr. 141. Ernest admitted to being very emotional and heavily medicated when his statement was taken. Tr. 160.

Samantha Booth testified that she arrived at Ernest's house around noon on May 12, 2005, accompanied by her stepson, Devin, who was two years old at the time. Tr. 166. Samantha admitted that she had known Ernest since 2000, and the relationship between them was a business one, since she was buying a trailer and some land from him. Tr. 165. Samantha claims that she called the Sheriff's office when Nancy and Wendy arrived the second time. Tr. 169. She claimed Ernest instructed her to lock the door. Tr. 171. Samantha claimed Nancy broke out the glass in the front window with an axe handle. Tr. 174. She testified Ernest told her to run and hide. Samantha then ran to the back bathroom by the washing machine. At that point she heard the front storm door break. Tr. 175.

While hiding in the back room Samantha heard the "front door bust open." Samantha claimed she heard Nancy tell Wendy to get the gun by the chair. Tr. 175. The next thing Samantha heard was Wendy instructing her mother to move out of the way. Tr. 176. Samantha then heard a shot go off. Samantha alleged she then took off with her stepson out

Plus
Monday
Night 372

the back door. While Samantha was running out of the back door, she dialed 911 again. Tr. 177. She heard more shots being fired as she ran. Samantha then found a place to hide under a piece of tin. Tr. 178. She testified she could hear Nancy tell Wendy that Ernest was moving and to get a knife and cut his throat. Tr. 180. Samantha stayed hidden until deputies arrived. Tr. 181. She claimed never to have touched the gun. Tr. 194.

Deputy David Taylor was dispatched to go out and talk to Ernest. While en route, the dispatcher informed Taylor that there was a disturbance at the Byrd residence. Tr. 204. Since the dispatcher told him that shots were fired, Taylor waited for back-up. Tr. 205. Taylor and another deputy proceeded to the scene. When Taylor exited his vehicle, Samantha emerged from the woods, and told him the women had a gun and had shot Ernest. Tr. 206. Taylor then inquired what happened to Ernest, and Nancy told him he had crawled off into the woods. Taylor then hollered for Ernest, and he emerged from the woods holding his right arm. Tr. 207. He found the weapon in the house. The .22 had four spent rounds and two live rounds left in the chamber. Tr. 213. Taylor never found the knife allegedly used by Wendy, only the axe handle and the gun. Tr. 214.

Taylor admitted he took no prints from the gun and conducted no gunshot residue tests. Tr. 229-230. The sheriff's office log book showed Ernest called the station at 11:47 a.m. The next recorded call came from Wendy, telling them Ernest needed an ambulance. The phone calls were made from the same phone. Tr. 232. There was no evidence presented that Samantha actually made any call to 911 from her cell phone. Tr. 198.

Wendy testified in her own defense. She stated that they went to Ernest's house to collect some of her mother's things. Ernest met them on porch and asked them to return when Samantha left, which was supposed to be in about twenty minutes. Tr. 263. When they returned, Ernest became upset because they did not wait long enough to allow Samantha to leave. Tr. 264. The situation escalated and Ernest grabbed both an axe handle and hammer, and began swinging both weapons at the same time. Tr. 265. Wendy became upset when Ernest hit Nancy in the leg with the axe handle. She testified Ernest broke her thumb and injured her arm with the hammer. Wendy then lunged at Ernest and they both went down the steps, and she somehow got Ernest to drop the hammer. They went into the front yard while Nancy remained on the porch. At this time, Samantha came from around the house and began firing the gun. Ernest was telling Samantha to shoot her. However, Samantha shot Ernest instead. Tr. 267.

Wendy stated Samantha then ran behind the back of the house. Tr. 268. Wendy broke down the door to call 911. Tr. 269. She then went back outside to check on her mother, and then went check on her father. Wendy testified that she was helping her mother to the truck when deputies arrived. She was in fear of Samantha. Wendy looked for her father but could not find him. Tr. 270. Wendy denied ever having a gun in her hands. She denied having any weapon at the time of the incident. Tr. 271. She was treated for injuries that afternoon for the bruises and the broken thumb that resulted from her father hitting her. Tr. 272.

Samantha testified in rebuttal about an incident the day before where Wendy allegedly stopped her on the highway. She claimed Wendy forced her off the road and then cursed her and threatened her. Tr. 221-31.

SUMMARY OF THE ARGUMENT

Both Nancy Byrd and Wendy Miller were denied a fundamentally fair trial free from inflammatory and misleading cross-examination and closing arguments about what her trial counsel stated on opening statement. The prosecutor also improperly brought out that both defendants exercised their rights to remain silent after *Miranda* warnings were given to them. Appellants contend that the errors complained of herein were so prejudicial as to deprive them of a fair trial before an impartial jury. Finally, these errors and the evidence presented at trial, demonstrate that the verdicts were against the overwhelming weight of the evidence. Both Nancy Byrd and Wendy Miller should have their convictions reversed and remanded for a new trial.

ARGUMENT

ISSUE NO. 1: THE TRIAL JUDGE ERRED IN ALLOWING THE DEFENDANT WENDY MILLER TO BE CROSS-EXAMINED ON COMMENTS MADE BY HER ATTORNEY DURING OPENING ARGUMENT AND BY ALLOWING THE STATE TO FURTHER ARGUE ON THIS MATTER DURING CLOSING.

During opening statements, defense counsel for Ms. Miller, made a quick summation of what he thought the evidence would show. He concluded by commenting:

[BY MR. JONES]...[T]hat the argument, the fight continued out in the yard; that Samantha Booth is inside the house. She is locked in. She is in the back of the house. And there is a gun in the house. That Wendy – neither Wendy

nor Nancy Byrd went in the house. But at some point that gun comes from wherever it was in the house and it is discharged; that Ernest Byrd is struck with one of the bullets that was fired from that gun. But at no time during the events of that day of May 12, 2005, was Nancy – excuse me – was Wendy Byrd in possession of a firearm nor did she shoot her father.

Tr. 66-67, R.E. 18-19.

As the facts above state, Wendy Miller took the stand in her defense and told the jury that Samantha Booth came from around the house and began firing rounds. Tr. 267. This was not inconsistent with counsel's opening statement. However, during her cross-examination, the prosecution began improperly asking her about her lawyer's comments.

[BY MR. ANGERO] Q. Now, I try to be careful when attorneys are making comments. The way I understood the opening statement from Mr. Jones was that – of course, he didn't mention anything about you and your dad basically wrestling in the yard. But he did say that shots were fired basically from an unknown person from an unknown direction. Do you remember that? Shots came from inside the house; do you remember him saying that?

[BY WENDY MILLER] A. No – I mean, yes, I remember him saying that. But that's not how it happened.

Q. Well, my question is: did you tell Mr. Jones this version of the story before today?

A. Yes.

Q. Why would he tell the jury that shots were fired from inside the house if your version of it is that the shots were from outside the house?

A. I don't know.

Q. Well, he's your lawyer, right?

A. Yes.

Q. You have no explanation as to why the opening statement version of this is that shots were fired from inside the house and yet your version of it is that shots were fired from the yard, right?

A. I believe what he said is that the gun was discharged.

Q. From inside the house, shots came from inside the house, right?

A. Maybe he was mistaken.

Q. Well, was he mistaken?

A. He was very mistaken.

Q. How can he be mistaken, ma'am? How is that possible.

BY MR. JONES: Objection. What I say is not evidence. She's offering testimony and counsel is arguing with her about decisions that I made in presenting this case.

BY THE COURT: Well, it is cross-examination and statements that were made by counsel that was not present, he is entitled to cross-examine this witness where you might have obtained that information.

Q. My question is: How can it happen that he can come in here and give this jury erroneous information when you are sitting there right beside him? How is that possible?

A. He was mistaken. Maybe he misspoke.

Q. How is it possible that he is mistaken? Did you tell him something different?

A. No, sir.

Q. Did you ever tell this story to him before you took the witness stand?

A. Yes, sir.

Q. So he just made up his own version, I guess, of what happened there to give the jury so that it would conflict with what you've got to say; is that right?

A. No, he misspoke.

Tr. 288-89, R.E. 20-22.

It is abundantly clear in reviewing the opening statement by counsel, that Ms. Miller's testimony did not conflict with counsel's comments. This cross-examination clearly confused the jury, and both defendants were prejudiced by it. The trial judge erred in not sustaining the objection to it. By overruling the objection, the court ultimately confirmed the prosecutor's version of the opening statement. The prosecutor was the one who was mistaken about what was said by defense counsel.

The State's questioning was improper impeachment. The State was essentially allowed to go outside the record in attempting to impeach Wendy with a comment made by her counsel which was not even accurate. The Mississippi Supreme Court found reversible

error in a similar case when a prosecutor used comments by a co-defendant's counsel in opening to cross-examine a defendant. *Walker v. State*, 729 So.2d 197 (¶14-17) (Miss. 1998). In a case such as this, where the jury must determine which party is being truthful, such impeachment was undoubtedly prejudicial to both Wendy and Nancy.

The error was compounded and the jury was further misled by the prosecutor's insistence on bringing the matter up again during closing.

[BY MR. ANGERO] ...What is significant about her attorney, in my mind is that apparently it was unknown when we started this trial what she was going to say. If you want my opinion, she didn't know what she was going to say until she was on the witness stand. The fact that her lawyer is telling you – and, ladies and gentlemen, when I was – I don't know anything about Mr. Jones' schooling, I'm sure he had quality teachers like I did. I had one teacher in particular who told me, he said, never ever, ever tell a jury something on opening statement that you don't intend to prove, because that is a promise. You are making a promise to the jury that you will prove just that. Don't say it if you don't intend to prove it. If you aren't sure that you can prove it, don't say it. And I have taken that to heart, and I have never done that.

I'm not saying it is Mr. Jones' fault. I'm sure he is doing the very best he can with what he's got. But you don't say a shot came from out of the house and hit Mr. Byrd when you about to prove or attempt to prove that Ms. Booth came around the house and shot somebody. You don't do that. The problem is that nobody knew, including Ms. Miller, until she took the witness stand, what she was going to say on the witness stand...

Tr. 381-82, R.E. 23-24.

Wendy's testimony was severely impeached by comments that were neither evidence nor even accurate. Counsel did place his objection on the record immediately after closing arguments.

[BY MR. JONES] ...The other thing is I do object to comments that the District Attorney made regarding me towards the close of his closing arguments, and I do want that noted for the record. I object to those remarks. BY THE COURT: Okay. I think I understand why you didn't make those objection in front of the jury. I will note the objections, but I heard no argument here that did not feel was appropriate.

Tr. 386-87.

Appellants acknowledge that parties are given great latitude in making closing statements. *Dunaway v. State*, 551 So.2d 162, 163 (Miss. 1989). "However, arguing statements of fact which are not in evidence or necessarily inferable from it and which are prejudicial to the defendant is error." *Watts v. State*, 828 So.2d 835 (¶9) (Miss.App. 2002), quoting *Tubb v. State*, 64 So.2d 911, 912 (Miss.1953).

An attorney's function in closing argument "is to draw conclusions and inferences from evidence on behalf of his client in whatever he deems proper, so long as he does not become abusive and go outside the confines of the record." *Flowers v. State*, 842 So.2d 531 (¶ 65) (Miss.2003). In the case at bar, the prosecutor argued an impermissible inference based on his mistaken belief of what defense counsel said during opening statements. The oft cited test to determine reversible error during closing is whether the natural and probable effect of improper argument created unjust prejudice against the accused so as to result in a decision influenced by prejudice. *See Craft v. State*, 84 So.2d 531, 535 (Miss. 1956).

The personal attacks on defense counsel by the prosecutor were entirely unnecessary in this case. Such conduct, at least in part, has been considered the by the Supreme Court as the basis for reversal. *Edwards v. State*, 737 So.2d 275, 300-301 (Miss. 1999). Taking both

the cross-examination of Wendy and the prosecutors closing statement together, it cannot “be said with confidence that the inflammatory material had no harmful effect on the jury.” *Smith v. State*, 457 So.2d 327, 336 (Miss. 1984), quoting *Coleman v. State*, 23 So.2d 404 (Miss. 1945). Both convictions should be reversed and remanded for a new trial.

ISSUE NO. 2: THE TRIAL JUDGE ERRED IN ALLOWING THE STATE TO COMMENT ON BOTH DEFENDANTS’ RIGHT TO REMAIN SILENT.

During the cross-examination of Deputy David Taylor, defense counsel inquired whether or not Taylor tried to get both sides of what occurred at the scene.

[BY MR. GEARHART] Q. I know domestic disturbances are probably some of the most dangerous and hard calls to manage. Is it routine in domestic disturbances, which this was reported as, do you normally separate the parties and try to get the real story *on the scene*, or how does that work with your policy here?

A. Yes, sir, we try to get both sides of the story.

Q. *And at the scene* did you ask the defendants what had happened to get their story?

A. I believe I did ask what had happened, *but no stories were given at the scene*.

Q. You said that you had made a call --

BY THE COURT: Excuse me just one second. Are you talking about from the defendants?

BY THE WITNESS: From the defendants, yes sir. Ms. Miller and Ms. Byrd.

Tr. 234, R.E. 25 [emphasis added].

Apparently, the prosecutor believed this entitled him to ask on re-direct about whether the defendants ever volunteered their stories.

[BY MR. ANGERO] Q. Did you try *at anytime* to get a statement from any of them?

A. Yes, sir, I did.

Q. When?

A. At our office, *I believe it was the next day*. It was when Ms. Miller's – the pictures of her bruises were taken. It was that day.

Q. And what did they tell you?

A. They didn't want to make a –

BY MR. JONES: Objection. We're getting into – the defendants do not have to make any kind of statement. We are getting into as to their remaining silent.

BY MR. ANGERO: I don't disagree, Judge, but I didn't bring it up. And to leave the jury with an impression that this officer didn't even try or didn't ask them to get their side of the statement makes it seem as if he was locked in on one thing and wasn't going to do anything else. Mr. Gearhart asked whether or not he asked them for a statement. I just wanted it explained to the jury that there are statements, but that they chose not to give one.

BY THE COURT: I will allow you to ask that question. *Basically without going into details of the statement*, did you ask them when you took those pictures to give a statement about their version? That's the question.

A. Yes, sir, I Mirandized them *and they declined to give statements at that time*.

Q. So you did try to find out their version?

A. Yes, sir.

Tr. 238-39, R.E. 26-27 [emphasis added].

Defense counsel carefully asked the question pertaining to Deputy Taylor's actions at the scene. Counsel did not ask about subsequent attempts to get a statement from the defendants. The question did not open the door to re-direct on whether or not Ms. Miller and Ms. Byrd exercised their right to remain silent after they were read their rights².

Allowing Deputy Taylor to testify that Wendy and Nancy refused to give a statement after they were arrested and informed of their rights, violates the Fifth Amendment of the United States Constitution, as well as Article III, Section 26 of the Mississippi Constitution.

² The deputy could have simply testified that although he did not get the defendants' version at the scene, he did subsequently give them an opportunity the following day. As long as he did not elaborate that they invoked their rights, there would have been no error.

Both appellants were penalized for exercising those rights by Taylor's testimony. The deputy was merely asked whether he tried to get their side of the story at the scene. It was improper for the trial judge to allow testimony about the appellants' silence after they were read their rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). *Doyle v. Ohio*, 426 U.S. 610, 618, 96 S.Ct. 2240, 2244-45 (1976), clearly prohibits questioning about such matters.

The Mississippi Supreme Court has held it is not a violation to inquire into a defendant's post-arrest silence, as long as there was no evidence *Miranda* warnings had been given. *McGrone v. State*, 807 So.2d 1232 (¶10) (Miss. 2002). The evidence was clear in this case that it was only after Deputy Taylor arrested and read both Nancy and Wendy their rights did they decline to make a statement. Tr. 239. The jury should have never been informed of this. The question was clearly prejudicial to both appellants. This constitutional violation is reversible error.

ISSUE NO.3: THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

In both trial counsels' Motion for Judgment of Acquittal Notwithstanding the Verdict and in the Alternative for a New Trial (JNOV), it was specifically argued that the jury's verdict was against the overwhelming weight of the evidence. C.P. 80, 88, R.E. 44, 49. The trial judge denied both motions. C.P. 92, 104, R.E. 51, 52. The trial judge erred in failing to grant both motions.

"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).

In the case at bar, there were several key pieces of evidence (or lack thereof) that supported Wendy’s version of events. The knife allegedly used by Wendy against Ernest was never found. Tr. 214. There would have been no time to hide this knife before deputies arrived. There was also no need for Nancy to tell Wendy to get a knife to cut Ernest’s throat if she already had one in her possession. Samantha’s claim that she called 911 on her cell phone was never proven by the State. The only evidence presented to the jury was that Wendy had called 911 from Ernest’s house after the shooting. Tr. 232. This is exactly what Wendy testified happened.

No gunshot residue tests were conducted and deputies did not even attempt to find fingerprints on the weapon. Tr. 229-30. Counsel was never given the opportunity to develop Samantha’s relationship with Ernest, especially her possible role in helping to formulate Ernest’s written statement. Tr. 198-99. Although there was evidence concerning some past hostility between Nancy and Ernest, there was never any evidence presented to show any motive for Wendy to kill or hurt her father. There were also inconsistencies between

Ernest's testimony and the written statement he provided to deputies several days after the incident. Specially, he neglected to mention throwing the axe handle at Nancy right before she allegedly fired the gun at him, or the crucial fact that Nancy had tried to finish him off with a second shot, but the gun snapped. Tr. 134-35. Ernest was also shown to have a motive to put Nancy in jail in order to obtain a favorable outcome in their divorce as well as to keep custody of Wendy's son. Tr. 139-40.

Although appellants are not arguing there was reversible error due to prosecutorial misconduct, we do submit the improper actions of the State served to diminish the strength of the defense case. The prosecution spent most of their time, not on the facts supporting the elements of the offenses, but on damaging the credibility of Wendy. Normal impeachment of a party is obviously part of every case, but the prosecution unnecessarily steered the jury away from the facts, and went after Wendy on extraneous matters. Because of her prior felony, the prosecution referred to her as a "card carrying liar." Tr. 315-16. The prosecution also went into Wendy's prior problems with Samantha, but this was completely unrelated to her aggravated assault charge against Ernest. Neither defendant was charged with assaulting Samantha.

Wendy was improperly asked why she did not call witnesses to support her claim of injuries from Ernest. Tr. 278. The prosecutor, over objection, was allowed to argue with Wendy and repeatedly ask the same questions during her cross-examination. Tr. 298, 301. Finally, the prosecutor, with absolutely no evidence whatsoever to back up the allegation,

inferred to the jury that Wendy was under the influence of alcohol or drugs. Tr. 286, 318. With such extraneous comments and innuendo, especially combined with the improper impeachment and testimony about appellants' silence after their arrest, there can be no confidence in these verdicts. Both defendants deserve a new trial.

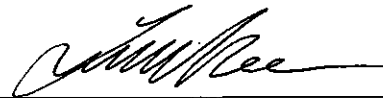
CONCLUSION

Based on the above claims, both Nancy Byrd and Wendy Miller are entitled to have their respective convictions reversed and remanded for a new trial.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Nancy Byrd and Wendy Gayle (Gail) Byrd Miller,
Appellants

By:



Leslie S. Lee

CERTIFICATE OF SERVICE

I, Leslie S. Lee, do hereby certify that I have this the 15th day of June, 2007, mailed a true and correct copy of the above and foregoing **Brief Of Appellants**, by United States mail, postage paid, to the following:

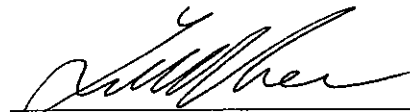
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