IN THE SUPREME COURT OF MISSISSIPPI

NO. 2007-TS-00209

YASMIN HUGHES — APPELLANT

v.

STATE OF MISSISSIPPI — APPELLEE

APPEAL FROM THE CIRCUIT COURT OF WINSTON COUNTY

BRIEF OF THE APPELLANT YASMIN HUGHES

ORAL ARGUMENT IS REQUESTED

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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.

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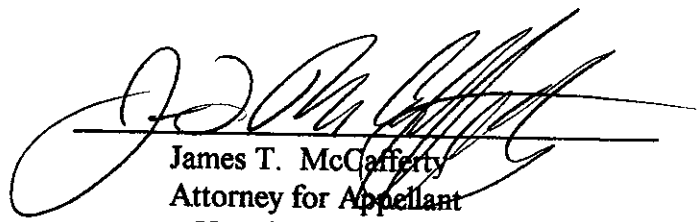

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Appellant believes oral argument would be helpful in this case because it is an unusual case in that involves insufficient evidence, communications by the trial court with the jury during jury deliberations, and sentencing apparently enhanced due to exercise of appellant's right to trial. Because these issues all involve rather intricate factual, as well as legal, questions, the Court should find oral argument beneficial.

STATEMENT OF THE CASE.

PROCEEDINGS BELOW.

Appellant Yasmin Hughes [Yasmin, herein] was indicted September 26, 2007, by a grand jury of Grenada County on one count of armed robbery[1] and two counts of aggravated assault[2] in the robbery of Jack Warner, Jr., and the shooting of Mr. Warner and his wife, Pat Warner, on or about May 2, 2006. CP 3-4, RE 6-7. Also indicted was Adrion Webster. Webster pled guilty to the two counts of aggravated assault and the armed robbery charge was dropped. Yasmin pled not guilty and was tried November 27, 2006, [T 1] and convicted on all three counts. T 196, CP 29-30, RE 29-30. Yasmin was sentenced on December 6, 2006, to 30 years on the armed robbery charge and to 20 years each on the two aggravated assault charges, all to be served concurrently. T 213-214, CP 47-48. Yasmin now appeals his convictions and sentences. CP 61.

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[1]Miss. Code Ann. § 97-3-79. Copies of all statutes cited herein may be found in the Appendix hereto at 3.

[2]Miss. Code Ann. § 97-3-7 (2) (b).

FACTS OF THE CASE

It is undisputed that the victims, farmer and fertilizer vendor Jack "Bubba" Warner, and his wife, were shot. They were shot by Adrion Webster, though, and not by Yasmin Hughes. Yasmin was present with Webster when Webster approached Warner's house simply because he had followed Webster at Webster's request. It was uncontested that Yasmin did not have a gun, did not say anything, did not do anything, and indeed started walking off before any shot was fired. While Yasmin gave a statement saying that immediately prior to this incident, he was riding in a truck that Webster was driving and they talked about different ways of making money, including robbery, the lead investigator testified there was no evidence that Yasmin knew in advance that Webster was armed with a gun. T 130. Yasmin did nothing to aid and abet Webster and since he did not know Webster had a gun, there is no way Yasmin could be guilty of either aggravated assault or armed robbery.

Jack Warner testified that on May 2, 2006, around ten p.m., he was at home. "It was a cool night," according to Warner, "sort of a springy, summer kind of day. We had the air conditioner off. The doors were open. The windows were up." T 80.

Responding to a knock at the door, Warner found a young black man, who turned out to be Adrion Webster, standing inside his carport. T 81-84. Warner asked if he could help him. T 81.

Warner testified that Webster told Warner he had run out of gas, and he asked to use Warner's phone. Warner retrieved his cordless phone from within the house and went into the carport to give it to Webster. T 82. Webster spoke on the phone, then returned the phone to Warner. T 87. As Warner stepped outside to take the phone, he first noticed another young man, who turned out to be Yasmin Hughes, standing "a couple of feet behind" Webster. T 81, T 94-95. Webster was three or

four feet away from Warner. T 81. Yasmin, who was wearing a black sweatshirt,[3] "pulled the hood [of the sweatshirt] over his head . . . and walked off." T 98.

Warner said he told Webster that he "had a gallon or two of gas somewhere in a can." T 87-88. Webster refused the offer, saying "They are bringing us some gas." T 88. Webster took a step back as if he were leaving. T 88.

Warner testified that as he turned to go back into the house, he heard a noise "like a loud firecracker." Warner turned, and "it went off again and again." T 88. Warner looked and saw that Adrion Webster had a gun and was shooting at him. Webster also shot twice at Warner's wife, Pat Warner, hitting her in the leg. T 92. Warner cursed Webster and ran toward him. Webster shot once more, hitting Warner in the groin. T 92. Warner was shot by Webster a total of four times. T 92.

Warner testified that neither Webster nor Yasmin entered the house, took anything, or demanded anything from him or his wife. T 94, 98. Warner also testified, emphatically, that Yasmin Hughes did not shoot anyone, did not have a gun, did not ask to use the phone, did not demand or ask for anything whatsoever, and did not even speak. T 94. Instead, he walked off before there was any shooting. T 98.

An ensuing investigation determined that Webster's call had been made to an answering machine at the home of Talmadge Edwards, the uncle of Yasmin Hughes. Yasmin was living in Mr. Edwards home. T 106-107. Based on that investigation, police interviewed Yasmin. Yasmin gave a statement to Investigator Greg Clark of the Louisville Police Department. In that statement, Yasmin said he was riding around Louisville in a car driven by Webster. According to the statement:

> We got into a conversation about money and ways to make money. We were talking about hustling, robbing and even right ways to make

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3Mr. Warner testified that it was a cool night. T 80.

> money. [Webster] asked to use my phone and I told him I didn't have it. He pulled over and told me to walk up to someone [*sic*] house with him so he could use the phone. A man answer [*sic*] the door and let [Webster] use the phone book.

Exhibit S-24, RE 38. Yasmin said in the statement that during the conversation at the door, he left and was walking away when he "heard gun shots. I ran and didn't look back." Ex. 24, RE 38. According to Investigator Clark, Yasmin also told him that the ways of making money they discussed included things such as barber school. T 111. He said Yasmin also said that when Webster arrived back at the vehicle after the shooting, Webster said, "Why did you run? That was our lick." T 116.

Investigator Clark testified that Yasmin's statement about having left to walk away before the shooting was confirmed by the victim, Mr. Warner, who gave Clark a statement saying that Yasmin "had already pulled his hood over his head and walked off" when the shots were fired. T 129. Clark said Warner's statement was consistent with Yasmin's. Id. More importantly, Clark testified that investigators found no evidence that Yasmin knew Webster had a gun when they went to Warner's house. T 130.

> Q. You don't have any evidence that Yasmin knew that Adrion had a gun before he walked up that driveway, do you?
>
> A. I do not.

Id.

During jury deliberations, the bailiff handed a note to the trial judge from the jury. The note said: "Is Yasmin being charged with armed or attempted robbery?" CP 42, RE 20. Over objection of the defendant, the court replied as follows:

> You must consider all of the instructions the Court has given you. The elements of the crimes charged are contained in Instruction #2.

T 193-94.

Yasmin was convicted on all three counts. He was sentenced to thirty years on the armed robbery count, to be served day for day, and twenty years on each of the aggravated assault counts, with all sentences to be served concurrently. T 213-14, RE 32-33. In sentencing Yasmin, the trial judge pointed out that a request for "leniency and mercy" had been made, but that "when you are offered leniency and mercy, sometimes you have got to pick it up." He explained that Yasmin had been offered a plea to a ten year sentence for aggravated assault with the armed robbery charge dismissed, but had decided "to take his chances and go to trial" and "by taking that gamble, he . . . is now convicted of three charges." T 212.

SUMMARY OF THE ARGUMENT.

I. THERE WAS INSUFFICIENT EVIDENCE TO PROVE YASMIN GUILTY OF ARMED ROBBERY OR AGGRAVATED ASSAULT.

In this case the Appellant, Yasmin Hughes, was convicted of armed robbery and aggravated assault against Mr. and Mrs. Warner, both of whom were shot by Webster, not a party herein. Yasmin was merely present. A conviction for aiding and abetting a felony, the prosecution must prove "*beyond a reasonable doubt and to the exclusion of every reasonable hypothesis*" that (1) a crime was committed; (2) that the accused was present at the scene of the crime; (3) that he consented to the crime; and (4) that he actually aided and abetted the principal in the commission of such crime(s). *Brooks v. State*, 763 So. 2d 859, 861 (Miss. 2000).

There Is No Evidence Yasmin Knew Webster Had a Gun or That an Armed Robbery or Aggravated Assault Would Be Committed

An aider and abetter must have the same intent as the principal and must intend to commit the crime charged, and the prinicipal's intent may not be imputed to anyone else. *United States v. Murray*, 988 F. 2d 518, 522 (5th Cir. 1993). Lead investigator Clark testified there was no

evidence that Yasmin knew Adrion Webster had a gun when they went to Mr. Warner's house or that there was any plan to rob the Warners. T 130. The conviction cannot be sustained.

Yasmin Did Nothing to Aid and Abet
the Crimes of Armed Robbery or Aggravated Assault

Yasmin did nothing to aid or abet Webster's crimes. Victim Jack Warner testified that Yasmin did not have a gun, did not demand or ask for anything, and did not speak. Mere presence at the scene--even with knowledge that a crime is going to occur and a failure to stop it--is not enough to convict a person of that crime. *Harper v. State*, 83 Miss. 402, 415, 35 So. 572 (Miss. 1903); *United States v. James*, 528 F. 2d 999 (5th Cir. 1976).

The Jury Was Required to Accept a Reasonable Hypothesis
Consistent with Yasmin's Innocence.

To convict as an aider and abettor, the State must "exclude every other reasonable hypothesis than that of guilt." *Pryor v. State*, 239 So. 2d 911 (Miss. 1970) 239 So. 2d at 913. The State did not do that. There remained a reasonable hypothesis that Yasmin did not commit the crimes of which he was convicted: Webster was driving, he asked Yasmin to accompany him to a house to borrow a phone, and Yasmin did that.

With Respect to the Armed Robbery Charge,
the Elements of Robbery Were Not Proven

The armed robbery statute requires a taking or an "attempt to take from the person or from the presence the personal property of another . . . by violence to his person or . . . by the exhibition of a deadly weapon. . . ." Miss. Code Ann. § 97-3-79. There was no proof Yasmin knew violence would be used or a deadly weapon exhibited. Neither was there proof of a taking or attempted taking by either Yasmin or Webster. Webster pled guilty to two counts of

aggravated assault, but the armed robbery charge against him was dropped. Yasmine's armed robbery conviction cannot stand. *Anderson v. State*, 168 Miss. 424, 151 So. 558 (1934).

II. EVEN IF THE EVIDENCE IS CONSIDERED SUFFICIENT, IT IS OF SUCH A NATURE AS TO CREATE A SERIOUS DOUBT AND THE CONVICTION SHOULD BE REVERSED AND THE CASE REMANDED FOR A NEW TRIAL.

At minimum this Court should reverse and remand for a new trial because the verdict was against "the great weight of the evidence." *Quarles v. State*, 199 So. 2d 58 (Miss. 1967). The lead investigator admitted there was no evidence that Yasmin knew Webster had a gun and therefore no evidence Yasmin knew in advance of any armed robbery or aggravated assault. Yasmin did nothing to aid and abet Webster. Yasmine had no weapon, took nothing, demanded nothing. He remained silent. Webster took nothing nor demanded anything. At the very least, the case should be remanded for a new trial.

III. THE COURT ERRED IN ITS COMMUNICATION WITH AND INSTRUCTION OF THE JURY.

After the jury retired it asked the court in writing this: "Is Yasmin being charged with armed or attempted robbery?" The trial judge, over defense objection, replied:

> You must consider all of the instructions the Court has given you.
> The elements of the crimes charged are contained in Instruction #2.

The court thereby erred in at least three respects.

Such Communications Between Judge and Jury
After Deliberations Begin Are Prohibited Generally.

In this case, no further instruction was necessary. All the lower court did by sending the note was to impermissibly call attention to a specific instruction. *Haynes v. State*, 451 So. 2d 227 (Miss. 1984).

Court Failed to Ascertain Exactly What the Jury Intended to Ask.

It is clear from the question that the Jury was confused as to the charge against Yasmin. Yet, in more than six pages of transcript devoted to this issue, the Court made no effort to determine exactly what the jury wanted to know, which was error. *Girton v. State*, 446 So. 2d 570, 573 (Miss. 1984).

Court's Note to Jury Erroneously Emphasized a Single Instruction.

Any instruction by the court that singles out a specific instruction violates the principle that instructions must be read as a whole. By emphasizing the "elements of the crimes" in instruction no. 2, the court quite likely deflected the jury's attention from Instruction no. 3, an instruction that would have required a verdict of not guilty from an unbiased jury under the circumstances of this case. *Haynes v. State*, 451 So. 2d 227 (Miss. 1984).

IV. PROSECUTORIAL MISCONDUCT REQUIRES REVERSAL.

Prosecutor Impermissibly Argued Facts Outside Record.

The prosecutor roamed far beyond the record in his closing which was inherently unfair and is grounds for reversal. *Cabello v. State*, 471 So. 2d 332, *certiorari denied*, 476 U. S. 1165, 106 S. Ct. 2291, 90 L. Ed. 2d 732 (Miss. 1985).

Prosecutorial Misconduct Violated Appellant's Constitutional Rights.

If a prosecutor knew or should have known that an argument or evidentiary implication was false and went forward with it any way, such amounted to prosecutorial misconduct. *Barrientes v. Johnson*, 221 F. 3d 741, 754 (5th Cir. 2000). Without doubt, the prosecutor's misconstruction of the evidence amounted to such prejudicial misconduct, which requires reversal.

V. APPELLANT'S SENTENCE WAS UNCONSTITUTIONAL.

The Sentence Unconstitutionally Punished Yasmin for Exercising His Right to Trial.

Any doubt as to whether the exercise of the right to trial was considered by the lower court in determining the sentence must be resolved in favor of the defendant. *Fermo v. State*, 370 So. 2d 930, 932 (Miss. 1979). At the time of sentencing, the trial judge in this case noted that Yasmine was offered a sentence of ten years on aggravated assault but took "his chances and [went] to trial." The court's comments in their entirety strongly implied enhancement of the sentence to due Yasmine's failure to plea bargain. This case must be remanded for resentencing.

The Sentence Was Manifestly Disproportional Given Yasmin's Role in the Incident.

As stated earlier in this brief, Yasmin did not hold a gun, shoot a gun, ask to use a phone, take anything, demand anything, or say anything. The lead investigator admitted there is no proof Yasmin knew Webster had a gun. Any role that Yasmin had was minimal. Under the circumstances, the sentence is manifestly disproportional. *Hart v. State*, 639 So. 2d 1313, 1319 (Miss. 1994).

VI. OTHER ERRORS.

There were other errors, that together with the cumulative effect of all errors, only added to the prejudicial effect of the errors more fully argued above, and mandate reversal. *Ross v. State*, Supreme Court of Mississippi, No. 1998-DP-01038-SCT (April 26, 2007), ¶ 138.

ARGUMENT.

I. THERE WAS INSUFFICIENT EVIDENCE TO PROVE YASMIN GUILTY OF ARMED ROBBERY OR AGGRAVATED ASSAULT.

It is an ancient principle of law that while a verdict of a jury should not be lightly set aside, a conviction cannot be permitted to stand where the verdict is clearly not supported by evidence. *Allen v. State*, 1 Miss. Dec. 126 (1885); *Conner v. State*, 632 So. 2d 1239 (Miss.), *cert. denied*, 115 S. Ct. 314, 130 L. Ed. 276 (1993). Moreover, the state must make its case to a moral certainty. An accused need only raise reasonable doubt of guilt to be entitled to an acquittal. *Cumberland v. State*, 110 Miss. 521, 531, 70 So. 695, 696 (1915). Where the evidence is such that on one or more elements of the offense charged no reasonable hypothetical juror could have resolved the issue against the defendant beyond a reasonable doubt, the Supreme Court has no authority to affirm and must order the defendant discharged. *Bullock v. State*, 447 So. 2d 1284, 1287 (Miss. 1984).

In this case, the Appellant, Yasmin Hughes, did not shoot or rob anyone and was not the principal. In order to convict a defendant of aiding and abetting a felony, the prosecution must prove "*beyond a reasonable doubt and to the exclusion of every reasonable hypothesis*" that (1) a crime was committed; (2) that the accused was present at the scene of the crime; (3) that he consented to the crime; and (4) that he actually aided and abetted the principal in the commission of such crime(s). *Brooks v. State*, 763 So. 2d 859, 861 (Miss. 2000); *Gibbs v. State*, 77 So. 2d 705 (Miss. 1995); *See also, United States v. Murray*, 988 F. 2d 518, 522 (reversing conviction for aiding and abetting in the sale of a firearm to a convicted felon when there was insufficient proof the defendant knew the buyer was a felon; the knowledge of the principal could not be imputed to the person who allegedly aided and abetted). While Yasmin said in his statement that

the two discussed robbery as a way to make money, there is no evidence he knew about any firearm, and therefore no evidence of knowledge that the crimes for which he was convicted — *armed* robbery and aggravated assault — were going to occur. And while there was testimony by Investigator Clark that Yasmin told him Webster said, "why did you run, that was our lick," when they returned to the car, T 116, that occurred after the fact and provides no evidence Yasmin knew Webster had a gun or was going to assault anyone. As Investigator Clark admitted, there was no evidence Yasmin knew about the gun. Clark admitted also admitted that there was no evidence that Webster or Yasmin had any plan to rob anyone. T 111. Accordingly, Yasmine cannot be guilty of armed robbery or aggravated assault.

Yasmin Did Nothing to Aid and Abet
the Crimes of Armed Robbery or Aggravated Assault

Even if Yasmin had known Webster had a gun and that he was going to commit `an armed robbery and aggravated assault, Yasmin did nothing to aid or abet those crimes. The victim, Jack Warner, testified that Yasmin did not shoot anyone, did not have a gun, did not ask to use the phone, did not demand or ask for anything, and did not speak. T 94. Mere presence at the scene--even with knowledge that a crime is going to occur and a failure to stop it-- is not enough to convict a person of that crime.

> Proof that one has stood by at the commission of a crime without taking any steps to prevent it does not alone indicate such participation or combination in the wrong done as to show criminal liability, although he approves of the act. Even the fact of previous knowledge that a felony was intended will not render one who has concealed such knowledge and is present at the commission of the offense a party thereto.

Harper v. State, 83 Miss. 402, 415, 35 So. 572 (Miss. 1903) (citation omitted). *See also, Davis v. State*, 586 So. 2d 817, 820-821 (Miss. 1991) (repeating this same phrasing and adding, "[g]uilt by association is neither a recognized nor tolerable concept in our criminal law").

In *United States v. James*, 528 F. 2d 999 (5th Cir. 1976), FBI agents and Jackson, Mississippi, police officers attempted to execute arrest warrants on persons believed to be within the Jackson "capitol" of the *Republic of New Africa* [RNA]. When officers fired tear gas into the building, occupants of opened fire, killing one officer and wounding two others. Five males and two females (including Lockhart) were arrested as they exited the rear of the building. Although one of the suspects, Norman, said that "we all" fired at officers, one male and both females denied firing weapons. 528 F. 2d at 1007-08.

The evidence proved that Lockhart, though not a member of the RNA, was the wife of a member and had been at the RNA headquarters for two days prior to the gunfight. She "obviously sympathized with [the RNA's] objectives," the court said, and she had "purchased groceries and prepared meals for the occupants of the 'capitol.'" 528 F. 2d at 1013. Numerous illegal weapons, including an automatic rifle, unmarked military rifles, Molotov cocktails, and a bomb, together with large quantities of loose ammunition were found in plain view in the house. 528 F. 2d at 1009. Still, the court found insufficient evidence of Lockhart's complicity in the crime and reversed her conviction by the lower court. "Mere presence at the scene of a crime or mere association with the members of a conspiracy is not enough to prove participation in it," the court said. 528 F. 2d at 1013.

In *Cochran v. State*, 191 Miss. 273, 2 So. 2d 822 (Miss. 1941), a sheriff observed the appellant's actions at and outside a dance hall for some 30 to 60 days. During that time, Cochran's interactions with occupants of automobiles outside the dance hall "gave the appearance that he was delivering whiskey to the occupants" of the cars, though the sheriff did not say he had actually seen the whiskey delivered. *Cochran*, 2 So. 2d at 822. The sheriff executed a search warrant and discovered illegal beer and slot machines on the premises. Cochran, too, was there.

He told the sheriff either "I work here" or "I stay here." *Cochran*, 2 So. 2d at 822. The sheriff arrested Cochran for possession of the contraband and, during an attendant search, discovered two bottles of whiskey concealed under Cochran's shirt. Cochran was convicted for illegal possession of whiskey.

This Court reversed, finding no basis for the initial arrest that revealed the contraband. The Court quoted its earlier decision in *Harper v. State*: "[S]ome degree of participation in the criminal act must be shown in order to establish any criminal liability. Proof that one has stood by at the commission of a crime without taking any steps to prevent it does not alone indicate such participation or combination in the wrong done as to show criminal activity, *although he approves of the act."* 2 So. 2d at 823, *quoting, Harper v. State*, 35 So. at 573. (emphasis added) *See also, L. M., Jr., v. State*, 600 So. 2d 967, 971 (Miss. 1992)(reversing adjudication of delinquency for carrying concealed weapons where the defendants at issue knew the weapons were present, but played no role in the crime of concealing them).

As stated earlier, there is no evidence Yasmin knew Webster had a gun or was in a position to commit the crimes of armed robbery and aggravated assault. But even if Yasmin had known that those particular crimes were going to be committed, even if he had been in a position to stop the crimes but had not done so, and even if he approved of the commission of those particular crimes, he did nothing to aid or abet them. In line with the clear authority from this and other courts, the evidence is insufficient and his conviction must be reversed.

The Jury Was Required to Accept a Reasonable Hypothesis Consistent with Yasmin's Innocence.

In *Pryor v. State*, 239 So. 2d 911 (Miss. 1970), three young men en route from Kansas City to Tupelo stopped their vehicle "some distance south of Littlejohn's Grocery" in New

Albany. Two left appellant Pryor in the car, went to the grocery, robbed it, returned to the car, and fled. The three were subsequently apprehended by a highway patrolman. 239 So. 2d at 911.

Pryor testified that he was in the backseat at the time of the robbery, asleep from an excess of intoxicants. State witnesses testfied they saw all three in the car, sitting up, around the time of the robbery. One witness testified he saw Pryor crawl out of the front seat and get in the back immediately after the robbery. 239 So. 2d at 912. All three were convicted

This Court reversed as to Pryor. Despite evidence contradicting Pryor's story, the law, said the Court, required the state "to exclude every other reasonable hypothesis than that of guilt." 239 So. 2d at 913. From the evidence presented, "there still remains," said this Court, "a reasonable hypothesis that the defendant did not, in fact, aid and abet" the robbery. The trial court, said this Court, should have directed a defense verdict. 239 So. 2d at 913.

In the instant case, as in *Pryor*, there was a reasonable hypothesis that Yasmin did not commit the crimes of which he was convicted: Webster was driving, he asked Yasmin to accompany him to a house to borrow a phone, and Yasmin did that. Although Yasmin's statement said there was a discussion in the car regarding robbery, there was no proof Yasmin knew Webster was armed, much less intending to commit an armed robbery or aggravated assault. Thus, there is a reasonably hypothesis that Yasmin did not believe or know that an armed robbery or aggravated assault was going to occur.

With Respect to the Armed Robbery Charge, the Elements of Robbery Were Not Proven

As mentioned earlier, there is no evidence Yasmin knew Webster was armed, much less that anyone was going to commit armed robbery or aggravated assault, and this requires that the convictions be reversed. Moreover, even if Yasmin did know, he did nothing to aid and abet

Webster in any armed robbery or aggravated assault. This too requires that the convictions be reversed. But there is an additional and independent reason why the armed robbery conviction must be reversed — there was no taking or attempted taking of any property.

The armed robbery statute requires that the defendant "take or attempt to take from the person or from the presence the personal property of another . . . by violence to his person or . . . by the exhibition of a deadly weapon. . . ." Miss. Code Ann. § 97-3-79. Apart from the fact that there is no proof Yasmin knew violence would be used or a deadly weapon exhibited, there was no taking or attempted taking by either Yasmin or Webster. Nothing was taken from Mr. or Mrs. Warner's person or presence. While Webster shot both Mr. and Mrs. Warner, he never took anything or demanded anything from them. Webster pled guilty to two counts of aggravated assault, but the armed robbery charge against him was dropped.

In *Anderson v. State*, 168 Miss. 424, 151 So. 558 (1934), Anderson and Evans approached the rear of a store owned by Wong Fong and Wong Sing and asked for cigarettes. When Wong Sing left and returned with the tobacco, the Anderson and Evans entered the door and began shooting, wounding the proprietors. When a third party in the store sought to intervene, Anderson and Evans shot him as well. The assailants then left without taking anything. Evans and Anderson were convicted of armed robbery.

This Court reversed. The evidence, this Court found, did not support a verdict of robbery. To assume robbery from the shootings of Wong, Wong, and the third man, this Court said "would be the merest speculation." 168 Miss. at 428, 151 So. at 559. *See also Fortenberry v. State*, 190 Miss. 729, 1 So. 2d 585 (1941) (defendants who pistol-whipped victim, took his knife, and rummaged through his pockets were not guilty of armed robbery, even where victim later was missing two dollars).

Webster's shootings of the Warners was a seriously vicious crime, but it was neither a robbery nor an attempted robbery. Neither Mr. Warner nor his wife ever claimed that anything was taken from them by Webster or Yasmin, or that either of them attempted to take anything. Even if the convictions are not reversed for the other reasons mentioned earlier in this section of the brief, the armed robbery conviction must be reversed because no robbery occurred or was attempted.

For all of these reasons, the judgment must be reversed and rendered. This claim regarding sufficiency of the evidence is brought under Mississippi law, including Miss. Code Ann. §§ 97-3-7 and 97-3-79 and §§ 14 and 26 of the Mississippi Constitution, and the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

II. EVEN IF THE EVIDENCE IS CONSIDERED SUFFICIENT, IT IS OF SUCH A NATURE AS TO CREATE A SERIOUS DOUBT AND THE CONVICTION SHOULD BE REVERSED AND THE CASE REMANDED FOR A NEW TRIAL.

As noted in the previous section, the evidence is insufficient to sustain the aggravated assault convictions and the armed robbery conviction. Thus, the case should be reversed and rendered and the defendant discharged. But even if this Court concludes that the evidence meets the threshold of sufficiency, there should be a reversal for a new trial because of serious doubt about the weight of the evidence. For example, in *Quarles v. State*, 199 So. 2d 58 (Miss. 1967), this Court held that the evidence was sufficient to allow the case to go to the jury. However, the Court said the evidence was nevertheless "weak" and "close to the borderline," and a new trial was required. "Since the evidence of defendant's guilt is of such a nature as to create a serious doubt in our minds, we think that another jury should be permitted to pass upon this question."

Id., *quoting, Mister v. State*, 190 So. 2d 869, 871 (1966). *See also, Edwards v. State*, 736 So. 2d 475, 483 (Miss. App. 1999).

So it is that this case also creates serious doubts. If this Court concludes the evidence is sufficient, it nevertheless should reverse and remand for a new trial because the verdict is against what *Quarles* called "the great weight of the evidence." 199 So. 2d at 61, *quoting, Mister v. State*, 190 So. 2d at 871. The lead investigator admitted there was no evidence that Yasmin knew Webster had a gun and therefore no evidence Yasmin knew in advance of any armed robbery or aggravated assault. Yasmin did nothing to aid and abet Webster and did not hold a gun, demand anything from the victims, or even say anything. Neither Yasmin nor Webster took or demanded anything from the persons or presence of the victims. At the very least, the case should be remanded for a new trial.

This claim is brought under Mississippi law, including Miss. Code Ann. §§ 97-3-7 and 97-3-79 and §§ 14 and 26 of the Mississippi Constitution, and the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

III. THE COURT ERRED IN ITS COMMUNICATION WITH AND INSTRUCTION OF THE JURY.

The jury retired at 5:30 p.m. to begin its deliberations. T 188. At 6:05 p.m., the jury sent this note to the court [T 188]: "Is Yasmin being charged with armed or attempted robbery?" CP 42, RE.

The trial judge initially told trial counsel that "I will tell them they are just going to have to . . . refer to the instructions that I have already given them . . . ." The defense had no objection to that proposal. "I would just ask," said defense counsel, "that the Court not highlight a specific instruction." T 190.

The trial court, though, went further than originally indicated to counsel. Following a discussion that filled seven pages of the transcript, [T 189-195, RE 21-27] the court replied as follows

> You must consider all of the instructions the Court has given you.
> The elements of the crimes charged are contained in Instruction #2.

T 193-94, CP 43, RE 28.

Defense counsel objected on the ground that such an instruction would place undue emphasis on instruction #2 [CP 34-36, RE 15-17]. T 193. The court sent its reply to the jury over the defense's objection, T 194, and, thereby, committed reversible error in at least three respects.

Such Communications Between Judge and Jury
After Deliberations Begin Are Prohibited Generally.

"Unless it is necessary to give another instruction for clarity or to cover an omission," this Court has said, "it is necessary that no further instruction be given." *Girton v. State*, 446 So. 2d 570, 572 (Miss. 1984). In this case, clearly, no further instruction was necessary, for all the judge did, other than to impermissibly call attention to a specific instruction, was to tell the jury to read the instructions.

Court Failed to Ascertain Exactly What the Jury Intended to Ask.

Where it is necessary for the court to further instruct the jury in response to a question, the court must make absolutely certain what question is being asked before responding. *Girton v. State*, 446 So. 2d 570, 573 (Miss. 1984). To do otherwise risks misunderstanding. *Girton*, 446 So. 2d at 572.

In this case it is clear from the question that the Jury was confused as to exactly what the charge against Yasmin was. CP 43, RE. Yet, in the more than six pages of transcript devoted to this issue, there is absolute nothing that remotely suggests the Court made any effort to ascertain exactly what the jury wanted to know. The jury asked, "Is Yasmin being charged with armed or attempted robbery?" CP 42, RE.

It is not clear whether that meant either one or the other, both, or neither. Moreover, the court did not answer the question. Rather, the court told the jury that the elements of the crimes charged are in instruction no. 2, which only compounded the error.

Court's Note to Jury Erroneously Emphasized a Single Instruction.

A guiding principal in appellate review of instructions is that "jury instructions are to be read together as a whole with no one instruction taken out of context." *Harris v. State*, 861 So. 2d 1003, 1012-13 (2003). Any instruction by the court that singles out a specific instruction clearly violates that principle and is a likely ground for reversal, as this Court made clear in *Haynes v. State*, 451 So. 2d 227 (Miss. 1984).

In *Haynes*, a murder case, this Court faced the exact situation before it now. There, the jury, during deliberations, sent a note to the judge asking for clarification concerning a justifiable homicide instruction. The court replied, instructing the jury to read the instructions together but calling the jury's attention to a specific portion of a specific instruction. 451 So. at 230. Citing *Girton v. State*, 446 So. 2d 570 (Miss. 1984) and *Stubbs v. State*, 441 So. 2d 1386 (Miss. 1983), this Court reversed. The trial judge's "proper response," this Court said, would have been to simply tell the jury it "had already been properly instructed and to read their instructions." 451 So. 2d at 227. The lower court's response pointing to a specific instruction "may very well have accentuated an instruction even further, which was error." 451 So. 2d at 227.

The exact thing is true in this case. By emphasizing the "elements of the crimes" in instruction no. 2, the court quite likely deflected the jury's attention from Instruction no. 3, an instruction that would have required a verdict of not guilty from an unbiased jury under the circumstances of this case.

The emphasis on instruction no. 2 also drew attention from instruction no. 4 [CP 38, RE 19] (reasonable doubt), which likewise required acquittal under the circumstances of this case. Clearly, the court's communication to the jury was prejudicial error and requires reversal. *Haynes v. State*, 451 So. 2d at 231.

This claim is brought under Mississippi law, including Miss. Code Ann. §§ 97-3-7 and 97-3-79 and §§ 14 and 26 of the Mississippi Constitution, and the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

IV. PROSECUTORIAL MISCONDUCT REQUIRES REVERSAL.

Although attorneys are afforded wide latitude in making arguments, *Manning v. State*, 735 So. 2d 323, 344-45 (Miss. 1999), prosecutors, as representatives of the state, are not to be motivated purely by the desire to win. They must take special care to make certain that jurors are not improperly influenced by their words. *Roberson v. State*, 185 So. 2d 667 (Miss. 1966) (due to his office, prosecutor unconsciously exerts tremendous influence on jurors).

Prosecutor Impermissibly Argued Facts Outside Record.

Certainly a prosecutor, at minimum, is required to keep his comments within the record. *Hanner v. State*, 465 So. 2d 306 (Miss. 1985) (prosecution's argument limited to matters presented as evidence). Arguing facts outside the record is inherently unfair and is grounds for reversal. *Cabello v. State*, 471 So. 2d 332, *certiorari denied*, 476 U. S. 1165, 106 S. Ct. 2291,

90 L. Ed. 2d 732 (Miss. 1985); *Craft v. State*, 226 Miss. 426, 84 So. 2d 531 (Miss. 1956); *Tubb v. State*, 217 Miss. 741, 64 So. 2d 911 (Miss. 1953); *Traxler v. U. S.*, 293 F. 2d 327 (5th Cir. 1961). The prosecutor below, however, forgot his duty in that regard and roamed far beyond the record in his closing.

The prosecutor tailored the larger part of his rebuttal argument to convince the jurors of supposed facts not in the record and to inject bias and prejudice into the jury's deliberations. That is beyond the pale.

The Fifth Circuit Court of Appeals considered an analogous situation in *Traxler v. U. S.*, 293 F. 2d 327 (5th Cir. 1961). In the closing argument in a possession of moonshine case, the prosecutor "made reference to 'getting out here on the highway, drinking whiskey, and killing people." The Fifth Circuit found that statement "was improper, prejudicial and constituted reversible error." 293 F. 2d at 328.

The prosecutor in this case similarly tried to prejudice the jury with references to nonspecific bad acts outside the record:

> If you will think about it, just about every capital murder case that we have had in this state where someone was killed during an armed robbery, and I know we have had several in the district; they go in a store; they kill somebody, and then they take what they want. That is capital murder during the commission of an armed robbery. That is what it is. That is what happened here. They went to that house. They could have demanded what they wanted, but that wasn't enough. They were going to go ahead and shoot first and then take what they wanted, and that's exactly what they did. We don't have to prove that they took anything.

T 184-85.

The prosecutor's use of beyond-the-record anecdotes about supposed crimes committed in the state and county violated Yasmin's rights and tainted the verdict. *See Traxler, supra.* The

prosecutor, though, went further. In referring to acts proved in the record to have been done by Webster alone, he consistently used the pronoun "they," telling the jury that Yasmin did the things as well. That simply was not proved by the evidence.

For instance, the prosecutor said "they" went to the Warners' home for the purpose of killing and robbing them. There is no evidence whatsoever that Yasmin had any intention of doing either. Second, he said "[t]hey were going to go ahead and shoot first and then take what they wanted, and that's exactly what they did." Again, there is no evidence that Yasmin shot anyone or even knew that Webster had a gun. Neither is there any evidence in the record of any robbery or attempted robbery.

The prosecutor also told the jury that "they called and talked on an answering machine . . . ." Of course, they didn't do any such thing; only Webster did that. He further indicated to the jury that Yasmin was the shooter: "Of course, when you are shooting somebody four times, what are you intending?" T 186.

The District Attorney also told the jury that Yasmin "admit[ted] that right before we went [to the Warners' house], one of the things we were talking about was robbing somebody." T 185. The record says something quite different. Yasmin's statement says the two were talking about many things. Greg Clark admitted on cross-examination that Yasmin told him that he (Yasmin) and Webster were talking about various ways to make money, including barber school, and that there was no conversation about a specific plan to rob any one. T 126. Clark admitted that there was no evidence that Webster and Yasmin had any plan to rob anyone. T 111. That is all quite different from the representations the prosecutor presented to the jury in closing.

These distortions of the record are especially serious given the jury's obvious confusion concerning the evidence, the instructions, and the exact nature of the charge(s) against Yasmin.

The prosecution's repeated excursions beyond the record's boundaries require reversal. *Tubb v. State*, 217 Miss. 741, 64 So. 2d 911 (Miss. 1953); *Traxler v. U. S.*, 293 F. 2d 327 (5th Cir. 1961).

Prosecutorial Misconduct Violated
Appellant's Constitutional Rights.

If a prosecutor knew or should have known that an argument or evidentiary implication was false and went forward with it any way, such amounted to prosecutorial misconduct. *Barrientes v. Johnson*, 221 F. 3d 741, 754 (5th Cir. 2000).

To prevail on a due process claim regarding the use of false testimony, argument, or implications by a prosecutor, one must show that (1) the testimony was false, (2) the testimony was material to the verdict, and (3) the prosecutor knew or believed the testimony to be false. *United States v. Blackburn*, 9 F.3d 353, 357 (5th Cir. 1993), *cert. denied*, 513 U. S. 5, 115 S. Ct. 102, 130 L. Ed. 2d 51 (1994).

False evidence or statements are material where there is any reasonable likelihood that verdict could have been affected thereby. *Kirkpatrick v. Whitley*, 992 F.2d 491, 497 (5th Cir. 1993) (Quoting *United States v. Bagley*, 473 U. S. 667, 679 n. 9, 105 S. Ct. 3375, 3382 n. 9, 87 L. Ed 2d 481, 492 n. 9 (1985)); *Westley v. Johnson*, 83 F. 3d 714, 726 (5th 1996). Without doubt, telling the jury that Yasmin did things that, in fact, only Webster had done, not only *could* have affected the jury's verdict, but was *calculated* by the prosecution to do exactly that. Justice requires, at minimum, a new trial for Yasmin Hughes.

This entire claim is brought under Mississippi law, including Miss. Code Ann. §§ 97-3-7 and 97-3-79 and §§ 14 and 26 of the Mississippi Constitution, and the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

V. APPELLANT'S SENTENCE WAS UNCONSTITUTIONAL.

At sentencing, the Court stated that a request "for leniency, of mercy" had been made on Yasmin's behalf. "You know," continued the Court, referring to a plea bargain offered to Yasmin,

> when you are offered leniency and mercy, sometimes you have got to pick it up. And [Yasmin] was offered a sentence of ten years on aggravated assault, which would have been with the possibility of parole. The most he would have had to serve would have probably been 85 percent of that. That is eight and a half years, and after discussions with his father and everybody, the other people involved in this thing, he decided he didn't want that. He wanted to take his chances and go to trial. And . . . the jury found that he was just as culpable as Mr. Webster. And by doing that, by taking that gamble, he, unlike Mr. Webster, is now convicted of three charges.

T 212.

The Court then sentenced Yasmin to 30 years without the possibility of parole on the armed robbery charge and 20 years each on the two aggravated assault charges, all to be served concurrently. T 213-214, CP 47-48, RE 34-35.

The Sentence Unconstitutionally Punished Yasmin for Exercising His Right to Trial.

Many years ago, the United States Supreme Court held that when a defendant's sentence is increased for exercising his right to a jury trial, it unconstitutionally "chill[s] the exercise of basic constitutional rights." *United States v. Jackson*, 390 U.S. 570, 582 (1968). Similarly, this Court long has held that a "sentencing court may consider only legitimate factors and cannot base the sentence, either in whole or in part, upon the defendant's exercising his constitutional rights to a jury trial." *Fermo v. State*, 370 So. 2d 930, 932 (Miss. 1979). This Court in *Fermo* said that "that any doubt, as to whether or not the exercise of such constitutional rights was considered by the lower court in determining the sentence, must be resolved in favor of the defendant." *Id.* at

932. This is in line with the holdings of other courts. *See Hess v. United States*, 496 F.2d 936, 938 (8th Cir. 1974) (when "the tenor" of the trial court's comments are unclear, "fairness dictates that these proceedings be remanded to the district court for the purpose of permitting [the trial court] to determine whether the sentences were enhanced for that reason"); *United States v. Stockwell*, 472 F.2d 1186, 1188 (9th Cir. 1973) (when a "harsher sentence has followed a breakdown in negotiations...the record must affirmatively show that the court sentenced the defendant solely upon the facts of his case...and not as punishment for his refusal to plead guilty"); *State v. Canon*, 387 S.E. 2d 450, 451 (N.C. 1990) ("[w]here it can reasonably be inferred from the language of the trial judge that the sentence was imposed at least in part because defendant did not agree to a plea offer by the state and insisted on a trial by jury, defendant's constitutional right to trial by jury has been abridged, and a new sentencing hearing must result"); *State v. Baldwin*, 629 P.2d 222, 226 (Mont. 1981) ("an allegation that the sentence imposed was intended as punishment for defendant's jury demand need not be shown solely by the overt comments of the sentencing judge--it may also be shown by inference").

At the time of sentencing, the trial judge in this case noted that "Mr. [Yasmin] Hughes was offered a sentence of ten years on aggravated assault...[and that the] most he would have had to serve would have probably been 85 percent of that." Yasmin received a sentence of thirty years without parole only after, in the judge's words, he took "his chances and [went] to trial." The judge explicitly told Yasmine that "when you are offered leniency and mercy, sometimes you have got to pick it up." These comments by the trial court strongly imply that Yasmine received a harsher sentence *because* he exercised his right to a jury trial.

In *Commonwealth v. Bethea*, 379 A. 2d 102 (Pa. 1977), the Pennsylvania Supreme Court vacated a sentence because it found that it was, in part, based on the defendant's decision to go to

trial. At sentencing, the trial judge told the defendant that "[i]f you had...pled guilty it might have shown me the right side of your attitude about this, but you pled not guilty, fought it all the way, and the jury found you guilty." *Id.* at 105-06. Because the court found that a "fair reading of the trial court's remarks prior to the imposition of sentence...indicates that the judge *may* have been influenced by the fact that appellant chose to stand trial rather than plead guilty, with a possible resultant augmentation of the sentences imposed," it remanded the case for resentencing." *Id.* at 107 (emphasis added).

In *State v. Nichols*, 247 N.W.2d 249, 256 (Iowa 1976), the Iowa Supreme Court remanded a case for resentencing after finding that comments by the trial court suggested that it took "into account the fact defendant had not pleaded guilty but had put the prosecution to its proof' in determining the sentence. In that case, the trial court stated at sentencing that "I think I'm saying to you, had you said 'Okay. I have done this, and I'm willing now to face the consequences of my acts,' you might then be able to persuade the court that sufficient turn-around had occurred, that you should be afforded another chance." *Id.*, at 250.

In *State v. Hazel*, 453 S.E. 2d 879 (S.C. 1995), the South Carolina Supreme Court remanded for resentencing when it found that the trial court rejected the defendant's request to be sentenced under the Youth Offender Act (YOA) in part because he chose to exercise his right to trial. At the sentencing hearing the judge responded to the request to be sentenced under YOA by noting that "it's one thing, if he'd pled guilty, I'd have considered that, but taking into consideration the age and where he was and the time it was, the sentence of the court is you be confined to the State Board of Corrections for a period of fifteen years and pay a fine of twenty-five thousand dollars." *Id.* at 879. The court supported its remand order by citing and

paraphrasing the *Fermo* holding that "sentencing court cannot base sentence, either in whole or part, upon defendant's exercise of constitutional right to a jury trial." *Id.* At 880.

Here, the trial judge's comments, particularly those about the defendant taking his chances and going to trial, indicate Yasmin may have been punished for exercising his constitutional right to a trial. As this Court said in *Fermo*, any doubt must be resolved in favor of the defendant, and even if the convictions are affirmed, this case must be remanded for resentencing.

The Sentence Was Manifestly
Disproportional Given Yasmin's Role in the Incident.

As stated earlier in this brief, Yasmin did not hold a gun, shoot a gun, ask to use a phone, take anything, demand anything, or say anything. The lead investigator admitted there is no proof Yasmin knew Webster had a gun. Any role that Yasmin had was minimal. Appellant respectfully suggests that, under the circumstances, and for the reasons described above, the sentence is manifestly disproportional. At minimum, this case should be remanded for resentencing. *Hart v. State*, 639 So. 2d 1313, 1319 (Miss. 1994).

These claims regarding the sentence are raised under Mississippi law, including §§ 14, 26, and § 28 of the Mississippi Constitution, and the Sixth and Eighth Amendments and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

VI. OTHER ERRORS.

There were other errors at trial that only add to the prejudicial effect of the errors more fully argued above.

Instruction C-5 (No. 3) Was Incomplete and Confusing.

The trial court's instruction C-5 (No. 3) was incomplete and likely confused the jury as to the relationship between aiding and abetting and intent because it failed to inform the jury that intent to aid must be must be communicated to the principal to form a basis for guilt on the part of an accessory. *See Crawford v. State*, 133 Miss. 147, 151, 97 So. 534 (1923) (instruction to permitting the jury to convict on the basis of presence with intent to assist should not have been given).

Trial Court Erred in Denying Motion to Quash Venire.

The trial court further erred in failing to grant the defense motion to quash the venire given the fact that the Warners and the facts of their shooting were very well-known in the Winston County community.[4] There was prejudice justifying quashing the venire in this case. *See West v. State*, 463 So. 2d 1048, appeal after remand, 519 So. 2d 418 (Miss. 1985) (motion to quash a jury panel typically is not granted absent actual fraud, *prejudice*, or flagrant violation of statutory procedures).

Cumulative Error Requires Reversal.

Individual errors, even if not reversible error in and of themselves, "may combine with other errors to make up reversible error, where the cumulative effect of all errors deprives the defendant of a fair trial." *Ross v. State*, Supreme Court of Mississippi, No. 1998-DP-01038-SCT (April 26, 2007), ¶ 138, *citing Byrom v. State*, 863 So. 2d 836, 847 (Miss. 2003). When

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[4]According to trial counsel's calculations, which appear to be correct, 12 of the 50 jurors in the jury pool actually knew the Warners. Thirty-four had heard about the case, mostly through gossip. T 61. At least four persons [Juror no. 14, T 35; juror no. 21, T 21; juror no. 44, T 29; and juror no. 46, T 29-30] stated, apparently in the presence of the rest of the panel, that they had formed opinions in the matter such that they could not be fair minded jurors.

undertaking such an analysis, this Court considers "whether the issue of innocence or guilt is close, the quantity and character of error, and the gravity of the crime charged." *Id.* Yasmin did nothing, said nothing; his conviction is based entirely upon his association with Webster. Certainly the question of his guilt or innocence must be called a close one. Moreover, this brief has set out major errors, including the close evidentiary question, improper instruction of the jury, and prosecutorial misconduct. Finally, armed robbery and aggravated assault, without question are serious crimes. Under the circumstances, the errors briefed herein, taken together, had a cumulative, prejudicial effect requiring reversal in this case. *Id.*

CONCLUSION.

For the foregoing reasons, and on the basis of the authorities cited, the judgment below should be reversed and the case rendered, or in the alternative remanded for a new trial, or in the alternative remanded for resentencing.

This the 7th day of May, 2007.

Respectfully submitted,

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PROOF OF SERVICE

I, James T. McCafferty, attorney for appellant, Yasmin Hughes, certify that I have this day, by United States mail with postage prepaid, filed the foregoing document with the clerk of this Court and have served a copy of the same upon the following persons at the addresses indicated below:

1. Honorable Doug Evans
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2. John M. Collette, Esquire
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4. Honorable Jim Hood
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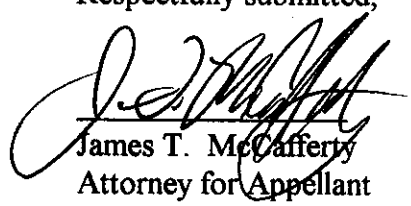
This the 7th day of May 2007.

Respectfully submitted,



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IN THE SUPREME COURT OF MISSISSIPPI

NO. 2007-TS-00209

YASMIN HUGHES — APPELLANT

v.

STATE OF MISSISSIPPI — APPELLEE

APPENDIX

UNITED STATES CONSTITUTION

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF THE STATE OF MISSISSIPPI

Article 3, Section 14. Due process.

No person shall be deprived of life, liberty, or property except by due process of law.

Article 3, Section 26. Rights of accused; state grand jury proceedings.

In all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both, to demand the nature and cause of the accusation, to be confronted by the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and, in all prosecutions by indictment or information, a speedy and public trial by an impartial jury of the county where the offense was committed; and he shall not be compelled to give evidence against himself, but in prosecutions for rape, adultery, fornication, sodomy or crime against nature the court may, in its discretion, exclude from the courtroom all persons except such as are necessary in the conduct of the trial. Notwithstanding any other provisions of this Constitution, the Legislature may enact laws establishing a state grand jury with the authority to return indictments regardless of the county where the crime was committed. The subject matter jurisdiction of a state grand jury is limited to criminal violations of the Mississippi Uniform Controlled Substances Law or any other crime involving narcotics, dangerous drugs or controlled substances, or any crime arising out of or in connection with a violation of the Mississippi Uniform Controlled Substances Law or a crime involving narcotics, dangerous drugs or controlled substances if the crime occurs within more than one (1) circuit court district of the state or transpires or has significance in more than one (1) circuit court district of the state. The venue for the trial of indictments returned by a state grand jury shall be as prescribed by general law.

Article 3, Section 28. Cruel or unusual punishment prohibited.

Cruel or unusual punishment shall not be inflicted, nor excessive fines be imposed.

Article 3, Section 31. Trial by jury.

The right of trial by jury shall remain inviolate, but the legislature may, by enactment, provide that in all civil suits tried in the circuit and chancery court, nine or more jurors may agree on the verdict and return it as the verdict of the jury.

§ 97-3-7 (2). Simple assault; aggravated assault; domestic violence.

A person is guilty of aggravated assault if he (a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or (b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm; and, upon conviction, he shall be punished by imprisonment in the county jail for not more than one (1) year or in the Penitentiary for not more than twenty (20) years.

§ 97-3-79. Robbery; use of deadly weapon.

Every person who shall feloniously take or attempt to take from the person or from the presence the personal property of another and against his will by violence to his person or by putting such person in fear of immediate injury to his person by the exhibition of a deadly weapon shall be guilty of robbery and, upon conviction, shall be imprisoned for life in the state penitentiary if the penalty is so fixed by the jury; and in cases where the jury fails to fix the penalty at imprisonment for life in the state penitentiary the court shall fix the penalty at imprisonment in the state penitentiary for any term not less than three (3) years.