IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2007-KA-00989-COA

BERNARD YOUNG — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
George T. Holmes, MSB No. [redacted]
301 N. Lamar St., Ste 210
Jackson MS 39201
601 576-4200

Counsel for Appellant

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CERTIFICATE OF INTERESTED PERSONS

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

1. State of Mississippi
2. Bernard Young

THIS 4th day of December, 2007.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Bernard Young

By: George T. Holmes
George T. Holmes, Staff Attorney

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STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Lee County, Mississippi, where Bernard Young was convicted of murder following a jury trial May 14-16, 2007, Honorable Sharion Aycock, Circuit Judge, presiding. Bernard Young was sentenced to life imprisonment and is presently incarcerated with the Mississippi Department of Corrections.

FACTS

Tamara Neal, age 27, was shot and killed on June 26, 2006 at around 9:30 a. m. on Mississippi Highway 6 near Plantersville in Lee County. [T. 92]. Witnesses who were traveling on the highway came upon an incident near the city limits of Plantersville where a sport utility vehicle was blocking a Ford Mustang in the middle of the road "and a slim black man" got out of the SUV with a pistol holding it with both hands and walked towards and shot into the driver's side of the Mustang, ... "three times, and he got back

into his vehicle and spun out... back towards Tupelo." [T. 133-36, 146]. Witnesses afterwards observed Tamara slumped over behind the wheel of the Mustang with fatal chest wounds. *Id.*

No state witness identified Bernard Young as the shooter. [T. 141]. One witness said the shooter's vehicle was "light colored". [T. 130-31]. Another said it was "dark". [T. 141-42].

Tamara Neal and Bernard Young had had a "rocky" relationship beginning in 2000 or 2001, and had two children age four and two. [T. 88-89, 91, 93-94, 97]. They, however, had been broken up for about eight to nine months at the time of Tamara's death. *Id.* At the time of the break-up, Tamara began seeing someone else. [T. 96]. Young reportedly married another woman in 2002 during the time of his and Tamara's relationship. [T. 97]. Tamara's mother testified that for the last six months before the shooting, Young had been riding up and down the street were she and Tamara shared an apartment. [T. 89].

Earlier on the day of the shooting around 8:45 a. m., Young allegedly called Tamara's place of employment, a day care center, asking for her, but she was not there. [T. 100]. Young sounded angry. *Id.* Tamara arrived at the day care about 9:00 and left about 9:25. [T. 101-02]. She told a co-worker that Young was outside "acting a fool". *Id.*

Thereafter close to 9:30 a. m., about 15 minutes before the shooting, Tamara had gone to the Lee County Sheriff's Department to allegedly file a complaint against Bernard

Young for stalking. [T. 176-77]. As Tamara was speaking with the deputy, the testimony was that Young came into the sheriff's office and said to Tamara, "I would just like to talk to you", and then left. *Id.* The deputy taking the information advised Tamara that the complaint needed to be filed in Plantersville where the alleged stalking supposedly started. [T. 177]. It was on her way to Plantersville that the shooting took place. [T.133-36].

Shortly after the shooting, Young allegedly came back to the Lee County Sheriff's department and told the same deputy, "I'm here to turn myself in. ... I shot her" upon which Young was taken into custody. [T. 178]. After being verbally *Mirandized,* Young allegedly confessed, "I shot her." [T. 185-88, 190-92, 196-97]. Young never named who he shot. *Id.* There was no written statement *Id.* The waiver form indicated that Young "invoked [his] right to remain silent." [Ex. 16].

Tamara was shot in the chest four times with a .44 caliber weapon. [T. 204, 216-19]. The projectiles pierced her lungs and heart. *Id.* Mortally wounded in her car, she died almost instantaneously. [T. 139-40, 148, 217-18, 230]. There was no gun shot residue report offered into evidence and the weapon was discarded. [T. 241-42, 187].

SUMMARY OF THE ARGUMENT

The erroneous admission of hearsay evidence irreparably prejudiced the appellant and the weight of the evidence was not supportive of the verdict.

ARGUMENT

ISSUE NO. 1: WHETHER YOUNG WAS IRREPARABLY PREJUDICED BY THE ERRONEOUS ADMISSION OF HEARSAY EVIDENCE?

This issue involves the repetition of assertions made by the decedent victim to the sheriff's personnel prior to the shooting, as the victim was attempting to file a stalking complaint, that "He's just following me, he just keeps following me, I'm just tired of it, I want him to stop following me". [T. 123-24, 162-67, 176]. The statements were offered by the state under Miss. R. Evid. Rules 803(3) and 803(3)(1) "present sense impression and then exiting state of mind." *Id.* The court ruled the statements admissible. *Id.* The standard of review regarding admissibility of evidence is abuse of discretion, hence an appellate court may only reverse for abuse of discretion. *Brown v. State*, 864 So.2d 1009, 1011 (Miss. Ct. App.2004). Errors of this class require reversal only if an abuse of discretion results in harm to the defendant. *Parker v. State,* 606 So.2d 1132, 1137-38 (Miss.1992).

In its ruling, the trial court relied on the following case law: *Dendy v. State*, 931 So. 2d 608, 613-14 (Miss. Ct. App. 2005), *Council v. State*, 2007 WL 1248509, *Harris v. State*, 861 So. 2d 1003, 1018-19 (Miss. 2003), and *Bogan v. State*, 754 So. 2d 1289, 1293-94 (Miss. 2000). All of these cases are clearly distinguishable to Young's fact situation and, therefore, are not authority under this issue.

In *Dendy,* the defendant was convicted of murdering his wife. 931 So. 2d at 613-

14. One issue in the appeal was whether trial court erred in admitting hearsay statements that witnesses heard the victim say prior to her murder, apparently about arguments the couple had. The trial court in *Dendy* ruled that the victim's statements were admissible as hearsay exceptions under M.R.E. 803(3) which provides that "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition ... is not excluded by the hearsay rule." *Id.*

This conclusion was based on the *Dendy* court finding that "the Mississippi Supreme Court has held that a relevant statement made by a murder victim prior to his death may be admissible as an exception to the hearsay rule under the declarant's then-existing mental condition, or state of mind exception under M.R.E. 803(3). *Brown v. State*, 890 So.2d 901, 914-15 (¶¶ 42-46) (Miss.2004); *Harris v. State*, 861 So.2d 1003, 1018(¶41-42) (Miss. 2003)." *Id.*

The *Dendy* court noted "that the trial court made detailed findings on the record that the statements were more probative on the point for which they were offered by the proponent than any other evidence which the proponent could procure through reasonable efforts, the statements had a high degree of trustworthiness, and the defense was given reasonable notice as to the State's intent to offer them at trial." *Id.*

Contrarily to *Dendy*, the trial court here did not make any finding that the evidence was more probative than prejudicial, nor was there any analysis of the trustworthiness of the statements between this couple whose relationship was described by state witnesses as

"tumultuous". [T.95]. The heated nature of the relationship between Tamara and Young would tend to negate any trustworthiness; because, in any emotionally charged exchange, people are at their most prone to say irrational things not always based on clear perception.

Also, contrary to *Dendy*, in the present case, Young's trial counsel was clearly surprised by the information about the victim's statement, so much so as that he raised an objection that the information was late under the discovery requirements of UCCR 9.04. [T. 165-174]. A motion for mistrial was denied. *Id.*

Yet the main differentiation is, in *Dendy,* the hearsay was merely information that the couple had argued. In Young's case, the victim's statement is accusatory, in fact the victim was in the sheriff's department to commence a criminal proceeding, i. e., file a complaint or affidavit for stalking. [T. 176]. Therefore, the statements contained criminal accusations that the defendant never had the opportunity to cross-examine.

In *Council,* the defendant was convicted of murdering a woman during an altercation over a man. 2007 WL 1248509 (¶ 27-28). On appeal, Council complained that the trial court should not have admitted hearsay testimony that "consist[ed] of descriptions from two witnesses who overheard the ensuing argument between Council and [the victim] immediately before [the victim] was stabbed."

The *Council* court said "[t]his testimony qualifies as an exception to the hearsay rule as a statement of a then-existing mental condition, or state of mind under Mississippi

Rule of Evidence 803(3) ... [which] encompasses relevant statements made by murder victims before their death." *Id.* at (¶ 42)." Note that the court used the language that Rule 803(3) "*encompasses*". So, not all statements of victims are automatically admissible. The statements have to be relevant and not more prejudicial than probative. *Id.*

The *Council* court found the argumentative statements repeated by the witnesses overheard between Council and the victim "just before the fight began [were] relevant to show that Council intended to fight and might have been the initial aggressor." *Id.*

In the present case, once again, contrary to the trial court's cited authority and analysis, the victim's statement were accusatory, they did not provide information to the jury which would make a proposed material fact more or less likely. Therefore, not only was the statement in the present case accusatory, without the opportunity for cross-examination, but it was irrelevant too under the definition set forth in Miss. R. Evid. Rule 401.[1]

Both *Dendy* and *Council* referred to *Harris v. State*, 861 So. 2d. 1003, 1019 (Miss. 2003) a murder case arising from a tavern shooting. In *Harris* it was the defendant who was trying to introduce evidence of the heated verbal exchange between the defendant, his brothers and the victim before the shooting. The *Harris* court found that it was error

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[1]RULE 401. DEFINITION OF "RELEVANT EVIDENCE"
"Relevant Evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

for the trial court to have excluded the evidence because in that particular case, it was "relevant to show that [the victim] intended to fight and might have been the initial aggressor." However, the error was harmless because there was other evidence which afforded the defendants the basis to claim self defense and "the jury had sufficient evidence of [the victim]'s conduct before the fight began. Thus, excluding the statement did not prejudice the Harrises."

Then there is *Bogan v. State*, 754 So. 2d 1289, 1293-94 (Miss. 2000). Bogan and his co-defendant robbed a restaurant and murdered one of the workers shortly after Bogan's co-defendant told a girlfriend that he was going to "pick up" Bogan on his way to work. Bogan assigned the admission of this hearsay as error on appeal. The *Bogan* court found "that the rule was specifically designed for this type of statement. The present state of mind exception clearly states that '[a] statement of the declarant's then existing state of mind, emotion, sensation or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health) ... [is not excluded by the hearsay rule].'" Miss. R. Evid. 803(3)."

The court found that the statement was likewise relevant under Miss. R. Evid. Rule 401 and not over prejudicial under Rule 403 because, "the girlfriend's testimony shows that Johnson intended to pick up Bogan on the morning of the robbery and murder. This act is an issue in the case as it places Bogan at the murder scene. In allowing the statement, the trial court determined that its probative value was not outweighed by the

danger of unfair prejudice."

So, in *Bogan* it was a statement of intent or intended action, not an accusation of criminal conduct as in the present case. As will be shown below, the difference is crucial and is of Constitutional import. What is plain is that none of the case law used by the trial court was appropriate for the present case. So, the appellant respectfully suggests that the trial court abused its discretion.

Along this line of argument, the Appellant would ask the court to direct its attention to a more comparable and more authoritative opinion under the facts of this case: *Edwards v. State*, 736 So. 2d 475, 477-79 (Miss. Ct. App.1999). In *Edwards*, the defendant was identified at trial, and convicted, as the shooter in a murder case based on hearsay statements made by witnesses to interviewing police investigators. In reversing, in part based on the wrongful admission of hearsay, the court said in regard to Miss. R. Evid. Rule 803(3):

> The present sense impression rule requires a spontaneous statement, not one in response to a question. ... For a witness to give a response to an officers question is by definition not "spontaneous," no matter how soon it is made after the event that is the focus of the questioning. ... Answering an officer's question is not a "self-generated" statement, but a police-generated one. These therefore were not present sense impressions.

Since Tamara, the victim in this case was in the process of filing a stalking complaint, her comments to the sheriff's deputy that "He's just following me, he just keeps following me, I'm just tired of it, I want him to stop following me.", were, in part, responding to the deputies' questions, and were not present sense impressions.

The *Edwards* opinion also reflects the importance courts have traditionally placed on a defendant's right of cross-examination. In *Crawford v. Washington*, 124 S. Ct 1354, 1356-59, 541 U.S. 36, 158 L. Ed. 2d 177 (2004), Crawford was charged with and convicted of assault with a deadly weapon for stabbing a man who allegedly tried to rape his wife. 124 S. Ct. at 1356-58 The defendant's wife gave a recorded statement to investigating officers which was introduced at trial against Crawford. *Id.* Crawford was never given the opportunity to cross examine the wife's statement. *Id.* Crawford gave a statement/confession claiming self defense which was consistent with the wife's version. *Id.*

Crawford's wife was "unavailable" and did not testify because of the marital privilege applicable in Washington state which did not extend to the spouse's out of court statements. *Id.* The *Crawford* court ruled that admission of wife's statement violated the Confrontation Clause. *Id.* at 1359.

> The Sixth Amendment's Confrontation Clause provides that '[i]n all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him.'
>
> * * *
>
> The text of the Confrontation Clause . . . applies to 'witnesses' against the accused – in other words those **who 'bear testimony'**. Testimony in turn is typically a solemn declaration or affirmation made for the purpose of establishing or proving some fact.
>
> * * *
>
> An accuser who makes a **formal statement to government officers bears testimony** in a sense that a person who makes casual remark to an acquaintance does not." *Id.* at 1364.

The *Crawford* Court explained that statements given to police officers sworn to or not are clearly testimonial, "the Sixth Amendment is not solely concerned with testimonial hearsay. . ." it would also be concerned with "testimonial statements of a witness who did not appear at trial unless he was unavailable to testify and the defendant had a prior opportunity for cross-examination." *Id.* at1364-65.

The end result of the *Crawford* decision is that, if testimonial hearsay is offered because a witness is unavailable, there must have been a prior opportunity for cross-examination by the accused for the declaration to be admissible:

> Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of 'testimonial'. Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. *Id.* at 1374.

Applying *Crawford*, therefore, in this case becomes an exercise in determining whether Tamara's statement to the sheriff's deputy constitute testimonial hearsay. Clearly it does.

In the Mississippi Supreme Court's decision in *Clark v. State* , 891 So.2d 136 (Miss. 2005), ¶16, the Court applied *Crawford*, and found error in the fact that a police officer was allowed to restate to the jury what witnesses had told him. The *Clark* court did not overrule because the erroneous evidence was cumulative of other "overwhelming" evidence. *Id.* Here the evidence was highly prejudicial in that it constituted allegations

of criminal conduct, not mere information.

If a definition of "testimonial" is needed here, a good place to look is in the opinion of in *Burchfield v. State* , 892 So.2d 191, 198 (Miss. 2004) where the Court had to decide whether a medicine label used against a defendant in a methamphetamine case constituted "testimonial" hearsay under *Crawford*. In deciding that it was not, the *Burchfield* court merely looked at whether the declarant was a "witness against the accused." Here applying the same standard, the court should ask whether the declarant Tamara Neal was a "witness against the accused." The answer is clearly in the affirmative; therefore, the hearsay statements which helped convict Young was "testimonial" and should have been subjected to cross-examination, or excluded. Since it was not, reversal is the only result supported by applicable legal precedents.

The allowance of the hearsay evidence against Young resulted in the trial court erroneously limiting the defendant's cross-examination of state witnesses thus preventing the defendant from exercising his rights under Sixth and Fourteenth Amendments to the U. S. Constitution and Article 3 § 26 of the Mississippi Constitution.

ISSUE NO. 2: WAS THE VERDICT CONTRARY TO THE WEIGHT OF THE EVIDENCE?

In the present case, no witness for the state identified Bernard Young as the person who shot Tamara Neal, there was no gun shot residue test results, there was no weapon

recovered. The state did introduce Young's purported statement, but it was never recorded, the documentary evidence indicates that no statement was given, Ex. 16, and as alleged, the defendant never identified Tamara Neal as the person he claimed he shot.

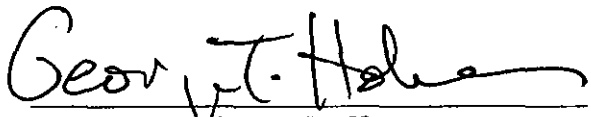
It follows that the verdict of guilty is not supported by the credible evidence and Young's conviction, should be reversed, even viewing the state's evidence in the best possible light. *Edwards v. State*, 736 So. 2d 475, 477-79 (Miss. Ct. App.1999).

CONCLUSION

Bernard Young is entitled to have his convictions reversed and rendered or remanded for a new trial.

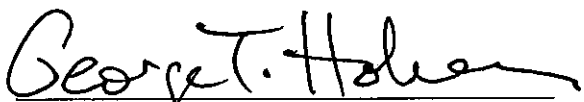
Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Bernard Young, Appellant

By: 
George T. Holmes, Staff Attorney

CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 4th day of December, 2007, mailed a true and correct copy of the above and foregoing Brief Of Appellant to Hon. Sharion Aycock, Circuit Judge, P. O. Box 1100, Tupelo MS 38802, and to Hon. John R. Young, Dist. Atty. , P. O. Box 7237, Tupelo MS 38801, and to Hon. Charles Maris, Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid.



George T. Holmes

MISSISSIPPI OFFICE OF INDIGENT APPEALS
George T. Holmes, MSB No. [redacted]
301 N. Lamar St., Ste 210
Jackson MS 39201
601 576-4200