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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

STEVEN YARBROUGH

APPELLANT

V.

NO. 2007-KA-1105-COA

STATE OF MISSISSIPPI

**FILED**

APPELLEE

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COURT OF APPEALS

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BRIEF OF THE APPELLANT

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MISSISSIPPI OFFICE OF INDIGENT APPEALS

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**STEVEN YARBROUGH**

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**NO. 2007-KA-1105-COA**

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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.

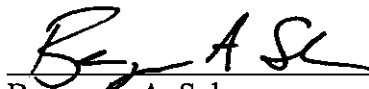
1. State of Mississippi
2. Steven Yarbrough, Appellant
3. Honorable Forrest Allgood, District Attorney
4. Honorable James T. Kitchens, Jr., Circuit Court Judge

This the 13<sup>th</sup> day of November, 2007.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:



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**BRIEF OF THE APPELLANT**

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**STATEMENT OF THE ISSUES**

**ISSUE NO. 1**

**THE TRIAL COURT ERRED IN ALLOWING THE STATE TO AMEND THE  
INDICTMENT**

**ISSUE NO. 2**

**THE TRIAL COURT ERRED IN DENYING STEVEN'S MOTION FOR A NEW  
TRIAL BECAUSE THE VERDICT WAS AGAINST THE OVERWHELMING  
WEIGHT OF THE EVIDENCE**

**STATEMENT OF THE CASE**

This appeal proceeds from the Circuit Court of Lowndes County, Mississippi, and a judgment of conviction of Aggravated Assault on a Law Enforcement Officer. Steven T.

Yarbrough was sentenced as a Habitual Offender as defined by Section 99-19-81 Mississippi Rules Annotated, (1972), to thirty (30) years in the custody of the Department of Corrections following a jury trial on May 15-16, 2007, Honorable James T. Kitchens, Jr., presiding. Yarbrough is presently incarcerated with the Mississippi Department of Corrections.

### **FACTS**

Around 1:30 a.m. on the morning of October 13, 2006, Officer Clint Sims [hereinafter Sims] was on patrol on Lehmberg Road headed south towards the Highway 82 overpass. [T. 97]. Sims saw a male and female walking north on Lehmberg Road off to the side of the roadway. *Id.* The male appeared to be holding the female. *Id.*

According to the testimony of Sims, he stopped, activated his overhead lights, and signed out with 911 to see if he could offer assistance to them. *Id.* As Sims was exiting the vehicle, Steven T. Yarbrough [hereinafter Steven] dropped the female and took off running north on Lehmberg Road. [T. 98]. Sims, not knowing was going on, chased after Steven yelling several times to stop. *Id.*

Sims continued to testify that after about a tenth (1/10) of a mile away from his police car, Sims caught up with Steven as he tried to cut through the woods and tripped over a curb and fell to his hands and knees. *Id.* Sims grabbed Steven by the right arm and took his left hand and placed it on Steven's back attempting to place Steven all the way to the ground. *Id.* As Steven was actively trying to get away, Sims placed his arm around Steven's neck, which reduces blood flow and calms people down. [T. 99].

Sims further stated that as he was trying to reach his radio, he finally loosened up his grip and Steven rotated his hips and they both fell backwards with Steven on top of Sims. [T. 100, 117]. Steven then placed his right forearm into the neck of Sims. [T.101]. Sims said he was pinned down and his breathing was becoming restricted at which point Steven told him that he knew him and wanted to go home. *Id.* Sims then pulled his weapon and to defend himself, but was able to kick Steven off of him. [T. 102]. Steven crawled away into the woods. *Id.* Sims stated that he was unable to inform the 911 dispatcher of his location because he could not speak. [T. 103]. He was able to get the word light out and crawled to the edge of road and flipped on his tactical light. [T. 104]. Officer Travis Robertson was the first officer that came to the assistance of Sims. *Id.*

Sims was taken to the hospital, and he stated that he had swelling and deep bruising to the inside of his neck. [T. 105]. He also had difficulty swallowing, but he had no fractures. *Id.* Sims received oxygen and received a nebulizer treatment at the hospital. *Id.* He spoke with the doctor and was released from the hospital. *Id.*

Steven's version of the events that took place are different. Steven testified that he was overwhelmed with a sense of panic at the sight of the police car and started running. [T. 169]. Steven said he fell when he tried to cross a ditch. *Id.* When he was down on his knees, Sims jumped behind him saying stop resisting, and put Steven in a choke hold that was cutting off his air. *Id.* He was panicked and when he felt Sims's grip loosen, he reversed it. *Id.*

Steven had realized what he was doing and did not want to hurt Sims, therefore he released him. *Id.* Steven patted Sims on the shoulder and said “I love you man, just let me go.” *Id.* Steven then took two or three strides and went into the woods, it only took about four or five seconds. [T. 170].

Steven ran through the woods and hid in a shed till cops left. [T. 172]. He later asked for a ride to his grandmothers apartment, where he was later arrested. *Id.*

### **SUMMARY OF THE ARGUMENT**

The Appellant, Steven T. Yarbrough, is entitled to a reversal of his case and a new trial. Steven was not doing anything wrong when Sims pulled up behind him in the police car. After Steven ran, Sims tackled him and initiated the physical contact. Steven in freeing himself from the pain that was being inflicted, reversed the hold of Sims and Steven ended up on top of Sims possibly causing injury.

By amending the indictment and striking the word “serious” from “cause or attempt to cause serious bodily injury to Clint Sims,” Steven was prejudice in not able to present his full defense of the case that he did not cause or attempt to cause serious bodily injury. The change in the indictment was a substantive change and not one of form. Only the grand jury can correct defects of substance. *Evans v. State*, 813 so.2d 724, 728 (Miss. 2002) (quoting *Mitchell v. State*, 739 So.2d 402, 404 (Miss Ct. App. 1999)). For the fact that Steven suffered this prejudice, he is entitled to a new trial.

The verdict was also against the overwhelming weight of the evidence. Steven was not doing anything wrong. Nor was Steven ever under arrest when Sims put Steven in a



choke hold. Sims initiated the physical contact. Steven did not have any intent to injure Sims, he was just trying to defend himself. No medical evidence was entered into evidence to show the injuries of Sims. The verdict was against the overwhelming weight of the evidence and this was reversible error and Steven is entitled to a new trial.

## **ARGUMENT**

### **ISSUE NO. 1**

#### **THE TRIAL COURT ERRED IN ALLOWING THE STATE TO AMEND THE INDICTMENT**

In reviewing a claim of error in whether the indictment is defective is a question of law, and the standard of review for a question of law is a de novo standard. *Spears v. State*, 942 So.2d 772, 773 (Miss. 2006). “The rule concerning indictments is that they cannot be amended to change the nature of the charge, except by the grand jury.” *Jones v. State*, 798 So.2d 1241, 1250 (Miss. 2001), *Miller v. State*, 740 So.2d 858, 862 (Miss. 1999) (citing *Greenlee v. State*, 725 So.2d 816, 819 (Miss. 1998)). “Any amendment not approved by the grand jury must be of form only and must not affect the substance of the charge pending.” *Jones*, 798 So.2d at 1250, *Rhymes v. State*, 638 So.2d 1270, 1275 (Miss. 1994). “[A] change in the indictment is permissible if it does not materially alter facts which are the essence of the offense on the face of the indictment as it originally stood or materially alter a defense to the indictment as it originally stood so as to prejudice the defendant’s case.” *Id* (quoting *Shelby v. State*, 246 So.2d 543, 545 (Miss. 1971)).

**Rule 7.06 of the Mississippi Uniform Rules of Circuit and County Court Practice** provides what is required to be provided in an indictment. **Rule 7.06** states:

The indictment upon which the defendant is to be tried shall be plain, concise and definite written statement of the essential facts constituting the offense charged and shall fully notify the defendant of the nature and cause of the accusation. Formal and technical words are not necessary in an indictment, if the offense can be substantially described without them. An indictment shall also include the following:

1. The name of the accused;
  2. The date on which the indictment was filed in court;
  3. A statement that the prosecution is brought in the name and by the authority of the State of Mississippi;
  4. The county and judicial district in which the indictment is brought;
  5. The date and, if applicable, the time at which the offense was alleged to have been committed;
  6. The signature of the foreman of the grand jury issuing it; and
  7. The words "against the peace and dignity of the state."
- The court on motion of the defendant may strike from the indictment any surplusage, including unnecessary allegation of aliases.

***Spears*, 942 So.2d at 774, Rule 7.06 of the Mississippi Uniform Rules of Circuit and County Court Practice.**

The State asked to amend the indictment the day of trial. The language in the original indictment: ". . . unlawfully, wilfully, feloniously, purposely, and knowingly, cause or attempt to cause serious bodily injury to Clint Sims . . . ." The State moved to delete the word serious from the indictment and the trial court agreed. The amended indictment read, ". . . unlawfully, wilfully, feloniously, purposely, and knowingly, cause or attempt to cause bodily injury to Clint Sims. . . ."

By allowing the indictment to be amended by deleting the word serious, the substance of the indictment was changed. Steven was not prepared to go forward with the trial. By removing the word serious from the indictment, also changed Steven's defense at trial. [T. 11].

Steven contends that he did not try to or attempt to cause serious bodily injury to Sims; however, by his own admission he was trying to defend himself. [T. 176]. Steven also stated that if injuries were sustained by Sims, then he could have possibly caused bodily injury, but there was not any intention to cause serious bodily injury. [T. 183]. A difference between serious bodily injury and bodily injury does exist.

In order to determine whether an amendment is one of form or of substance, and whether a party was prejudiced by the amendment, the court must determine:

[W]hether an accused is prejudiced by the amendment of an indictment or information has been said to be whether or not a defense under the indictment or information as it originally stood would be equally available after the amendment is made and whether or not any evidence [the] accused might have would be equally applicable to the indictment or information in the one form as in the other; if the answer is in the affirmative, the amendment is one of form and not of substance.

*Medina v. State*, 688 So.2d 727, 730 (Miss.1996) (quoting *Griffin v. State*, 540 So.2d 17, 21 (Miss.1989) (quoting *Reed v. State*, 506 So.2d 277, 279 (Miss.1987))); Also see *Spears*, 942 So.2d at 775. The purpose of this rule is to protect the rights of the defendant by preventing unfair surprise after he has diligently prepared his defense strategy. See URCCC 7.09. The issue here is not the sufficiency of the indictment, but whether amending the indictment compromised the defendant's rights by prejudicing his defense. "Due Process requires the State to prove each element of the offense charged in the indictment beyond a reasonable doubt." *Hennington v. State*, 702 So.2d 403, 408 (Miss.1997).

Steven submits that the amendment to the indictment at issue was substantive in nature, materially changed an element of the original offense charged, materially altered the

defense to the indictment and was reversible error as it circumvented the authority of the grand jury.

## ISSUE NO. 2

### THE TRIAL COURT ERRED IN DENYING STEVEN'S MOTION FOR A NEW TRIAL BECAUSE THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

In trial counsel's Motion for Judgment of Acquittal Notwithstanding the Verdict (JNOV) or in the Alternative Motion for a New Trial, counsel specifically argued that the jury's verdict was against the overwhelming weight of the evidence. R.E. 13 The trial judge denied this motion. R.E. 14

In *Bush v. State*, the Mississippi Supreme Court set forth the standard of review as follows:

When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, we will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. *Herring v. State*, 691 So.2d 948, 957 (Miss.1997). We have stated that on a motion for new trial, the court sits as a thirteenth juror. The motion, however, is addressed to the discretion of the court, which should be exercised with caution, and the power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict. *Amiker v. Drugs For Less, Inc.*, 796 So.2d 942, 947 (Miss.2000). However, the evidence should be weighed in the light most favorable to the verdict. *Herring*, 691 So.2d at 957. A reversal on the grounds that the verdict was against the overwhelming weight of the evidence, "unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict." *McQueen v. State*, 423 So.2d 800, 803 (Miss.1982). Rather, as the "thirteenth juror," the court simply disagrees with the jury's resolution of the conflicting testimony. *Id.* This difference of opinion does not signify acquittal any more than a disagreement among the jurors themselves. *Id.* Instead, the proper remedy is to grant a new trial.

*Bush v. State*, 895 So.2d 836, 844 (Miss. 2005) (footnotes omitted).

In the present case, Steven is at a minimum entitled to a new trial as the verdict was clearly against the overwhelming weight of the evidence. Sims did not see a crime, he was just wanting to know what was going on with the male and female walking down the street. [T. 124]. Steven just panicked and took off running, and had no idea why the cop was chasing him. [T. 126, 169]. Steven admitted that he made a mistake by running from the cop. [T. 170]. However, at no point did the cop tell Steven that he was under arrest. [T. 137]. Sims also did not have a reason to arrest Steven. [T. 138].

However, Steven did not have the intent to hurt the cop, and did not want to hurt the cop. *Id.* Steven also stated that he did not have his right forearm across the neck of Sims. *Id.* He said that he had his forearm across the chest of Sims, and he was just using it as a prop. *Id.* At no point was he putting his full weight on the cop, he was just trying to level out. *Id.* Sims even testified that Steven did not take any measures to hurt him other than using his forearm. [T. 136].

Sims grabbed Steven first and Steven did not know why the cop was grabbing him first because he did not do anything wrong. [T. 171]. Steven felt threaten by Sims. [T. 170]. Steven never punched Sims, nor did he swing at Sims. [T. 171]. Steven has had boxing and martial arts training and knows how to hurt someone. *Id.* He did not attempt to hurt Sims, he was just reacting to the force that was used by Sims. [T. 171, 176]. The point when Steven got control of the situation, he left the situation. [T. 172].

According to Sims, he went to the hospital and was there for two to three hours and was released. [T. 138]. Sims did not have any broken bones or surgical procedures at the

hospital and was only given some medicine then sent home. *Id.* No medical evidence was presented to show the injuries to Sims. Also, no pictures of the injuries that could have occurred that night were introduced into evidence.

Steven admitted that he made a mistake by running from the cop, but by running did not warrant the force used by Sims. Steven felt threaten and was acting in self-defense. Sims was choking Steven when he reversed the situation.

It would be a great injustice for this conviction to stand in that no reasonable jury could convict Steven based on the testimony and the lack of any other type of evidence implicating Steven.

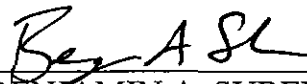
The verdict was clearly against the overwhelming weight of the evidence. Steven therefore respectfully asserts that the foregoing facts demonstrate that the verdict was against the overwhelming weight of the evidence, and the Court should reverse and remand for a new trial. To allow this verdict to stand would sanction an unconscionable injustice. *See Hawthorne v. State*, 883 So.2d 86 (Miss. 2004).


### CONCLUSION

Steven contends that the amendment of the indictment was in error and that the Court should reverse and remand for a new trial. Steven also requests that the verdict was against the overwhelming weight of the evidence, and therefore the Court should reverse and remand for a new trial.

Respectfully submitted,  
MISSISSIPPI OFFICE OF INDIGENT APPEALS  
For Steven T Yarbrough a/k/a  
Steven Tracy Yarbrough, Appellant

BY:



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## CERTIFICATE OF SERVICE

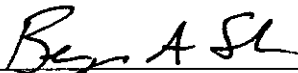
I, Benjamin A. Suber, Counsel for Steven Yarbrough, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

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Circuit Court Judge  
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Columbus, MS 39703

Honorable Forrest Allgood  
District Attorney, District 16  
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Honorable Jim Hood  
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This the 13 day of November, 2007.

  
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