IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CIVIL CAUSE NO.: NO. 2007-KA-1177

MONTRELL JORDAN,
APPELLANT

VS.

STATE OF MISSISSIPPI,
APPELLEE

APPELLANT'S BRIEF IN SUPPORT OF APPEAL

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PARTIES

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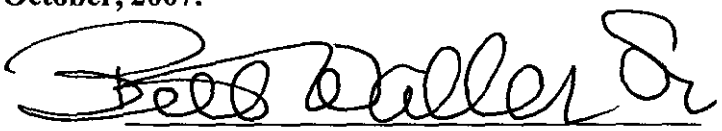
The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

Honorable Jannie Lewis, Holmes County Circuit Court Judge
Montrell Jordan, Appellant
Bill Waller, Sr., Attorney for Appellant
Antwayn Patrick, Esq., Former Attorney for Appellant
Akillie Malone, Esq., Former Attorney for Appellant
State of Mississippi, Appellee
James H. Powell, Esq., Attorney for Appellee
Steven Waldrup, Esq., Attorney for Appellee

CERTIFIED, this the 23rd day of October, 2007.



BILL WALLER, SR.

Attorney of Record for Appellant,
Montrell Jordan

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II. STATEMENT OF THE CASE

This case arises out of gunshots allegedly fired by the Defendant herein striking a freshman football player and killing him during the occurrence of a melee at a dance at Holmes Community College. Montrell Jordan was indicted by the Grand Jury in Holmes County on the charge of murder pursuant to Miss. Code Ann. § 97-3-19(1)(a). (R.6, R.E. 8). All aspects of the homicide reflected the classic elements of manslaughter a constituent crime which was not changed in the indictment.

Prior to the trial and during the course of the trial, there were several errors committed by the trial court which the Defendant contends requires reversal. Those errors include, but are not limited to allowing in-court identification of the Defendant without proper predicate, admission of evidence found from an illegal search, and improper jury instructions. Additionally, the Appellant contends that he received ineffective assistance of counsel, and therefore, respectfully submits that this case should be reversed.

After a trial commencing on February 14, 2007 and ending February 16, 2007, a jury verdict was rendered finding the Defendant guilty of murder and he was sentenced to life in prison. (R. 306, 307; R.E. 171, 172).

Defendant then filed a Motion for New Trial and an Amended Motion for New Trial on February 26, 2007 and June 8, 2007, respectively, which was denied on July 2, 2007 and entered on the docket on July 3, 2007. (R. 310, 356, 460, R.E. 173, 214, 316). It is from the Jury's Verdict and the Court's Order from which the Defendant appeals. (R. 465, R.E. 317).

III. SUMMARY OF THE ARGUMENT

We are living in a time when crime is the focal interest of the average citizen, and so much so, that people have purchased electronic devices to protect their homes and property and are familiar with 911 availability and are generally alert, constantly to protect themselves as a victim of crime. These moves of our society prompt rapt attention to criminal activities particularly those involving schools and colleges.

The sparsely populated county of Holmes has a major educational institution which has operated for over 50 years in the form of Holmes Community College located at Goodman, about ten (10) miles from the Holmes County Courthouse at Lexington.

When the annual event known as the Spring Fling was underway on the campus on the night of April 27, 2005, a freshman football player was fatally wounded which event made all media forms published or broadcasted in Lexington, Jackson, Greenwood and other places all over the State, and was also publicized in the college newspaper sent to alumni. From this unusual and shocking event, the general public became permeated with the horrible nature of this crime and that something should be done to make it safe for our students on the college campus.

The investigation prompted all local resources to become involved, including the police department of the town of Goodman, Holmes Community College, Holmes County Sheriff's Department, and the Mississippi Bureau of Investigation. Top flight investigator services were employed but only very veil circumstantial evidence could be produced to incriminate the Defendant in this case. Recognizing such, the Prosecution asked for a straight murder indictment rather than a manslaughter indictment to give leverage in the prosecution since it was evident that the decedent, a non-resident, freshman student, was not acquainted directly or indirectly with the Defendant and

since there was a crowd uprising and numerous fights between individuals prior to the shooting. The evidence reflected that the entire Holmes Community College football team was the aggressor with the victim being a member of that team.

The trial in February 2007 came on about five months prior to the August primary election in which all officials, excluding the trial judge, connected with the Prosecution stood for re-election. That, plus the notoriety of the event, prompted the Prosecution to resort to unusual and extreme means to bring about a successful prosecution of the homicide, calling it murder, and avoiding charging any constituent crime such as manslaughter.

The all out investigation failed to produce any eyewitnesses to identify the individual or individuals doing the shooting; failed to bring about identification of the Defendant as the shooter; failed to recover the weapon or weapons used in the shooting; failed to produce any motive or malice between the Defendant and the victim; and generally failed to have any direct positive proof that the Defendant committed any crime.

Using typical prosecution strategy an indictment for murder, which did not describe manslaughter, was obtained and the trial proceeded with only one charge of murder and no alternative or constituent charges.

The fourteen assignments of errors reflect a cumulative pyramiding avalanche of inadmissible evidence to contrive a conviction of murder.

The Court is compelled to reverse this conviction for many reasons beginning with one of the more convincing reasons is the lack of a fair and impartial jury. About 75% of the panel was disqualified on their own volition even though the court, nor the attorneys on voir dire, questioned the jury about their opinions gained from pretrial publicity, community concern, and their connection

or association with the Community College whether as a student, a family member, an employee, a sports fan, or other connection or association including the fact that all taxpayers in Holmes County contribute to the support of the school. After the twelve juror panel was chosen it became obvious that four (4) of the twelve were not qualified to serve, including open, emotional displays during the course of the trial and other facts including the selection of a male juror who was a retired police officer and who had a civil law conflict with the Defendant's father. Altogether, the record reveals that the jury was not qualified to serve on this case, they simply pantomimed which the State asked them to do.

Throughout the course of the trial, the State successfully engaged in devious tactics literally staging the evidence to unduly persuade the jury to convict the Defendant of murder. These tactics include (1) failure to adequately voir dire the jury; (2) opening statements highly inflammatory and improper; (3) admission of various witness statements to corroborate the testimony of the State's own witnesses before cross-examination; (4) dramatic courtroom identification by five witnesses of the Defendant when that identification had no connection with the shooter's identification; (5) the use of Defendant's unsigned statements in which he did not waive his Miranda rights and insisted on an attorney; (6) the introduction of evidence illegally acquired without the benefit of a search warrant from the Defendant's vehicle; (7) failure of the court and/or attorneys to properly instruct the jury on manslaughter and/or amend the indictment; (8) introduction of irrelevant items seized in a warrantless and illegal search of the Defendant's vehicle; (9) but for ineffective counsel the Defendant would have been acquitted; and (10) closing statements by the Prosecutor, stating that the Defendant would only serve a short time in jail before being released, obscuring and secreting the mandatory provision of the statute requiring a "life sentence".

Altogether, taking the evidence most favorable to the State, there is no proof beyond a reasonable doubt that the Defendant committed any crime and the Court should reverse and render.

IV. STATEMENT REGARDING ORAL ARGUMENT

This murder conviction was obtained on very vague, circumstantial evidence, a good part of which was inadmissible. The trial was dominated by prosecutorial overreaching and play acting over and above inadmissible evidence.

Oral argument would greatly aid the Court in its analysis of the issues presented in this case. The number and uniqueness of the issues create a need for counsel to give a detailed explanation of the evidence and law related to those issues. These issues range from the inadmissible use of witness statements; improper crime charged in the indictment; pretrial errors; pretrial publicity; prejudicial jury panel; and many others. Accordingly, the Defendant respectfully requests that the Court grant oral argument in this case.

V. STATEMENT OF THE FACTS

Montrell Jordan, a lifetime resident of Holmes County, Mississippi was born on March 16, 1980 and was arrested in connection with a homicide at a time when he was 26 years of age. Jordan and had no prior criminal record, arrests, or conflict with abiding by the law with the exception of one DUI. Jordan had absolutely no motive to commit a crime of murder or manslaughter, and he maintains his innocence. Jordan did not shoot into the air, did not shoot a person, did not act recklessly, and did not commit this crime for which he is charged. Jordan is not a habitual criminal like the majority of the people that are charged with murder and convicted. He was gainfully employed, living with his parents, Mr. and Mrs. Walter Jordan, Sr. of Pickens and had otherwise led an exemplary life.

He attended a social ceremony termed a "dance" at Holmes Community College located at Goodman in Holmes County, about 10 miles from the Holmes County Courthouse, where a large number of participants, both students and non-students, engaged in highly spirited activities when a fight broke out from inside the building to the outside parking lot when someone fired a weapon which accidentally fatally wounded a freshman football player at the Community College, a resident of Louisiana. The College traditionally has an annual three day event call the "Spring Fling" which includes the dance which was conducted in the Student Union building. It was an officially sanctioned event and both student and non-student guests were free to attend.

The Defendant did not shoot into the crowd and murder the victim and stands by the fact that he is not guilty. However, at best, under any reasonable interpretation of the *res gestae*, this unfortunate event cannot support charges for any crime other than "manslaughter." This is especially true when the fact that this was a crowd melee, a violent episode erupting among the

crowd of young men and women.

There is no evidence that the Defendant, a non-student, even knew the name or identity of the victim. Moreover, there is no evidence that they had ever laid eyes on each other. This reflects the almost impossibility of a motive between the Defendant and the victim for him to intentionally commit grave bodily harm or fatal injuries. Since there were no eye witnesses, nor any type of probative evidence identifying the individual or individuals among the crowd that did the shooting, the proper description of the event would be an act of culpable negligence.

The Court will take judicial notice that Holmes County is basically a rural county having a population of about 21,000 individuals and that Holmes Community College is a public Junior College supported partially by taxes collected from Holmes County residents. Likewise, the Court will take judicial notice that scores upon scores of Holmes County residents, their ancestors, descendants, friends, neighbors and collateral relatives have attended and/or supported Holmes Community College so much as to say that it is our local college and we do not want any unlawful events, particularly shootings and homicides on the campus among the students or guests. Holmes Community College was founded in 1911 and has had an average enrollment of 5,000 students. In 2005 it had 1, 403 students on the Goodman Campus, one of 5 separate campuses. The Court should take judicial notice that the school has some connection with most all Holmes County families whether student or alumni, among family members, or supporters, or sports fans, or frequent attender of events on campus as well as financial support through tax payments.

The State's case is woven around emotionally charged evidence, a good part of which should not have been admitted, and none of which met the test in a criminal prosecution of proving the guilt of the Defendant beyond a reasonable doubt.

The alleged weapon, pistol or other firearm, has not been found, nor has the caliber or description of that weapon been identified. There is no confession by the Defendant and there is no direct evidence that he was involved in any of the violent activities.

The ballistics evidence attempted to prove that the bullet causing the fatal injury could have been fired by a weapon of a different caliber.

As stated, the gun that was used on the night of the shooting has never been identified, including the make, model and caliber. Furthermore, the gun in question has not been found, was not in evidence, there was no proof that a gun purportedly bought by Defendant was used to shoot the victim, and the bullet found in the victim's body did not match the type of bullets used by that particular type of gun, nor did the bullet found in the victim's body match the bullets found in the Defendant's vehicle pursuant to the illegal search.

Defendant filed a Motion for New Trial and Amended Motion for New Trial on February 26, 2007 and June 8, 2007, respectively. (R. 310, 356, R.E. 173, 214). The lower court overruled the Motion on July 2, 2007 and it was entered on the docket by the Clerk on July 3, 2007. (R. 460, R.E. 316). Defendant filed his Notice of Appeal on July 5, 2007. (R. 465, R.E. 317).

VI. ARGUMENT

1. **Defendant's Constitutional Rights to a Fair Trial were Violated Materially and Continuously from the Qualification of the Jury, Voir Dire Examination, and the Seating of a Panel of Twelve to Try the Case in that the Court, the Prosecution and Defense Counsel Failed to make a Proper Inquiry as to the Opinions, Biases, or Prejudicial Feeling Toward the Defendant Arising out of the Homicide of a Freshman Football Player at Holmes Community College.**

The failure to voir dire the jury concerning knowledge of the facts acquired by community discussion and pretrial publicity made the Defendant's trial fundamentally unfair in violation of his constitutional rights. Had the court, the prosecution, or defense counsel made inquiries about the impressions and opinions obtained from community outrage and contents of any news reports that potential jurors had read, it would have materially assisted in obtaining a jury less likely to be tainted or influenced by public opinion and by pretrial publicity and sentiment to protect "students" than the jury that was selected without those questions. The victim was a teenage freshman college student and football player from Louisiana. The Defendant was a 24 year-old, non-student, resident of Holmes County. This Court, or any common sense analysis, would force the conclusion that this event in a sparsely populated rural county was sensational, horrible and one of a kind.

> Pervasive, adverse pretrial publicity has the potential to taint the perspective of the community from which a jury is selected. When the proceedings surrounding the investigation and prosecution of a particular crime are highly publicized, courts must inquire as to whether the defendant has been denied an impartial jury that will render a verdict based upon the evidence presented at trial rather than on information received from an outside source.

U.S. v. Parker, 877 F.2d 327 (5th Cir. 1989)(citing *Irvin v. Dowd*, 366 U.S. 717, 723, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961)).

A defendant is not required to show that community prejudice permeated the jury box. A defendant can show that "prejudicial, inflammatory publicity about his case so saturated the

community from which his jury was drawn as to render it virtually impossible to obtain an impartial jury... proof of such poisonous publicity raises a presumption that appellant's jury was prejudiced, relieving him of the obligation to establish actual prejudice by a juror in his case." *U.S. v. Parker*, 877 F.2d 327 (5th Cir. 1989)(internal citations omitted).

The jury panel was given an opportunity to respond; a large number voluntarily mentioned having (1) talked about it, (2) read about it, and (3) saw news stories on television. These comments alerted the court and counsel that this case involved broad public concern, but they failed to follow up with proper questioning.

The high volume of saturating publicity from television, radio, newspaper, alumni newspaper, and word of mouth created hysteria in a community over the fact that a teenage freshman college student had been killed on the campus in the course of a social event. Further, compounding the hysteria is the fact that campus shootings at schools had been going on across the country which provoked outrage in the public. These facts were so unique and shocking as to make everyone in Holmes County aware that a homicide on a college campus was a major event that shocked and rocked the whole community. However, the record is devoid of any investigation or discussion regarding the fairness or lack of prejudice of the jury panel based upon bias, ill-will or prejudicial feeling toward a non-student accused of shooting a student at a social event. It is obvious that the public was highly charged over this event and comments made by different jurors during voir dire confirmed prejudicial pre-trial publicity even though the trial court and counsel for the Defendant failed to ask direct questions regarding a juror's direct or indirect affiliation with the college. This was essential because the college is partially supported by Holmes County taxpayers and since a violent crime occurred at a college sponsored event it would serve to prejudice jurors against the

Defendant. For example, Juror No. 25, without being questioned, voluntarily stated that he had read in the Holmes County Herald and in the Holmes Community College Alumni paper about what had happened on the campus. His response was that he could be fair and impartial, but no question was asked him if he felt the least bit prejudiced against the Defendant because of the shooting on campus. (Tr. 163, line 8; R.E. 417). In all questions or comments reviewed in the record, there was no direct discussion with any juror by the lawyers or by the court regarding the influence in favor of the State or prejudice against the Defendant related to the college campus homicide. Apart from being a freshman student, Mr. Davis, the victim, was a football player, making his death of more concern to sports enthusiasts and alumni in general.

All of the grounds for change of venue are set up in Miss. Code Ann. § 99-15-35 which states that the grounds for change of venue include prejudgment of the case, or grudge, or ill-will to the defendant in the public mind. The totality of the circumstances including the pretrial publicity and the general knowledge that people take offense when there is a violent act involving students on a public school campus.

Since the homicide was a major news story in all forms of media publications, the Court should take judicial notice that the pretrial publicity was "prejudicial" and saturated the jury panel and their families.

Attached to Defendant's Amended Motion for New Trial is a summary of media publications reflecting a high level of penetration with the general public. (R. 289, R.E. 247). We submit that news of this event amounted to one of the highest news stories concerning Holmes County during this century. Being mindful that the Court is not often impressed by a vague and indefinite claim about prejudicial pretrial publicity we emphasize the extent and saturation of publicity accorded this

event. The campus is about 50 miles from Jackson and the event was "lead story" type coverage of Jackson television stations; daily newspapers and radio news, as well as television stations in north Mississippi and surrounding areas. This Court can take judicial notice that every member of the jury panel taken from this small county had gained a negative and prejudicial opinion of the "shooter". But this feeling or impression was compounded when neither the court nor the lawyers broached the subject.

The provisions of Miss. Code Ann. § 13-5-79 were not followed even though this statute is a shield to prevent reversal of convictions where the competency of jurors are questioned on appeal. The statute precisely requires:

> ...if it appear to the satisfaction of the court that he has no bias or feeling or prejudice in the case, and no desire to reach any result in it...

Broken down: a potential juror's (1) bias, (2) feeling, (3) prejudice, or (4) desire was not questioned by the court or by counsel for either party. Since the subject matter was a homicide of a student on a college campus, the most notorious crime committed in Holmes County in the last 100 years, specific questions as to (1) student connection, (2) sports fans, (3) alumnus, (4) taxpayers, (5) publicity, (6) family connections, (7) college employees or family members, etc. should have been asked.

It was impossible for "it" to appear to the satisfaction of the court since "it" or the subject matter influencing the mind and opinion of members of the panel was not mentioned.

There is proof beyond a reasonable doubt and to a moral certainty that the panel held bias, feelings and prejudice because 75% of the venire disqualified themselves extemporaneously, without questions or prompting.

The salient question in this case is: "Did the Defendant receive a fair trial by unprejudiced and non-biased jury or would any jury feel compelled to convict under the hysteria and argument arising from the unprovoked death of a freshman college student?"

If panic, hysteria and juror bias did not prevail then what explanation can be given for striking 44 jurors before the trial panel was chosen. Moreover, there is clear and convincing evidence that 4 of the chosen 12 were disqualified. Guarantees under both constitutions and the substantive law requires a fair and impartial trial.

2. Defendant's Constitutional Rights to a Fair Trial were Violated and the Jury was Forced to Reach a Verdict not Supported by the Evidence in that the Trial Panel was not Qualified as to Their Opinions brought about by Prejudicial Pretrial Publicity and Community Involvement Arising from a Notorious Homicide at a Public Tax-Supported Community College.

The transcript of the voir dire reveals several unusual and voluntary revelations by members of the jury panel. Juror numbers 34, 36, 57, 21, 51, 18, 55, 43 responded to inquiry by the court that they could not be fair and impartial. (Tr. 108, 109, 110, 117, 120, 121, 125, R.E. 408, 409, 410, 411, 412, 413, 414). The State's voir dire revealed that Jurors 26, 37, 40, 50, 51, 38, 41, 24, 55, 36, and number 14 all indicated that they had some problem or fixed opinion in serving on the jury because of friendship or connections with Defendant and his family. Even though a Holmes Community College connection was not mentioned on voir dire by the trial court or by either of the attorneys, the State requested and was granted 21 challenges for cause, some of which included those mentioned above, however, the Defendant only challenged one juror for cause and that was granted, because the juror's daughter was a student at Holmes Community College and knew the victim and his parents.

Another index of a prejudicial or unfair jury panel is the fact that the State used 11

peremptory challenges. Defendant used 11 challenges also. There was a total of approximately 50 or 75% of the jury panel excused for cause or for peremptory challenges.

Another index of the problems with the venue appears in the record (Tr. 170-173, R.E. 418-421) wherein Juror Deborah Nickel advised the Court "I have heard several things. My daughter was with them at the dance the night it happened. She was there at the dance, after the dance, was running and firing she went to the bathroom and he went outside and she wasn't looking, he went outside she went into the bathroom, she said she thought it was him they brought to the hospital. After that she told her he had died. It was only news and newspaper." That Juror was challenged for cause by the Defendant, the only one. Her voluntary statement to the trial court without being interrogated reflects the penetration of the pretrial publicity and the prejudice or ill feelings created in the minds of members of the jury panel.

On page 163, line 8 of the transcript, Juror No. 25 approached the bench and stated "I just read it in the Holmes County Herald and in the Holmes Community College has a little alumni paper that they send out." (Tr. 163, R.E. 417). This is another example of the minute penetration of prejudicial pretrial publicity, namely, not only was it in the local newspapers, but in the newspaper published by the college for circulation to the alumni.

The Court's interest in determining whether or not the case was tried before a fair and impartial jury should include consideration of the type of questions asked by counsel for the Defendant and a minute review of the record reveals only the following questions: (1) Whether or not the jury gave the Defendant the presumption of innocence which required a "yes" or "no" answer compelling the jurors to answer "yes"; (2) Identification of jurors who had members of the family previously killed; (3) Jurors acquainted with the District Attorney; and (4) Jurors acquaintance with

witnesses Netherland, Brown, Oliver, McDaniel, and Jerry Farmer. When all questions or subject matter advanced to the jury panel is considered cumulatively, there is no discussion whatsoever regarding jurors connections with the college, as an alumni, family member of alumni, sports fan, and supporter of the college. Likewise, there was no mention whatsoever of reading newspapers, looking at television, discussing the subject matter and other typical inquiries made in the trial of a murder case.

3. Defendant was denied a fair trial when the court failed to grant a mistrial upon observing four (4) jurors among the twelve accepted for the trial who were emotionally or otherwise unable to fairly and impartially consider the evidence.

Before the trial started (Tr. 197, R.E. 422) Juror Marcus Turner advised the court "Like I say I don't think I can focus on this." To which the court responded: "You're going to have to give your best effort and focus." The demeanor of this juror during the course of the trial reflected his inability to concentrate or focus on the evidence and with that being obvious to the court a mistrial should have been declared. A conviction requires the independent decision of each juror. This juror's overstatement that he was not qualified to serve makes it manifest error to require him to serve.

After she was chosen as a juror to try the case, and before the trial started, Juror Loretta McGee, an acquaintance with the Jordan family, was examined for the second time by the court and the District Attorney in chambers (Tr. 200-203; R.E. 425-428), reflecting pressure on this juror which in reality forced her to vote for a conviction. This confrontation in chambers placed her in a position of overacting in a negative way toward Defendant.

Further illustrating the tainted panel is Curtis Moore of Pickens who was allowed to serve even though he is a retired police officer, and who had a serious civil conflict with the Defendant's father regarding a collision between the juror's automobile and Mr. Jordan's cow. Attached to

Defendant's Motion for New Trial and Amended Motion for New Trial as Exhibits "D" and "B", respectively, is the Affidavit of Walter Jordan, Sr., to show that this individual was not identified before the trial commenced, however, his biographical data should have been used by the court on its own motion to excuse Curtis Moore because of his work in law enforcement. (R. 324, 423; R.E. 187, 281). The only way this juror should have been allowed to serve was for him to satisfy Defendant's counsel that his law enforcement background did not place him on the side of the prosecution and to the prejudice of the Defendant.

Throughout the course of the trial from the very beginning to the very end, Juror "female dressed in red" was openly emotional, crying and making emotional gestures continuously. Since this was in the clear view of the court and even though counsel for the Defendant did not make an appropriate motion, the court should have declared a mistrial because the obvious emotional illness of this juror. Furthermore, her demeanor and emotional acts were continuous and obvious, and so much so that defense counsel called her actions to the attention of the court (Tr. 429, R.E. 526), after the trial had been underway for some time.

Alternate Juror Delores Toliver was available to replace either one of these four jurors and was not asked to do so by the trial court which also prevented the Defendant from having a trial by a fair and impartial jury.

4. There was no Evidence Identifying the Defendant as the Shooter and it was Error for the Court to Deny the Motion for Directed Verdict and it was Error for the Court to Admit Evidence Regarding In-Court Identification of the Defendant.

The victim was shot and killed at night during the course of a free for all brawl on a local college campus. All evidence analyzed, including reasonable inferences, the shooter's identity was

not proven. There is no eye witness as to who actually fired the shots, and there was absolutely no evidence presented at the trial to identify the person who fired the shots. The Prosecution used inadmissible evidence to orchestrate a courtroom drama after first using the illegal search of his automobile and the illegal admission of the pawn shop records to prove he owned a pistol sometime in the past. There is no gun, and no proof that the gun shown in the pawn shop records as being purchased by a man named Jordan, was the gun that was used to fire the shots or that he owned it or any other gun on the date of this event. The bullet that was taken from the victim does not match the bullets that were found in the illegal search of the vehicle.

Even the State's key "eyewitness" Shagunda Simpson repeatedly stated she did not see and could not identify the shooter. The State even made an effort to identify Defendant by having witnesses testify as to his dress, a white t-shirt and blue jeans, which was typical or common dress for many individuals at that time and place.

There is absolutely no evidence to convict the Defendant of murder beyond a reasonable doubt or to a moral certainty as required by law.

A. No Positive Identification and Motion for Directed Verdict.

The case of *Edwards v. State*, 736 So.2d 475 (Miss. App. 1999) provides insight into the rule regarding identification of the Defendant. In *Edwards* the Court found that the identification of the defendant as the shooter was against the weight of the evidence. *Edwards* at 475. The rule regarding evidence sufficient to convict is as follows:

> For evidence that is sufficient to convict, the jury must among other requirements be given proof that identifies the accused in a manner adequate to convince them beyond a reasonable doubt. If only one person makes the identification and there is no other evidence that adds to it, then if that witness himself is not convinced beyond a reasonable doubt, neither may be the jury. Here, Warren's statement that he

> 'believed' or 'thought' Edwards committed the crime but was not certain is simply inadequate by itself to permit a conviction. True, a positive identification of a suspect is not required if other evidence is sufficient to support the jury verdict. *Bogard v. State*, 233 So.2d 102, 105 (Miss. 1970). However, the only other evidence is that Edwards was in the vicinity of the crime both before and after the shooting. So were other people. He also had on clothes similar to that worn by the person whom Warren saw shoot the victim. The clothes were merely described as 'dark' and there was nothing distinctive about them. Edwards talked with the victim some ten minutes before the shooting and was seen running from the area where the crime occurred within a few minutes after the shooting, though perhaps as long as ten or fifteen minutes after.

Edwards at 483 ¶ 29.

Going further the Court stated:

> The evidence here is Warren's qualified identification, hearsay statements that immediately after the crime he only 'thought' Edwards was the shooter... None of the evidence besides the identification would permit a juror to conclude that Edwards was involved in the crime as opposed to just being in the vicinity. And the identification is too qualified to permit conviction.

Edwards at 483 ¶ 30.

In *Edwards* at 486 ¶ 40, the Court gave the reason for reversal:

> [T]he only eyewitness to the crime never testified that he was certain that Edwards was the culprit; the only augmenting evidence was from one person who said that she overheard that eyewitness say that Edwards committed the crime. To reverse a conviction and order a new trial because of significant weakness but not total want of evidence is the course marked by a century of Mississippi jurisprudence. We must follow that path as well.

Id.

In the present case, there is no positive identification of the Defendant, nor any other evidence to link him to the crime as will be discussed below in the Appellant's Brief.

Shagunda Simpson testified that she did not see the person shoot, but she heard gunshots and saw the flash of the second shot after it was fired. (Tr. 239, lines 15-20; 241, line 27; R.E. 438, 440).

She was specifically asked if she saw Montrell Jordan doing the shooting and she responded several times that she did not see Montrell Jordan pull the trigger. (Tr. 258, 259, 263, 266, 270, 271; R.E. 453, 454, 458, 459, 460, 461). "No, I didn't see Montrell Jordan shooting." (Tr. 259, line 15; R.E. 454). "I didn't see Montrell's face, no, so the answer to your question is yes, I didn't see it. I don't know if it was Montrell. I don't know if it was his face." (Tr. 271, lines 10-13; R.E. 461). Therefore, Simpson was not an eyewitness to identify the shooter.

The Prosecution had Terry Wade read from his statement in which he said that he saw Montrell Jordan fire a gun two times. However, while the Prosecution was asking him if that was his statement, he interjected by stating that he had heard it from someone. (Tr. 465, line 20; R.E. 536). The Prosecution made him read from his statements in response to their questions. He was not allowed to testify on his own recollection. On cross-examination Wade testified that he did not actually see Montrell Jordan shoot and that the statements he gave to investigators were not made from his own personal knowledge, but from what he had heard from rumors. (Tr. 473, 480, 481-82; R.E. 544, 550, 551-552). Wade testified that he did not actually see the shooter. We make the Court aware that this is but one of many examples wherein the State used collateral statements by their own witnesses to bolster the weight of the witness' "on stand" testimony in violation of Miss. R. Evid. 612 which prevents the introduction of hearsay evidence. Wade admitted that his statements were actually hearsay (Tr. 461, R.E. 532). The law in regard to testimony being read from statements in order to put it into the record where they are otherwise inadmissible is more fully outlined below in the Brief.

Carlton Brown gave a statement that he could not with 100% accuracy identify the Defendant as the shooter. He gave a statement that he did not look at him directly, only out of the corner of his

eyes, that he glanced at the shooter. (Tr. 529, lines 9-19; R.E. 559). Even in the photo line-up he said "I believe it was five." He was not even 100% positive during the photo line up which line-up in and of itself is inadmissible. (Tr. 538, lines 6-15; R.E. 561). Earlier that day when Defendant's attorney was attempting to interview Carlton Brown before the trial, Defendant walked into the room where Brown and Malone were and Attorney Malone directed Defendant to leave because he could not be in the room with the witness. This gave Carlton Brown an identification of Montrell Jordan, and the court allowing him to identify Jordan in the courtroom when he testified that he did not see the shooter was prejudicial error. (Tr. 537, 538; R.E. 560, 561).

According to Officer Newton's testimony at a hearing on May 1, 2006, he testified that Joey Netherland stated that he did not see the guy who was shooting. (Tr. 57, R.E. 127). At the trial, Joey Netherland stated that he identified the shooter in the photo line up by his facial features and build. The photo line up did not show his build. (Tr. 585, 586; R.E. 577, 578). However, the State's key witness testified that the security guards were not outside at the time of the shooting. (Tr. 260, R.E. 455).

As in *Edwards* the Defendant was identified as wearing a white t-shirt. As the Court is well aware, this type of attire is not uncommon on young males. In fact, Arlena Shaw stated in her statement to the police given the night of the shooting that all of the males who left after the shooting were wearing white t-shirts. (R. 329, R.E. 192). Arlena Shaw also testified that the shooter left in a Kia. (R. 328-329, R.E. 191-192). There is nothing distinctive about a white t-shirt. In *Edwards* the Court stated that there was nothing distinctive about the dark clothing the defendant was wearing.

The Defense moved for a direct verdict on the grounds that the state failed to prove one of the burdens in the case, the identification of the defendant. The court denied the motion. (Tr. 589,

590; R.E. 581, 582).

It was error for the court to deny the motion for directed verdict on this issue.

The basis for the Motion for Directed Verdict as expressed on the record was that the State failed to prove the identity of the shooter, or conversely, the Defendant was not identified as the person who fired the fatal shot. (Tr. 589, 590; R.E. 581, 582). The trial court denied the Motion which was an error since there was no evidence proving that the Defendant was guilty, however, the least that the trial court should have done at that point was to reduce the charge to manslaughter and direct a verdict on murder alone and allow the jury to consider the guilt or innocence of the Defendant on a charge of manslaughter. The weak argument by defense counsel along with no citation of law on the subject matter of the Motion is an element of the inefficient representation claim. *Edwards v. State*, 736 So.2d 475 (Miss. App. 1999).

B. In-Court Identification.

It was error for the trial court to allow in-court identification of the Defendant without the proper foundation being established.

To replace its lack of evidence on identity, the State orchestrated a bizarre inadmissible in court attempt to prove that the Defendant was the shooter. In the course of their theatrical portrayal they asked Simpson, Wade, Wilson, Oliver, Brown and Netherland to identify the Defendant for the purpose of inferring that he was the shooter when they had established that they did not see the shooter. That subliminal approach is both inadmissible and inflammatory when the "in-court" identifying witnesses could not identify the shooter and could not connect the Defendant to the shooting. Such antics exemplified the off the wall attempts to prove something with nothing. Clearly, this added color and cover-up to lack of identity evidence.

To determine whether an in-court identification is proper, courts evaluate the following factors: "(1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation." *Bogan v. State*, 754 So.2d 1289, 1292 (¶ 11) (Miss. App. 2000). *U.S. v. Honer*, 225 F.3d 549 (5th Cir. 2000).

Before the in-court, finger-pointing identification could be undertaken by either of the six witnesses the *Bogan* criteria must be complied with and it was not. No predicate or foundation is possible when the witness cannot connect the Defendant to the shooting.

In the case of *White v. State*, 532 So.2d 1207, 1214 (Miss. 1988), the Court found the witness' in-court identification of defendant to be valid because the witness recognized defendant, having seen him on numerous occasions, witness testified he saw defendant at time of incident in question under a street light, and for that viewing witness was only 100 feet away, and only six days passed between date of crime and confrontation. However, those are not the facts in the present case.

In the present case, the in-court identification of the Defendant was erroneous. As stated above, Shagunda Simpson testified that she did not see the person shoot, specifically did not see Jordan doing the shooting or pull the trigger, specifically stated that she did not see Jordan's face and did not know if it was Jordan. (Tr. 239, lines 15-20; 241, line 27; R.E. 438, 440). (Tr. 258, 259, 263, 266, 270, 271; R.E. 453, 454, 458, 459, 460, 461). (Tr. 259, line 15; R.E. 454).(Tr. 271, lines 10-13; R.E. 461). The Prosecution asked Ms. Simpson if she knew who Montrell Jordan was. She responded that she did. The Prosecution then asked Ms. Simpson to identify him in the courtroom, which she did. The Prosecution then asked that the record reflect that Ms. Simpson had identified

the Defendant. (Tr. 242, lines 7-16, 17-20; R.E. 441). Ms. Simpson also stated that she had known Montrell Jordan since she was four. (Tr. 242, line 29; R.E. 441). Such testimony was a pure charade for the jury to assume that she was an "eyewitness" when dramatized with in-court identification, like they do on television.

It was error for the court to allow the in-court identification of Montrell Jordan by Officer Wilson. Officer Wilson was not a witness to the shooting. (Tr. 291, lines 5-15; R.E. 467). His only connection with Jordan was an after the fact investigation. This meaningless event served to incite the jury and to enter a conviction on police sentiment.

It was error for the court to allow the in-court identification of Montrell Jordan by Investigator Oliver. Investigator Oliver was not a witness to the shooting. (Tr. 421, lines 15-29; R.E. 518). Likewise, this evidence had no probative value, but was offered for the sole purpose of inflaming the jury.

It was error for the court to allow the Prosecution to identify the Defendant in the Courtroom to Terry Wade during direct examination. (Tr. 463-464, lines 25-29, 1; R.E. 534-535). The Prosecution had Wade read from his statement in which he said that he saw Montrell Jordan fire a gun two times. However, while the Prosecution was asking him if that was his statement, he interjected by stating that he had heard from someone. (Tr. 465, line 20; R.E.536). The Prosecution only allowed him to read from his statements in response to their questions. He was not allowed to testify on his own which is the best evidence. On cross-examination Wade testified that he did not actually see Montrell Jordan shoot and that the statements he gave to investigators were not made from his own personal knowledge, but from what he had heard from rumors. (Tr. 473, 480; R.E. 544, 550). Wade testified that he did not actually see the shooter and it was error for him to identify

Montrell Jordan in the courtroom. Since a statement by a "live witness" can only be used for impeachment, the use on direct examination to bolster his testimony is clearly prejudicial and grounds for reversal. This tactic was also used erroneously with Carlton Brown as described below. Additionally, M.R.E. 806 does not apply because Wade was able to express why his statement differed from his testimony at trial.

It was error for the court to allow the in-court identification of the Defendant by Carlton Brown. (Tr. 525; R.E. 558). Mr. Brown gave a statement that he could not with 100% accuracy identify the Defendant as the shooter. He gave a statement that he did not look him directly in the eyes, only out of the corner of his eyes. (Tr. 529, lines 9-19; R.E. 559). Even in the photo line-up he said "I believe it was five." He was not even 100% positive during the photo line-up. (Tr. 538, lines 6-15; R.E. 561). Earlier that day when Defendant's attorney was attempting to interview Carlton Brown before the trial, Defendant walked into the room where Brown and Malone were and Attorney Malone directed Defendant to leave because he could not be in the room with the witness. This gave Carlton Brown an identification of Montrell Jordan, and the court allowing him to identify Jordan in the courtroom when he testified that he did not see the shooter was prejudicial error. (Tr. 537, 538; R.E. 560,561).

It was error for the court to allow the in-court identification of the Defendant by Joey Netherland, who was an unarmed security officer without any formal training, and who not followed school procedure at the dance. (Tr. 558, lines 12-26; R.E. 568). Mr. Netherland stated that he identified the shooter in the photo line-up by his facial features and build. The photo line-up did not show his build. (Tr. 585, 586; R.E. 577, 578). Additionally, according to Officer Newton's testimony at a hearing on May 1, 2006, he testified that Joey Netherland stated that he did not see

the guy who was shooting. (Tr. 57, R.E. 127).

The procedure for being able to identify the person in-court was not followed. It was error for the court to allow these witnesses to identify the Defendant when they did not meet the factors of: "(1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation." *Bogan v. State*, 754 So.2d 1289, 1292 (¶ 11) (Miss. App. 2000). *U.S. v. Honer*, 225 F.3d 549 (5th Cir. 2000).

The procedure for identifying the Defendant in-court was not followed and it was error for the court to have allowed the witnesses to identify the Defendant. Furthermore, in a criminal case the "relevant evidence" rule as set out in Miss. R. Evid. 401 should be strictly followed. This evidence has no relevancy and proves no part of the elements of the crime. It only serves to inflame and prejudice the jury. The case of *Wade v. State*, 583 So.2d 965 (Miss. 1991) holds that the evidence is not admissible because it is not relevant to the charge in the indictment nor to the res gestae. The shooter was never identified and the line up fantasy was a ruse to imply that the Defendant has now been identified as the guilty party.

5. Defendant's Unsigned Statements Violate his Miranda Rights and are Inadmissible Because he was Interrogated on Three Different Occasions by Different Investigators over a Period of Approximately 3 hours after he was Arrested and at a time when he Repeatedly Requested the Assistance of Counsel and Declined to Sign the Miranda Rights Certificates.

In *Miranda v. Arizona*, 384 U.S. 436, 444 (1996), the Court held: "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege

against self-incrimination and his right to retained or appointed counsel." *Id.*

Defendant was immediately upon his arrest interrogated without the benefit of counsel. He did not testify at the trial. The statements made by the Defendant are unsworn and the Defendant was not allowed to review his statements for accuracy once they were transcribed. These statements do not contain any type of a confession. The statements are exculpatory in nature, but they were admitted as Exhibits S-20 and S-24 through the testimony of A.C. Hankins and Lacarius Oliver. (Ex. 64, 76; Tr. 376, 423; R.E. 627, 639, 499, 520). Defense counsel filed a Motion objecting to the admission of the statement before the trial, but the trial court overruled the Motion. (Tr. 377, 378; R.E. 500, 501). Apparently the sole purpose was to question Defendant's veracity when he stated he did not own a gun. Defendant filed a Motion *in Limine* to Exclude the Audio Tape of Montrell Jordan and All Transcribed Statements. (R. 151, R.E. 51). It was improper for the State to use these statements in a left-handed fashion to attack Jordan's veracity when he did not testify. Such could only be used for impeachment or for rebuttal.

At the hearing on this Motion on February 7, 2007 (Tr. 81A, R.E. 321), the four law enforcement officers associated with the two statements given by Jordan stated that they did not remember him asking for counsel, or that they hadn't been told anything about wanting an attorney. (Tr. 81R, 81V, 81Y, 81NN; R.E. 338, 342, 345, 360). However, these officers lack of knowledge of this does not matter. The rule is that all State actors are charged with knowledge of Jordan's previous request for counsel. *Arizona v. Roberson*, 486 U.S. 675, 687, 108 S.Ct. 2093, 2101, 100 L.Ed.2d 704, 717 (1988). "If the accused requests access to counsel, all officers of the prosecution force are bound thereby even those who have no actual knowledge of the request." *Kirkland v. State*, 559 So.2d 1046, 1047 (Miss. 1990).

Defendant refused to sign a waiver of rights form. (Tr. 81W, 81X; R.E. 343, 344). Officer Oliver testified that he voluntarily gave up his rights, but that part was not recorded on the tape. (Tr. 81X, R.E. 344). When Defendant refused to sign a waiver of rights form, he did not waive his rights, and did not intend to waive his rights. The officers should not have continued on, but should have stopped as is required by *Miranda*. Defendant testified at the hearing on this Motion that he advised Captain Chambers that he did not want to talk, that he wanted an attorney. Captain Chambers then told him that it would not be used against him, it was just a proceeding that they had to go through. (Tr. 81MMM, R.E. 385). Defendant's statements were inadmissible by the violation of the Defendant's constitutional rights and the statements should not have been allowed into evidence.

In the case of *United States v. Ramos*, 448 F.2d 398 (5th Cir. 1971), the Fifth Circuit held that defendants were warned of their *Miranda* rights, including right to counsel and to remain silent and acknowledged that they understood their rights. However, they refused to sign a waiver of rights and thereafter neither of the defendants voluntarily initiated further conversation. The government agent's refusal to terminate interviews violated the Supreme Court's mandate in *Miranda* and incriminating statements which agent elicited from defendants were inadmissible. The Fifth Circuit reversed the defendants' convictions based on the *Miranda* violation by the government agent. *Id.*

The Fifth Circuit has also held that the mere answering of questions is insufficient to show a waiver; there must be some affirmative act demonstrating a waiver of *Miranda* rights. *United States v. Collins*, 40 F.3d 95, 99 (5th Cir. 1994)(*cert. denied*).

The interrogators did not acknowledge Defendant's invocation of his constitutional rights when he refused to sign the waiver, and when he requested counsel prior to being interrogated. In fact, in both interviews the interrogators immediately began asking questions and would not stop

even after Defendant stated he was not going to talk anymore. In the second interview, Defendant requested to go back to his cell several times during the questioning and the officers forced him to continue talking. The officers would not let him go back to his cell; they kept talking to him trying to make him confess to a crime that he did not commit and which he kept telling them that he did not do it. There was no confession by Montrell Jordan in any statement given to police. (Ex. 64, 76; R.E. 627, 639). Defendant was held by interrogators against his will when they blatantly ignored his statements that he was not talking anymore, he wanted to go back to his cell, etc., and they told him "no" and continued to interrogate him. These circumstances for a person who had never been confined to jail before, or interrogated in a threatening, forceful manner makes both statements inadmissible. Even if one statement is assured to be admissible, the second statement is repetitious and should not have been admitted. They cover the same subjects and the State was grand standing to impress the jury on the manpower used to investigate such a serious crime as this, using inadmissible evidence to do so.

In ruling on the Motion, the trial court found that Defendant was advised of his *Miranda* rights before making both statements, that there was no coercion, no force, or nor was there any promises made to Mr. Jordan before making statements. (Tr. 81TTT, R.E. 392). However, this is not the law. Since he refused to sign a waiver of rights, the conduct of the accused must be examined and the State must prove that he did something to waive his rights. The making of an exculpatory statement alone cannot indicate waiver. *Miranda v. Arizona*, 384 U.S. 436, 475 (1996).

In Mississippi, the right to counsel attaches once the accused is in custody. *Nicholson v. State*, 523 So.2d 68, 76 (Miss. 1988). Federal constitutional jurisprudence demands that "broad, rather than narrow" interpretation be given to a defendant's request for counsel "at every critical

stage of prosecution." *Michigan v. Jackson*, 475 U.S. 625, 633, 106 S.Ct. 1404, 1409, 89 L.Ed.2d 631, 640 (1986). This is necessary for the rule that courts "indulge ever reasonable presumption against waiver of fundamental constitutional rights." *Michigan v. Jackson*, 475 U.S. 625, 633, 106 S.Ct. 1404, 1409, 89 L.Ed.2d 631, 640 (1986)(quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed.2d 1461, 1466 (1938).

Defendant's Fifth Amendment right against self-incrimination and Sixth Amendment right to counsel was violated when he was forced to give two statements to officers without the benefit of counsel being present. Defendant requested counsel prior to being mirandized and was denied the benefit of counsel. Defendant did not waive his right to have counsel present. The Court in *Burnside v. State*, 544 So.2d 1352, 1355 (Miss. 1988) held that the defendant's Sixth Amendment rights were violated and that it constituted reversible error for the court to allow the introduction of the verbal statement of the defendant without the benefit of counsel. It is an age old prosecutorial tactic to lay out a "lie" so they can argue to the jury "he lied about this, so he lied about everything," more or less saying he killed the man but lied about it. That tool or theory was surreptitiously gained by using the inadmissible statements.

The Court will be made aware that there is a line of cases allowing police officers to question individuals such as motorist before they are arrested under which circumstances the *Miranda* rights do not apply. As set out in *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984) and *Yazzie v. State*, 366 So.2d 240 (Miss. 1979) together reflect a rule that a modest number of questions which do not amount to a formal arrest do not encompass the *Miranda* rule, however, several hours after the episode in question the Defendant was arrested at his home, handcuffed and transported to the police station in Goodman where a number of police officers intimidated and

interrogated him and he immediately in the beginning requested the services of a lawyer. That interview was taped and used in court. They moved him to the courthouse in Lexington and the MBI investigators interrogated him a second time and that interrogation was taped and offered into court. There are no cases within our purview that sanction the waiver of *Miranda* rights under these circumstances. *Hart v. State*, 639 So.2d 1313, 1315 (Miss. 1994).

The Prosecution used the unsworn statements of Defendant in order to try and show that the Defendant's veracity was questionable and also to try and show the jury that the Defendant was guilty by innuendo. (Tr. 677, 678; R.E. 590, 591).

Before a witness may be impeached with a prior inconsistent statement, there must be an actual contradiction in fact between the testimony and the prior statement. *Everett v. State*, 835 So.2d 118, 122 (¶ 11) (Miss. App. 2003)(internal citations omitted). Defendant did not testify and the admission was improper. Moreover, Defendant had asserted his right to counsel and was not given the benefit of counsel, therefore, making his statement inadmissible at trial.

6. It was Error for the Court to Admit Evidence Found from Searching Defendant's Automobile on Two Grounds: (1) The search was illegal; and (2) The evidence was irrelevant and highly prejudicial.

The night of the alleged shooting, officers searched the Defendant's vehicle at the place of his residence without a warrant, without permission and without valid consent. The Defendant filed a Motion to Suppress the "evidence" found in the vehicle. (R. 11, 30; R.E. 9, 15). The trial court found that Jordan did not give the officers permission to search his vehicle. (Tr. 76-77, R.E. 146-147). The trial court held that "there was no evidence of testimony as it relates to any exigent circumstances that would require the search to be done without a search warrant" and suppressed the "evidence" found in the vehicle. (R. 104; Tr. 76-78; R.E. 146-147). This included the suppression

of the bullet cartridge that was found in the vehicle and that was used by the crime lab to compare the bullet found in the victim to that found in the vehicle (which were not the same caliber). (Tr.78, R.E. 148). The Prosecution filed a Motion to Reconsider. (R. 161, R.E. 57). On Monday, February 12, 2007, before the trial commenced on Wednesday, February 14, 2007, pursuant to a sudden and unnoticed Motion filed by the District Attorney, the court reversed its ruling holding that evidence could be admitted by the State. (Tr. 82-93, R.E. 395-406). However, this was erroneous. As the court had earlier ruled there existed no exigent circumstances warranting the admission of the evidence at trial; nor did there exist probable cause. Additionally, it was error for the court to allow witness Wilson to testify at trial that they had permission to search the vehicle, when the court found that there was no permission to search. (Tr. 290, R.E. 466).

The Prosecution mislead the jury giving false information regarding the bullet pulled from the victim and the cartridges that were found in the Defendant's vehicle. It started with testimony from Officer Wilson. When the Prosecutor showed Officer Wilson the bullets he first identified the bullets incorrectly as being .38. (Tr. 292, line 27; 293, line 18; 294; R.E. 468, 469, 470). Over objection of defense counsel, Wilson was then asked to read what the head of the cartridges said and he changed it to .357. (Tr. 294, R.E. 470). This, in and of itself, was erroneous and highly prejudicial. However, the State's own expert forensic firearms identification scientist, Byrom McIntire, testified that the bullet pulled out of the victim was different from the bullet loaded in the cartridges.

> Q. Do you have an opinion, to a reasonable degree of scientific certainty, as to whether or not the slug that Dr. Hayne gave you is consistent with the slug that has not been fired out of that particular cartridge in front of you right now?
>
> A. Yes, sir.

Q. What is that?

A. The projectile that's in State's Exhibit 2, in my opinion, is a different bullet than the bullet that's loaded in these cartridges in State's Exhibit 11.

(Tr. 502, R.E. 557).

The one case citation used by the State to persuade the court to reverse its ruling was not on point, nor did it waive the requirement for a warrant. The Prosecution's argument was based upon *McNeal v. State*, 617 So.2d 999 (Miss. 1993) wherein the trial court and the Supreme Court ruled that the officers had a valid search warrant to search the house of an alleged bootlegger. After the residence was searched the officers found evidence that caused them to believe that they should search the defendant's automobile. The lawful search with a warrant gave them "probable cause" to search the automobile.

Before the court at the time of the reversal order was evidence rebutting probable cause and exigent circumstances including:

(1) Defendant was a life-time resident of Holmes County whose family with whom he resided was well regarded.

(2) He was employed and had no criminal record, except prior traffic violations.

(3) There was no vehicle involved in the shooting.

(4) The State had conflicting evidence as to the vehicle the shooter departed in- one said a Kia and one said Suburban.

(5) Defendant made no effort to escape and the vehicle was parked at his residence. (Tr. 317, R.E. 479).

(6) Numerous law enforcement officers participated in the investigation with manpower

being available to secure the vehicle while a search warrant was obtained.

(7) No effort was made to obtain consent to search.

(8) Rumor or hearsay statements regarding a Suburban leaving the scene along with numerous other vehicles did not rise to probable cause.

Since no probable cause or exigent circumstances existed, Defendant relies upon the general rule which has always been that warrantless searches of private property are *per se* unreasonable. *Cady v. Donbrosky*, 413 U.S. 433 (1973). At the time of the search of the automobile there existed no probable cause and no exigent circumstances. The automobile was parked on private property at the time it was searched, and no effort had been made to hide or otherwise avoid the service of a search warrant. The State offered no excuse for failing to get a search warrant and blatantly violated the Defendant's constitutional rights. The county site of Holmes County is about 10 minutes or 10 miles from the location of the vehicle. The *McNeal* case used to persuade the court to admit such evidence is completely off point because the probable cause to search arose directly and proximately from a valid search warrant and no search warrant for any search was even issued in this case.

No probable cause or exigent circumstances existed in order to search the vehicle without a warrant. It was parked at the Defendant's residence. There was no risk and no danger of evidence being removed or destroyed; and there was plenty of time for the officers to obtain a search warrant if they could prove that probable cause existed. However, there existed no probable cause, which is why they performed a warrantless search. *See Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). The vehicle was personally owned by the defendant who was not contacted before the search.

Additionally, the search and seizure went beyond the scope of a permissible search and

seizure incident to an arrest and, therefore, the physical evidence must be suppressed. *Chimel v. California*, 395 U.S. 752 (1969); *Wright v. State*, 236 So.2d 408, 411 (Miss. 1970). The evidence seized after an illegal arrest and/or illegal search must be suppressed. *Wong Sun v. United States*, 371 U.S. 471, 488 (1963).

The Defendant's constitutional rights were violated in the conduct of an illegal search and the allowance of the evidence therefrom. The Court should find that the trial court was correct in its original ruling suppressing the evidence found in the vehicle and that the trial court erred in reconsidering the suppression and finding that the evidence should be admitted. There is absolutely no authority, State or Federal, for such a search as this to be valid or for objects obtained thereby to be admitted into evidence.

The State overreached rules of evidence in attempting to prove guilt by inadmissible evidence of a "cartridge and holster" being located in a vehicle not connected to the shooting which was owned by an individual who was never identified as the shooter.

To allow the jury to hear all of the evidence regarding a .357 caliber pistol when the State knew that the bullet did not match the weapon amounted to improper evidence which was highly prejudicial and certainly reaches the grounds required for a new trial. (Tr. 499-500; R.E. 554, 555).

7. The Verdict of Murder is Contrary to Overwhelming Weight of the Credible Evidence and It was Error to Deny the Defendant's Motion for New Trial.

There is no credible evidence to establish that Defendant discharged a gun into the crowd.

"Although the court's power to set aside a jury verdict and grant a new trial should be exercised with caution, this Court has the duty to review the evidence and cancel the verdict if it is against the overwhelming weight of the evidence." *Gray v. Turner*, 145 So.2d 470, 472 (Miss.

1962)(citing *Williams v. Hood*, 114 So.2d 854, 856 (Miss. 1959).

The Defendant was convicted of murder. The Defendant asserts that he is not guilty of any crime, and that the verdict was contrary to the overwhelming weight of the evidence. This issue was raised in the Defendant's Motions for New Trial. (R. 310, 356, R.E. 173 ,214). In determining whether the evidence is sufficient the Court must find "after viewing the evidence in the light most favorable to the prosecution, [that] any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Bush v. State*, 895 So.2d 836, 843 (¶ 16) (Miss. 2005)(quoting *Jackson v. Virginia*, 443 U.S. 307, 315, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)).

A motion for new trial challenges the weight of the evidence. *McClain v. State*, 625 So.2d 774, 781 (Miss. 1993). The standard is "the sufficiency of the evidence as a matter of law is viewed and tested in a light most favorable to the State." *Wetz v. State*, 503 So.2d 803, 808 (Miss. 1987). The Court will reverse when the evidence is such that reasonable and fair-minded jurors could only find the accused not guilty with respect to an element of the offense charged. *Id.*

However, should the Court not be compelled to reverse the conviction, there is precedent for the Court to change the crime. In the case of *Wells v. State*, 305 So.2d 333 (Miss. 1975) the defendant was convicted of murder and the Supreme Court ruled regarding Miss. Code Ann. § 97-3-29 and § 97-3-31 regarding the definition of the crime of manslaughter. The *Wells* court cited numerous cases defining manslaughter which fit implicitly the facts of this case. We quote from Justice Suggs opinion: "In other criminal cases we have reversed and remanded for sentencing for a lesser crime when such lesser crime was a constituent of the offense charged in the indictment. In *Anderson v. State*, 290 So.2d 628 (Miss. 1974), the defendant was convicted of burglary. The burglary conviction was reversed but remanded for re-sentencing on the charge of trespass without

granting the defendant a new trial on a lesser charge. Trespass is necessarily a component of every burglary. Implicit in the verdict finding the defendant guilty of burglary is finding he was guilty of the constituent offense of trespass." Also, quoting further, "in a number of cases where defendant has been convicted of assault and battery with intent to kill and murder, this court has reversed such convictions but affirmed as a conviction of assault and battery and remanded for re-sentencing on the lesser charge. (Citing *Corley v. State*, 264 So.2d 384 (Miss. 1972)."

Bearing further upon our argument that the facts did not rise to support an indictment for murder, we cite *Bangren v. State*, 17 So.2d 599 (Miss. 1944) where the Court held that the issue of murder should not have been submitted to the jury, but should have been limited to manslaughter.

The statute bearing strict construction provides for conviction of the lesser crime of manslaughter, however, that alternative was not set out in the language in the indictment nor was it covered by the instructions offered by either the State of the Defendant. These omissions prevented the jury from considering the crime of manslaughter since that crime was not defined nor were they informed that a conviction of manslaughter was permissible. This exclusion deprived the Defendant of his right to a fair trial based upon the law relating to a homicide, and thereby his constitutional rights, both State and Federal, were violated.

Accordingly, the Defendant respectfully submits that the verdict was against the overwhelming weight of the evidence to support a charge of murder, and the conviction should be reversed. However, in the alternative, should the Court disagree, the crime should have been changed to manslaughter and the jury given instructions on manslaughter. That could have been handled by amending the indictment or by a peremptory instruction allowing the jury to consider only manslaughter. Failing to do so resulted in a miscarriage of justice.

8. The Indictment Charges the wrong Crime and is Fatally Defective. It was error for the Court not to Require the State to Amend the Indictment to Charge only Manslaughter before the Trial Started or after the State Rested.

The State, relying on the old prosecution tactic of "this is a horrible crime" indicted the Defendant for the crime of murder when the evidence did not support a charge of murder. At best, but Defendant in no way concedes there was any evidence, it supported a change of manslaughter and nothing more.

Obviously the State's tactics were good politics for the District Attorney, Sheriff and county officials who faced the Holmes County voters shortly after the date of the trial. There is a serious conflict in the statute used for the indictment, Miss. Code Ann. § 97-3-19(1)(b) with other statutory definitions of manslaughter. (R. 6, R.E. 8). For example, paragraph (3) of this same code section states: "An indictment for murder or capitol murder shall serve as notice to the defendant that the indictment may include any and all lessor included offenses thereof, including, but not limited to, manslaughter." Miss. Code Ann. § 97-3-19(3). That language should have been included in the indictment so as to give the jury and the Defendant advance notice that manslaughter was included in the charge. However, Defendant disagrees that even that addition would have been a fair or proper indictment. Miss. Code Ann. § 97-3-35 defines the crime of manslaughter as "the killing of a human being without malice, in the heat of passion, but in a cruel or unusual manner or by the use of a dangerous weapon, without authority of law, and not in necessary self-defense shall be manslaughter." *Id.* The statutory definition of manslaughter exactly and succinctly fits the facts and circumstances involving a random shot fire in the course of a violent episode at a large crowded party in the nighttime on a college campus. The Defendant and victim were strangers and not in eye sight of each other when the shot was fired.

The record is replete with physical facts, eye witness accounts, and general circumstances that the shooting arose out of a brawl in the nighttime at a dance, involving a large number of young people, including students and non-students. Even if the Court should rule that the Defendant was indicted under the proper statute, the indictment is defective to the extent that it should have been dismissed or amended prior to the commencement of the trial. Considering that a collateral attack on the indictment should have been presented by defense counsel at that time, it is submitted that such was in the province of the court since the facts did not support an exclusive singular charge of "murder" and nothing else. Further compounding this error are the misleading and inadequate instructions approved for the State. Again, defense counsel did not offer any instructions or argument regarding the defective indictment or for manslaughter. The only mention of manslaughter was an obscure and defective definition in paragraph 2 of Instruction No. 5 quoted as follows:

> If you find the State has failed to prove any essential element of the charge of Murder, beyond a reasonable doubt, then you may consider the lesser included charge of Manslaughter. However, it is your duty to accept the law given to you by the Court and if the facts and the law warrant conviction of the crime of Murder, then it is your duty to make such finding uninfluenced by your power to find a lesser included offense. This provision is not designed to relieve you from the performance of an unpleasant duty. It is included to prevent a failure of justice if the evidence fails to prove the original charge but does justify a verdict for the lesser crime. (R. 298, R. E. 163).

Miss. Code Ann. § 97-3-19 has some fifteen subsections, whereby the District Attorney had the option to choose several different murder charges, but having chosen (1)(b) he was required to include a clear and concise statement of the murder theory on which he was proceeding. A careful review of the indictment will reveal that language in this paragraph was not included in the indictment. First of all, the charge starts out "...willfully, unlawfully, feloniously and without authority of law kill and murder Daewantre D. Davis, known as DeeDee, a human being, by shooting

him with a hand gun, at a time when the said Montrell Jordan was engaged in the commission of an act imminently dangerous to others, and evincing a depraved heart regardless of human life, to wit, shooting indiscriminately into a crowd in violation...". The language immediately following "human life" was completely omitted, which language is "human life, although without any premeditated design to effect the death of any particular individual." (R. 6, R. E. 8). That exclusion made the indictment fatally defective and further there is no description of the imminently dangerous act being performed by the accused. The evidence was the individual doing the shooting was shooting in the air, not at, or intentionally pointed the gun at anyone. Without any question, the evidence supports a charge under Miss. Code Ann. § 97-3-35 which is the traditional manslaughter statute. Obviously, the District Attorney created a trick indictment so as to make the crime more horrible and to give the jury no choice but a murder conviction, however, the opening statement, examinations of witnesses and closing arguments, erroneously allowed by the court, technically put the jury in a corner forcing them to believe that a victim killed by a gunshot is murder regardless of the circumstances.

9. Arguments by the Prosecution including Closing Statements in which the Jury was Instructed that If Convicted the Defendant would only Serve a Short Time in Jail before being Released, Obscuring and Secreting the Mandatory, Statutory Provision that he Receive Life in the Penitentiary if Convicted of Murder.

The record will reveal (Tr. 212, lines 1-5; R.E. 431) a statement made by Assistant District Attorney Waldrup "the evidence will show he probably didn't think he was going to hit anybody, but under Mississippi law that you will be given at the end of this case, the way he was indicted, if you do an act like that, it is murder in the State of Mississippi." "The standard of review that appellate courts must apply to lawyer misconduct during opening statements or closing arguments

is whether the natural and probable effect of the improper argument is to create unjust prejudice against the accused so as to result in a decision influenced by the prejudice so created." *Slaughter v. State*, 815 So.2d 1122, 1130 (¶ 45) (Miss. 2002) (citing *Sheppard v. State*, 777 So.2d 659, 660 (Miss. 2000); *Ormond v. State*, 599 So.2d 951, 961 (Miss. 1992)).

That statement was highly prejudicial and reversible error because the Prosecutor described manslaughter, but advised the jury that it was murder under Mississippi law. That set the tone for the jury to return a murder conviction which was highly improper and highly prejudicial and made it seem that the jury had no other choice but to convict the Defendant of murder.

During closing arguments the prosecution made the following comments which were highly prejudicial and improper: "You can find him guilty of murder. The evidence is there. We've proven that Montrell shot DD. Shot into the crowd. Irresponsible. Whatever the consequences that come from it, based on the law he's responsible. Hold him responsible. He should have to live with the consequences. Go back there and find him responsible." (Tr. 637, 638; R.E. 588, 589). "Do you think that this defendant is the first person who has committed a crime and denied doing it, and lied about not only doing it, but lied about other things, and these are physical evidence." (Tr. 678, 679; R.E. 591, 592). "Because the evidence shows that Montrell is the one that did it." (Tr. 680, line 22; R.E. 593). "...there is no reasonable doubt about who did this. Everybody in this courtroom knows who did it. We didn't charge the wrong person. He's over here because he earned being here because of his actions that night." (Tr. 685, lines 6-10; R.E. 598). "Well he's charged with a crime that he committed, and he ought to be convicted of it. The judge is going to impose, once he's convicted, the sentence in this case. He ain't going to die as a result of this. He's going to get **sentenced** to **some time** in the penitentiary, which is where people who kill people need to be." (Tr.

685, lines 14-20; R.E. 598). "He deserves to be held accountable for what he did. You know, that's all we're asking you to do, hold him accountable for what he did. It ain't taking his life. His family will still be able to visit him for whatever time he's there." (Tr. 685, lines 27-29; 686, lines 1-3; R.E. 598, 599).

In order to affirm a conviction despite the presence of an improper remark by a prosecutor, "it must be clear beyond a reasonable doubt, that absent the prosecutor's comments, the jury could have found the defendant guilty." *Spicer v. State*, 921 So.2d 292, 318 (¶ 56) (Miss. 2006). The remarks by the prosecution in closing arguments were clearly in error and improper. Montrell Jordan should have been presumed innocent until the moment the jury decided otherwise, according to law. However, the prosecution had already decided his guilt and made it clear to the jury that they were to find him guilty of murder and that there was no choice in the matter. The prosecution even went so far as to say that he would not die for the murder, but would just get "some" time in prison. The prosecution failed to inform the jury that the mandatory sentence for murder is life in prison. The prosecution made it seem so easy that the Defendant would do a little time in jail, his family would get to see him while he was there and then he would be out. The comments by the prosecution are highly inflammatory, made to prejudice the jury, erroneous and improper. When all of these camouflaged comments are put into jury influence it is obvious that the prosecution was seeking a murder conviction on, at best, manslaughter evidence.

Because the comments by the prosecution are highly inflammatory, prejudicial, erroneous and improper, the trial court should have should have chastised the prosecutors and instructed the jury from the bench or in instruction as to the penalty for murder.

The errors are confirmed in this text, namely, the prosecution was using left-handed,

prejudicial, emotional persuasion to effect a murder conviction; defense counsel was grossly ineffective allowing this to happen; and the court failed to correct the errors. The Court should find that these comments constitute reversible error.

10. Errors Regarding Admissibility of Evidence, Witnesses and Exhibits.

A. Inadmissible Prior Statements of Witnesses.

The Prosecution used the prior statements of its witnesses on direct examination throughout each witness's testimony in order to bolster their testimony as is outlined herein below. Ironically, when Defense calls its only witness on direct examination, Arlena Shaw, the Prosecution objects to the use of her reading from her statement: "If she needs to refresh her recollection about some part of the statement, then the foundation can be laid to do that. However, she hasn't been asked any questions at this point about what she remembered happening or how the events happened, or state she doesn't remember that part of it. For him to just go through the statement with her at this point is improper. She hasn't said anything inconsistent. There are times when the refreshing recollection or impeachment through inconsistencies occur, but no foundation has been laid for any of that yet, and just to have her start reading the statement." (Tr. 595, R.E. 584). The court sustained the objection. (Tr. 595, R.E. 584).

Miss. R. Evid. 612 does not allow a statement to be used where it is not shown that the witness does not remember. In *Livingston v. State*, 525 So.2d 1300, 1304 (Miss. 1988) the Court held that a witness may use a memorandum to refresh his memory if it appears that the witness has no present memory and that the present memory may be refreshed from the memorandum. The memorandum can be used even if it would not be admissible. Where it is inadmissible, the witness can only use it to refresh memory, **not to put the content of an inadmissible document into**

evidence. *Id.* (Emphasis added).

In the present case, during the State's case in chief, the Prosecution used the statements of their witnesses to put the content of inadmissible documents into evidence. These statements were not used to refresh their witnesses memories. The contents of the statements were read into the trial court record and this act was highly inflammatory and prejudicial to the Defendant and it was error for the court to allow the contents of the statements to be read into the record.

It was error to allow the statements of other witnesses to be used to bolster their testimony when they were clearly inadmissible.

B. Photographs of Decedent Should Not Have Been Admitted.

The photographs of the decedent should not have been admitted at the trial during the testimony of Dr. Steven Hayne. (Tr. 227-231, R.E. 432-436). The Prosecution sought to introduce three photographs of the decedent: (1) picture of the decedent's face for identification purposes, (2) picture to show the exact size of the bullet, and (3) picture to show the relationship of the bullet entry wound to his chin and face. (Ex. 19, 20, 21;Tr. 227; R.E. 618, 619, 620, 432). The court allowed photographs (1) and (3) at the trial, and excluded number (2). (Tr. 229, R.E. 434).

Prior to trial, the Defendant objected to and sought to have the photographs excluded at a pretrial hearing on February 7, 2007. (R. 81G, R.E. 327). The objection was noted again at the trial. The argument made by Defendant is correct. There is no probative value in admitting the photographs into evidence. The photographs are highly inflammatory and prejudicial and outweigh the probative value of the evidence. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury...". Miss. R. Evid. 403. The photographs are not relevant as defined by Miss.

R. Evid. 401.

The Court has held that photographs of the victim should not ordinarily be admitted into evidence where the killing is not contradicted or denied, and the corpus delicti and the identity of the deceased have been established. *Shearer v. State*, 423 So.2d 824, 827 (Miss. 1982); *Sharp v. State*, 446 So.2d 1008, 1009 (Miss. 1984).

Evidence must satisfy the relevancy test of Rule 401 to be admitted. Once it is determined to be relevant, it must be properly authenticated and identified under Rule 901. *Stromas v. State*, 618 So.2d 116 (Miss. 1993). The photographs were never authenticated pursuant to Rule 901, nor were they self-authenticating pursuant to Rule 902 of the Rules of Evidence. The photographs were not satisfactorily authenticated and identified, therefore they are irrelevant and should be excluded.

There is no question as to who was killed and how they were killed. The Defense made it clear at the pretrial hearing on February 7, 2007: "...there's no question about his, about the way he was killed and all of that, we're not questioning it, Your Honor. The case law says that. We're not questioning it, and nor should it be pled to the jury. That's what we're asking here in this case." (R. 81G, R.E. 327). It is admitted that the victim died of a gunshot wound to the chest. The diagram attached to the final report of autopsy and entered into evidence as Exhibit S-1 is sufficient for the purposes in which the Prosecution said that they wanted to introduce the photographs into evidence. (Ex. 8-14, R.E. 607-614).

Photographs should not be admitted if their probative value is outweighed by their tendency to inflame the jury. Admissibility of photographs is governed by whether the proof is absolute or in doubt as to the identity of the guilty and whether the photos are necessary evidence or only a ploy to arouse the passion of the jury. *McNeal v. State*, 617 So.2d 999 (Miss. 1993).

C. Shaghana Simpson. (Tr. 236-285).

Shaghana Simpson, a 22 year old Holmes student, testified as the State's key witness, and who did not know anything, but who was allowed to be lead into agreeing with the Prosecutor on certain theories and vague circumstantial facts.

It was error to admit photographs of a tan suburban (S-6 and S-7)(Ex. 24, 25, Tr. 244, 245, R.E. 621, 622, 442, 443) which were pictures of a tan suburban owned by the Defendant, however, there was no predicate laid for the identification of the vehicle. There was no authentication or self-authentication of the photographs. Miss. R. Evid. 901, 902. Moreover, there was no qualification by the witness that she had specific knowledge from the photograph that it was the same tan suburban as that owned and/or driven by the Defendant. The photographs were the subject of a motion in limine which was heard on February 7, 2007. (R. 126; Tr. 81A; R.E. 28, 321). The trial court ruled that the court would rule on them after hearing the evidence surrounding the submission of the photographs and them being offered into evidence. (Tr. 81H, R.E. 328). These pictures were highly prejudicial to the Defendant and tended to prove that he was guilty because he "fled" the scene in the same tan suburban and the photographs should not have been admitted into evidence. The melee foregoing the fleeing of vehicle produce a level of hysteria that caused many vehicles to flee the scene. Fleeing was not particep criminous. Even those without vehicles were fleeing. It was error for the trial court to allow the introduction of these photographs into evidence.

During the course of the brawl, this witness was hit in the face by a football player, (Tr. 238, line 22, R.E. 437) shortly after which she heard two gunshots. (Tr. 239, line 15, R.E. 438). Practically every answer from this witness came from a leading question and many of her answers were confusing even though the Prosecution had her read answers from her statements into the

record which was erroneous. She finally decided that the shots were above her (used to bolster Dr. Hayne's testimony), which means an unidentified shooter was on a hill elevated above her position making it impossible for her to see anything other than the flash or flashes. Throughout her testimony she testified that she did not know who fired the shots. Although she could not identify the shooter, the Prosecutor was allowed to discuss inadmissible hearsay evidence regarding a weapon alleged to have been in the possession of Defendant at some unspecified date in the past, testifying (Tr. 248, lines 11-13 , R.E. 444) that the Defendant told her that it was a .357. All of the testimony regarding the weapon was plainly hearsay and inadmissible. No foundation was laid and the leading question was to set the caliber of the weapon to support the ballistics evidence.

A very serious error was committed when the Prosecution was allowed to bring up Ms. Simpson's unsworn written statements (Tr. 249, 251, R.E. 445, 447). This witness's statement is self-serving and is used to bolster her testimony. Moreover, under Miss. R. Evid. 804 where you have the witness you cannot put in a written statement for the purpose of bolstering the credibility of her testimony. The discussion about the statement and offering it for identification was highly prejudicial and obviously inadmissible. We submit the use of a prosecution prepared witness statement of a prosecuting witness to bolster his direct testimony is basically unheard of by this Court or any appellate court. This type of theatrics is usually controlled by the court *sua sponte*.

The Prosecutor was allowed to use the witness's self-serving statement to corroborate and validate her statement regarding the .357 weapon (Tr. 251, lines 1-4, R.E. 447) a leading and inadmissible question: "Can you tell this jury and this court whether or not you told the law enforcement officers about this .357 Montrell had?" A. "Yes, sir." That brash unconscionable error alone is grounds for a new trial and the Court should take judicial notice that it was highly prejudicial

to the Defendant to allow the key prosecuting witness to corroborate her own oral statement in the courtroom by her own previously made written statement. This could be called "echo evidence." In the case of *Stampley v. State*, 284 So.2d 305 (Miss. 1973), the Court held that "Evidence of prior consistent statements made by the witness is not evidence of the fact testified to by the witness, but may be offered for the sole purpose of supporting the testimony of the witness whose veracity has been attacked which says the use of the statement is limited to impeachment or defense thereof which is out of the question here because it was used on direct examination. Evidence of prior consistent statements should be received by the court with great caution and only for the purpose of rebuttal so as to enable the jury to make a correct appraisal of the credibility of the witness." *Id.* (internal citations omitted). The Prosecution introduced Shagunda Simpson's prior statements in direct examination of Ms. Simpson. This was error in that the only way that they could be used is if Ms. Simpson's veracity had been attacked and they could be used in rebuttal. The Prosecution used Ms. Simpson's prior statements without her veracity being attacked and for the sole purpose of bolstering the witness which was highly improper, prejudicial and erroneous.

Prior statements may only be used when refreshing the memory of a witness or to impeach the witness's testimony with the prior written statement. Miss. R. Evid. 612 and 806. To do so, the proper predicate must first be laid. In laying the predicate to introduce prior inconsistent statements of a witness, the questions should include whether or not on a specific date, at a specific place, and in the presence of specific persons, the witness made a particular statement. *Carlisle v. State*, 348 So.2d 765 (Miss. 1977). Here, the prior statements were not used to refresh the witness's memory, nor were they being used to impeach the witness's testimony. The Prosecutor knew that this witness had given a total of eight (8) separate written statements and was attempting to overcome serious

problems with her credibility.

Next the Prosecutor revealed that defense counsel had interviewed Ms. Simpson, and he goes into the same effort to prove that the Defendant owned a hand gun or a .357 (Tr. 252, line 5, R.E. 448) wherein he used a negative term such as allowing Ms. Simpson to testify that defense counsel did not even ask her about the .357. Bringing up a negative concept of an interview, or the fact that defense counsel failed to ask particular questions during an interview with defense counsel was highly prejudicial and inadmissible, unless and until that transcript was offered to rebut the testimony of Ms. Simpson.

Another point to discredit this witness in a major way is the fact that her boyfriend, Randy Scott, (Tr. 255, R.E. 451) was involved in the melee and most of her testimony has been centered around an effort to help him since he was originally arrested and charged with accessory to murder in the case. According to the testimony on cross-examination, Ms. Simpson had given a total of about eight (8) statements (Tr. 256, line 8, R.E. 452). She again admits that she is not an eyewitness to the shooting and cannot identify the person doing the shooting (Tr. 258, 259; R.E. 453, 454). She admits that she did not see the Defendant shooting and that she does not know if it was the Defendant and that she did not see his face. (Tr. 271, R.E. 461).

D. Kenny Wilson. (Tr. 285-299).

a. Inadmissible Hearsay Testimony and Inadmissible Opinion Testimony.

Hearsay statements are not admissible except as provided by law. Miss. R. Evid. 802. The testimony given by this witness is full of rank hearsay and does not meet any of the requirements to the hearsay exceptions under Rule 803.

Most of Kenny Wilson's testimony was inadmissible beginning with repeating hearsay

statements made by witness Simpson (Tr. 286, line 25, R.E. 462), wherein he quoted comments by Ms. Simpson. These statements do not qualify under Miss. R. Evid. 803. Additionally, Ms. Simpson had already testified and it was error to allow testimony from Wilson regarding Ms. Simpson's statements.

Wilson was allowed to testify about the contents of the search and about the clothes recovered that Jordan was supposedly wearing that night, non of which he had personal, first hand knowledge and which is rank hearsay. Wilson did not have first hand knowledge of the clothing, nor was he in the chain of custody of the clothing and should not have been allowed to testify regarding such. He was not even sure who retrieved the clothing. (Tr. 292, R.E. 468).

According to Wilson, he was not present when Officer's Newton and Coats searched the suburban, however, the trial court allowed his hearsay testimony as to what these other two officers told him they had found in their search of the suburban, including the caliber of the cartridges which were allegedly recovered from the suburban as being caliber .38. (Tr. 291, lines 21-24, 292; R.E. 467, 468). When the Prosecutor showed Officer Wilson the bullets he first identified the bullets incorrectly as being .38. (Tr. 292, line 27; 293, line 18; 294 R.E. 468, 470). Over objection of defense counsel, Wilson was then asked to read what the head of the cartridges said and he changed it to .357. (Tr. 294, R.E. 470). This in and of itself was erroneous and highly prejudicial. He was not even in the chain of custody of the cartridge. Officer Wilson was not offered as an expert in ballistics and he was not qualified to be an expert in ballistics and allowing the identification of the cartridges by this witness was error. Miss. R. Evid. 701 does not allow opinion testimony by a lay witness unless it is rationally based on the perception of the witness and helpful to the clear understanding of his testimony or the determination of a fact in issue. In determining these

requirements, the witness must have first hand knowledge and his testimony must tell the jury something that it did not already know. *Roberson v. State*, 569 So.2d 691 (Miss. 1990). Clearly, this testimony was not only incorrect, highly prejudicial, inflammatory and erroneous, by blatantly and deliberately telling the jury the wrong type of bullet (to try to bolster the case for later), but also inadmissible and highly prejudicial to the Defendant.

Allowing comments on a search which is claimed by the Defendant to be illegal in the first place to be described by hearsay testimony of an officer who did not participate in the search, but simply testifies as to what the other two officers did is so prejudicial as to require the Court to grant a new trial. Beyond this, and although continuing to be rather shocking, the trial court allowed the results of the illegal search to be identified and exhibited to the jury by witness Wilson. This was accomplished without showing any chain of possession when the searching witnesses were available to testify. Defendant's counsel noted its previous objection to the evidence and objected to the introduction of the evidence including the caliber of the cartridges which were really .357. (Tr. 293, 294, R.E. 469, 470).

Witness Wilson was never qualified through training or experience as a ballistics expert, but he was allowed to testify that a .38 caliber cartridge could be shot in a .357 caliber weapon. (Tr. 295, R.E. 471). It will be obvious to the Court, and the Court should take judicial notice, that trying to match the cartridges obtained through the illegal search of the Defendant's vehicle, with the cartridge identified by Dr. Hayne, who performed the autopsy, was the very crux and central theme of the Prosecution's case. This error allowed the State to overcome a material flaw in proving the Defendant guilty of murder. This, coupled with Wilson's deliberate incorrect testimony about the type of bullets found in the Defendant's vehicle, gave the appearance of connecting him to the bullet

in the body. It was error for the trial court to admit the objects in the first place, and that error was certainly compounded to have an unqualified witness in firearms to give his opinion as to the type of weapon that could possibly fire the illegally seized cartridges, especially when this witness intentionally told the jury the wrong size caliber of the bullets.

Miss. R. Evid. 704 applies to expert testimony. Where a witness does not have special qualifications to express an opinion as to an ultimate issue, admission of that opinion is in error. If the witness is qualified as an expert, he must give a basis for his opinion. *Whittington v. State*, 523 So.2d 966 (Miss. 1988). A lay witness cannot express an opinion on an ultimate issue which is not based on his personal perceptions. Miss. R. Evid. 701. The caliber weapon matched to the caliber bullet allegedly found by the illegal search is the gravaman of the State's case. Even the State's own ballistics expert stated that the cartridge did not match the bullet found in the decedent. (Tr. 502, R.E. 557).

E. John Newton. (Tr. 301-324).

a. Inadmissible Hearsay Testimony.

In a trial such as this a jury normally believes every word spoken by a police officer including false and inadmissible "words". John Newton's testimony is rife with inadmissible hearsay statements and discussions about evidence about which he had no direct knowledge. He was allowed to testify that another officer, Officer Coats, found some bullets inside the vehicle (Tr. 307; R.E. 472), when this statement and subject matter was clearly inadmissible as hearsay. It has always been the rule in this State that when discussing objects found in a search a chain of possession and control must be shown and proven that the object is in the same condition at the trial as it was when it was seized. Such rule was not applied in any of the testimony by the officers. This witness was

called as a symbol to show uniform police support of the prosecution, and to demonstrate the horror of the homicide. The State should not have been allowed to use numerous witnesses to repeat the same inadmissible hearsay evidence.

The officers testified by hearsay about the clothes that he wore that night. The Court should bear in mind that no one has ever identified the clothing other than by hearsay. For example, (Tr. 309, 314, 315, 316; R.E. 474, 476, 477, 478) on orders of the Sheriff, a deputy went back to the Defendant's home in Pickens at some later time and obtained some clothing which were delivered by Defendant's father, however, that is not proper identification of objects of evidence to qualify it for admission. The only foundation for admissibility of the clothing was through qualification by the Defendant or his father. White t-shirts and blue jeans abound and the objects so identified had no identification inscribed. It was error for the trial court to admit the clothing even though counsel for the Defendant did not object. This episode is one more example of ineffective counsel. There are at least four methods to avoid having the jury consider inadmissible evidence: (1) motion *in limine*, (2) objection before or at the time it is offered, (3) request to voir dire the witness, particularly those who are to give opinion evidence, (4) post admissible objection and request for the court to instruct the jury to disregard the evidence. None of these methods were used by defense counsel.

F. William Meredith. (Tr. 324-344).

a. Inadmissible Hearsay Testimony and Inadmissible Evidence.

The gun that was used on the night of the shooting has never been identified, including the make, model and caliber. Furthermore, the gun in question was not in evidence, there was no proof that it was used to shoot the victim, and the bullet found in the victim's body did not match the type

of bullets used by that particular type of gun, nor did the bullet found in the victim's body match the bullets found in the Defendant's vehicle pursuant to the illegal search. Any evidence or testimony concerning the Defendant's purchase of a gun was inadmissible, irrelevant and hearsay under the Mississippi Rules of Evidence. (Tr. 327-331; R.E. 480-484). Defense counsel objected to the hearsay evidence and lack of authenticity of the documents introduced during Meredith's testimony. (Tr. 327-331; R.E. 480-484).

William Meredith operates a pawn shop in the town of Canton, Madison County, and has never seen or had any identification with the Defendant. The form which was identified by this witness and admitted into evidence was not prepared by the witness, and the witness was neither present, nor otherwise had any knowledge of the form or the purchase of the weapon. The employee of the pawn shop handling the transaction was John Franklin (Tr. 334; R.E. 485). The next several pages of the transcript is rife with hearsay evidence and self-serving statements regarding federal requirements for registering a firearm, however, and nevertheless, there is no identification that the purchaser was the Defendant, or whether or not it was an imposter. This testimony is not admissible under the exceptions to the hearsay rule. Miss. R. Evid. 801, 802, 803.

Tied into this error is the fact that the gun in question was not in evidence making it apparent that the pawn shop records were irrelevant and inadmissible because there is no evidence linking the gun in the pawn shop records to the gun used to commit the crime.

Since witness Meredith was not present upon the completing of this form there is no way that his testimony regarding what happened can be admitted into evidence. He went into detail describing what was done with the form which was pure hearsay (Tr. 335, 336, 337; R.E. 486, 487, 488) and which is a long detailed discussion of the government regulations and trying to corroborate

the validity of the document through what procedure the government requires, with the witness having absolutely no knowledge of the transaction that took place on the date. Even an imposter could use a borrowed driver's license to buy a gun and since no direct evidence was offered to connect the Defendant with the purchase or to connect the document with a weapon, the same was clearly inadmissible.

Under the best evidence rule or hearsay exceptions, it was not shown that the clerk transacting the gun sale was unavailable to testify whereby the State failed to lay a proper foundation.

Much later in the trial, Bryon McIntire, an employee of the Mississippi Crime Lab, as a forensic scientist in firearms identification testified that the bullet recovered by Dr. Hayne during the course of the autopsy was a .38 caliber. To allow the jury to hear all of the evidence regarding a .357 caliber pistol when the State knew that the bullet did not match the weapon amounted to improper evidence which was highly prejudicial and certainly reaches the grounds required for a new trial. (Tr. 499-500, 502; R.E. 554-555, 557).

G. David Whitehead. (Tr. 344-368).

A very dramatic excursion by the prosecution offering immaterial and irrelevant evidence occurred when they called David Whitehead, an employee of the State Crime Laboratory who identified himself as a "forensic scientist". His appearance was staged as a very dramatic episode to persuade the jury to vote "guilty" although the evidence was grossly irrelevant, immaterial and inadmissible. Mr. Whitehead's testimony was very lengthy covering 24 pages in the transcript or 344-368 and dealt only with the method used by the State Crime Laboratory to detect "gunshot residue". An improper hypothetical was used with this witness to show that washing your hands or changing your clothes would remove the residue, consequently the Defendant had washed his hands

and changed his clothes thereby removing gunshot residue, or expressed another way, there was no gunshot residue and this witness was used to inferentially imply to the jury that the Defendant had removed the residue. Overall, it is a negative connotation of no evidence, but the forensic scientist from the State Laboratory was used to again emphasize the seriousness and horrible nature of the crime. Exhibit S-19 confirms that no gun residue was found and contains a highly inflammatory, inadmissible hypothetical accusation just above the signature line on the second page wherein it states: "Because of factors listed above, the lack of gunshot residue on samples does not preclude the possibility that the person had been in the environment of a discharged weapon." (Ex. 62; Tr. 354; R.E. 625, 490). Possibilities are not admissible in criminal cases for reason that such inadmissible statements prejudice the jury, which happened in this case.

This "no evidence of residue" witness was staged to imply that the Defendant was guilty because he did not have gunshot residue on his person, clothing or vehicle. (Tr. 353, line 25; R.E. 489). Under Miss. R. Evid. 702, expert testimony is admissible, if it will aid the trier of fact in understanding the evidence. "The evidence" in this case is "no evidence."

Miss. R. Evid. 703 was clearly violated because the testimony of this expert did not aid the jury in understanding the evidence because there was no evidence. The Mississippi Supreme Court has held that "[t]he interrogator may frame his question on any theory which can reasonably be deduced from the evidence and select as a predicate therefor such facts as the evidence proves or reasonably tends to establish or justify." *Chapman v. Carlson*, 240 So.2d 263, 268 (Miss. 1970)(quoting 31 Am.Jur.2d Expert and Opinion Evidence Section 56 (1967)). The interrogator cannot assume facts unsupported by any evidence. *Strickland v. M.H. McMath Gin Inc.*, 457 So.2d 925, 928 (Miss. 1984). However, since there was no evidence that the Defendant had removed

gunshot residue from his person, his clothing, or his automobile, all testimony by Whitehead was clearly inadmissible. Moreover, it was highly inflammatory and prejudicial to the Defendant.

Re-direct examination by the State was also highly erroneous (Tr. 365, 366; R.E. 493, 494) wherein the witness was asked if taking a bath would remove gunshot residue to which the defense objected and to which the trial court sustained the objection, however, it was highly inflammatory and prejudicial because that subject was not brought up on cross-examination and for the taking of the bath to be mentioned was highly inflammatory and prejudicial. Appellant again emphasizes two points, namely, the prosecutorial charade of witnesses who offered immaterial, prejudicial and inadmissible testimony, and the ineffectiveness of counsel. (Tr. 365, 366; R.E. 493, 494).

The rules of evidence clearly prohibit all of Whitehead's testimony, which rules are recited in *Hart v. State*, 637 So.2d 1329, 1339 (Miss. 1994)(citing *State v. Flick*, 425 A.2d 167, 170 (Me. 1981):

> Under M.R.Evid. 701 and 702, the presiding justice may exclude opinions which state *legal* conclusions, beyond the specialized knowledge of the expert. He may also exclude opinions which are arguably within the expert's specialized knowledge, but which are so conclusory, or so framed in terms of the legal conclusions to be drawn, that they will not "assist the trier of fact" (M.R.Evid.702), or will pose a danger of confusing the jury which outweighs their probative value (M.R.Evid. 403), or if there is an insufficient factual basis to support the conclusions (M.R.Evid. 705(b)).

Id. at 1340.

H. A. C. Hankins. (Tr. 368-407).

a. Improper and Highly Prejudicial Admission of Statement of Defendant.

A. C. Hankins is an investigator with the Mississippi Bureau of Investigation and was called to testify from a statement taken from the Defendant. However, no proper qualification of the statement was ever made (Tr. 370, 371, 375, 376, 377, 378; R.E. 496, 497, 498, 499, 500, 501) with

the only testimony being that Captain Chambers read him his rights as we talked to him. Defendant was arrested, confined to jail, and did not have counsel at the time. The statement Hankins read from was what Chambers had asked Montrell Jordan during the interview, therefore making it hearsay in that regard, not to mention that his statement should have never been admitted in the first place. The State never showed that Chambers was not available to testify. What rights were read was not given and whether or not the witness was advised that the statement could be used against him in a criminal charge was not commented on, therefore, an unqualified statement in which there is no predicate or qualification laid cannot be admitted.

b. Hearsay Testimony Regarding Gunshot Residue.

This witness was also asked to discuss the negative test on gunshot residue. (Tr. 369, 370; R.E. 495, 496) If the statement was admissible at all, it was only admissible to cross-examine the Defendant or to rebut some proof offered on behalf of the Defendant. It is impossible to prove "guilt" by an event that did not occur, namely, that the Defendant was removing evidence of having shot a pistol by proving that he may have taken a bath or that he may have done something to remove the evidence. This testimony is preposterous and highly prejudicial.

c. Hearsay and Opinion Testimony as to Other Witness Statements.

Additionally, it was error for the trial court to allow Hankins to give his opinion as to why Ms. Simpson gave the type of statement that she did "That's what she said. That's what she said, but at the same time, based on my experience as a police officer, I was under the impression that Ms. Simpson probably wasn't telling us everything that she knew. She appeared to be– this is just my opinion, she appeared to be scared." (Tr. 392, 393; R.E. 502, 503). Hankins was told by the Prosecutor to read portions of the statement of Simpson which was clearly erroneous and only served

to put portions of her statements into the record. (Tr. 406, R.E. 505A). This is simply a highly improper back door effect to use rank hearsay to bolster the "key" witness' testimony. This is so preposterous that this Court never has heard of the State calling a second witness to bolster the testimony of the first witness. This is a direct invasion of the province of the jury who is the sole judge of the weight, worth and credibility of each testimony of all witnesses.

d. Inadmissible Testimony Concerning Defendant's Guilt.

Further, it was error for the trial court to allow Hankins to testify as to the truthfulness of the Defendant and of his statement. "Yes, ma'am. Can I add, you know if- it's essential to say he didn't do it, but when you talk about the incident, he also told us that he never owned a gun, so if he didn't tell the truth about that, he didn't tell the truth about owning a gun, so who is to say whether he's telling the truth about not doing it." (Tr. 402, 403; R.E. 504, 505). This represents an opinion by an investigator that the Defendant killed the victim and was lying about it. Hankins' opinion is clearly inadmissible and grounds for a new trial. "There are two reasons that this type of testimony is unacceptable. First, it is more prejudicial than probative; second it is not based on first hand knowledge. This Court, in *West v. State*, 249 So.2d 650 (Miss. 1971), recognized the danger of allowing a jury to be presented with what appears to be the 'official' opinion of the police department that the defendant is guilty." *Rose v. State*, 556 So.2d 728 (Miss. 1990). The errors of allowing immaterial emotionally driven evidence and the ineffectiveness of counsel are noted again.

I. Lacarius Oliver. (Tr. 407-457).

Lacarius Oliver is another employee of the Mississippi Bureau of Investigation and apparently the witnesses were selected in such a manner to impress the jury on the extent of the investigation and to emphasize that all of the investigators had an opinion that the Defendant was

guilty. Basically, another effort with a purely theatrical charade to force the jury to render a guilty verdict.

a. Prejudicial Photo Line-Up.

This is the witness who established the line-up from which the Defendant was selected as the guilty party. Extended discussion was had with Mr. Oliver (Tr. 409, 410; R.E. 506, 507) to discuss all facets of the investigation and who was arrested and who was charged and who said what to whom was all inadmissible, hearsay, and highly prejudicial to the Defendant. Also, the State asked some more negative questions like "Was anybody else charged with this murder?" Over the objections of the Defendant, the trial court allowed this witness to discuss a line-up. (Tr. 411, 412, 413; R.E. 508, 509, 510).

The law is basic on how a line-up can be conducted and it excludes the clothing of the individuals in the line up, or prohibits the persons in the line up from looking completely different from each other, which is the case here because at the time the line up photograph was taken, the Defendant was the only person wearing civilian clothing, including a white t-shirt, and not wearing an orange jumpsuit or a black and white jumpsuit, and was the only one where you could see that he had on a plain white t-shirt. Clearly a police mock up for false identification since Defendant was one of a large number of individuals at the scene and since there is no evidence identifying him as the shooter, picking him out of the line up serves to prove only the fact that he is Montrell Jordan who was present at the scene- a fact which is not denied by the Defendant. Further, it is obvious that prior to the questioning the two witnesses about the line-up, the tape was turned off and discussions took place off the record. The tape was then turned on to ask which one they thought was the shooter. This places undeniable doubt and suspicion as to what type of conversation took place off

of the record.

An impermissibly suggestive pretrial line up procedure did deprive this Defendant of a fair trial to which he was entitled to under the Federal Constitution Due Process Clause. *Foster v. California*, 394 U.S. 440, 89 S.Ct. 1127, 22 L.Ed.2d 402 (1969). The identification by the line-up is also inadmissible because the Defendant was not given his right of assistance of counsel prior to being exposed in the line-up. Altogether, it was error for the trial court to allow this witness to talk about the photograph of a line-up when the ID witness, Joey Netherland, later testified and if he knew the identity of the shooter, the best evidence was his testimony and not some photograph conjured up by several investigators. Beyond it was rank hearsay testimony by Oliver as to who identified Montrell Jordan, namely, Joey Netherland and Carlton Brown, when both of these witnesses were available to testify. The photograph of the so-called line-up was admitted over objections of defense counsel, Ex. S-21(Ex. 73; Tr. 414; R.E. 636, 511). To avoid protracted argument on this point, the Court is aware that Carlton Brown, and Joey Netherland were so-called witnesses, and that Lacarius Oliver was involved in the investigation and to have one investigator pantomime what another investigator did or identified is obviously inadmissible and clearly prejudicial to the Defendant.

Briefly, the Court's attention is invited beginning on page 415-432 of the transcript, that this witness rehashed, repeated all of the testimony regarding the statement by the Defendant, witness Simpson's testimony, the Defendant's statements and various other repetitious and inadmissible comments and hearsay statements regarding what the other investigators did. There is more hearsay "echo evidence" in this record than material or admissible evidence. Oliver was told to read the statement that was taken by Captain Chambers, an interrogation which Oliver did not take part in

and was not present. The reading of the statement was inadmissible, unauthenticated by this witness, and hearsay. This was also done to place portions of the statement on the record which is erroneous and highly prejudicial.

The Court in *Burnside v. State*, 544 So.2d 1352 (Miss. 1988) held that the defendant's Sixth Amendment rights were violated and that it constituted reversible error for the court to allow the introduction of the verbal statement of the defendant without the benefit of counsel.

So, moving forward into the best evidence rule, the testimony was repetitious, hearsay, and violated Defendant's constitutional rights in regard to most of the testimony of all of the police officers and investigators.

b. Inadmissible Testimony Concerning Defendant's Guilt.

Additionally, Investigator Oliver gave his opinion that the Defendant was "guilty" based on his investigation. Oliver's personal assessment to the jury that "in his opinion Defendant is guilty" is overtly an act of bad faith and overreaching by the State and so grievous that this one even is grounds for granting a new trial. (Tr. 432, 438, 451; R.E. 529, 529A, 529B) As stated above, "There are two reasons that this type of testimony is unacceptable. First, it is more prejudicial than probative; second it is not based on first hand knowledge. This court, in *West v. State*, 249 So.2d 650 (Miss. 1971), recognized the danger of allowing a jury to be presented with what appears to be the 'official' opinion of the police department that the defendant is guilty." *Rose v. State*, 556 So.2d 728 (Miss. 1990).

c. Error in Admitting Non-Authenticated Documents.

Additionally, defense counsel objected to the admission of Exhibits S-22 and S-23 to which the court overruled the objection. Specifically the exhibits are the ATF Gun Trace and Trace Return.

The documents were not properly authenticated and should not have been admitted into evidence. M.R.E. 901 requires that the document be authenticated. Further, these documents are not self-authenticating documents under M.R.E. 902. It was error for the court to admit these documents into evidence. (Ex. 74, 75; Tr. 416-419; R.E. 637, 638, 513-516).

J. Terry Wade. (Tr. 457-494).

The State used a written statement by this witness to impeach him without laying a proper foundation to do so, or without getting the witness to contradict his statement. They simply pulled the statement out and had the witness read it when the witness was saying that what he was saying in the statement someone else told him which is rank hearsay. Miss. R. Evid. 801, 802, 803, 804.

They approached this witness the same way as several others. They pulled out his statement and started reading it without even attempting to contradict or to change his testimony. Furthermore, if the statement was to be used it had to be offered by the person who took it to establish that it was a free will statement and that it was given under oath or subscribed to. We believe this trial is without precedent on using extraneous statements to bolster the testimony of a witness impermissibly and creating a combination of serious errors on using collateral statements of witnesses for the Prosecution. The Prosecution only wanted the witness to testify as to what was contained in his statements and did not allow the witness to testify as to the truth. Again, the best evidence is the actual testimony of the witness from the witness stand, not the reading of a statement. The witness attempted to clarify that his statements were not true and attempted to give testimony on direct examination of the truth. However, he was continuously interrupted by the Prosecution who only allowed him to read from his statements in response to the questions asked by the prosecution. (Tr. 459-472, R.E. 530-543). Defense counsel objected to the Prosecution leading this witness, however,

it was overruled. (Tr. 459, R.E. 530).

Additionally, defense counsel objected to the testimony of Wade as being hearsay because Wade did not personally hear Jordan make a statement, he heard someone else say it. The court sustained the objection because Wade admitted to the court that his statements were hearsay. (Tr. 461, R.E. 532).

On cross-examination this same witness testified (Tr. 473, line 19; R.E. 544) "I didn't actually see him shoot him. I know after the shot was fired a boy in the suburban, one did the shooting, I say well its Mon's suburban and they are like, well that's who did the shooting I guess that Mon shot him." This witness again repeated the fact that someone else told him who did the shooting and he simply adopted hearsay evidence. Again he said, "I did not actually see him shoot." (Tr. 474, R.E. 545).

To illustrate that the investigators wrote up this witness' statement in the manner and form that they chose, including the wording, is illustrated by the witness' statement to defense counsel (Tr. 483, lines 14-18; R.E. 553):

> Q. Mr. Wade your testimony here today you would agree that the information that you gave the investigators at that time was incorrect information.
>
> A. Yes, ma'am. I told them it was.
>
> Q. And you are here today because you are trying to tell the truth about what you really saw?
>
> A. Yes, ma'am.

Going back to square one of this argument is that the statement of the witness was used in advance of any contradiction to bolster the testimony and to beat the Defense to the punch. In any

event, the form and manner in which this evidence was offered is clearly inadmissible and rises to reversible error.

Again, the Prosecution used the statements of this witness to put the content of inadmissible documents into evidence. The contents of the statements were read into the trial court record and this act was highly inflammatory and prejudicial to the Defendant and it was error for the court to allow the contents of the statements to be read into the record.

K. Joey Netherland. (Tr. 552-588).

This individual is the head of maintenance at Holmes Community College, as well as a private security patrolman hired by the college as an overseer at events. (Tr. 553, R.E. 563). Technically speaking he is not a policeman or law enforcement officer and his work is supposedly carried out without being armed with any type of mace or other security measure. Additionally, he has had no formal security or guard training. (Tr. 575, R.E. 571).

The students, including, Simpson, testified that he was no where around when the melee started inside the building and that they did not see security outside the building. (Tr. 260-261, 478-479;R.E. 455-456, 548-549).

He testified that he heard a gunshot and "I looked up the hill where the gunshot was and I saw the flash of the second gunshot." (Tr. 556, line 17; R.E. 566). His own testimony precisely and specifically disqualified him from picking out an individual in the line-up as the person who did the shooting because he had no knowledge of that person. Netherland testified that he chased the shooter. (Tr. 557, R.E. 567). Other witnesses directly contradict this testimony. Shaw testified that she did not see security chasing the shooter. (Tr. 620, R.E. 587). Simpson testified that she did not see security chasing the shooter. (Tr. 271, R.E. 461).

There is evidence from other witnesses that Netherland did not check IDs that night, including witnesses interviewed by the media. (R. 451;Tr. 476-477; R.E. 279, 546-547). Netherland did not do any investigation about the fight. (Tr. 569, R.E. 570). Even though he had no weapon, no formal training, he testified that he stepped in front of the truck. (Tr. 575, R.E. 571). Mr. Netherland testified that he was 40-50 feet away from where the shots had been fired, yet he had time to run that far, plus the additional length to get in front of the truck. (Tr. 576-578, R.E. 572-574). Netherland also testified that he could not remember the faces of the boys he broke up, but that he could identify a shooter who was at least 40-50 feet away from him. (Tr. 580-581, R.E. 575-576). Netherland also testified that he did not have any mace. (Tr. 554, R.E. 564). However, other witnesses testified that security sprayed mace inside the building in order to break up the fight. Brown testified that security used mace. (Tr. 547, R.E. 562). Wade testified that security sprayed mace. (Tr. 478-479, R.E. 548-549). Shaw testified that mace was used. (Tr. 593, R.E. 583).

Since this individual was the State's last witness and was theatrically programmed to impress the jury, his left-handed identification of the Defendant as the shooter is highly prejudicial and grounds for reversal.

The Court has not reviewed a case similar to this at any time in the past for the simple reason that it is rife with theatrics using inadmissible concepts of inadmissible evidence to inflame and prejudice the jury against the Defendant.

We urge the Court to bear in mind that this security guard had a special personal interest in his "story" as it directly involved his job and his future. One final never heard of before trial incident was when the State (Tr. 562, line 16-19; R.E. 569) brought up the subject matter of the fact that this witness had given a statement as a part of the State's investigation: "Q. Can you tell this jury and this

Court whether or not these statements include everything you've testified to today? A. Yes, they do."

The original question asked by the Prosecution was objected to by Defense counsel as being open-ended and the court sustained the objection. The Prosecution rephrased the question as quoted above. (Tr. 562, R.E. 569). Netherland then testified that his statements did not contain the partial tag number because he failed to put it in there, but that he knew the partial tag number. (Tr. 562, R.E. 569).

This is one more highly prejudicial side swiping event used by the State to bolster the testimony of their own witness and to impart to the jury the impeccable veracity of their last witness. The rules of evidence simply do not allow collateral self-corroboration by a prior written statement.

Netherland's testimony is clearly fabricated in order to save himself and his job.

Further, as stated before, Netherland did not get a clear look at the shooter's face. He testified that he identified the shooter in the photo lineup by his features, neck and head. (Tr. 586, R.E. 578). We refer the Court to the Defendant's above argument regarding the subject of the identification of the shooter and the prejudicial and inadmissible line-up.

In conclusion, Netherland knew nothing, saw nothing, and had no knowledge of who the shooter was, however, the State having realized that they had no identification of the shooter attempted to cover up that void by literally having this witness act out a scenario using statements and concepts of evidence that were plainly inadmissible, but the effect of which was to attempt to prove that the Defendant fired the shots.

11. Error in Granting Jury Instructions.

It was Error for the court to Grant Instruction Nos. 3, 4 and 5 which deal with the conviction of murder.

It was error for the court to grant Instruction No. 3 regarding a definition of murder without including a definition of manslaughter in the same instruction. (R. 296, R.E. 161). This Instruction unduly prejudiced the jury because it left out completely the crime of manslaughter.

When this Instruction is read with Instruction No. 4, a common sense analysis reaches the conclusion as stated in Instruction No. 4 "all that is necessary is that you believe beyond a reasonable doubt that Dwaeuntre D. Davis, a human being was killed by Montrell Jordan not in necessary self defense and at a time when Montrell Jordan was engaged in the commission of an act imminently dangerous to others and evincing a depraved heart..." (R. 297, R.E. 162). The Instructions are devoid of any description of "an act imminently dangerous to others" and when the two Instructions are read together, No. 4 negates the basic requirements for a murder conviction.

It was error for the court to approve Instruction No. 5 which started out in paragraph 1 defining "murder" for the third time and continuously using the term "an act imminently dangerous to others" without defining such and in paragraph 2 this Instruction alludes to manslaughter and attempts a description, but when it is all read together it is a back door or indirect instruction on murder making a total of three (3) such Instructions. (R. 298, R.E. 163). The error includes the fact that no instruction, particularly Instruction No. 3 had a clear, unequivocal and finite description of the crime of manslaughter.

The Jury was not given clear instructions on the definition of manslaughter and again throughout the entire trial, the prosecution told the jury over and over that the Defendant was guilty of murder or that they jury had to find the Defendant guilty of murder. The instructions when read together as a whole were confusing and did not clearly instruct the jury on the applicable law especially depraved heart and culpable negligence.

On the subject of instructions, we again note deficient representation in failing to offer instructions defining manslaughter and requiring proof of the element of "malice" before a conviction of murder can be had. Likewise, closing arguments failed to point out deficiencies in the State's case or to argue manslaughter as an alternative.

12. Verdicts of Either Manslaughter or Not Guilty would have Resulted if the Defendant had received Effective and Competent Assistance of Counsel.

The Defendant was represented by Antwayn Patrick and Akillie Malone at trial. (Tr. 96). With the upmost respect to Attorneys Patrick and Malone, the Defendant submits that Attorneys Patrick and Malone committed critical errors which amount to ineffective assistance of counsel, and thereby denied him his Sixth Amendment right to counsel.

Because the Defendant has different counsel on appeal than he did at trial, this issue may raised on direct appeal. "Any defendant convicted of a crime may raise the issue of ineffective assistance of counsel on direct appeal, even though the matter has not first been presented to the trial court." *Read v. State*, 430 So.2d 832, 841 (Miss.1983). *See also Swington v. State*, 742 So.2d 1106, 1114 (Miss. 1999).

In order to prevail on an ineffective assistance of counsel claim, the Defendant must show a deficiency of his trial counsel and that he suffered actual prejudice to his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Walker v. State*, 703 So.2d 266, 268 (Miss.1997); *Stringer v. State*, 454 So.2d 468, 477 (Miss.1984). The burden falls on the Defendant "to prove both prongs of the *Strickland* standard." *McQuarter v. State*, 574 So.2d 685, 687 (Miss.1990)(citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

Defense counsel is presumed competent. *Hansen v. State*, 649 So.2d 1256, 1258 (Miss.1994). The standard under the second prong of *Strickland* is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Mohr v. State*, 584 So.2d 426, 430 (Miss.1991). That is to say a "probability sufficient to undermine the confidence in the outcome." *Id.* Counsel is presumed competent, and there is also a presumption that counsel's decisions are strategic in nature. *Handley v. State*, 574 So.2d 671, 684 (Miss.1990); *Leatherwood v. State*, 473 So.2d 964, 968-69 (Miss.1985). The following is a list of ineffectiveness of counsel which includes, but is not limited to:

(1) Failure to file a motion to quash or object to the defective indictment and to move the Court at intervals to amend the indictment from murder to manslaughter.

(2) Failure to adequately present law regarding illegal search of Defendant's automobile.

(3) Failure to move for change of venue based upon public sentiment and prejudicial pretrial publicity.

(4) Failure to voir dire the jury on influence of pretrial publicity; connections family wise or otherwise with Holmes Community College; connections or associations with alumni, students, sports events and emotional support for Holmes Community College.

(5) Failure to move to strike the jury panel or for a mistrial or change of venue based upon the striking of approximately fifty (50) jurors or 75% of the jury panel that had some feeling or concern about serving on the jury were obviously disqualified.

(6) Inadequate voir dire by limiting questions to presumption of innocence, prior homicide within juror's family, acquaintance with District Attorney, and

acquaintance with five of the State's witnesses.

(7) Failure to object to Opening Statement by Prosecutor prejudicial to the Defendant and failure to object to highly inflammatory and prejudicial statements made by prosecution during closing arguments.

(8) Failure to enter proper objections to the admission of evidence, including failure to object to written statements given by State's witnesses used repeatedly by the State to bolster the testimony of their witnesses.

(9) Failure to file a motion *in limine* or to make proper objections to the pawn shop records and accompanying testimony.

(10) Failure to move for a protective order or to object regarding recorded statements by Defendant denying complicity and failure to object properly upon its tender for admission into evidence.

(11) Failure to object and file motions regarding evidence offered by the State for "in-court identification of the Defendant."

(12) Failure to move to reduce the charge from murder to manslaughter after the Court overruled Defendant's Motion for Directed Verdict.

(13) Failure to enter proper objections to State's Instructions numbers 3, 4, and 5.

(14) Failure to offer a detailed Instruction on manslaughter compliant with the statute defining manslaughter, Miss. Code Ann. § 97-3-35.

(15) Failure to object in a timely fashion during pretrial proceedings regarding exculpatory evidence withheld by the State, including several written statements given by State's key witness, Shaghana Simpson, a Holmes Community College student, and the key

witness for the State.

(16) Failure to call material witnesses, including those mentioned by the State, but not called, including three (3) accused individuals originally arrested, namely, Randy Scott, James P. Oliver and Patrick Day.

(17) Failure to call the Defendant as a witness after having structured the defense around the fact that he did not own a gun and did not fire a weapon.

(18) Failure to present character witnesses confirming Defendant's good character and lawful conduct.

Finally, should the Court find that any of the previously argued issues were not properly preserved for appellate review, including the sufficiency of the evidence, the granting of improper jury instructions, the weight of the evidence, or in allowing the jury to hear highly prejudicial and inflammatory statements about the Defendant's guilt during opening statements and closing arguments, then the Defendant respectfully submits that trial counsel was ineffective for failing to properly preserve said issues for appellate review. In the interest of clarity and in order to avoid repetition on these issues, the Defendant relies on the arguments previously made in this brief regarding those issues.

Taking the above into consideration, the Defendant submits that counsel committed professional errors, and further, that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Mohr v. State*, 584 So.2d 426, 430 (Miss.1991). Therefore, the Defendant has met his burden of proof on both prongs of the *Strickland* test. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Edwards v. State*, 615 So.2d 590, 596 (Miss.1993). Had counsel not been ineffective,

Defendant would not have been convicted of murder.

However, as shown, counsel did commit critical errors, and those errors were of such a nature that they deprived the Defendant of his constitutional rights, including his Fourteenth Amendment due process protections, Fifth Amendment right against self-incrimination and Sixth Amendment right to counsel, and therefore, the Defendant respectfully submits that reversal on this issue is warranted.

13. Error for State to Withhold Pretrial Discovery of Evidence including Witness Statements Unfavorable to the State.

It was error to allow the State to choose from a number of witnesses who were at the scene of the shooting and to fail to disclose those that were favorable to the Defendant or gave exculpatory evidence. The State failed to provide the Defendant with all of the statements made by Shagunda Simpson and Randy Scott. This was a violation of the discovery rule. The Uniform Circuit and County Court Rules require that this information be disclosed. U.C.C.C.R. 9.04. This implies or alleges that there are contradictions or conflicts in the statements that could be helpful to the Defendant. Additionally, witness statements reviewed for the purpose of this argument include those of: Arlena Shaw, Carlton Brown, and Shagunda Simpson. (R. 325, 331, 333, 334, 344; R.E. 188, 194, 196, 197, 207). The most shocking conflict in these statements include the statement of Arlena Shaw, a student who said that the person shooting was shooting in the air and not shooting at anyone and that the shooter and friends left the scene in a Kia automobile. (R. 325, R.E. 188).

14. The Cumulative Errors of the Trial Court Mandate Reversal.

Assuming for the purposes of argument that the Court takes the position that the errors cited above are not major errors and when considered separately do not justify reversal, however, these

distinct errors must be considered cumulatively. Thereby, the entire proceedings are so fraught with errors as to mandate reversal because of the totality of the prejudicial effect. The Mississippi Supreme Court has recognized that several errors taken together may warrant reversal even though when taken separately they do not. *Flowers v. State,* 773 So.2d 309, 334 (Miss.2000). "This Court may reverse a conviction and sentence based upon the cumulative effect of errors that independently would not require reversal." *Coleman v. State*, 697 So.2d 777, 787 (Miss. 1997)(citing *Jenkins v. State*, 607 So.2d 1171, 1183-84 (Miss.1992); *Hansen v. State*, 592 So.2d 114, 153 (Miss.1991)).

The Court has recently reaffirmed that principle in *Byrom v. State,* 863 So.2d 836 (Miss.2004). There, the Court stated that "upon appellate review of cases in which we find ... any error which is not specifically found to be reversible in and of itself, we shall have the discretion to determine, on a case-by-case basis as to whether such error or errors ... may when considered cumulatively require reversal because of the resulting cumulative prejudicial effect." *Byrom,* 863 So.2d at 847. Cumulative error has been held to be applicable in the civil context.

In the case *sub judice*, the Defendant has demonstrated that there was a failure to identify the shooter; error in the improper indictment, including the statutory language which was excluded from the face of the indictment; error in allowing the presentation of evidence obtained from an illegal search; failure to voir dire the jury regarding personal bias and pretrial publicity thus giving the Defendant an unfair trial; partial or prejudicial jury with 44 excused or 75% of the jury panel; failure to move for change of venue; improper and prejudicial in court identification of the Defendant; failure to reduce the charge from murder to manslaughter; the granting of improper jury instructions, the weight of the evidence, or in allowing the jury to hear highly prejudicial and inflammatory statements about the Defendant's guilt during opening statements and closing arguments.

Additionally, the Defendant has demonstrated, *inter alia*, that the trial court improperly instructed the jury, that the trial court erred in allowing the jury to hear improper and inflammatory argument as to Defendant's guilt during open statements and closing arguments by the Prosecution, erred in failing to object and admonish the Prosecution for making such highly inflammatory and prejudicial statements to the jury.

VII. CONCLUSION

The Appellate Court cannot affirm this conviction using the most often comment that the errors were harmless because of the overwhelming weight of the evidence against the Defendant which maxim is repeated in *Williford v. State*, 820 So.2d 13 (Miss. App. 2002) which cites *McKee v. State*, 791 So.2d 804, 810 (Miss. 2001) and *Watts v. State*, 717 So.2d 314, 323 (Miss. 1998) "an error is harmless when it is apparent on the face of the record that a fair-minded jury could have arrived at no verdict other than that of guilty." *McKee*, 791 So.2d at 810 (¶ 19).

After the Court has looked at all of the circumstances surrounding this trial, including the total lack of credible evidence to prove the crime of murder as charged in the indictment and as defined by the instructions to the jury it will agree that the State realized very early in the prosecution that it did not have the required evidence, but only very thin and vague circumstantial evidence.

It is patently obvious that the State used a series of indirect theatrical and inflammatory tactics to force the jury to return a guilty verdict.

With the Police Department from Goodman, the Holmes County Sheriff's Department, the Mississippi Bureau of Investigation, all participating in a special and motivated investigation of this homicide, the District Attorney's office knew before the Grand Jury met that it did not have proof of the salient elements of murder, but as most prosecutors do, they reach for the moon and requested

and obtained a murder indictment without naming or identifying the constituent crime of manslaughter. The strategy, which is ages old, gives the prosecution leverage to say to the jury that this event is horrible and outlandish; we know you want to stop crime in Holmes County, and murder is much more horrible and dastardly than manslaughter, giving the jury an emotional persuasion to convict regardless of the evidence.

Common sense reveals that there is a lot of subterfuge and skillful staging of the evidence in this case. To begin with, they interrogated their star witness, Shagunda Simpson, endlessly and there were a number of contradictory recorded statements taken from her including her steadfast insistence that she did not know who the shooter was and was not close enough to the firing of the weapon to identify the culprit. Likewise, the three interviews of the Defendant, during which interviews he requested the assistance of an attorney, and did not sign a statement, and refused to sign a waiver of his Miranda rights, but those statements were used to convict the Defendant by using his statement that he did not own a gun, which served as a predicate for the pawn shop operator's records to be improperly admitted to show someone having the same name had purchased a gun a long time prior to the shooting.

The ridiculous and overreaching antics by the State in having dramatic courtroom identification of the Defendant by witnesses Simpson, Officer Wilson, Investigator Oliver, Terry Wade, and Carlton Brown to point at the Defendant in the courtroom and say that is Montrell Jordan- - - implying to the jury that these witnesses identified him as the shooter. Strikingly, there is no dispute as to the fact that the Defendant was Montrell Jordan and there is no dispute that he attended the party on the Holmes Community College campus so his identification was a mockery that had no probative value whatsoever but was a very dramatic, prejudicial and inflammatory staged exposé

which was grossly improper and inadmissible.

The holster and a cartridge recovered from the Defendant's vehicle are inadmissible because of the illegal search and because of the relevancy. There is no evidence that the caliber of the cartridge found in the vehicle matched the caliber of the bullet fatally injuring the victim. Whether a holster is material is certainly a simple common sense answer. In the absence of having the weapon to match the holster or having evidence that the Defendant had a weapon in the holster some time in the past makes this evidence clearly inadmissible for both reasons.

The State's case consisted of 13 witnesses and exhibits. The first witness, Dr. Steven Hayne, a medical doctor specializing in pathology proved the cause of death to be a gunshot wound. Six of the 13 witnesses were policemen, or officers of the MBI. That evidence included the arrest; the recorded and unsigned statements of the Defendant; the warrantless search of the Defendant's vehicle and some involvement in the line-up identification process which was inadmissible. David Whitehead was a forensic expert who testified that soap and water could eliminate gun powder residue from the shooter. Terry Wade was an acquaintance of the Defendant whose statement was offered on direct examination and who disputed the statement regarding identity of the Defendant saying that he was told or that his information was hearsay and plainly inadmissible. Byrom McIntire is the ballistics expert who testified as to the possibility of shooting a .38 caliber bullet in a .357 pistol. Carlton Brown and Shagunda Simpson, Holmes students, testified but could not identify the shooter or shooters. They were repeatedly questioned and several recorded statements were taken from Shagunda Simpson who repeatedly stated that she could not identify the Defendant as the shooter. Carlton Brown's overt statement was that he was not looking directly at the event and only noticed the gun fire out of the corner of his eye, in an unlighted area where a large number

of people were gathered, meaning that he could not identify the shooter either. Joey Netherland, a long time employee of Holmes Community College, was given some assignments on this occasion in the nature of a security guard. Several students testified that he was no where around when the shooting occurred, but later on he attempted to say that he knew the Defendant and could identify him, but the gist of his testimony is totally unbelievable. In essence, the State's case is vaguely circumstantial and they were only able to prove that a person was killed by an unknown assailant and that the weapon used in the homicide was not recovered and that the search of the Defendant's vehicle recovered an empty holster and a cartridge, the caliber of which did not match the caliber of the bullet taken from the decedent. The only evidence proven beyond a reasonable doubt is the fact that the Defendant was present among the crowd of people involved in the melee.

A part of the pantomime staged evidence scheme promoted by the Prosecution was the use of the Defendant's statements which were not admissible under Miranda or otherwise since he had requested counsel and since he refused to sign the waiver of his Miranda rights. Nevertheless, the State seemed to find an indirect, novel approach to convicting the Defendant of murder by using his statements to collaterally attack his credibility even though he did not testify. The statement, if admissible at all, would have been for impeachment purposes only.

Putting the final touches on their stage play prosecution, the opening and closing arguments are clearly reversible error and especially so since the jury was told: "Well he's charged with a crime that he committed, and he ought to be convicted of it. The judge is going to impose, once he's convicted, the sentence in this case. He ain't going to die as a result of this. He's going to get **sentenced** to **some time** in the penitentiary, which is where people who kill people need to be." (Tr. 685, lines 14-20; R.E. 598). "He deserves to be held accountable for what he did. You know, that's

all we're asking you to do, hold him accountable for what he did. It ain't taking his life. His family will still be able to visit him for whatever time he's there." (Tr. 685, lines 27-29; 686, lines 1-3; R.E. 598).

In looking at a question of effective counsel we find numerous cases which places the burden on the convicted party to prove that a different verdict would have been reached with effective counsel than that which was reached with so-called ineffective counsel.

This Brief has proven by a reasonable probability that the Defendant would have been acquitted or at worst, convicted of manslaughter if his counsel had been effective.

We briefly recite from the fourteen assignments of error wherein counsel was ineffective. Issue number one deals with the qualifications of the jury panel and inadequate voir dire relating to public outcry and the influence of pretrial publicity. Issue number two deals with the voluntary disqualifications of 75% of the jury panel and the failure of counsel to move for a mistrial, change of venue or other remedies. Issue number three points out that four of the seated panel of twelve jurors were disqualified to serve from emotional outcry to the foreman who was a retired police officer and had a significant civil law conflict with the Defendant's father. This could have been corrected with a motion for mistrial or other remedies.

If as the record reflects the Defendant was not tried by a fair and impartial jury then all else is secondary or immaterial.

There are many other areas wherein counsel was ineffective including the nature and type of prejudicial opening and closing statements by the Prosecutor; failure to make a timely motion to amend the indictment; failure to offer adequate and detailed jury instructions defining the crime of manslaughter; the admission of expert testimony by the forensic scientist; the pawn shop operator;

and inadequate pretrial and trial motions regarding the Defendant's *Miranda* rights.

Overall, counsel failed to understand the pantomime presentation of inadmissible evidence and the introduction of highly inflammatory and inadmissible evidence such as the photographs offered by Dr. Hayne.

Otherwise, and notwithstanding, ineffective counsel, the errors are so gross and clearly prevented the Defendant from receiving a fair trial, the Court should reverse this case with instructions because the Defendant is not guilty of murder and his presumption of innocence continues through and after the trial because there is no evidence proving him guilty beyond a reasonable doubt.

The conviction of murder should be reversed.

RESPECTFULLY SUBMITTED, this the 23rd day of October, 2007.

MONTRELL JORDAN, APPELLANT

BY: _____

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CERTIFICATE OF SERVICE

I, Bill Waller, Sr, the undersigned counsel for the Appellant, hereby certify that I have this day served via facsimile and United States mail, postage fully prepaid, a true and correct copy of the above and foregoing document upon the following:

Honorable Jannie Lewis
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SO CERTIFIED, this the 23rd day of October, 2007.

BILL WALLER, SR.