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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-KA-01202-COA

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**OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS**

RICHARD MITCHELL

APPELLANT

VERSUS

STATE OF MISSISSIPPI

APPELLEE

**APPEAL FROM THE CIRCUIT COURT OF THE 1ST JUDICIAL DISTRICT OF
HINDS COUNTY, MISSISSIPPI**

REPLY BRIEF BY APPELLANT

**OFFICE OF THE PUBLIC DEFENDER,
HINDS COUNTY, MISSISSIPPI**

William R. LaBarre, MSB No. [REDACTED]

PUBLIC DEFENDER

Greta Mack Harris, MSB No. [REDACTED]

Virginia L. Watkins, MSB. No. [REDACTED]

Assistant Public Defenders

Post Office Box 23029

Jackson, Mississippi 39225

Telephone: 601-948-2683

Facsimile: 601-948-2687

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REPLY BY APPELLANT

Comes now Richard Mitchell, Appellant herein, and pursuant to MISSISSIPPI RULE OF APPELLATE PROCEDURE 28(C) makes this, his *Reply to Brief of the Appellee* on assignments of error I and II. In so doing, however, Mr. Mitchell brings forth all errors, arguments and citation of authority in *Brief on the Merits by Appellant*, incorporated herein by reference, and in no way abandons other errors and issues not specifically addressed in this *Reply*.

I. The trial court abused its discretion in refusing Instructions D-10 and D-11 regarding the evaluation of accomplice testimony, thus depriving Mr. Mitchell of his fundamental right to a properly instructed jury, and

Mr. Mitchell agrees with honored counsel for the state that the trial court's discretion in regard to the crafting of cautionary jury instructions has limitations, limitations that Mr. Mitchell submits the trial court violated to the fatal prejudice of his case before the jury. In addition, Mr. Mitchell would submit the trial court failed to use the appropriate standard in evaluation of his request for the cautionary instruction, thus denying to him the fundamental right under both state and federal constitutions to a properly instructed jury as to his theory of defense. See *Lenard v. State*, 552 So.2d 93 at 95-96, (Miss. 1989); CP 62-63; 66-67; RE 20-21; T 331-332.

Mr. Mitchell asks this honorable Court to consider the abjuration of *Wheeler v. State*, 560 So.2d 171, 173 (Miss. 1990), in which the state Supreme Court reversed an armed robbery conviction for failure to give a more strongly worded cautionary instruction. The facts of *Wheeler* bear particular mention in this case. Wheeler, owner of a used car lot, was accused of enticing two others to rob an auto auction owner, Robert F. Collier, in 1982. Five years later, Collier identified from a photographic array the two men who robbed him and further, told police he had seen the two, Woodard and Holmes, in the company of Wheeler at an auction. *Id.*, at 172. At Wheeler's trial, both Woodard and Holmes testified against Wheeler, who disputed their testimony.

The Supreme Court employs a two-prong test to determine whether the trial court abused his or her discretion: “(1) Was the witness an accomplice: and, (2) was his testimony without corroboration?” *Id.*, at 173, citing *Derden v. State*, 522 So.2d 752, 754 (Miss. 1988). In holding that the trial court had indeed abused its discretion in denial of Wheeler’s proffered instruction (virtually a mirror of Instructions D-10 and D-11 offered by Mr. Mitchell), the Mississippi Supreme Court found, among other facts, that *no physical evidence* linked Wheeler to the claimed role as catalyst for the robbery. One of the witnesses, Woodard, an averred participant in the robbery, was granted absolute immunity for his testimony against Wheeler and that Woodard had confessed to committing some 25 felony crimes. *Id.*, at 174.

In the case at bar, there were no eyewitnesses to the shooting of Mr. Willie Barnes. The linchpin of the prosecution’s case was testimony by Robert Buford and Michael Gibson (also referred to as “Gipson” in some court documents and testimony). Both received much lighter sentences in exchange for their testimony against Mr. Mitchell; in fact, Buford had already completed his sentence and Gibson, who admitted he had given the gun to Mr. Mitchell, was serving out his term. T. 190; 192; 199. The gun used in the shooting was found by Katherine Ledbetter, grandmother to Gibson and aunt and apparent guardian for Mr. Buford, who lived with Ledbetter in her Powell Rhodes Driver home, under circumstances that are, at the very least, highly contradictory.

Buford and Gibson were both initial suspects, before their information pointed the finger at Mr. Mitchell. T. 240. Some two weeks after the shooting, Ms. Ledbetter mysteriously shows up at municipal court services to find and tell the investigating detective she has found the gun in a rusty paint can in an overgrown area in the rear of her yard searched the day of the shooting by no less than ten police officers. T. 270; 279-281. Investigating detective James Cornelius

however, remembers it much differently. Cornelius testified Ledbetter told him her nephew and ward, Buford, told her the location of the gun. T. 320.

Perhaps just as telling is the police investigation into Mr. Mitchell's involvement. The jury knew police recovered three pairs of Mr. Mitchell's shoes and a blood-stained T-shirt from his home in the days following the robbery. T. 243-244. The jury knew police obtained a blood sample from Mr. Mitchell. T. 254. The jury knew police had blood samples drawn from the body of Mr. Barnes at autopsy. T.230. The jury knew despite requests to do so, no analysis or comparison was ever made of blood on Mr. Mitchell's garments with that of Mr. Barnes. T. 254; 259; 260. The jury knew two shoe impressions were taken on the day of the incident. T. 227. The jury also knew that no comparison was ever made between either of the two impressions with any of the three pairs of Mr. Mitchell's shoes recovered from his home. T. 227; 243-244. Finally, the jury knew that in the week before trial, Jackson police sought analysis of a fingerprint recovered from the gun magazine, but *only* for comparison with the fingerprints of Mr. Mitchell, *not* for his accomplices -- and that the recovered fingerprint failed to match those of Mr. Mitchell. T. 325.

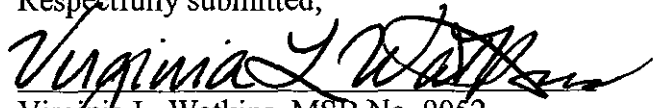
In short, by their own admission, Buford and Gibson were both accomplices and testimony was contradictory on key points. In particular, Buford's testimony was contradicted on critical issues by that of his life-long neighbor, 17-year-old Darwan Traylor, whose contemporaneous statement and trial testimony varied wildly. For instance, Traylor testified it was Buford he saw with the gun after the robbery, not Mr. Mitchell. Exhibit 9 [Statement of Darwan Traylor] T. 157-158. Traylor also testified that Mr. Mitchell stripped off the bloodied white T-shirt he was wearing and stuffed it in a garbage bag as he stood in Buford's back yard, a statement Buford emphatically contradicted during his testimony. T. 140; 193.

CONCLUSION

Mr. Mitchell respectfully argues that the trial court failed to follow more than century-old Mississippi case law by rejecting Instructions D-10 and D-11 in favor of instructions proffered by the state. Mere addition of the word suspicion was insufficient to fully inform the jury of the long-standing and deep repugnance with which our law views testimony by accomplices, particularly accomplices who received much lighter sentences in return for testimony against Mr. Mitchell. Given the complete lack of any physical evidence linking Mr. Mitchell to the crime, when the police had plentiful evidence to test, compare and analyze, and the fact that the testimony of Buford was contradicted on key points, Mr. Mitchell also contends that the facts are insufficient to support the verdict returned against him.

Therefore, Mr. Mitchell humbly moves this honorable Court for reversal of his conviction and remand for a new trial.

Respectfully submitted,


Virginia L. Watkins, MSB No. 9052
Assistant Public Defender

William R. LaBarre, MSB No. [REDACTED]

PUBLIC DEFENDER

Greta Mack Harris, MSB No. [REDACTED]

Virginia L. Watkins, MSB No. [REDACTED]

Assistant Public Defenders

Post Office Box 23029

Jackson, Mississippi 39225

Telephone: 601-948-2683/Facsimile: 601-948-2687

Certificate of Service

I, the undersigned attorney, do hereby certify that I have this day caused to be hand-delivered a true and correct copy of the foregoing REPLY BRIEF BY APPELLANT to the following:

Honorable Robert Shuler Smith,
DISTRICT ATTORNEY
Hinds County Courthouse
Post Office Box 22747
Jackson, Mississippi 39225


Honorable Breland Hilburn
SPECIAL CIRCUIT JUDGE
Hinds County Courthouse
Post Office Box 327
Jackson, Mississippi

Honorable James Hood III
ATTORNEY GENERAL
Charles W. Maris Jr.
Assistant Attorney General
Walter Sillers State Office Building
Post Office Box 220
Jackson, Mississippi 39205-0220

And by United States Mail, postage prepaid, to

Richard Mitchell
MDOC No. 125346
MSP Unit 29
Post Office Box 1057
Parchman, Mississippi 38738

So certified, this the 13th day of June, 2008.


Virginia L. Watkins, MSB No. [REDACTED]
Certifying Attorney