IN THE SUPREME COURT OF MISSISSIPPI

JERMAINE NEAL — APPELLANT

VS. — NUMBER 2007-KA-01899-SCT

STATE OF MISSISSIPPI — APPELLEE

APPEAL
FROM
THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF
TALLAHATCHIE COUNTY, MISSISSIPPI

BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record for Appellant certifies the following listed persons have an interest in the outcome of the case. This representation is made in order that the Judges of this Honorable Court may evaluate possible disqualifications or recusals:

John W. Champion, District Attorney

Jim Hood, Attorney General

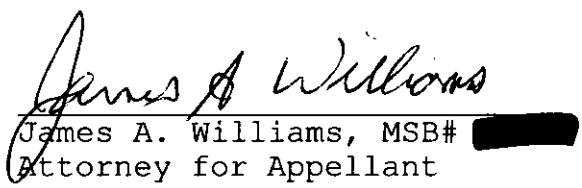
James A. Williams, Appellant's Attorney

Hon. Andrew C. Baker, Judge

Jermaine Neal, Appellant

Sanford Knott, Original Trial Attorney

Ross R. Barnett, Jr., Successor Trial Attorney



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STATEMENT OF ISSUES

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STATEMENT OF THE CASE

Course of Proceedings Below

On November 10, 2006 the grand jury for the First Judicial District of Tallahatchie County indited Jermaine Neal upon a charge of deliberate design murder of Latisha Cleveland by willful decapitation of her in violation of 97-3-19(1) a of **Mississippi Code 1972.** (CP4) On December 7,2006 the trial was reset to April 9, 2007. The state, in response to the discovery request, filed some 169 pages of discovery (CP13-182). By order dated January 4, 2007 Honorable Ross Barnett Jr. was substituted for as counsel for Mr. Neal. (CP210) Trial started on September 17, 2007(T5) and ended on September 18, 2007 at 5:55 PM (T255), when the jury returned the verdict of guilty (CP237)after having retired to deliberate at 3:50 PM.(T254) The Judge sentenced Neal to Life Imprisonment.

On September 24, 2007 defense filed a Motion for Judgment Notwithstanding the verdict or, in the alternative, Motion for New Trial. (CP258-259) The transcript does not reflect that a hearing was held on this motion. The motion was denied by order entered on September 25, 2007. (CP264) On October 22,2007 undersigned Attorney Williams filed an entry of appearance (CP265) an order allowing defendant pauper status (CP272), the Notice of Appeal (CP275)on that date.

Preliminary Matters

Voir Dire

The judge explained that the questioning was for their benefit because it was an opportunity for a juror to tell a reason why he or she should not be required to serve on this particular case. He explained that a indictment was not evidence of guilt, saying "This is a manner in language that we use to charge someone with an offence".(T6) He got no response to whether anyone were close friends of the D. A. or in his social circle or had a family member that had been prosecuted them (T7) He identified defense counsel Ross Barnett and though he then asked counsel about where

Neal lived in the county, the Judge said : " I kind of think it is in the South part of the county." (T8) Juror number 124, Antonio Markel Andrews said he stayed about a half mile from Neal, said he had stopped by his house before and was his neighbor so to speak. To the question: "and you feel like that would put you in a spot that you don't want to be", Andrews answered: " No-- Yeah." The judge then said Andrews would not have to answers any more questions from either side and he would excuse him later. Mrs Rosalind Adams, number 227 said she worked at the Tallahatchie prison with Neal and did not think she should serve. The judge asked her if she had close contact with Neal and she had seen him a lot. Mrs. Adams answered "Yeah", to the judges questions: "Has anything developed that you feel that would cause you to be biased or prejudiced or something less than a fair-minded juror?" Similarly as with Andrews, the judge told Adams she would not have to answer any more questions.(T10) Patrick Shelton Hollis, 214 said she worked at the prison where he was at and had seen him a lot and the judge said she would not have to answer anymore questions.(T10) Mrs. Theresa Lang Davis, #160 said that due to pre-gossip and hearsay that her judgement might be misled and explained that when it happened all the news media and everybody talking might cause her to jump to a conclusion and misjudge Neal. The judge then told her he would ask her a question and it depend ed on how she answered it, explaining, "Us lawyers, we have certain, questions we must ask and certain answers we are seeking." he then asked her if she came in that morning with the case already decided in her mind. She said no but she had heard a lot. The judge remarked that sure a lot of folks in here have heard about this case and he said "What we are looking for is if you are telling me that you have got your mind made up...(if you have) I don't want you." Mrs. Davis said she didn't have her mind made up and the judge further explained they were looking for people that were fair and impartial and who would listen to the evidence and make a decision based on what they heard in the court room: " Rather than what you here up and down these streets or in the coffee shop somewhere."(T11) To the question "Do you see where I'm coming

from" Mrs. Davis answered yes. The judge went on to elaborate that: " when things happen in a small community, we all hear about it. You know, if we are alive and up walking and we got ears and eyes, we know pretty much what's going on but at all the times, we don't get the true facts. We don't get the facts that would let us fairly judge a person and if we go on this morning and if you feel like you have got the case pre-judged, it doesn't make any difference which way it is, we need to know about it. Okay?" (T12)

" The judge asked if there is anyone else have any connection now with Mr. Jermaine Neal, the accused in this case?". (No Response) Then asked if you have got something on your mind and you are not sure whether it is a problem or not, go ahead and reveal it and let me help you with it. All we are looking for is 12 People and two alternates that can hear this case, fairly decide it. We don't want some juror coming on that already dislikes him or his family or is extra close to him or his family. We are looking for 12 people who can just listen to the evidence, apply the law, and call it like you see it. That's what makes the criminal justice system work. All right? I'm going to move on."(T12)

Pamela Denise Davis number 258 said her religion didn't believe in judging people. The judge explained she wouldn't be judging his salvation, if he would be going to heaven or hell, but just if he was guilty or not guilty. Mrs. Davis said she could not. The judge said she could not have to answer any more questions. Mr. Berlin Taylor number206 (T15) spoke up and the judge recognized him from prior panels that he could not judge like Mrs. Davis and he said he would not have to answer any more questions. .(T16) Mrs. Shirley Brooks Number 188 said she did not think she would judge him either. He did not tell her that she would not have to answer any more questions.

The judge then went back to the fact that the panel might have heard about the case (T17)

He wanted to know if anybody had decided the case in their mind that Neal was guilty or not guilty that none of them had heard a sworn witness been examined or crossed examined by a lawyer to get to the truth. Mrs Cherrie Laking Truy, number 272 raised her hand and the judge asked her if she was involved in the investigation to which she said no, agreeing she had just heard talk but when she persisted she had formed a opinion, the judge stopped her and didn't want her contaminating other Juror (T18) Mrs Sammy Lella Laws, number 53 Said she had heard about the case and read about it in the paper the Judge said: " Most everybody has haven't they?" she agreed. Mrs. Laws said she already formed a opinion and the judge said she didn't have to answer anymore questions. (T19) The judge invited the panel to ask questions about procedures or such not about the case.(T20)

District Attorney John Champion Voir Dired the jury, (T21) He said the States burden was beyond a reasonable doubt not reasonable doubt.(T24) Without objection first saying Mississippi did not define reasonable doubt he said it was what your heard from the evidence, what law was given to you by judge Baker and your common sense. He said you put these three things together and reach a decision on the case. He again said that judge Baker would not tell them what reasonable doubt was that each member would have to decide. Mr. Norris Genne Dungan, number 185 said proof would have to be without all doubt.(T25) Mr. G. .A. Johnson, 216, said what was the D A definition between reasonable and all. The DA said my definition doesn't really matter unfortunately. I bet mine and Mr. Barnett's definition is different. It is just something that you have got to decide in your own mind once you hear the evidence. and I wish I can--I sometimes hesitate about asking this question because typically somebody is going to ask me what is the definition of beyond a reasonable doubt as opposed to beyond all doubt and I really can't give it to you. I always like to say, well, when you are finally convinced one way or the other is the best way I can describe it."(T26)

The DA , without objection on (T28) he said they believe they would here a confession on

tape that he gave to the police. He then questioned if there were anyone overwhelmed by photograph and video tapes of the crime scene. (T28) He said the state did not have the head "at this time" (T29) Beverly Holmes Jackson, Number45, Mr. Anthony Tyrone Towns number 131, and Mrs. Rachel Ann Williams number 55 all said they could not view the pictures.(T29) He said this was a very serious matter and Mr. Neal was entitled to a fair trial not perfect and Lakeshia was entitled to a fair trial. There was no response to weather anybody would refuse to reach a decision to some unanswered questions(T30) Mrs. Theresa Lang number 160, said she might not be able to make a decision because of unanswered question one like she would like to ask where is the head. The D A responded that he could not get into the facts of the case.(T31) When the D. A. then asked was there anything that would keep someone from being fair and impartial, Kenneth Ray Bloodworth number 270, said he worked for the Department of Corrections at Parchman. The D.A. asked would that affect Bloodworth's fairness and Bloodworth said that it wouldn't affect his fairness but he had to work around inmates.(T32) The D. A. asked if the State failed to meet its burden of proof would Bloodworth have a problem with finding Neal not guilty, Bloodworth said he rather not answer because he works around inmates.(T33)

Mr. Barnett voir dired the panel .(T34). At T35, acknowledging that the State had gone first and a first impression was a last impression, he got no response to the question for the panel to tell him they would not make up their mind until all the evidence. He then said: "Some of you look like you may have already made up your mind." Asking the panel to tell him if anyone had, there was no response. He got no response to whether the jury understood the Judge was instruct them if the Defendant didn't testify they could not hold that against him. Asking had they heard the phrase "presumption of innocence" many times just like the phrase "reasonable doubt", seeming to not question the DA's previous description of reasonable doubt precipitated an unknown panel member effectively saying presumed innocence until proven guilty beyond a reasonable doubt (T36). He got

no response after he described how no two people see things exactly the same, asking them would they hold up their judgment until the Judge told them to go back in the jury room and consider a verdict.

Two people said they worked for the Department of Corrections. Panel member Ronnie Hand, number 99, had previously worked in law enforcement for eighteen years (T37). Some panel members nodded to the question whether after they went to consider their verdict: "will you make the State prove to you in your mind beyond a reasonable doubt to you that this man is guilty before you would vote guilty?"(T38-39) One verbally agreed they would not let someone else make up their mind. Defense counsel then directed them to make up their own mind and that a discussion between them was only natural but they were going to make up their own mind. Defense counsel then recalled the DA was talking about reasonable doubt, saying there was no legal definition, "because really a reasonable doubt is up to you and what is reasonable in your mind. I've always thought a reasonable doubt, the word 'reasonable' is reason able. It is able to be arrived at through reason. That is a doubt that is able to be arrived at through reasoning and so if you have reasonable doubt as to the defendant's guilt or innocence and you are selected to serve on the jury, would you not hesitate to vote not guilty? All of you?...(T39) (there was no response) ...Q. Even if 11 of you said he is guilty, you'd still stick to your own conscience wouldn't you?" One juror verbalized he or she would (T40).

Jury Selection

The Judge told Neal that he had the right to remain silent or testify in the case and that Mr. Barnett would discuss it with him at the proper time but he told Neal that if he disagreed with Mr. Barnett, he had the right to override his decision and do what is best for himself (T41).

The Judge, on his own, struck Number 53 Ms. Laws for cause because he thought she had heard too much about the case to be fair. Again, on his own, the Judge commented that the D. A. had

a couple that dealt inability to view evidence, but the Court deferred to the D. A. as to whether he would strike them. . The Judge said Mr. Andrews, number 124 was struck for cause because he was too close to the Defendant (T42). When the Judge said Mr. Townes, number 131, really needed to work, Barnett recalled Townes said he couldn't review the evidence and Barnett wanted somebody to listen to the evidence. The Judge said that Ms. Davis, number 160, had responded sufficiently to show she wanted off the jury and he didn't know whether she had sided up with one side or the other but he thought she should be struck for cause. Mrs. Brooks, number 188, said she couldn't sit in judgment of another and he thought she should go. The Judge said Mr. Dungan, white male number 185, that he had a note by when the DA was talking about reasonable doubt and the Judge said he never knew when jurors really understood the fine lines that a lawyer did. He asked the DA was he going to dismiss number 185 and the DA said probably not but if he needed to get rid of him, he would use one of his strikes. The Court said if the DA was going to strike him, he was going to give Defense counsel a chance to rehabilitate him "because often times I think a juror gets confused on that reasonable doubt." Defense counsel said he thought the DA would be sportsmanlike and allow number 185 to stay and during the trial the DA could rehabilitate him. The Judge then with agreement of counsel struck Mr. Taylor, number 206.(T44) The Court acknowledged that it had struck Mrs. Brooks, number 188. The Judge then turned to the panel members who had worked for Correctional Corporation of America (CCA) at the Tallahatchie County prison, number 214 and number 227, asking the Circuit Clerk were they excused who responded they weren't excused but Mr. Barnett corrected to say that number 214 was excused out in the Courtroom to which the DA responded number 214 was not excused but the Judge told him he didn't have to respond to any more question (T45). The Judge then said he needed to excuse number 214 (and number 227) saying: "both of these have told me they handle the prisoner and transported him and stuff and I don't know whether it is good or bad." (T46) The Court said number 258 said she could not sit in judgment and

Mr. Bloodworth works for MDOC. The Judge then acknowledged that Bloodworth was called "Okra", used to shoe the Judge's horse, and was old, and said they might call Bloodworth back to chambers and ask him if that was a problem, saying there was so many in the County that worked for MDOC, it was hard to excuse everybody. The Judge said Mrs. Truly, number 272 said she had heard too much about the case and that he needed to excuse her for cause. Neither the State nor defense counsel had any additional ones for cause.

Opening Statements

The Judge gave the jury instructions that no one was to talk to them as they went to lunch or were in the courtroom or wherever but did not order them to report any such attempts to talk to them, leaving it up to a third person to report if someone happened to see anyone talking to them (T57). He told them not to decide the case too early but to wait until he had instructed them on the law, implying, however, that the reason was that their job would be a whole lot easier to make a decision once they had heard and the witnesses and knew what the law was. He said at T58: "once you have all of that, your job will be a whole lot easier than it would be to try to prematurely decide the case."(T58) Juror Ardis Lee Jones told the Judge at T58-59 that he had bad eyesight but he could read a little bit. Mr. Jones persisted that he could not read, that he could not see too good and the Judge said he didn't know what to do other than substitute an alternate juror. Mr. Barnett said that the instructions would be read to him and he did not know what else he might need to read that would come into evidence (T59). Jones persisted that he had real bad eyesight. The Court suggested they just see kind of how the evidence "flows" and admitted it didn't know what other reading evidence except the instructions would come into the case. The State revealed it would have some photographs and two videotapes that were pretty important. The Court said they would just let him try to see and the Judge would ask him at some point if he was seeing everything like the videos. If he couldn't, they would use an alternate. Mr. Jones persisted his eyesight was bad and the Judge said

he saw Jones raise his hand one time but Jones did not follow up. Jones explained that he, pointing to someone, told him to put his hand down. Jones said he was trying to tell the Judge then. The Judge then sent the Jury to lunch at 12:00pm (T60).

After lunch, the Judge got a negative response to whether anyone had tried to talk to the jurors during lunch (T61).

The District Attorney gave his opening statement (T62) and, as it professed, told the jury that unfortunately he would not be able to produce a head or photographs of Lakeshia's head "because as of this day, it has not been found." (T69).

Mr. Barnett opened (T71) and eventually said Neal had said about 1:30 the afternoon of the incident there was a knock at the door. Jermaine only had his shorts on and he goes to the door. Somebody had their back to the door and Jermaine opened the door and 3 men came in that he had never seen before and one of them put a gun on Jermaine and told him to sit on the couch. The other 2 went into the back bedroom where Lakeshia was with the baby. Jermaine was trying to find out what was going on and the guy said "this is business. You shut up and sit on the couch." After about 4 or 5 minutes, he heard 2 shots and Jermaine was afraid they had shot Lakeshia and the baby. Ten minutes passed while Jermaine is trying to get in there but the man has the gun on him, apparently while the other 2 men were back there cutting her head off (T72). They put her body on a comforter and dragged her into the bathroom and put the body and the tub face down and put Clorox in there and water. They threatened Jermaine that if he told anybody that they had friends in high places and that they knew where his children lived, naming the address in Grenada. Jermaine is about out of his mind, crazy because of what all has happened. He kneels down beside Lakeshia and "I'm sure he got blood on his shorts, shoes, whatever he had on..." Jermond was asleep in the crib and Jermaine in his fright and terror left and went to work. He worked until about midnight and got home about

12:30, went in and got the baby and went to Mary's (T73). During the investigation, Neal told the investigators, according to Barnett, what Barnett had just told the jury. He didn't get an answer when he made phone calls at the Jiffy. He was trying to call the mother of his baby in Grenada, that they might try to hurt the baby but he couldn't get her and he tried to call his mother and couldn't get her. He finally just gave up trying to call people for help and with no lawyer with him and him on his own, he finally just said that he did it. Mr. Barnett finished by saying that their proof would show the statement was not true, it was not a confession but a false statement (T74).

Trial Testimony

Mary Loerker testified (T75) without objection . Michael, age 9 was the son of Lakeshia who came home that day and could not get in. It was still daylight when Michael left to go home. Without objection to hearsay (T77), Mary said that when Michael came back, he told her his bedroom window was locked, the air conditioning on, and that he could hear his baby brother inside but that no one would come to the door and Michael said "That seems odd. My window is never locked." (T77). It was abnormal that he couldn't get into the house because Mary would let them go down to the house to play on the Playstation. They all went to bed about 10:00pm and the next thing she knew was a sound like a bulldozer running into her door. Jermaine had the baby in his arms and she called 911. (T79). Mr. Barnett had no questions (T80).

Sheriff's investigator Rodzinski Weekly testified (T80) that dispatch gave him the call at about 1:11 in the morning (T81) and when he got to the residence of Ms Loeker, Neal was coming down the hill with the baby in his arms and mumbling and Neal followed his instructions to place the baby on the back of the patrol car and told Neal he was handcuffing him to protect Neal and himself (T83). He had not formally arrested Neal for anything at this time. He saw the baby crib and the blood on the bed, followed the blood trail to the bathroom (T88). The bathroom light was on and

he saw a body floating in the tub without a head. He backed out, went to his car and radioed the Sheriff (T89).

Sheriff's Investigator Brandon Hodges testified (T94) he arrived and (T95) later Sheriff Brewer did . It had been raining and was kind of muddy and they saw a set of foot tracks coming out and figured they were Weekly's. Weekly had told them what to expect when they went inside (T96). Photographic exhibits 1 and 2 of the exterior of the house were admitted into evidence (T97). Other photographs of the house were entered as exhibits 3, 4, 5, and 6 (T98-99). The blue comforter lay at the end of the blood trail. The Judge asked juror Mr. Jones if he could see the pictures and he said he could. Two photographs of the body identified as that of Lakeshia Cleveland were introduced as exhibits 7 and 8 (T100). On the bathroom wall written by red-colored marker were the words: "Bitch take care of my son" and in big letters the word: "Lame." There was the Clorox bottle. There were blood marks on the commode area. Four photographs of what Hodges saw in the bathroom were introduced as exhibits 9, 10, 11, and 12 (T102). Investigator Davis got in the back seat with Neal and Hodges was in the front seat, all in officer Weekly's vehicle. At 3:15am Neal was read his Miranda Rights and that document became exhibit 13 (T104). Their questioning of Neal lasted about 20 minutes and he supplied them with general information (T105-106). Neal was not under arrest at this time (T107). They took Neal's clothing, which he agreed to, and signed at about 6:12am which was admitted into evidence as exhibit 15 (T109). Hodges pointed out what he thought was a blood stain on Neal's shorts and they became exhibit 16 (T110). Once the blood was seen on the shorts, the investigators began to view Neal as a suspect. They went to Grenada to Neal's work and got his clock-in time of 3:10pm. Objection to hearsay was made and apparently sustained at T112 as to what Neal's coworkers would have said about Neal's normal method of transportation to work. Hodges further giving hearsay that it was normal for Lakeshia to transport Neal to work. (T113).

Court resumed in chambers at 8:30am on September 18, 2007 because juror Chelsea Woods

was traumatized by the gruesomeness to the point of a sleepless night. The pictures kept playing in her head. She was depressed. She was excused and the first alternate, Norris Dungan was substituted.

Brandon Hodges resumed testifying at T117, that about 3:15pm on August 22nd they went back to the jail, gave Neal his Constitutional Right to Silence again and he signed the same and waived his rights which document became exhibit 17 at T118. Hodges said Neal was still a suspect at this time based on the bloody underwear and the last one to see her alive and the first to find her dead. He and investigator Davis talked to Neal from that time until about 1:00 in the morning (T118). Neal was fully cooperative.

At first they did not believe what Neal was telling them but later in the night Neal made the promise of locating the head in exchange for the phone call. Neal gave an account of the afternoon after he took the truck to work and his stay at work that was not inculpatory. At about 10:30 that night on August 22nd was the phone call request in exchange for Neal telling where the head was. He told them Grenada Lake and they went that way (T120). The first spot Neal thought might be it was too far from the water, with the lake so low, to throw a head. Neal thought it might be at the gate tower but again the water was too far away. They stopped at the emergency spillway and that still didn't satisfy Neal. At the main spillway is where Neal said he threw the head (T123). There is a Homeland Security video camera on the top of the watch tower at the lake (T124). The video from these cameras did not show Neal there at all. On August 23rd they dragged the lake near where he said he'd thrown the head (T125).

On the way back from Grenada Lake spillway Hodges was driving and investigator Davis was taking notes as Neal gave more details. Once they got to the jail, Neal was still talking and he told Davis "let me see your pad." Hodges was concentrating on driving and wasn't paying much attention to what Neal was telling Davis. Objection was sustained to the question did Hodges recall

"Neal at all telling detective Davis that he did, in fact..." (T127) When officer Davis asked Neal why there wasn't a struggle during the decapitation, Neal took his pad and wrote in that he shot her in the head twice before decapitating her. The next day on August 23 at about 9:48am Davis took a video tape statement (T128). That video became Exhibit 19 at T129. A transcript of the video exhibit which Hodges had not compared to the video was allowed into evidence after Mr. Barnett said that it was no objection if Hodges had read the typed statement and he knew that was on the video (T130). The video statement was played for the jury at T131. The officers went back to the residence to look for the .32 shell casing and found none. When Hodges saw the body in the bath tub he could not see the panties because they were underneath the body. Neal told the officers he had thrown the gun at a construction site on Highway 51 South, just North of Grenada and they went there, using an inmate crew to look, but did not find the gun. At T135 Hodges attention is directed to page 9 of the transcript of the video at lines 95-98 and he explained that he was just trying to see if there had been any fighting or arguing between them. At T136 Hodges says Neal told him there were no arguments about his wrecking her car after he promised to get her a new one. At T138 Hodges said Neal admitted the text messages was an attempt to cover up Lakeshia's death.

On cross (T139) defense counsel had Hodges admit that Neal was under arrest when he was handcuffed and put in the back of his car after which the officers first entered the house (T140). At T141 defense counsel gets Hodges to admit the officers believed Neal about the head in Grenada Lake because they went there but then could not get Hodges to agree that Neal putting the head in Grenada Lake wasn't true because they couldn't find the head. At T142 defense counsel goes through questioning of belief about the location of the gun and a failure to find the gun creating disbelief of Neal. At T143 Hodges said he didn't know what to believe, admitting he believed it at first but when he couldn't find the head or the gun, he didn't know what to believe. Defense counsel did not at this point use the intruder(T71-74) explanation to say they took the head and the gun and

the knife. Officer Hodges agreed that it was the failure to find the items and the absence of Neal's vehicle on the Homeland Security tape at Grenada Lake is grounds to believe that Neal was telling a lie (T144). At T145-146 defense counsel contended the officers should have taken a gun shot residue test on Neal's hand. This despite them not knowing until many hours later that a gun was involved. At T147 defense counsel establishes that Neal never had a lawyer during any of the questioning nor friend nor minister or family member to support him but Hodges pointed out that he was allowed to use the phone and he called someone. As to the trip back from Grenada Lake where Neal was talking, Hodges explained that Neal was in the front seat of the pick up truck and investigator Davis was sitting in the back at the console area. Hodges was listening but he was not taking notes (T149).

MBI Investigator Walter Davis testified (T155), among other things, pointed out that Neal told him they didn't use the front door to the house because they didn't have a key and that it was kind of grown up around it (T159). Davis resumed interrogating Neal about 3pm that afternoon. At . Davis agreed that after the residence interview he had talked to Lakeshia's family members and "other witnesses as well."(T164) At T164-167 Davis recounts the non-inculpatory account of Neal of the events of August 21. At T168 Davis agrees that he had concerns about the story as the afternoon turned into evening. Davis recounted "We had found out information from talking to other folks about whether or not the baby was his child or whether or not they had any problems, any arguments between them, and he was firm that they didn't argue and didn't fuss but other folks had told us that they did and that possibly the baby wasn't his and there was some friction between them because of that." Davis agreed to the leading question that he was beginning to think he might have a motive (T168). About 10:30pm they were appealing to Neal to tell them where the head was, that the family wanted to bury her with her head and Neal said he wanted to use the phone and they eventually took him to a pay phone. They told him that they had let him do what he wanted to do so

now he should tell them where the head was. He said he threw it in Grenada Lake and they went looking (T169). They went from place to place where Neal told them to go. At T170 the DA is offering the three page hand-written notes made by Davis of Neal's words to him at Grenada lake and Barnett suggested that before they were introduced into evidence, Davis should say whether or not they were the same notes and if they were accurate and correct, which Davis did. The notes were signed by Neal and Sheriff Brewer and, of course, Davis. Neal said, when asked by Davis what he used, that he got a knife out of a rack in the kitchen. He had his back turned towards the carport door and that he took the knife and came across her throat and that he cut back and forth until her head came off (T172). Davis said "He said whenever he first cut her, that blood shot out of her neck and onto the table and onto her pants." (T172) All he was wearing was his boxers that had blood on them when the officers took them after he was arrested. He put her head in the black plastic bag and the bag in the back door of the truck. Put the knife in the bag and drove off. He went towards Grenada Lake, stopped got the head out of the bag and threw it in the lake and put the bag, which had the knife in it, on the front seat and threw it out later. He admitted writing the phrase "Bitch take care of my son!!" and "Lame" and explained that "Lame" meant wrong or that she had done him wrong. He had found the DNA paternity test results while she was on the road. He undressed her to make it look like her boyfriend had been there with her. He said he had a .32 semi automatic and had threw it near a construction site on Highway 51.

After they got back to the jail and Davis was going over his notes, he asked Neal how did he cut her throat and she not fight him. He took Davis' note pad and wrote that he shot her twice in the head before cutting her throat (T174).

On cross Davis agreed with defense counsel that they did not know how Lakeshia died except from what they saw when they went in the house and what they knew from Neal (T178). Davis agreed that it was "very possible" the gun shots killed her (T179). Davis agreed had they known

earlier about the gun shots, they could have done a paraffin wax test. Then defense counsel established with Davis, as he had Hodges, that Neal could have lied about putting the head a Grenada Lake and the gun at the construction site.

On direct MBI Senior Crime Scene Analysis, Arthur S. Chancellor, testified (T181) about his extensive training and education. He had analyzed probably several thousand crime scenes. There were no indications of forced entry. The front door was stuck and very difficult to open. It was not used as an entrance way. (T187). There appeared to be tissue and bone fragments sitting right on the stained area. on the bed spread. Chancellor identified photo exhibits 22 and 23 and they were admitted. The blood stain was right below the pillow with tissue and bone fragments embedded. On the small night stand on the right side of the bed was some clothing, telephone books, and telephone (T189). Because he had been briefed that she had been decapitated, he interpreted the bone fragments and tissue on the bed to mean that she was in that position when she was beheaded.

Underneath the body on the bottom of the tub was a pair of women's panties. They were not visible until the body was removed. The blood stained sheet became exhibit 28 at T200. There was a small amount of blood stain on the comforter beneath the sheet. There were writings throughout the house, on mirrors and doors that appeared to be love note exchanges. From Lakeshia's vehicle outside the residence, he recovered a white t-shirt with a suspected blood stain from the rear passenger seat (T204). There were very small blood stains in the upper right, chest front area.

The DA then questioned and specialist Chancellor then responded that his opinion was that it was a staged crime scene where things are altered, changed, added or taken away to make the police believe something else happened rather than what did happen. He said there were no defensive wounds on the body. Lakeshia was not fighting or struggling for her life (T206). The phrase "Bitch take care of my son!!" seemed to be addressed to Lakeshia and thus it did not fit (T206). At T207

without objection to hearsay, Chancellor said they started getting some background on the victim and realized that she had children by other men and it was strange for one of the other men to draw attention to themselves. He agreed the writing was a type of coverup (T207). The video of the crime scene, Exhibit 32, was then played for the Jury (T209). Chancellor narrated. At T213 Chancellor explains that part of the video where there is the comforter and they are looking at the hallway and the bathroom, explaining that they were looking for any type of blood that may have been thrown out or splattered during some type of violent assault.

On cross (T214) Chancellor admitted no one had said there was forced entry. He admitted they had not analyzed the writing compared to the defendant's hand writing.

On redirect defense counsel objected to the question which assumed Neal had told Chancellor that he wrote the writing, with the DA changing his question to say was Chancellor aware of the statements that had been made and there was no objection (T218).

Motion for Directed Verdict

At T218-219 defense counsel argued the State had not proven every essential element of the Indictment and failed to proved cause of death and offer any autopsy testimony to testify as to cause of death. The DA responded that the defendant has said in his own words that "I shot her in the head twice and I cut her head off." The Court denied the Motion and said: "It is just purely a question or rather clearly before the jury at this point in time that Neal caused the death by decapitation." (T219)

Neal stated to the Court that he did not wish to testify (T220-221). Jury instructions were examined and approved at T222-224. The only witness called by defense was Neal's mother Helerine Neal Seymour (T224-229).

SUMMARY OF ARGUMENT

Neal argues that the State limited itself in the proof of the killing to a decapitation killing. It said such in the Indictment, thus he argues it was error not to include in the Instruction on the elements of deliberate design murder that the killing had to be found to be caused by decapitation.

Neal argues that the voir dire was constitutionally defective in that the Judge's striking jurors for cause without allowing defense counsel, nor the state for that matter, to question them and the manner in which the Judge's questioning them fatally infected his jury with prejudice. He argues a change of venue should have been granted by the Court despite the failure of defense counsel to request same, this in light of the confessed fact that all had heard about the horrible killing .

He argues that the female juror who left the courtroom during trial should have been questioned as to improper influences and this by the judge without necessity of defense counsel requesting same.

He argues that hearsay from the police investigators was used to prove motive of infidelity and of actions by Neal after the death. He argues he was denied effective assistance of counsel for various reasons, mainly that his defense counsel advanced in opening that the killing was done by gunshots from three intruders and Neal was threatened along with the life of his daughter who lived in another town, that Neal had told the investigators this, but defense counsel never cross examined the investigators nor the crime scene nor did he require Neal to testify. Defense failed to object to hearsay, failed to cross examined crime scene testimony and photos that would have shown post mortem decapitation and supported Dr. Hayne's autopsy ; failed to object to jury instruction that did not include decapitation. ; failure to request a change of venue; failure to have Neal testify; failure to make timely objections and failed to request lesser included jury instructions.

ARGUMENT AND BRIEF

PROPOSITION I

It it Is a Violation of Due Process of Law When the Indictment Charges Deliberate Design Murder by Decapitation, Where Decapitation Occurs after Death and the Jury Instruction on the Elements of Is a Generic Statement of Deliberate Design Murder Not Requiring a Jury Finding of Decapitation Nor Any Other Act of the Defendant

The indictment, in relevant part read:

> That JERMAINE NEAL, late of the District, County and State aforesaid, on or about the 22nd day of August, in the year of our Lord, 2006, in the District, County and State aforesaid, and within the jurisdiction of this Court, did willfully, unlawfully and feloniously decapitate Lakeshia Cleveland, a human being; JERMAINE NEAL acted with the deliberate design to effect the death of Lakeshia Cleveland, in direct violation of Section 97-3-19(1)(a), Mississippi Code 1972 Annotated, as amended, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Mississippi.

Instruction 9 read as follows:

> The Defendant, JERMAINE NEAL, is charged with the crime of Murder. If the Jury finds from the evidence in this case, beyond a reasonable doubt, that:
>
> 1.) The deceased, Lakeshia Cleveland, was a living person; and
>
> 2.) On or about August 22, 2006, JERMAINE NEAL did wilfully and of his malice aforethought, kill Lakeshia Cleveland with the deliberate design to effect the death of Lakeshia Cleveland, and not in necessary self-defense, then the Jury shall find the Defendant guilty of Murder.
>
> If The State has failed to prove any one or more of these elements beyond a reasonable doubt, then the Jury shall find the Defendant not guilty.

Section 97-3-19(1), in relevant part reads:

> The killing of a human being without authority of law by any means or in any manner shall be murder in the following cases: (a) (w)hen done with deliberate design to effect the death of the person killed, or of any human being; ...

Steven Hayne had done an autopsy on Lakeshia and he had determined, as we know from his report being attached to the D. A.'s Response to Request for discovery, found in the Clerk's Papers, that the decapitation was "post mortem". Hayne was not called by the State nor the Defense.

The State through the Indictment falsely stated the cause of death as decapitation, contrary to the autopsy conclusion of Stephen Hayne (RE 61, CP 146-147), whom of course the State did not call as a witness, but submitted and obtained an instruction, and argued in closing, that did not require the Jury to find decapitation as the cause of death. Decapitation as inherit brutality permeated the trial. In fact, the State in voir dire by saying "the head had not been found yet" invited the Jury to get involved in the search for the head through a verdict which might cause Neal to produce the head. One panel member blurted out in voir dire that what she wanted to know was where the head was.

The blood evidence found in the bedroom was not consistent with decapitation as the cause of death but consistent with the autopsy conclusion of decapitation occurring after death. . The photographic exhibits in the Record Excerpts, Exhibit 22 (RE 58) and Exhibit 23 (RE 59) of the night stand with telephone and Lakeshia's pants there and the head board of the bed show not spewing of blood. The pool of blood on the bed covers supports decapitation after death. The Highway Patrol Crime Unit investigator Chancellor went unchallenged in saying the bone fragments in that pool of blood was from decapitation despite the two bullets to the head and the autopsy which said no saw marks . Only investigator Davis' notes of Neal's description of the decapitation give a scintilla of evidence Lakeshia was killed by decapitation. (Exhibit 21, RE 55) Those Notes at the relevant part read:

> "Took the knife and came across her throat
> - She just jerked & kicked.
> cut back & forth.

(shot her twice in the head before cutting her throat,(signed) Jermaine Neal) twist & cut. head came off."

For decapitation to be the cause of death, blood would have spewed from the carotid artery but the blood on the telephone and Lakeshia's pants are only spots of blood. Admittedly Sheriff's investigator Walter Davis' hand written notes have him writing that Neal said Lakeshia jerked and kicked during decapitation with Davis bolstering this part of his notes and explaining Neal's handwritten statement nearby that entry that he had shot her twice in the head before decapitation. The note by Neal came as an answer to Davis' question, after they got back to the Sheriff's Department and Davis was reviewing the notes, of why Lakeshia did not fight and struggle against being decapitated. Interestingly, the video tape confession by Neal the next morning, conducted by investigator Brandon Hodges, does not substantiate Davis' notes on the way back from Grenada Lake that Lakeshia jerked and kicked during decapitation. Hodges was sitting next to Neal and driving with Davis in the back seat of the truck at the console area. It is common sense as the Jury was invited to employ, through the Jury instructions, that jerking and kicking was an involuntary response as the nerves to the brain were being cut by the knife. A spew of blood from the carotid artery is necessary to prove death by decapitation. Crime scene Specialist Arthur Chancellor only testified as to interest in blood spatters at the doorway to the bathroom near the comforter.

The brutality of decapitation, while useful to assure a verdict , made it impossible for the State to meet the burden of proof, it self-imposed by the Indictment. The Judge during Jury instruction should not have allowed the State to escape this burden by giving a totally abstract instruction in a deliberated design murder charge that did not require the Jury to find the only act set forth in the Indictment, i.e. decapitation.

The purpose of the post mortem decapitation fits snugly with what the officers testified as

they described the remainder of the crime scene was efforts to conceal the crime: air conditioner on, Clorox, door locked and Michael's window locked. The head contained the two bullet projectiles which, if Neal's statement is true as to the caliber of the weapon, would have tied him to the shooting. Further proof of concealment and confirmation of post mortem decapitation is the text message by cell phone to Lakeshia's cousin whose content would cause the cousin to believe Lakeshia was the one text messaging. The officers' trip with Neal to the construction site for the gun and to Grenada Lake for the head all to no avail supports decapitation as concealment rather than cause of death.

The Element Instruction was Purposefully Abstract and Unconstitutionally Vague and Denied Neal a Right to have the Jury find the Fact of Decapitation Caused Death.

There is no doubt that where no jury instruction requires the jury to find the elements set forth in the indictment then the verdict of guilty must be reversed. In **Mackbee v. State**, 575 So. 2d 16, 33-34(Miss. 1990), Mackbee had complained of the underlying offense instruciton on armed robbery in the capital murder case and it clearly was abstract. However the Court said that "the mere fact that an instruciton is abstract or lacks specificity is not ground for reversal.." The general principle is that the language of the element instruction should track the indictment. In **Richmond v. State**, 751 So. 2d 1038, at 1046(Miss. 1999) the court said: "At trial the jury should be instructed in language that tracks the indictment; however, failure of the instruction to contain this language does not necessarily render it fatally defective." The Court cited **Duplantis v. State,** 708 So. 2d 1327, 1344(Miss. 1998); **Doss v. State**, 709 So. 2d 369, 387-388(Miss. 116) and **Berry v. State**, 575 So. 2d 1, 13(Miss. 1990). **Duplantis** and **Doss** ruled that "malice aforethought" wasn't necessary to be proven or set forth in an instruciton, because it was a capital case and felony murder was the element and it was described in the instruciton. **Berry** held the same, but adding significantly for Neal's claim here, citing **Williams v. State**, 445 So. 2d 798, 804(Miss. 1984) "(purpose of

indictment is to provide description of charge which will enable accused to prepare defense; all that is required is a concise statement of the crime." Of course, "killing" is an essential element of the crime and the only way it was described in the indictment was Neal "did willfully, unlawfully and feloniously decapitate Lakeshia Cleveland, a human being". *Mississippi Uniform Circuit and County Court Rules*, Rule 7.06 directed the language of "decapitation" placed in Neal's indictment. That rule in relevant part says:

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

Here the only allegation of killing is "decapitation". No doubt the Court in its instruciton 9 had to contain that description of the killing and the State thus was burdened to prove it beyond a reasonable doubt. In **Richmond v. State**, 751 So. 2d 1038, at 1046(Miss. 1999) the State was required to prove two allegations that were surplusage, the value of the automobile and "feloniously". In **Swanier v. State**, 473 So. 2d 180, 188(Miss. 1985) confessed that surplusage in a jury instruction raised its burden. It is clear here that the decapitation had to be proven and the jury instructed because that is what the State charged him with in the Indictment, i.e. killing by decapitation. There is no doubt that Neal's conviction must be reversed and remanded for a new trial. See **Henderson v. State**, 660 So. 2d 220, at 222(Miss. 1995) This failure of an instruction should be deemed "plain error". See **Ishee v. State**799 So. 2d 70, at 76(Miss. 2001)

The Instruction was Unconstitutional

In **Alexander v. McCotter**, 775 F.2d 595, 598 (5th Cir.1985) the court stated: "[T]he sufficiency of a state indictment is not a matter for federal habeas corpus review unless it can be shown that the indictment is so defective that the convicting court had no jurisdiction." When the jury instruction changed the indictment by removing decapitation as the killing that the jury was

required to find, then it changed the indictment, thus destroying the court's jurisdiction. .

Instruction C-9, by its failure to require proof of death by decapitation varied the indictment. Such is proven as helpful to the State because it allowed the State to argue it didn't matter if it was shooting or decapitation. There is no doubt that the Jury has to find facts, not just the legal conclusion of "deliberate design". By analogy, Neal cites **Jones v. United States**, 526 U.S. 227,at 250-52, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999)(held that provisions of a car jacking statute, establishing higher penalties when the offense resulted in serious bodily injury or death, provided additional elements of the offense, not sentencing considerations) , **Apprendi v. New Jersey**, 530 U.S. 466, at 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)(held that any fact (other than a prior conviction) that "increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury, and proved beyond a reasonable doubt"), **United States v. Cotton**, 535 U.S. 625, at 634, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002)(held an indictment's not including any allegation regarding the quantity of drugs involved in enhancing sentences beyond the statutory maximum was error; but, where there was no timely objection at trial, this error did not affect substantial rights where the evidence of quantity was "overwhelming and uncontroverted") and **Ring v. Arizona**, 536 U.S. 584, at 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)(held an Arizona statute permitting the judge to determine whether aggravating factors necessary for the death penalty are present violates the Sixth Amendment right to trial by jury). See also **United States v. Robinson**, 367 F.3d 278 (5th Cir.2004)("the government is required to charge, by indictment, the statutory aggravating factors it intends to prove to render a defendant eligible for the death penalty, and its failure to do so ··· is constitutional error ").

PROPOSITION II

The Defendant Was Denied a Fair Jury Trial by a Defective Voir Dire Procedure That Did Not Allow and Which Did Not Evidence a Determination That the Jury Finally Selected Had Not Prejudged the Defendant Guilty and Which Prejudiced the Jury Against the Defendant.

Section 13-5-69 of **Mississippi Code Annotated** provides:

> Except in cases in which the examination of jurors is governed by rules promulgated by the Mississippi Supreme Court, the parties or their attorneys in all jury trials shall have the right to question jurors who are being impaneled with reference to challenges for cause, and for peremptory challenges, and it shall not be necessary to propound the questions through the presiding judge, but they may be asked by the attorneys or by litigants not represented by attorneys.

Section 13-5-79 of **MCA** provides:

> Any person, otherwise competent, who will make oath that he is impartial in the case, shall be competent as a juror in any criminal case, notwithstanding the fact that he has an impression or an opinion as to the guilt or innocence of the accused, 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, except that to which the evidence may conduct. Any juror shall be excluded, however, if the court be of opinion that he cannot try the case impartially, and the exclusion shall not be assignable for error.

In **McClemore vs. State**, 669 So. 2d 19(Miss. 1996) the Court ruled that it was up to the court to ensure that the defendant received effective voir dire. In **Tighe v. Crosthwait**, 665 So. 2d 1337(Miss. 1995) , the Court ruled that the court has the duty to see that competent , fair and impartial jury is empaneled. **Peters v. State,** 314 So. 2d 724(Miss. 1975) stated that the defendant has the right to question the jurors for cause after they have been determined to be qualified jurors on voir dire by the court. **Jones v. State**, 133 Miss. 684, 98 So. 150(1923) says that denial of this right to question is reversal error.

The Judge , by announcing after some of the panel members had indicated prejudice or knowledge of the facts that they would not have to answer any more questions, communicated implicitly to the other panel members if they wanted to stay on the jury, they should be cautious in giving any response that might indicate pre-judgment. What this did, despite no objection from

Defense, or the State for that matter, was these jurors were not subject to further inquiry and disposed of without any input from the Defense.

The panel member Bloodworth with persistent reservations about finding a defendant guilty because the member was employed at the Penitentiary should have been treated just as those who had heard about the case. During jury selection in chambers, the judge revealed he knew Mr. Bloodworth because he used to shoe the Judge's horse. The Judge acknowledged that many people in the County worked for MDOC, it was hard to excuse everybody. (T46) S\

The Judge, when the panel member who worked at the penitentiary/jail questioned her fairness because of conduct by Neal at the jail, should have told the other panel members to disregard her report about Neal.

Juror Selected who Could not See when Exhibits Required Seeing.

Ardis Lee who during voir dire insisted he could not see was put on the jury with the caution that the judge would see during trial if he could see and when he was asked during an exhibit if he could see. Naturally once the juror is into the evidence, including hearing the video confession, so to speak, he will say he had no trouble seeing. The inflammatory evidence will encourage him to stay and find Neal guilty. Any jury discussion on the spots of blood on the phone and the pants on the night stand will not see Lee participating, if he could not see.

Parties allowed to Define "Reasonable Doubt" without Court disallowing and Jurors found to be Confused and Stricken During Selection.

Here Neal recounts what went on during voir dire. The D. A. said the State's burden was beyond a reasonable doubt not reasonable doubt.(T24) Without objection first saying Mississippi did not define reasonable doubt the D. A. said it was what your heard from the evidence, what law was given to you by judge Baker and your common sense. He said you put these three things together and reach a decision on the case. He again said that judge Baker would not tell them what reasonable

doubt was that each member would have to decide. Mr. Norris Genne Dungan, number 185 said proof would have to be without all doubt.(T25) Mr. G. .A. Johnson, 216, said what was the D A definition between reasonable and all. The DA said my definition doesn't really matter unfortunately. I bet mine and Mr. Barnett's definition is different. It is just something that you have got to decide in your own mind once you hear the evidence. and I wish I can--I sometimes hesitate about asking this question because typically somebody is going to ask me what is the definition of beyond a reasonable doubt as opposed to beyond all doubt and I really can't give it to you. I always like to say, well, when you are finally convinced one way or the other is the best way I can describe it."(T26)

When the Defense counsel voir dired he continued the discussion about reasonable doubt, saying there was no legal definition, "because really a reasonable doubt is up to you and what is reasonable in your mind. I've always thought a reasonable doubt, the word 'reasonable' is reason able. It is able to be arrived at through reason. That is a doubt that is able to be arrived at through reasoning and so if you have reasonable doubt as to the defendant's guilt or innocence and you are selected to serve on the jury, would you not hesitate to vote not guilty? All of you?...(T39) (there was no response) . ***The Judge even remarked in jury selection that he had noted Mr. Dungan, white male number 185, reacted when the DA was talking about reasonable doubt*** . The Judge said he never knew when jurors really understood the fine lines that a lawyer did. He asked the DA was he going to dismiss number 185 and the DA said probably not but if he needed to get rid of him, he would use one of his strikes. The Court said if the DA was going to strike him, he was going to give Defense counsel a chance to rehabilitate him "because often times I think a juror gets confused on that reasonable doubt." Defense counsel said he thought the DA would be sportsmanlike and allow number 185 to stay and during the trial the DA could rehabilitate him.

Neal advances this proposition though it is met with precedent by the Supreme Court stated

in **Thorne v. State**, 348 So.2d 1011, 1013 (Miss.1977).**Gillum v. State,** 468 So.2d 856, 863-64 (Miss.1985) of Mississippi that Judge McMillan acknowledge in **Kennedy v. State**, 766 So.2d 64,65 (Miss.App.,2000), could not be upset by that court.

Here Neal shows that the judge participated indirectly in the exchange of views given to the jury panel by the attorneys, and even acknowledged that it probably confused juror panel member.

PROPOSITION III

The Defendant Was Denied a Fair Trial Because the Judge and the Jury Pool All Knew Sufficient Information about the Highly Publicized and Naturally Attention-grabbing Decapitation Murder.

Now as to widespread knowledge of the details of the crime that the judge acknowledged the entire pool had, relevant are the principles set forth in **Fisher v. State**, 481 So. 2d 203, 214-223(Miss. 1985). In **Tennison v. State,** 79 Miss. 708, 713, 31 So. 421, 422 (1902) the Court said:

> It is one of the crowning glories of our law that no matter how guilty one may be, no matter how atrocious his crime, nor how certain his doom, when brought to trial anywhere he shall, nevertheless, have the same fair and impartial trial accorded to the most innocent defendant. Those safeguards, crystalized into the constitution and laws of the land as the result of the wisdom of centuries of experience, must be, by the courts, sacredly upheld, as well in case of the guiltiest as of the most innocent defendant answering at the bar of his country.

In **Mhoon v. State,** 464 So.2d 77, 81 (Miss.1985) the court stated: "Respect for the sanctity of an impartial trial requires that courts guard against even the appearance of unfairness...."

In **Fisher** at 215 the Court said:

> As our recent decision in Johnson v. State, 476 So.2d 1195 (Miss.1985) well demonstrates, we have overlooked some of our earlier cases which contain much wisdom and are still good law.
>
> > The sound exercise of the discretion vested in the trial judge when faced with a motion for change of venue must be informed by the evidence presented at the venue hearing coupled with the trial judge's reasoned application of his sense of the community and, particularly in a case such as this, an awareness of the uncontrovertible impact of saturation media publicity upon the attitudes of a community. No resort to expert psychological or behavioral science testimony is necessary to inform the judicial mind of that which common sense and experience have taught. A venire drawn from a fair cross-section of the community in theory and

> in fact is supposed to, and generally will, represent that community-and reflect the biases and prejudices of that community-as every judge and lawyer who has ever picked a jury well knows. The trial judge must also exercise his discretion consistent with legally established criteria which, as we will explain below, require more than the mere selection of twelve jurors against whom no challenge for cause may lie. Johnson v. State, 476 So.2d at 12; Seals v. State, 208 Miss. 236, 248-49, 44 So.2d 61, 67 (1950).
>
> Fundamentally, the trial judge and this Court as well must keep ever in mind that a motion for change of venue raises not only a procedural point; rather, the office of the motion is to afford the accused that most fundamental of all rights he possesses under our law: his right to a fair trial before an impartial jury, secured to him by Miss. Const. Art. 3, §§ 14 and 26 (1890).

Neal contends that under the circumstances that the Judge acknowledged the jury pool had been subject to widespread and extremely inflammatory pre-trial publicity in this case, he was denied a fundamentally fair jury trial when a change of venue wasn't ordered by the court.

Some of the places in the record during voir dire this came up are as follows. Juror (T18) Mrs Sammy Lella Laws, number 53 Said she had heard about the case and read about it in the paper the Judge said: " Most everybody has haven't they?" she agreed. Mrs. Laws said she already formed a opinion and the judge said she didn't have to answer anymore questions. (T19)

The judge remarked that sure a lot of folks in here have heard about this case and he said "What we are looking for is if you are telling me that you have got your mind made up...(if you have) I don't want you." Mrs. Davis said she didn't have her mind made up and the judge further explained they were looking for people that were fair and impartial and who would listen to the evidence and make a decision based on what they heard in the court room: " Rather than what you here up and down these streets or in the coffee shop somewhere."(T11) To the question "Do you see where I'm coming from" Mrs. Davis answered yes. The judge went on to elaborate that: " when things happen in a small community, we all hear about it. You know, if we are alive and up walking and we got ears and eyes, we know pretty much what's going on but at all the times, we don't get

the true facts. We don't get the facts that would let us fairly judge a person and if we go on this morning and if you feel like you have got the case pre-judged, it doesn't make any difference which way it is, we need to know about it. Okay?" (T12)

PROPOSITION IV

The Defendant Was Denied a Fair Trial by an Impartial Jury under the Circumstances When a Female Juror Left the Jury Box and the Courtroom and When She Was Retrieved the Judge Did Not Conduct Any Examination for Improper Influences During Her Absence.

T163 a juror left the room and the Judge instructed the Bailiff to go look for her and see what was wrong. There was a brief recess. When she returned there was no inquiry as to whether she had been subjected to some inappropriate pressure, or conversation when she was outside the control of the Bailiff.

In **Watts v. State**, 733 So.2d 214, 244(Miss.,1999), the court distinguished the rule of **Woods v. State**, 43 Miss. 364, 372-73 (1870) that consent to dispersal was not allowed in a capital case. In **Woods** the case was murder but capital at that time and the court said:

> In order to maintain the purity and integrity of this species of trial, great care and precaution on the part of the courts should be observed to guard the jury against improper influences; and the more effectually to do this, we hold the only safe practice to be to regard the separation of the jury, even by the permission of the court, during the trial of a capital case, either with or without the consent of the prisoner, except in a case of great necessity, or the separation of any of the jurors from their fellows during the progress of the trial, without being attended by a proper sworn officer, to be conclusive evidence of such an irregularity as will vitiate the verdict and render a new trial necessary

In **Grimsley v. State**, 212 Miss. 229, 233-234, 54 So.2d 277, 278-279 (1951), the court quoted from other cases and collected the precedent that seemed to say that separation created a presumption of improper influence. The judge here should have interrogated this juror with counsel present to determine whether she was influence. **White v. State**, 566 So.2d 1256, 1260(Miss.,1990) cited **Grimsley** , after acknowledging the trial court in White had examined the two groups of jurors

who were in different areas of the courthouse yard and determined none were subject to any influence.

PROPOSITION V

Defendant Was Denied His Right to Confrontation by the Hearsay Content of the Investigators' Testimony as to Motive and Unusual Act of Child's Window Being Locked

There are two glaring examples of this. Without objection to hearsay (T77), Mary said that when Michael came back, he told her his bedroom window was locked, the air conditioning on, and that he could hear his baby brother inside but that no one would come to the door and Michael said "That seems odd. My window is never locked."

Officer Hodges also had interviewed Michael and confirmed this hearsay. The hearsay from Michael also proved as unusual that the air conditioner was left on.

Again Defendant cites ***Crawford v. Washington,*** 541 U.S. 36, 124 S.Ct. 1354, where the United Supreme Court held, Justice Scalia writing for majority, that " out-of-court statements by witnesses that are testimonial are barred, under the Confrontation Clause, unless witnesses are unavailable and defendants had prior opportunity to cross-examine witnesses, regardless of whether such statements are deemed reliable by court".

PROPOSITION VI

The Appellant Was Denied Effective Assistance of Counsel When Trial Counsel: (1) Promised in Opening Intruders had killed Lakeshia and threatened Neal if he told and Neal had told the Investigators, but never again touched on this subject at all (2) Failed to Object to Crawford V. Washington Hearsay Used to Develop Motive and Culpability; (3) Failed to Cross Examine Witnesses on the Crime Scene to Develop support for PostMortem Decapitation and use Autopsy concluding such; (4) Failed to Object to Jury Instruction that did not include Decapitation as the Cause of Death; (5) Failed to Move for a Change of Venue; (6) Failed to Call Neal to Testify in support of Intruder Defense; (7) Failed to Make Timely Objections and Demand Adverse Rulings from the Court; (8) Failed to Request Lesser Included Manslaughter and Mutilation Instructions.

The Defendant earnestly contend that the Record shows beyond doubt that he was denied the right to counsel under the Sixth Amendment to the **U. S. Constitution**. Neal emphasizes that "totality of the circumstances" of counsel's performance in the proceedings is the measure of whether the below failures constitute ineffective assistance. The State will encourage the Court to dispatch many of Neal's arguments because of procedural default by Defense Counsel and that position will point out any additional complaints of ineffective counsel not specified below, so for that purpose Neal incorporates all his complaints of a fair trial denied here as the fault of ineffective counsel, in addition to any free-standing causes above or he may attribute to lack of such trial.

The Law Of Ineffective Assistance of Counsel

"The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." **Herring v. New York**, 422 U.S. 853, 862, 95 S.Ct. 2550, 2555, 45 L.Ed.2d 593 (1975). In **Strickland v. Washington**, 466 U.S. 668, 693-694 696, 104 S.Ct. 2052, 2068(1984), the Supreme Court(all emphases by writer) said:

> On the other hand, we believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case. ... ***The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.***

The Court in **Strickland** , at U.S. 696 S. Ct. 2069, went on to state how critical counsel performance was in assuring a just result, maintaining confidence in the judicial system:

> Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the ***fundamental fairness*** of the proceeding whose result is being challenged. In every case the court should be concerned with ***whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results***

Surely applicable here is the following requirement from **Strickland,** U. S. 685, S. Ct. at 2063:

> Thus, a fair trial is one in which evidence subject to ***adversarial testing*** is presented to an impartial tribunal for resolution **of issues defined in advance** of the proceeding.

Then at U. S. 688-689 and S. Ct. 2065, stated the duty which was clearly violated here:

> The proper measure of attorney performance remains simply reasonableness under prevailing professional norms. ... From counsel's function as assistant to the defendant derive the ***overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.***(citation omitted.)

At U.S. 690-691, S. Ct. 2066, the Supreme Court pointed out: "***In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.***" Finally, the Court said U. S. 695 - 696, S. Ct. 2068-2069

> Some errors will have had a pervasive effect on the inferences to *696 be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.

This benchmark discussion of the 6th Amendment right counsel has been rightly adopted by Mississippi Appellate Courts, but it was not new to our jurisprudence. See ***Perry v. State,*** 682 So.2d

1027, at 682 So.2d 1029, (Miss. 1996); ***Washington v. State***, 620 So.2d 966, (Miss. 1993); ***Stringer v. State***, 454 So.2d 468, 477 (Miss. 1984); **State v. Tokman**, 564 So.2d 1339, 1343 (Miss. 1990).

Defense Counsel by Saying in Opening That Intruders Killed Lakeshia and Defendant Told this to Investigators and Then Not Cross Examining Any Investigator as to the Intruder Defense to Guilt Effectively Became a Witness Against Defendant and Denied Him a Fair Trial

Defense counsel's opening statement provided the framework of a defense that unknown intruders, with a purpose of their own, had come in, held Neal at gunpoint, then first shot and then decapitated Lakeshia (T71-74). He also said Neal had told the investigators. However, he did not question one investigators about whether Neal had told them, leading to the clear inference that Neal had not. Defense counsel did not cross examine the crime scene depictions to show that Neal had not killed Lakeshia. He did not question decapitation as the cause of death by critiquing the crime scene. The State was allowed through Specialist Chancellor to give an expert opinion that the crime scene as the officers came to see it was staged. Strikingly, Defense counsel did not disagree with Neal's position when the Judge asked Neal about testifying that he disagreed with Neal. All of this led to a conclusion that Defense counsel disbelieved his client. There was no reason but to render damning inference against the Defendant, that Defense counsel s told the jury about the intruder defense, but did not back it up during cross examination. Defense admits that he had not investigated the case and did not know that Neal had not told of the intruders, when he said Neal had during voir dire, but didn't confront the officers on cross examination.

This court in , ***Russell v. State***, 849 So.2d 95,124 (Miss.2003), a homicide case, held that:

> "defense counsel has a duty to investigate and prepare, particularly where it involves investigation of a potential defense."

The Appellant contends that adequate preparation of the defense by Defense Counsel would have

caused him not to state in opening that Neal had told the officers of the intruder (T71-74)defense and to have questioned the officers about the crime scene to show that decapitation occurred after death by the two bullets to Lakeshia's head.

The Fifth Circuit in ***Rummel v. Estelle***, 590 F.2d 103,104 (C.A.Tex. 1979), held:

> Since "investigation and preparation are the keys to effective representation," court-appointed counsel have a duty to interview potential witnesses and "make an independent examination of the facts, circumstances, pleadings and laws involved." (Internal citations omitted)

Defense Counsel breached that duty and concomitantly prejudicing and denying the Appellant a fair trial.

Failed to Object to Crawford v. Washington Hearsay
Used to Prove Motice and Unique Act of Locking Child's Window

Hearsay is defined by **Lee v. State**, 338 So. 2d 395, 397(Miss. 1976). The cases of **Williamson v. State**, 512 So. 2d 868, 873(Miss. 1987); **Mitchell v. State**, 495 So. 2d 5, 8(Miss. 1986 and **Williams v. State**, 595 So. 2d 1299, 1307(Miss. 1992) all explain how the confrontation clause of the Sixth Amendment to the **U. S. Constitution** is implicated by hearsay and only hearsay that has traditional credibility is allowed, but restricted in criminal prosecutions. There can be no doubt that the hearsay about was harmful to Neal. **Bridgeforth v. State**, 498 So. 2d 796, 800(Miss. 1986)(testimony of officers concerning the results of their investigation is inadmissible hearsay and reversible error.) Such hearsay of the motive and Michael's window locked was not harmless error, because it was not cumulative. See **Jones v. State**, 606 So. 2d 1051, 1057(Miss. 1992)

This hearsay account of Michael came in through the testimony of Mary Loerker and then was substantiated by Officer Brandon Hodges. What this "locking" of Michael's window showed was that only a person who knew that there was a young child, that that child would come home from school and use his un-locked window as an entranceway, would be either his mother, Lakeshia or Neal. So, this hearsay showed Neal left after Lakeshia was dead. It would also fit with the

officers opinion that the crime scene was altered to prove someone else committed the murder.

Officer Davis, or maybe it was Officer Hodges, had interviewed family members and others and testified to the jury that Neal had a motive of infidelity. A specific and timely hearsay objection by Defense Counsel based on ***Crawford*** would have disallowed the testimony of motive and culpability inference from Michael's locked window.

Failed to Cross Examine Witnesses on Absence of Blood Spew, bone fragments in pool of blood from gunshots and not cutting of any neck vertebrae such Denoting postmortem Decapitation and bringing up the Autoposy to prove post mortem Decapitation..

There is no doubt that for decapitation to have been the cause of death, that when Neal, as the investigator testified to, stood with his back to the carport door and cut Lakeshia's throat, he first cut would have been to the side of her neck opposite the night stand where the phone, phone books and Lakeshia's white pants were. Yes, there is blood on those items, but it is spots, not a spew of blood. After being shot in the head and assuming she was still alive, her blood pressure would be high from a racing heart. Recall that Neal said he got the knife from the kitchen, reasonable believable after the two gunshots, thus time passing to allow them to cause death. The kicking and jerking was just as likely from involuntary muscle contractions from the nerves in the neck being severed. Common sense does not allow the kicking and jerking to indicate Lakeshia was still alive when she was decapitated. The massive, if you would, quantity of blood that drained directly onto the sheet just below the pillow, again supports a post mortem decapitation. Neal would have benefitted by proof of Steven Hayne's autopsy conclusion, either by impeachment of the cause of death or by calling Hayne himself to prove post mortem decapitation as the cause of death.

Cross Examination that Projected Neal lying about both Gunshots and Head

It was absolutely strange, only explained by the intruder (T71-74) defense which was not

advanced except in Defense counsel's Opening, that Defense counsel he would reveal through his questioning that Neal may have lied both about the two bullets to Lakeshia's head and the decapitation without including that someone, the intruders, (T71-74)committed the heinous crime. It cannot be a strategic choice that Defense counsel would question the gunshots, when he knew that Medical Examiner Steven Hayne had rendered a report of "post-mortem decapitation".

Failed to Object to the Absence of "decapitation" in the Instruction on the Elements of the deliberate design murder."

Defense Counsel failed to object to the failure of the jury instruction ***S-1A &S-2A*** the on the elements of the crime of deliberate murder not to require the jury to determine beyond a reasonable doubt that Lakeshia died from decapitation.

Failed to Move for a Change of Venue

Already discussed above is the factual predicate for change of venue.

Failed to Call Neal to Testify in Support of Intruder Defense

Section 26 of the **Mississippi Constitution of 1890** gives an accused the right to testify in his own behalf.

Culberson v. State, 412 So.2d 1184, 1186 (Miss., 1982.) The Court said:

> The denial of the right of an accused to testify is a violation of his constitutional right regardless of whether the denial stems from the refusal of the court to let a defendant testify as in Warren v. State, 174 Miss. 63, 164 So. 234 (1935), or whether the denial stems from the failure of the accused's counsel to permit him to testify.

We know from the record (Re 64-66, T 219-221)) that Neal remembered that the Judge had initially told him before the trial started that he had a right to testify and he alone would make that decision. Defense counsel recalled at this time that he had told Neal that he really needed to hear all the testimony before making up his mind to testify. Neal then said he had decided not to testify. Reports

outside this record are to the contrary.

It is apparent from the Defense Counsel's opening statement about the intruders that Neal needed to testify. He should have on the record recounted a difference of opinion, but also we know as it is argued Defense Counsel was ineffective in not advancing the intruder defense through cross examination .

Failed to Make Timely Objections and
Demand Adverse Rulings from the Court

Defense counsel failed to make elementary hearsay and leading objections during the course of this trial which further denied Neal effective counsel. Leading questions that go to material facts and provide proof of guilt violate due process and fair trial. In **Clemons v. State**, 732 So. 2d 883, 889(Miss. 1999), the Court defined "leading questions" and unlike used here, refused to reverse because "a leading question may be used to rebut an implication made on cross-examination and to further develop a witness's testimony". The Court in **Holliday v. State**, 758 So. 2d 1078, 1081-82(Miss. App. 2000) reversed because of an opinion on the nature of the crime whether a "strong arm robbery" had occurred.

The rule of "plain error", allows review of Neal's claims here . The Judge has a duty to assure a fair trial and he is implicitly clothed with more than an observer role. See ***Butler v. State***, 608 So.2d 314, at 318(Miss. 1992)(Circuit Judge should perceive and declare "plain error"; ***Whigham v. State***, 611 So.2d 988, at 996(Miss. 1992)("plain error" in closing argument); ***Brooks v. State***, 209 Miss. 150 at 155, 46 So.2d 94 at 9(1950)("Errors affecting fundamental rights are exceptions to the rule that questions not raised in the trial court cannot be raised for the first time on appeal.") The use of leading questions on direct or re-direct was fully discussed in ***Mosby v. State***, 749 So. 2d 1090(Miss. App. 1999)(red. and cert. denied). Here no doubt the questions were both leading and there had been no answers given before without leading questions. The answers went

to the core issues and materially assisted the State in its proof. When the harm caused by a leading question is neither speculative nor inconsiderable, reversal is warranted. ***Whitlock v. State***, 419 So. 2d 200, 203(Miss. 1982); ***McDavid v. State***, 594 So. 2d 12, 16-17(Miss. 1992)

Failed to Request Manslaughter and Desecration Instructions

These complaints are addressed below in proposition Eight.

Either "plain error" or Ineffective Counsel

The Court, it is respectfully submitted, compelled to either conclude counsel was ineffective or that "plain error" principles required the Court to intervene to protect the substantial constitutional rights of the Defendant and guarantee a fair trial by jury.

PROPOSITION VII

Whether a Valid Conviction Exists If the Judge Does Not Accept and Jury Verdict and Does Not Adjudicate the Defendant Guilty

The written verdict at (CP237) Says: "we the jury find the defendant Jermaine Neal guilty as charged." After the polling, the judge declared that the jury rendered a unanimous decision. (T257) After some instruction to jury about future jury service and discussing the decision with the public, the Judge at (T259) order the defendant to be brought to the bench but without stating he had accepted the verdict of the jury, said: " Mr. Neal, the jury has found you guilty", and stated it had no discretion in sentencing and sentenced Neal to the Department of Correction. (T259-260) The Honorable Circuit Judge signed a pleading entitled " trial verdict of the jury and sentence" (CP261-262) which quoted the verdict as quote " We, the Jury, find the Defendant, **JERMAINE NEAL** (CP261)guilty of murder." Immediately then the document read: " The Jury was polled, and it was determined that the verdict was unanimous. **WHEREUPON** , based on the Jury's verdict of guilty of murder, the Court then proceeded to conduct a separate sentencing hearing:" .... (CP262) That

document did not adjudicate the defendant guilty of any crime.

§ 99-19-3 of **M C A,** reads in part as follows:

> (1) Except as provided in subsection (2) of this section, ***a person*** indicted for a criminal offense ***shall not be convicted*** thereof, ***unless*** by confession of his guilt in open court or by admitting the truth of the charge against him by his plea, or ***by the verdict of a jury accepted and recorded in court.*** A ***person*** charged with an offense ***shall not be punished*** therefor ***unless legally convicted*** thereof in a court having jurisdiction of the cause and of the person.

MS Const. Art. 3, § 22. Double jeopardy, says:

> No person's life or liberty shall be twice placed in jeopardy for the same offense; but there must be an actual acquittal or conviction on the merits to bar another prosecution.

There is no doubt from **McLarty v. State**, 842 So.2d 590, 596(Miss.App.,2003), that Section 99-19-3 of **Mississippi Code Annotated** has significance as to accepting the verdict and adjudicating the defendant guilty . There the court reversed for a failure to poll requested after the verdict was accepted. Judge Southwick, in concurring, referred to **State v. Taylor**, 544 So.2d 1387 (Miss.1989), where the verdict was not guilty and a late poll request given to the State and a verdict later returned of guilty and thus double jeopardy protection was violated.

PROPOSITION VIII

Whether Defendant Is Denied a Fair Trial When a Lesser Included Offense Instruction on Manslaughter Desecration of a Human Corpse are Not Given Though They are Justified by the Evidence .

The State had filed a proposed instruction, S-4(RE 30, CP 230), on heat of passion manslaughter, but at the beginning of the session on jury instructions, (T 222, RE 67), the judge declared there was no evidence to support the instruction. While Defense Counsel did not object, Neal submits the Court had a duty to instruct. In Neal's statement, it was explained there that Neal did not intentionally shoot Lakeshia, but the gun went off and that he was operating under the passion of jealousy. There was no instruction offered on the corpse desecration theory of the case,

but it would have been justified if the jury proceeded under conviction because of decapitation and ignored the death by the two bullets to the head.

Neal argues that the jury should not have been put in the predicament of finding him guilty of murder or releasing him, but a lesser included offense instruction of manslaughter or mutilation of a corpse should have been given by the court. See **Beck v. Alabama**, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980)(invalidating an Alabama statute that prohibited the trial court from giving a lesser included offense instruction in a trial for a capital crime). In **Spaziano v. Florida**, 468 U.S. 447, 455, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), the Court stated: "The absence of a lesser included offense instruction increases the risk that the jury will convict ··· simply to avoid setting the defendant free···· The goal of the Beck rule, in other words, is to eliminate the distortion of the fact-finding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence."

Section 97-29-25(2)(a), of **Mississippi Code annotated** provides for a three year prison term and a $5,000.00 fine for desecration in any way of a human corpse.

In ***Booker v. State***, 745 So.2d 850 (Miss.App.,1998), this court ruled:

> It is, of course, essential that the jury is instructed on the defense's theory of the case. **Manuel v. State**, 667 So.2d 590, 591 (Miss.1995). However, if an instruction requested by the defense incorrectly states the law, is fairly covered elsewhere in other instructions, or is without foundation in the evidence, it is not error for the trial court to refuse it. **Heidel v. State**, 587 So.2d 835, 842 (Miss.1991).

Then in ***Edwards v. State***, 737 So.2d 275 (Miss.,1999):

> "Prior precedent of this Court makes it clear that an issue involving the denial of a requested jury instruction:
>
> > ... is procedurally preserved by the mere tendering of the instructions, suggesting that they are correct and asking the Court to submit them to the jury. This in and of itself affords counsel opposite fair notice of the party's position and the Court an opportunity to pass upon the matter. When the instructions are refused, there is no reason why we should thereafter require an objection to the refusal unless we are to place a value upon redundancy and nonsense." **Carmichael v. Agur Realty Co.,**

Inc., 574 So.2d 603, 613 (Miss.1990)

PROPOSITION IX.

WHERE CUMULATIVE ERRORS SEPARATELY CONSIDERED MAY NOT JUSTIFY REVERSAL BUT THE CUMULATIVE EFFECT OF THE ERRORS DENY APPELLANT A FUNDAMENTAL FAIR TRIAL THEN REVERSAL IS NECESSITATED

The Defendant earnestly contends, most respectfully, that it is inconceivable that this Court will conclude that he received his rights to a fair and impartial trial and cites **Byrom v. State**, 863 So.2d 836, 846-47 (Miss.2003) where the court said:

> What we wish to clarify here today is that upon appellate review of cases in which we find harmless error or 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, although not reversible when standing alone, may when considered cumulatively require reversal because of the resulting cumulative prejudicial effect. That having been said, for the reasons herein stated, we find that errors as may appear in the record before us in today's case, are individually harmless beyond a reasonable doubt, and when taken cumulatively, the effect of all errors committed during the trial did not deprive Michelle Byrom of a fundamentally fair and impartial trial. We thus affirm Byrom's conviction and sentence.

PROPOSITION X

The Court Denies Defendant a Fair Trial, Due Process of Law and Fundamental Fairness When it Fails to Grant a New Trial Where the Evidence Is Insufficient and May Have Been the Result of Bias, Prejudice and Improper Prejudicial Evidence

As clearly shown above, the evidence was insufficient to convict under the indictment alleging decapitation and thus the JNOV should have been granted. In **McClain v. State**, 625 So. 2d 774, 778(Miss.1993), this Court, said: "(the State gets) the benefit of all favorable inferences that may be reasonably drawn from the evidence... We are authorized to reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty."

Now, as for the motion for new trial **Pearson v. State**, 428 So.2d 1361(Miss.1983) teaches

that this motion does not seek discharge of the Defendant and later stated:

> Cases are hardly unfamiliar wherein the Court holds that the evidence is sufficient so that one party or the other was not entitled to judgment notwithstanding the verdict but, nevertheless, that a new trial in the interest of justice should be ordered. (Citations omitted.)

In both **Richmond v. State,** *supra* and in **Fisher v. State,** 481 So. 2d 203, 212(Miss. 1985) the State did not prove the allegation in the indictment. In **Fisher** the state by indictment allegation had undertaken the burden to prove two underlying predicate felonies for capital murder. It failed and the case was reversed.

CONCLUSION

The Appellant Neal urges this Honorable Court to conclude that he did not receive a fair trial and his conviction must be reversed and he be discharged.

Respectfully submitted,

James A. Williams

James A. Williams, MSB [redacted]
Attorney for Appellant

CERTIFICATE OF SERVICE

I, the undersigned James A. Williams, counsel for the Appellant, in the above styled and numbered cause, do hereby certify that a true and correct copy of the above and foregoing Brief of Appellant has been mailed by United States Mail, postage prepaid to the following:

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