IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

FLOYD ROBINSON — APPELLANT

V. — NO. 2007-KA-2202-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

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

1. State of Mississippi
2. Floyd Robinson, Appellant
3. Honorable Forrest Allgood, District Attorney
4. Honorable Lee J. Howard, Circuit Court Judge

This the 30th day of May, 2008.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE RULES

OTHER AUTHORITIES

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

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V. — NO. 2007-KA-2202-COA

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STATEMENT OF THE ISSUES

ISSUE ONE:

WHETHER THE APPELLANT'S FIFTH AMENDMENT RIGHTS WERE VIOLATED.

ISSUE TWO:

WHETHER STATEMENTS MADE DURING THE VIDEO-RECORDED STATEMENT REGARDING THE APPELLANT'S PRIOR BAD ACTS WERE INADMISSIBLE UNDER THE MISSISSIPPI RULES OF EVIDENCE.

ISSUE THREE:

WHETHER STATEMENTS MADE DURING THE VIDEO-RECORDED STATEMENT REGARDING THE APPELLANT'S PRIOR BAD ACTS WERE INADMISSIBLE UNDER THE CONFRONTATION CLAUSE OF THE UNITED STATES CONSTITUTION.

ISSUE FOUR:

WHETHER THERE WAS PLAIN ERROR DUE TO THE TRIAL COURT'S FAILURE TO CORRECTLY APPLY MISSISSIPPI RULE OF EVIDENCE 609 WHEN THE STATE IMPROPERLY IMPEACHED THE APPELLANT REGARDING HIS PRIOR CONVICTION DURING CROSS-EXAMINATION.

ISSUE FIVE:

WHETHER THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT THE

DEFENSE COUNSEL'S SELF-DEFENSE JURY INSTRUCTION.

ISSUE SIX:

WHETHER THE TRIAL COURT ERRED WHEN IT ALLOWED THE STATE TO DEFINE REASONABLE DOUBT.

ISSUE SEVEN:

WHETHER THERE WAS CUMULATIVE ERROR THAT DEPRIVED APPELLANT OF HIS RIGHT TO A FUNDAMENTALLY FAIR AND IMPARTIAL TRIAL.

STATEMENT OF INCARCERATION

Floyd Robinson, the Appellant in this case, is presently incarcerated in the Mississippi Department of Corrections.

STATEMENT OF JURISDICTION

This honorable Court has jurisdiction of this case pursuant to **Article 6, Section 146 of the Mississippi Constitution** and **Miss. Code Ann. 99-35-101.**

STATEMENT OF THE CASE

This appeal proceeds form the Circuit Court of Oktibbeha County, Mississippi, and a judgment of conviction for capital murder against Floyd Robinson, following a jury trial on January 29 - February 1, 2007, honorable Lee J. Howard, Circuit Judge, presiding. Mr. Robinson was subsequently sentenced to life imprisonment in the custody of the Mississippi Department of Corrections.

FACTS

On November 30, 2005, Shannon Williams (Williams) of the Oktibbeha County Sheriff's Department was paged to the front lobby of the county jail, in Starkville, where a woman asked if he would go to a residence on Apple Street to check on her friend. (T. 130-31). The woman indicated that she was scared something had happened to her friend. (T. 131).

Williams agreed to check on her friend, and drove to the residence, a short distance from the jail. (T. 131). When the officer pulled up, he went to the door of the house and saw a body of a deceased female who would be identified as Bridgette Moore (Moore). (T. 131). The Starkville Police Department was subsequently contacted and arrived on the scene. (T. 131). Investigators searched the area outside the house and found a brown paper bag, a black comb, and an unused .25 shell casing on the premises. (T. 145). Investigators also found what appeared to be blood on a cinder block holding up the steps to the house, blood on the third step, and two broken acrylic finger nails. (T. 151).

The initial suspect in the investigation was Floyd Robinson (Robinson) due to the fact that he was the victim's boyfriend. (T. 204). Robinson was not on the scene. (T. 204). The Starkville Police then contacted a detective in Columbus and asked them to ride by Robinson's home. (T. 204).

Members of the Columbus Police Department set up a peremeter around Robinson's home, and members of the Starkville Police Department went to the scene. (T. 205). After being unable to make contact with Robinson, officers put gas in the house and subsequently taken into custody and taken to the Columbus Police Department for interrogation. (T. 207-208).

Robinson was read his ***Miranda*** rights and signed a waiver. (T. 208). Over the course of an interrogation lasting upwards of five (5) hours, Robinson admitted to shooting the victim, however, he claimed that it was an accident that happened after an altercation with the victim. (T. 273, Exib. 27).

Robinson was subsequently indicted for the murder of the victim. (C.P. 5, R.E. 8). Robinson was tried, and, after deliberation, a jury returned a guilty verdict against him. (C.P. 60, R.E. 11). Robinson was subsequently sentenced to life in the custody of the Mississippi

Department of Corrections. (C.P. 64, R.E. 12).

On March 2, 2007, Robinson filed a Motion for Judgment Not Withstanding the Verdict. (C.P. 96, R.E.13). The motion was denied by the trial court on September 6, 2007. (C.P. 99, R.E. 14). Feeling aggrieved by the verdict of the jury and the sentence of the trial court, the Appellant filed a notice of appeal. (C.P. 116 , R.E.15).

SUMMARY OF THE ARGUMENT

The Appellant's Fifth Amendment rights were violated during the course of his interrogation. While discussing the waiver of his ***Miranda*** rights with police investigators, the Appellant made three separate statements concerning his desire for a lawyer. Furthermore, when asked why he was being interrogated, because that would be informative as to whether he needed a lawyer, police officers said they would tell him as soon as he signed his ***Miranda*** waiver. This constituted coercion in violation of the Appellant's Fifth Amendment rights.

Secondly, statements made during the Appellant's video-taped interrogation regarding the Appellant's prior bad acts and convictions were inadmissible under the Mississippi Rules of Evidence. The statements were inadmissible under both **Rule 404(b)** and **Rule 402.** The failure to properly exclude this evidence significantly prejudiced the Appellant and resulted in reversible error.

Thirdly, statements made during the Appellant's video-taped interrogation were in violation of the Appellant's fundamental constitutional right under the confrontation clause. The violation of this fundamental right warrants reversal.

Fourthly, the trial court committed plain error when it failed to correctly apply **Mississippi Rule of Evidence 609**, including conducting a balancing test or give a limiting instruction. The State improperly impeached the Appellant, resulting in reversible error.

Fifthly, the trial court erred when it failed to grant the Appellant his self-defense jury instruction. The Appellant's fundamental right to present the jury with his theory of defense was violated by the trial court. The Appellant contended that, in the course of defending himself, the gun accidently went off. The failure to grant the Appellant his self-defense jury instruction resulted in a violation of a fundamental right and warrants reversal.

Sixthly, the trial court erred when it allowed the State to define reasonable doubt. The error by the State in defining reasonable doubt rose to the magnitude of constitutional error and is subject to plain error analysis. The violation of this substantive right prejudiced the Appellant and therefore warrants reversal.

Lastly, all of the errors, while perhaps not reversible independently, when assessed cumulatively and taken in concert, deprived the Appellant of his fundamental right to a fair and impartial trial.

ARGUMENT

ISSUE ONE: WHETHER THE APPELLANT'S FIFTH AMENDMENT RIGHTS WERE VIOLATED.

i. Standard of Review

Because the admissibility of the Appellant's statements to investigators under the Fifth Amendment was not objected to at trial, the Appellant must proceed under the doctrine of plain error. If a contemporaneous objection is not made, an appellant must rely on plain error to raise the argument on appeal. ***Watts v. State***, 733 So. 2d 214, 233 (Miss. 1999). "The plain error doctrine requires that there be an error and that the error must have resulted in a manifest miscarriage of justice." ***Williams v. State***, 794 So. 2d 181, 187. (Miss. 2001) (citations omitted). Moreover, the plain error rule only is applied by Mississippi courts when the error effects an

appellant's substantive/fundamental rights. ***Id.***

ii. The Appellant clearly invoked his right to an attorney.

During the beginning of police interrogation, the Appellant invoked his right to an attorney on three separate occasions.

First, he asked, "I'm saying, why can't I have a lawyer present with me know? I'm saying I don't know what's going..." (Exib. 25). While phrased in the form of a question, this is a clear an unequivocal request for a lawyer. Someone does not ask for something they don't want. Therefore, police investigators should have ceased questioning immediately.

Through the course of essentially being talked out of his right to an attorney by police investigators, the Appellant said, "I might want a lawyer. I don't know what's going on." (Exib. 25). Finally, the Appellant's desire to have a lawyer present, he said, "I can't sign this if I don't have a lawyer or something and I don't know what's going on." The Appellant recognizes that an ambiguous request for counsel does not necessitate that investigators refrain from proceeding with the interrogation. *See e.g.* ***Davis v. United States***, 512 U.S. 452 (1994).[1]

Regardless, there was nothing equivocal or ambiguous about the statements made by the

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1. The Appellant, does, however, question the appropriateness of the position. Other states have expanded the rights of suspects during interrogation; *See e.g.*, ***State v. Hoey***, 881 P. 2d 504 (Haw. 1994) (holding that when a suspect ambiguously or equivocally requests a lawyer during interrogation, police must cease all questioning, or seek clarification of suspect's request); ***State v. Risk***, 598 N.W. 2d 641 (Minn. 1999)(concluding that police must cease questioning and clarify an accused's intentions if the accused makes an ambiguous or equivocal request for counsel during custodial interrogation). Even the majority opinion in ***Davis***, per Justice O'connor mention its holding "might disadvantage some suspects who – because of fear, intimidation, lack of linguistic skills, or a variety of other reasons – will not clearly articulate their right to counsel although they actually want to have a lawyer present." ***Davis,*** 512 U.S. at 460. Some legal theorists have concluded that the ***Davis*** rule will have a disproportionate impact. It has been written, "[s]ociolingusitic research indicates that certain discrete segments of the population, such as women and a number of minority racial and ethnic groups, are far more likely than other groups to avoid strong, assertive means of expression and to use indirect and hedged speech." Yale Kamisar, ***Gates, "Probable Cause," "Good Faith," and Beyond,*** 59 Iowa L. Rev. 551 note 11(1984). There can be little doubt that, though dated before ***Davis***, such studies and research are applicable today.

Appellant. He said, "I'm saying, why can't I have a lawyer present with me?" (Exib.25). That statement, at the very least, is an admission to not knowingly or intelligently understanding the ***Miranda*** rights, and, at most, a request for counsel.

iii. The Miranda Waiver was coerced, and, therefore, not voluntary.

In ***Neal v. State***, the Mississippi Supreme Court concluded that the signing of a waiver does not automatically make the subsequent statements voluntary, knowing or intelligent. ***Neal v. State***, 451 So. 2d 743, 753 (Miss. 1984). The ***Neal*** Court said,

> [T]he mere giving of the ***Miranda*** warnings, no matter how meticulous, no matter how often repeated, does not render admissible any inculpatory statement thereafter given by the accused.... When an accused makes an in-custody inculpatory statement without the advice or presence of counsel even though warnings and advice regarding his privilege against self-incrimination have been fully and fairly given, the State shoulders a heavy burden to show a knowing and intelligent waiver."

Id. at 753.

A suspect in a criminal investigation may waive his privilege against self-incrimination and his ***Miranda*** right to counsel before or during interrogation. However, there is a "heavy burden" resting on the prosecutor to demonstrate that the defendant "voluntarily, knowingly, and intelligently waived" his rights.[2] ***Miranda v. Arizona***, 384 U.S. 436, 475 (1966).

In order for a defendant to waive his right against self-incrimination, the waiver must be knowing, intelligent and voluntary. ***Id.*** at 444. The State has the heavy burden to prove beyond a reasonable doubt that the confession was voluntary. ***Cox v. State***, 586 So. 2d 761, 763 (Miss. 1991).

In order to be a valid waiver under ***Miranda***, that waiver must be voluntary, *i.e.*, "the

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2. This type of waiver is commonly known as a ***Zerbst*** waiver. *See* ***Johnson v. Zerbst***, 304 U.S. 458 (1938).

product of a free and deliberate choice rather than intimidation, coercion, or deception." ***Moran v. Burbine***, 475 U.S. 412, 421 (1986). In making a determination of voluntariness, the United States Supreme Court has stated that "[t]here is obviously no reason to require more in the way of a 'voluntariness' inquiry in the ***Miranda*** waiver context than in the Fourteenth Amendment confession context." ***Colorado v. Connelly***, 479 U.S. 153, 169-70 (1986).

As the Mississippi Court of Appeals has noted, in order for a waiver to be voluntary, a defendant must be aware of the nature of his self incrimination rights and the consequences of waiving them. ***Brown v. State***, 839 So. 2d 591, 600 (Miss. Ct. App. 2003).

The facts in the case *sub judice* are wholly analogous with a coerced consent to search with regard to Fourth Amendment jurisprudence. In ***United States v. Chavez-Villarreal***, the Fifth Circuit concluded that the consent was coerced and was not an independent act of free will. ***United States v. Chavez-Villareal*** , 4 F. 3d 124, 127 (5th Cir. 1993).

In ***Chazez-Villareal***, there was a stop of a vehicle at the Mexican border. This stop was found to be without probable cause. In the course of the stop, the officer smelled marijuana and, before returning the driver's alien registration card, requested and obtained a written consent to search the vehicle, whereupon marijuana and a gun were found. It is clear from the facts of the case *sub judice* that the ***Miranda*** waiver was coerced and therefore, not valid.

iv. Based on the Appellant's own words during interrogation, it cannot be concluded that the Appellant knowingly and intelligently waived his Miranda rights.

As noted above, the Appellant asked repeatedly concerning with obtaining counsel during the interrogation. He even went so far as to ask the investigators why he couldn't have a lawyer. Clearly, if the Appellant asked why he could not have a lawyer, he did not understand that he could have a lawyer. Therefore, based on his words and his words alone it cannot be reasonably

concluded that the Appellant understood the nature of his ***Miranda*** rights.

To be knowing and intelligent, a valid "waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." ***Moran***, 475 U.S. at 421. Therefore, it is clear that the Appellant did not knowingly and intelligently waive his ***Miranda*** rights.

v. Conclusion

As noted by the Mississippi Supreme Court, a violation of a defendant's Fifth Amendment right against self-incrimination while under custodial interrogation is a "violation of a fundamental constitutional guarantee." ***Edmonds v. State***, 955 So.2d 787, 805 (Miss. 2007). The violation of the Appellant's Fifth Amendment rights is both fundamental in nature and resulted in a manifest miscarriage of justice. Because there was not a knowing, voluntary and intelligent waiver of ***Miranda***, this honorable Court should reverse this conviction and remand for a new trial.

ISSUE TWO: WHETHER STATEMENTS MADE DURING THE VIDEO-RECORDED STATEMENT REGARDING THE APPELLANT'S PRIOR BAD ACTS WERE INADMISSIBLE UNDER THE MISSISSIPPI RULES OF EVIDENCE.

i. Standard of Review

The standard of review on appeal regarding the admissibility of evidence is abuse of discretion. ***Johnston v. State***, 567 So. 2d 237, 238 (Miss. 1990). Unless a trial court abuses its discretion in admitting the specific evidence, the appellate court will not find error. ***Shearer v. State***, 423 So.2d 824, 826 (Miss. 1983).

ii. Evidence concerning the Appellant's prior bad acts was not admissible under Mississippi Rule of Evidence 404(b).

During the State's case-in-chief, the State intended to enter into evidence, a lengthy video-taped interrogation of the Appellant regarding the facts of the instant case. The defense

counsel made a motion regarding the admissibility of the tape:

> "BY MS. CLINKSCALES: Your Honor, I'd like to suppress the interrogation video. There is inadmissible information concerning a possible criminal background of the defendant. I don't know if we can redact those portions.
>
> . . . .
>
> BY MR. ALLGOOD: If Your Honor please, the only other criminal activity that is on there is criminal activity involving him and Ms. Moore wherein there are other charges of domestic violence involving him and Ms. Moore. That's admissible. I got a case on that. That's Moss versus State –
>
> ....
>
> BY MS. CLINKSCALES: No, Your Honor. There is evidence of a criminal proceeding involving another young lady, which has nothing to do with Ms. Moore.
>
> BY THE COURT: What kind of criminal proceeding are you talking about?
>
> BY MS. CLINKSCALES: It's also a domestic violence or charges of domestic violence involving another young lady, Marilyn McKinney."

(T. 228-29, R.E. 16-17).

The State then reiterated its position that ***Moss v. State***, 727 So. 2d 720 (Miss. 1998) was controlling. The trial court subsequently questioned trial counsel regarding the exact contents of the video. Trial counsel replied,

> "BY MS. CLINKSCALES: Your Honor, apparently before they began interrogating Mr. Robinson they pulled his criminal record, and they had a printout of some statements and abstracts from different courts around the area of Clay County, Oktibbeha, Lowndes County. And they brought it up to him during that interrogation.
>
> BY THE COURT: What do you mean brought it up? They asked him if he had been convicted of another - -
>
> BY MS. CLINKSCALES: They didn't ask him if he had been convicted of

it. They told him about it. They questioned him about those convictions."

(T. 229-30, R.E. 17-18).

The State responded;

"BY MR. ALGOOD: If Your Honor please, initially my response is ***Moss***, which I've tendered to the Court. Secondly, Your Honor, insofar as the defendant's responses are concerned, as I recall one instance he says I pled guilty to something I didn't do. He doesn't, I guess you'd say, inculpate himself in any respect. He's being interrogated about it. It's part of the interrogation. It's part of the complete statement. I think it's admissible."

(T. 230, R.E. 18).

The Court then made its ruling, concluding;

"BY THE COURT: The completeness of the issue that I have, that's what they're doing is interrogating concerning a homicide. That is different than eliciting evidence of a prior crime or criminal act. The objection and motion to suppress on that basis is overruled."

(T. 230-231, R.E. 18-19).

Accordingly, during the State's case-in-chief, the entirety of the interrogation video was played to the jury. The video contained several references to prior bad acts and crimes by the Appellant, including the following comments by the investigator;

"Now I want you to let me read this other one too. Let me read this one to you. This is from, of all people, the other woman you been talking about. On the above date at approximately 20:52 hours, I, Officer Williams, took a report from Ms.. McKinney concerning her boyfriend... It says Ms., M-R-S, (sic) concerning her boyfriend, Floyd Robinson who constantly keeps threatening her about killing her. He's always talking to her...taking her... no, I'm sorry... taking her to the middle of nowhere, putting a gun to her head and throat and telling her what he would do to her. On the last evening, 5/24/03, at approximately 16:30-17:00, he took her to his house and started washing dishes and when she told him she was going home, her started going ballistic and started to push, kick, and pull out her hair. He pulled a gun on her then and once he settled down, he just told her to leave. She left and went home and then called the police. My goodness..... You got two women saying they felt like you were going to

kill them at one point in time... two separate ones."[3]

(Exib. 25).

Respectfully, it is unclear what the basis of the trial court's ruling is. **Mississippi Rule of Evidence 404(b)** provides;

> "***Other Crimes, wrongs, or acts***. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

Miss. R. Evid 404(b).

Nowhere, in **Rule 404(b)** is there any mention of "completeness" as an exception for the bar to the admissibility of other crimes evidence. Simply looking at the language of the rule itself, evidence of other crimes, wrongs or acts is inadmissible to prove character. The video-taped police interrogation was admitted into evidence. Contained therein was evidence regarding the Appellant's prior convictions. Therefore, simply looking at the language of the rule, the trial court erred in admitting the interrogation, or, at least, the portions of the statement concerning the prior crimes, bad acts, or wrongs.

Not only is the trial court's ruling not supported by the language and construction of the rule itself, it is not supported by case law. "Mississippi follows the general rule that proof of a crime distinct from that alleged in the indictment should not be admitted in evidence against the accused. ***Eubanks v. State***, 419 So. 2d 1330, 1331 (Miss. 1982).

> "The reason and justice of the rule is apparent, and its observance is necessary to prevent injustice and oppression in criminal prosecutions. Such evidence tends to divert the minds of the jury from the true issue, and to prejudice and mislead them, and, while the accused may not be able to

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3. The Appellant has transcribed the relevant content of the interrogation video to the best of his ability.

> meet a specific charge, he cannot be prepared to defend against all other charges that may be brought against him. 'To permit such evidence,' says Bishop, 'would be to put a man's whole life in issue on a charge of a single wrongful act, and crush him by irrelevant matter, which he could not be prepared to meet.'"

Id. (Citing 1 Bish.Crim Proc. § 1124; ***Floyd v. State***, 148 So. 226, 230 (Miss. 1933)).

The State's reliance on ***Moss v. State*** at trial was misplaced and easily distinguishable. In ***Moss***, the defendant told the victim's father that he was going to kill the victim. ***Moss v. State***, 727 So. 2d 720, 724 (Miss. 1998) (emphasis added). There were also two other instances of testimony regarding prior assaults against the victim by the defendant. ***Id.*** (emphasis added). The ***Moss*** Court concluded that the error alleged by the defendant was not introduced for the purposes of proving Moss's character, but rather to show an escalating level of violence, culminating in the crime of murder. ***Id.*** at 725.

The facts of the instant case are clearly distinguishable from ***Moss***. ***Moss*** involved prior bad acts of the defendant against the victim. In the instant case, the bad acts and prior convictions presented to the jury included those against a third party, Marilyn McKinney. Therefore, the exception to show an escalating level of violence is inapplicable.

The only use for the evidence of the allegations regarding Marilyn McKinney is to show that the Appellant committed a prior crime, and the crime against the victim was within conformity therewith, clearly unallowable under the Mississippi Rules of Evidence.

iii. Even if the evidence of the Appellant's prior bad acts was admissible under Mississippi Rule of Evidence 404(b), it was inadmissible under Rule 403.

Even if the evidence of the Appellant's prior bad acts was admissible under **Mississippi Rule of Evidence 404(b)**, the second part of the test for admission is a determination by the trial court as to whether the probative value of the testimony outweighs its prejudicial effect under

Mississippi Rule of Evidence 403. ***Id.***

> "To be sure, evidence admissible under **Rule 404(b)** is subject to the prejudice test of **Rule 403**; that is, even though the Circuit Court considered the evidence at issue admissible under **Rule 404(b)**, it was still required by **Rule 403** to consider whether its probative value on the issues of motive, opportunity and intent was substantially outweighed by the danger of unfair prejudice. In this sense **Rule 403** is an ultimate filter through which all otherwise admissible evidence must pass"

Watts v. State, 635 So. 2d 13664, 1368 (Miss. 1994) (quoting ***Jenkins v. State***, 507 So. 2d 89, 93 (Miss. 1987)).

Mississippi Rule of Evidence 403 provides:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Miss. R. Evid. 403.

In the case *sub judice* there was no on-the-record 403 balancing test done. Rather, the trial court merely concluded that the interrogation was admissible.

In ***Jasper v. State***, the Court found that the trial court erred in failing to perform a 403 balancing analysis. *See* ***Jasper v. State***, 759 So. 2d 1136 (Miss. 1999). In ***Walker v. State***, this Court found error when the trial court admitted evidence of a defendant's prior aggravated assault conviction. ***Walker v. State***, 936 So. 2d 424, 428 (Miss. Ct. App. 2006). This Court reasoned that the admission of the testimony regarding the appellant's prior convictions was more prejudicial than probative. ***Id.***

As this court concluded,

> "The dangers of allowing convictions based upon past behavior are self-evident. Were we to allow such evidence of past crimes without strict limitations, the State would be relieved of its burden to prove the guilt of a defendant as to a given charge by instead relying on a defendant's past

> criminality as proof of the defendant's current guilt. Furthermore, no defendant would be allowed to fully repay his or her debt to society as the defendant would be shacked with the fear of being convicted anew for past sins."

Id.

The prejudicial nature of the evidence is perhaps highlighted best by the manner in which the State used the evidence in its cross-examination of the Appellant.

> "Q. Your right hand was swollen?
>
> A. Yes.
>
> Q. Anything else? Got any scratches on your face, nose bleeding? Did you look like Marilyn McKinney (sic)?
>
> BY MS. CLINKSCALES: Objection, Your Honor.
>
> BY THE COURT: That is argumentative."

(T. 424, R.E. 20).

Clearly, this exemplifies the prejudicial nature of the Appellant's inadmissible and irrelevant prior crimes. Had the trial court performed the required **Rule 403** balancing test, it would have concluded that the prejudice of the prior bad acts evidence far outweighed any probative value it may have had.

iv. Conclusion.

The admission of the Appellant's prior bad acts regarding Marilyn McKinney was inadmissible under **Mississippi Rule of Evidence 404(b)**. Should this honorable court find it admissible, the trial court still erred in not performing the required balancing under **Rule 403**. Therefore, the trial court erred when it allowed into evidence the Appellant's prior bad acts and criminal conviction.

ISSUE THREE: WHETHER STATEMENTS MADE DURING THE VIDEO-

RECORDED STATEMENT REGARDING THE APPELLANT'S PRIOR BAD ACTS WERE INADMISSIBLE UNDER THE CONFRONTATION CLAUSE OF THE UNITED STATES CONSTITUTION.

i. Standard of Review

The standard of review for the admission of evidence is abuse of discretion. ***Smith v. State,*** 839 So. 2d 489, 494 (Miss. 2003) (citing ***Farris v. State***, 764 So. 2d 411, 428 (Miss. 2000)). However, when a question of law is raised, the applicable standard of review is *de novo*. ***Biglane v. Under the Hill Corp.***, 949 So. 2d 9, 14 (Miss. 2007) (citing ***Cummings v. Benderman***, 681 So. 2d 97, 100 (Miss. 1996)).

ii. There is a constitutional right for criminal defendants to confront the witnesses against them.

Part of the Sixth Amendment of the United States Constitution, the Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him."***U.S. Const. Amend. VI.***

The right of confrontation is deeply rooted in both the common law and in Roman law. The principle that the accused should be permitted to confront his accusers can be found as far back as the Bible. In Acts 25:16, the Roman Governor Festus, when discussing the proper treatment of his prisoner, Paul, stated: "It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face-to-face, and has been given a chance to defend himself against the charges." ***Acts* 25:16.**

Due to its incorporation via the Due Process Clause of the Fourteenth Amendment, this procedural right applies to both federal and state prosecutions. *See* ***Pointer v. Texas***, 380 U.S. 400 (1965). The right to confrontation is an essential right of criminal defendants, noted by the United States Supreme Court as a "bedrock constitutional guarantee." ***Crawford v. Washington***,

541 U.S. 36, 42 (2004).

The Confrontation Clause exists for several purposes. First, in ensures an adversarial criminal process by allowing for cross examination, "'the greatest legal engine ever invented for the discovery of the truth.'" ***California v. Green***, 399 U.S. 149, 158 (1970) (quoting **5 John Henry Wigmore, Evidence § 1367** (3d ed. 1940)). Secondly, by requiring that witnesses make their statements under oath, in court, and in front of the accused, the confrontation right promotes the truthfulness of witnesses. *See* ***Maryland v. Craig***, 497 U.S. 836, 846 (1990). Thirdly, in contrast to an *ex parte* affidavit, in-court examination allows the jury to observe the witness' demeanor, "thus aiding the jury in assessing his credibility." ***Green***, 399 U.S. at 158; *See also* ***Mattox v. United States***, 156 U.S. 237, 242-43 (1895).

iii. The video-taped interrogation was "testimonial" under Crawford.

The Court's opinion in ***Crawford*** did not define what constitutes "testimonial." A statement is likely to be determined as testimonial if government officials were involved in its creation "with an eye toward" using it at trial. *See* ***Crawford***, 541 U.S. at 56 n.7.

"At a minimum [testimonial includes] prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and [also includes] police interrogations." ***Id.*** At 68. On the other hand, business records and statements in furtherance of a conspiracy are not testimonial. ***Id.*** at 56.

According to ***Crawford***, if something is made by a government official with aspirations of using such information at trial, a statement is likely considered to be testimonial. ***Crawford*** even went so far as to say "statements taken by police officers in the course of interrogations are testimonial under even a narrow standard. ***Id.*** at 52. The Court further concluded, "even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and

interrogations by law enforcement officers fall squarely within that class." ***Id.*** at 53.

In the case *sub judice*, the jury was presented with an interrogation video. In the course of that video, investigators read to the Appellant the police report of an Officer Williams. This was hearsay. The basis for that police report was based on the hearsay statements given to Officer Williams by Marilyn McKinney.

The statements made by Marilyn McKinney that were the basis for Officer Williams' report, which was read out loud during the interrogation of the Appellant were testimonial in nature, and, therefore, subject to a ***Crawford*** analysis.

iv. The Appellant was never afforded the opportunity to cross-examine Officer Williams or Marilyn McKinney, and, therefore, was presented with testimony which he was unable to confront, in violation of his right to confrontation.

The jury was, in essence, read a police report by Officer Williams. Contained in that police report were statements made by Marilyn McKinney. The Appellant was never afforded the opportunity to cross-examine Officer Williams or Marilyn McKinney, and, therefore, was deprived of his fundamental right to confront the witnesses against him.

v. Conclusion.

There is a fundamental constitutional right of a criminal defendant to confront the witnesses against him. Whenever there is evidence which is testimonial in nature, defendants have the right to confront those providing such evidence. In the instant case, the Appellant was convicted based on hearsay testimony of Officer Williams and Marilyn McKinney and not given the opportunity to confront. Therefore, this honorable court, should reverse the Appellant's convictions and remand for a new trial, consistent with fundamental constitutional rights.

ISSUE FOUR: WHETHER THERE WAS PLAIN ERROR DUE TO THE TRIAL COURT'S FAILURE TO CORRECTLY APPLY MISSISSIPPI RULE OF EVIDENCE 609 WHEN THE STATE IMPROPERLY IMPEACHED THE APPELLANT

REGARDING HIS PRIOR CONVICTION DURING CROSS-EXAMINATION.

i. Standard of Review

Because the admissibility of the prior crimes impeachment evidence was not objected to at trial, the Appellant must proceed under the doctrine of plain error. If a contemporaneous objection is not made, an appellant must rely on plain error to raise the argument on appeal. ***Watts v. State***, 733 So. 2d 214, 233 (Miss. 1999). "The plain error doctrine requires that there be an error and that the error must have resulted in a manifest miscarriage of justice." ***Williams v. State***, 794 So. 2d 181, 187. (Miss. 2001) (citations omitted). Moreover, the plain error rule only is applied by Mississippi courts when the error effects an appellant's substantive/fundamental rights. ***Id.***

ii. The trial court failed to correctly apply Mississippi Rule of Evidence 609, including a balancing test on the record.

At the very onset of cross-examination, the State sought to question the Appellant on his prior convictions;

> Q. Isn't that what your lawyer asked you about several domestic violence calls you had; isn't that right?
>
> A. No. She asked me a couple.
>
> Q. Just a couple then. Out of all those couple then, Mr. Robinson, who got convicted of domestic violence?
>
> A. I pled guilty to it.
>
> Q. It would be you, wouldn't it, Mr. Robinson?
>
> A. Yes. That's correct.
>
> Q. Bridgette Moore didn't get convicted of domestic violence, did she?
>
> A. No, she didn't.

Q. She didn't get convicted in Clay county of it. She didn't get convicted in Oktibbeha County. You did, right?

A. That's correct.

(T. 399, R.E. 21).

Then, for the next few minutes, the State proceeded to question the Appellant regarding his probation.[4] Then, in the most aggressive use of the Appellant's prior conviction, the State made a highly prejudicial comment when it said;

Q. Your right hand was swollen?

A. Yes.

Q. Anything else? Got any scratches on your face, nose bleeding? Did you look like Marilyn McKinney (sic)?[5]

BY MS. CLINKSCALES: Objection, Your Honor.

BY THE COURT: That is argumentative

(T. 424, R.E. 20).

Miss. Rule of Evidence 609 sets out the proper procedure for attempting to impeach a criminal defendant's testimony by prior conviction of crime, and requires that before admitting evidence of a defendant's felony conviction, the judge must determine "that the probative value of admitting this evidence outweighs its prejudicial effect." ***Miss. Rule. Evid. 609(a)(1).***

The language of the rule is clear enough, but the Mississippi Supreme Court in ***Peterson v. State*** held that "Rule 609(a)(1) requires the trial judge to make an on-the-record determination

4. Questioning regarding probation is functionally equivalent to questioning regarding convictions. For one to be on probation, he or she must be convicted.

5. The "sic" contained in the transcript is inaccurate, but included for the purposes of conformity therewith.

that the probative value of the prior conviction outweighs its prejudicial effect before admitting any evidence of a prior conviction." ***Peterson v. State***, 518 So.2d 632, 636 (Miss. 1987). However, the prosecution first has to clear a threshold requirement of probative value. ***Hickson v. State***, 697 So. 2d 391, 397 (Miss. 1997) (citing ***Peterson v. State***, 518 So.2d 632, 636-37 (Miss. 1987)).

The ***Peterson*** court outlined the factors for the trial court to weigh in considering whether to admit the evidence of conviction of the defendant at a subsequent trial. Those factors are: (1) the impeachment value of the prior crime, (2) the point in time of the conviction and the witness' subsequent history, (3) the similarity between the past crime and the charged crime, (4) the importance of the defendant's testimony, and (5) the centrality of the credibility issue.

Though the court should consider all the factors, the trial court will not be reversed if it gives an "honest effort" to the balancing test. ***Bush v. State***, 895 So. 2d 836, 848 (Miss. 2005). Regardless, the "trial judge must make an on-the-record finding that the probative value of admitting a prior conviction outweighs its prejudicial effect." ***Triplett v. State***, 881 So.2d 303, 305 (Miss. 2004) (emphasis added). "An on-the-record finding that the probative value outweighs the prejudicial effect is not merely an idle gesture." ***Id.*** Unfortunately for the Appellant, his defense counsel failed to object when the prosecutor sought to improperly introduce evidence of the Appellant's prior conviction. Failure to object is failure to preserve the issue for appeal. **Miss. R. Evid. 103(a).**

Nothing, however, prevents this honorable Court from taking notice of plain errors which affect the substantial right of the defendant. **M.R.A.P. 28(a)(3)**; **Miss. R. Evid. 103(d)**. Plain error arises if "an error is so fundamental that it generates a miscarriage of justice." ***Davis v. State***, 891 So. 2d 256, 259 (Miss. 2004). The Mississippi Supreme Court found plain error when

the trial judge failed to perform an on-the-record balancing test that the probative value of prior conviction evidence outweighed the prejudice of such evidence. *See* ***Signer v. State***, 536 So. 2d 10, 12 (Miss. 1988).

In the case *sub judice*, the jury was told that the Appellant had plead guilty to a prior domestic violence incident involving a third party, Marilyn McKinney. The judge performed no prejudicial/probative balancing test; the jury was not instructed to consider the evidence for impeachment purposes only. Hence, it is logical that the Court would entertain plain error in this case for improperly admitting impeachment evidence. The Court should also entertain plain error for the State's method of questioning the Appellant regarding the presence of any wounds from the encounter with the victim.

Application of the ***Peterson*** factors militate against admitting the evidence in this case. The first ***Peterson*** factor is the impeachment value of the crime. Domestic Assault is not a crime involving dishonesty. Calling it a "rule of thumb," the Mississippi Supreme Court has expressed that "convictions which do not relate to credibility, i.e., deceit, fraud, cheating, generally have little probative value for impeachment purposes." ***Johnson v. State***, 525 So. 2d 809, 812 (Miss. 1988). Therefore, the first ***Peterson*** factor weighs heavily against admitting the prior convictions.

The next factor is the temporal proximity of the crime for which the defendant is on trial and the crime(s) to be used as impeachment evidence. From the record, it is not clear when the prior conviction for domestic assault occurred. From the record, there is not clear answer for how this factor is to be decided.

The third factor to be considered is the similarity between the crimes for which the defendant has been convicted and those for which the defendant is on trial. This factor "weighs

heavily against admissibility." ***Hopkins v. State***, 639 So. 2d 1247, 1253 (Miss. 1993) (emphasis in original). The analysis in ***Hopkins*** is instructive. The Court explained the problem with impeachment by prior similar crimes, noting "it was quite likely that the jury would believe 'if he did it before, he probably did it this time.'" ***Id.*** In this case in which the Appellant herein was on trial for murder, the prosecutor elicited evidence of prior conviction of domestic violence. The danger that the jury would view the prior crimes as substantive evidence of guilt was heightened due to the exact nature of the crimes. Further, this danger was not mitigated by a limiting instruction.

The fourth factor in ***Peterson*** examines the importance of the witness's testimony. Clearly, the Appellant's testimony was very important in this case as the Appellant's theory of the case was that of self-defense and accident.

Peterson enunciated that the more important the defendant's testimony is to his defense, the more likely prior crimes are to be prejudicial. ***Peterson***, 518 So. 2d at 637. The Appellant's testimony was the only way for him for him to assert his self-defense theory. Therefore, the fourth ***Peterson*** factor clearly holds that this impeachment by prior crimes should have never occurred and weighs in favor of the Appellant.

The fifth factor is the centrality of the credibility issue. Credibility was very important to this case. Jurors had to rely on witness testimony and very little physical evidence to reach their verdict. Nevertheless, even if this factor weighs against the Appellant, the centrality of the credibility issue is but one factor in a five-factor test. Had the trial court performed the required ***Peterson*** balancing test, the proper result would be to exclude the evidence. If the prosecution had followed the procedural requirements of **Miss. R. Evid. 609**, four of the five factors would have clearly militated against admitting the prior conviction.

As stated by the Mississippi Supreme Court, crimes which do not involve dishonesty have little probative value. ***Johnson v. State***, 525 So. 2d 809, 812 (Miss. 1988). In ***Jones***, the Supreme Court held that an appellate court has two basic choices when the trial court fails to conduct the required ***Peterson*** balancing test. ***Jones v. State***, 702 So. 2d 419, 421 (Miss. 1997). The appellate court can either perform the balancing test itself or it can remand the case for retrial. ***Id.*** The Court stated, "in those cases where the accused's credibility was central to his defense or where the evidence was hotly disputed, we took a different course and remanded the case for retrial." ***Id.***

In the case at bar, this honorable Court should choose the second option and remand for a new trial. Certainly the Appellant's credibility was central to his defense; certainly the evidence was hotly disputed. The Appellant's's prior domestic assault crimes were admitted in a murder trial with no *prima facie* showing of probative value, no ***Peterson*** balancing, no limiting instruction.

The error(s) regarding the admission of this evidence and the way it was handled once it was improperly admitted are numerous and can be called by many names: Judicial abuse of discretion, prosecutorial misconduct, ineffective assistance of counsel, etc. However, there was no objection by defense counsel to preserve these errors. For that reason, this honorable Court must examine the trial for plain error, an error or errors so fundamental as to constitute a miscarriage of justice, and to seriously call into question the fairness, integrity, or reputation of the judicial proceedings. ***Porter v. State***, 749 So.2d 250, 261 (Miss. Ct. App. 1999).

iii. The Appellant did not "open the door."

In anticipation of the Appellee's likely argument that the Appellant opened the door to the use of his prior convictions when he discussed his prior conviction on direct examination. In

fact, the Appellant's mentioning of his prior conviction was not the first time it was opened.

"[W]here an accused, on direct examination, seeks to exculpate himself, such testimony is subject to normal impeachment via cross-examination, and this is so though it would bring out that the accused may have committed another crime." ***Stewart v. State***, 596 So. 2d 851, 853 (Miss. 1992). When a defendant opens the door to the admission of otherwise inadmissible evidence, the State then may proceed to question further into the matter. ***Crenshaw v. State***, 520 So. 2d 131, 133 (Miss. 1988).

The Appellant did not open the door to the evidence of any prior crime. This was done by the State when it presented the evidence of the prior conviction during the video-taped interrogation; therefore, the applicability turns on whether or not the trial court should have performed a ***Peterson*** balancing test, not whether there was any need to at all due to the Appellant opening the door regarding the admissibility of his prior convictions for impeachment purposes.

iv. Conclusion

The procedures enumerated in the rules of evidence and Mississippi common law are not idle suggestions. These procedures are mandatory and serve the ultimate goal of justice. "In criminal procedures, due process requires, among other things, that a criminal prosecution be conducted according to established criminal procedures." ***Mackbee v. State***, 575 So.2d 16, 24 (Miss. 1990).

The jury was improperly informed by the prosecution that the defendant had been convicted of domestic assault. The prosecution made no showing the prior crime was probative under the rules of evidence, and the trial court never considered the prejudicial effect of that evidence.

ISSUE FIVE: WHETHER THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT THE DEFENSE COUNSEL'S SELF-DEFENSE JURY INSTRUCTION.

i. Standard of Review.

"[I]f the [jury] instructions fairly announce the law of the case and create no injustice, no reversible error will be found." ***Williams v. State***, 803 So. 2d 1159, 1161 (Miss. 2001) (citing ***Hickombottom v. State***, 409 So. 2d 1337, 1339 (Miss. 1982)). "If all instructions taken as a whole fairly, but not necessarily perfectly, announce the applicable rules of law, no error results." ***Milano v. State***, 790 So. 2d 179, 184 (Miss. 2001).

"A defendant is entitled to have jury instructions given which present his theory of a case, however, this entitlement is limited in that the court may refuse an instruction which incorrectly states the law, or is without foundation in evidence." ***Howell v. State***, 860 So. 2d 704, 745 (Miss. 2003) (citing ***Heidel v. State***, 587 So. 2d 835, 842 (Miss. 1991)).

ii. The right to present a defendant's theory of the case to the jury is a fundamental right.

Defense counsel submitted jury instruction D1(a) to the trial court, which was refused. D1(a) provided;

> "The Court instructs the jury that to make a killing justifiable on the grounds of self-defense, the danger to the defendant must be either actual, present and urgent, or the defendant must have reasonable grounds to believe that the victim intended to kill the defendant or to do him some great bodily harm, and in addition to this, he must have reasonable grounds to believe that there is imminent danger of such act being accomplished. It is for the jury to determine the reasonableness of the grounds upon which the defendant acts. If you find from the evidence that on or about November 29, 2005, Floyd Robinson, the defendant, acted in self-defense by shooting Bridget Moore, and the danger to the defendant was either actual, present and urgent, or the defendant had reasonable grounds to believe that the victim intended to kill him or to do him some great bodily harm, and in addition to this, he had reasonable grounds to believe that there was imminent danger of such act being accomplished, then you must find the defendant not guilty."

(C.P. 57, R.E.10).

> The State objected to D-1(a) because there was no basis in evidence for it;
>
> BY THE COURT: The objection is there is no evidence or testimony, assuming that the defendant's case is true, is that he shot her intentionally.
>
> BY MR. ALLGOOD: To prevent any bodily harm to himself. He never testified to it and it's in no statement.
>
> BY THE COURT: I agree....

(T. 470-71, R.E. 22-23).

> The trial court, did, however, grant jury instruction D2(a), which provided;
>
> "The Court instructs the jury that if you find from the evidence, or have a reasonable doubt therefrom, that Floyd Robinson, the defendant, on or about November 29, 2005, without any design or deliberation to cause the death of Bridget Moore and in the heat of passion in a struggle between Floyd Robinson and Bridget Moore, the fatal shot was fired accidentally and through misfortune, upon sudden and sufficient provocation, then it is your sworn duty to find Floyd Robinson not guilty."

(C.P. 54, R.E. 9).

The Mississippi Supreme Court has long held that, no matter how minimal the evidence, a defendant is entitled to present its theory of the case to the jury. "Every accused has a fundamental right to have her theory of the case presented to a jury, even if the evidence is minimal. ***Chinn v. State*** 958 So. 2d 1223, (Miss. 2007). This "certainly is so" in cases where the defendant is alleging justification by self-defense. ***Anderson v. State***, 571 So. 2d 961, 964 (Miss. 1990).

The Court has further held that;

> "[i]t is, of course, an absolute right of an accused to have every lawful defense he asserts, even though based upon meager evidence and highly unlikely, to be submitted as a factual issue to be determined by the jury under proper instruction of the court."

Chinn, 958 So. 2d at 1225 (citations omitted).

It is essential to know that the right of a defendant to present its his theory of the case is a fundamental right, because, as the Mississippi Supreme Court has held, "This court will never permit an accused to be denied this fundamental right." ***O'Bryant v. State***, 530 S0. 2d 129, 133 (Miss. 1998); *See also* ***Lancaster v. State***, 472 So. 2d 363 (Miss. 1985); *Pierce v. State*, 289 So. 2d 901 (Miss. 1974).

iii. Jury Instruction D-1(a) accurately stated the law.

Similar instructions have been approved by Mississippi Courts.

D1(a) was substantially identical to the instruction recommended by Mississippi Courts. ***Ford v. State,*** 975 So. 2d 859, 864 (Miss. 2008); ***Flowers v. State***, 473 So. 2d 164, 165 (Miss. 1985); ***Robinson v. State***, 434 So. 2d 206, 207 (Miss. 1983), *overruled on other grounds.*

Furthermore, D1(A) matches **Mississippi Model Jury Instructions Criminal § 2:13** which provides the model jury instruction for self-defense:

> "The court instructs the jury that to make a killing justifiable on the grounds of self-defense, the danger to the defendant must be either actual, present and urgent, or the defendant must have reasonable grounds to believe that the victim intended to kill the defendant or to do him some great bodily harm, and in addition to this, he must have reasonable grounds to believe that there is imminent danger of such act being accomplished. It is for the jury to determine the reasonableness of the grounds upon which the defendant acts. If you, the jury, unanimously find that the defendant acted ins elf-defense, then it is your sworn duty to return a verdict in favor of the defendant."

West's Mississippi Model Jury Instructions Criminal § 2:13 (2007-2008 ed.)

Because courts have held that jury instruction D1(a) was a valid self-defense jury instruction and D1(a) accurately tracks the language of the model jury instruction, the Appellant has satisfied the requirement that the jury instruction that was to be presented accurately state the

law.

iv. The evidence supported a self-defense jury instruction.

> The Appellant's testimony at trial, regarding the incident was:
>
> "I turned around to get my keys and I was getting my keys and I looked up and she had the gun. I said what you doing? And she, well you going over to be with that bitch, ain't you? I said this don't make no sense.
>
> I said - - and she got up close to me. That's when I grabbed her hand, and we started wrestling with the gun. And we fell outside the house. And we fell outside, and that's when the gun went off."

(T. 374).

Later, during direct examination, the Appellant testified that he had grabbed the gun from the victim in an act of self defense;

> Q. When you grabbed the gun, why did you grab the gun?
>
> A. To defend myself. Protect myself.

(T. 382).

What perhaps is even more indicative that there was a physical encounter between the Appellant and the victim is the physical evidence itself. As it was by police investigators, close to the stairs of the home, police found two broken acrylic fingernails. (T. 151). This is clear indication that there was some sort of encounter between the Appellant and the victim, and corroborates the position that there was an encounter between the Appellant and the victim, thus warranting a self-defense jury instruction.

v. There is a right to inconsistent theories of defense; however, these theories are not even inconsistent.

Mississippi Courts have long held that criminal defendants are entitled to present alternative theories of defense. The Mississippi Supreme court has recognized;

> "[L]itigants in all cases, including defendants in criminal prosecutions, are entitled to assert alternative theories, even inconsistent alternative theories. A criminal defendant is entitled to present his defense to the finder of fact, and it is fundamentally unfair to deny the jury the opportunity to consider the defendant's defense where there is testimony to support the theory."

Terry v. State, 718 So. 2d 1115, 1121 (Miss. 1998).

However, there's no need to consider such a theory. The two theories in question were wholly consistent with one another. The trial court's conclusion that there was no evidence of self defense is not supported by the facts. The Appellant testified that he saw the victim with a gun pointed towards him. The Appellant testified to walking towards the victim, grabbing the gun from her hand, and "tussling" with the victim. During the course of the "tussle" the gun went off.

The self-defense and the accident under these facts are part and parcel. The accident occurred during the course of self-defense. The self-defense action and the accident action happened during the same temporal course.

Under the trial court's reasoning, the mere occurrence of one thing, during the course of another, is enough to negate the occurrence of the first. That is to say that if B happened during the course of A, the simple fact that B occurred means A never happened.

Using a more applicable analogy: under the trial court's reasoning, if someone is driving a car, and, in the course of driving the car, gets into an accident, the car was never driven at all. Therefore, the trial court's ruling is not valid.

v. Conclusion.

Criminal defendants have a fundamental right to present to the finder of fact their theories of the case. There was ample evidence to support the jury instruction concerning self-defense. The instruction accurately stated the law and was supported by the defendant's own testimony.

Therefore, the trial court erred in not allowing the Appellant to present his theory of the case. For the reasons stated above, this honorable Court should reverse this conviction and remand for a new trial, so that the Appellant may be afforded his fundamental right to present his defense to the finder of fact.

ISSUE SIX: WHETHER THE TRIAL COURT ERRED WHEN IT ALLOWED THE STATE TO DEFINE REASONABLE DOUBT.

i. Standard of Review.

Because the nature of the State's closing argument was not objected to at trial, the appellant must proceed under the doctrine of plain error. If a contemporaneous objection is not made, an appellant must rely on plain error to raise the argument on appeal. ***Watts v. State***, 733 So. 2d 214, 233 (Miss. 1999). "The plain error doctrine requires that there be an error and that the error must have resulted in a manifest miscarriage of justice." ***Williams v. State***, 794 So. 2d 181, 187. (Miss. 2001) (citations omitted). Moreover, the plain error rule only is applied by Mississippi courts when the error effects an appellant's substantive/fundamental rights. ***Id.***

ii. The State violated the Appellant's fundamental right when it attempted to "quantify" reasonable doubt in its closing argument.

Due process under the United States Constitution demands that the State prove a defendant guilty beyond a reasonable doubt. *See* ***Jackson v. Virginia***, 443 U.S. 307, 324 (1979). Mississippi courts have historically entrust jurors to define for themselves the meaning of "beyond a reasonable doubt."

Neither the trial court, nor attorneys, are permitted to instruct the jury on the definition of reasonable doubt, instead, it is proper to rely on the inherent common sense of a jury. ***Colburn v. State***, 2008 WL 223118 (Miss. Ct. App. 2008). Any violation of this right results in an error of constitutional proportion, affecting substantive rights and may be considered under the doctrine

of plain error. ***Johnson v. State***, 904 So. 2d 162, 170 (Miss. 2005). During closing arguments, the State sought to define reasonable doubt, when it told the jury,

> "Let me tell you what this reasonable doubt – let my (sic) quantify that for you. If you go to bed at night and you wake up in the morning and there's snow all over the ground, you can suppose a number of things. You can suppose a bunch of Eskimos got a big tractor and they came down here in a trailer, and they shoveled snow on your front yard or that the Army brought in a C-130 and dumped snow out as they flew over your house, but you don't do that because it's not reasonable. It's ludicrous. And so you say it snowed last night. That's what this reasonable doubt thing is all about, Ladies and Gentlemen. That's what it's about. You weren't there to see the snow. You weren't there to see this woman killed. But the question is was it shoveled out or was it dumped out or did it actually just snow that night? That's the question."

(T. 504-05, R.E. 24-25).

Interestingly enough, the State's argument is lacking in sense. The analogy used explains circumstantial evidence rather than reasonable doubt. This could have done nothing more than confuse the jury as to what reasonable doubt actually is.

Certainly, the fact that the State, when attempting to explain what reasonable doubt, actually presented an explanation of circumstantial evidence, something far from reasonable doubt, could only be one of the precise reasons Mississippi courts do not allow for either party or the judge to define reasonable doubt: juror confusion. Conflating circumstantial evidence and reasonable doubt together was not only nonsensical, but clouded the burden of proof in the eyes of the jury.

In ***Stigall v. State***, the Appellant argued that the prosecutor made statements during voir dire and closing arguments that were attempts to define reasonable doubt. ***Stigall v. State,*** 869 So. 2d 410, 413 (Miss. Ct. App. 2003). The Court, however, disagreed and affirmed the judgment, finding no merit in the argument because the prosecutor was not defining reasonable

doubt, but comparing reasonable doubt to "all doubt" and "a shadow of a doubt." ***Id.***

The facts in ***Stigall*** are distinct from the facts of the case *sub judice*. In the instant case, the State specifically says "let my (sic) quantify that for you." (T. 505). There's no comparison. There's no beating around the bush. The State openly admits attempting to quantify reasonable doubt. Essentially, the acts of the State amounted to nothing more than a "Hey, let me tell you what it is" situation, something forbidden by courts in our state.

As noted by the Mississippi Supreme Court, the purpose of closing argument is to fairly sum up the evidence. ***Rogers v. State***, 796 So. 2d 1022, 1027 (Miss. 2001). The State should point out those facts upon which the prosecution contends a verdict of guilty would be proper. ***Id.*** While lawyers are given wide latitude in the argument of their cases to juries, they are not allowed to employ tactics which are inflammatory, highly prejudicial, or reasonably calculated to unduly influence the jury. ***Id.***

"Reasonable doubt defines itself; it therefore needs no definition by the court." ***Barnes v. State***, 532 So. 2d 1231, 1235 (Miss. 1988). The State, by its own words at trial was attempting to quantify reasonable doubt.

iii. Conclusion.

As noted above, any abrogation of the right to be found guilty beyond a reasonable doubt is an error of constitutional magnitude. ***Johnson,*** 904 So. 2d at 170. Therefore, such error effects substantive rights and may be considered under the plain error doctrine. ***Id.*** The Appellant had a fundamental right to be found guilty beyond a reasonable doubt. The State's attempts to quantify and define reasonable doubt violated that right, and, therefore, warrant reversal by this honorable court under the doctrine of plain error.

ISSUE SEVEN: WHETHER THERE WAS CUMULATIVE ERROR THAT DEPRIVED

APPELLANT OF HIS RIGHT TO A FUNDAMENTALLY FAIR AND IMPARTIAL TRIAL.

While the Appellant contends that none of the above-mentioned errors could be construed as harmless error, should this honorable Court find harmless error, the Appellant contends that such errors, when considered together, rise to the level of cumulative error.

The cumulative error doctrine stems from the doctrine of harmless error. ***Ross v. State,*** 954 So. 2d 968, 1018 (Miss. 2007). It holds that individual errors, not reversible in themselves, may combine with other errors to constitute reversible error. ***Hansen v. State***, 582 So. 2d 114, 142 (Miss. 1991); ***Griffin v. State***, 557 So. 2d 542, 553 (Miss. 1990). The question under a cumulative error analysis is whether the cumulative effect of all errors committed during the trial deprived the defendant of a fundamentally fair and impartial trial. ***McFee v. State***, 511 So. 2d 130, 136 (Miss.1987).

Relevant factors to consider in evaluating a claim of cumulative error include whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charge. ***Ross***, 954 So. 2d at 1018.

The violation of the Appellant's Fifth Amendment rights under ***Miranda***, the inadmissibility of the interrogation video under both the Mississippi Rules of Evidence and the Confrontation Clause of the United States Constitution, the improper use of prior convictions as impeachment evidence without the proper balancing test, the trial court's error in violating the Appellant's fundamental rights in denying the self defense jury instruction all, and the improper defining of reasonable doubt by the State in closing arguments, when taken in concert, deprived the Appellant of his right to a fundamentally fair and impartial trial.

CONCLUSION

The Appellant herein submits that based on the propositions cited and briefed hereinabove, together with any plain error noticed by the Court which has not been specifically raised, the judgment of the trial court and the Appellant's conviction and sentence should be reversed and vacated, respectively, and the matter remanded to the lower court for a new trial on the merits of the indictment on charges of capital murder, with instructions to the lower court. In the alternative, the Appellant herein would submit that the judgment of the trial court and the conviction and sentence as aforesaid should be vacated, this matter rendered, and the Appellant discharged from custody, as set out hereinabove. The Appellant further states to the Court that the individual and cumulative errors as cited hereinabove are fundamental in nature, and, therefore, cannot be harmless beyond a reasonable doubt.