

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**NO. 2008-KA-00226-COA**

**RODNEY MENDENHALL**

**APPELLANT**

**VERSUS**

**STATE OF MISSISSIPPI**

**APPELLEE**

**APPEAL FROM THE CIRCUIT COURT OF THE 1<sup>ST</sup> JUDICIAL DISTRICT OF  
HINDS COUNTY, MISSISSIPPI**

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**REBUTTAL BY APPELLANT**

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**Appellant Seeks Oral Argument**

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

**William R. LaBarre, MSB No. [REDACTED]**

**PUBLIC DEFENDER**

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STATEMENT REGARDING ORAL ARGUMENT

The undersigned counsel of record humbly begs oral argument before this Court on these issues regarding appropriate offers of evidence central to a citizen's defense of charges against him or her. Such argument may further illuminate for the Court the issues raised here and clarify the standards for both bench and bar in future cases.

Respectfully Submitted,

  
Virginia L. Watkins, MSB No. [REDACTED]

***Rodney Mendenhall v. State of Mississippi***

**2008-KA-00226-COA**

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### REBUTTAL BY APPELLANT

Comes now Rodney Mendenhall, Appellant herein, and pursuant to MISSISSIPPI RULE OF APPELLATE PROCEDURE 28(C) makes this, his reply in rebuttal to *Brief of the Appellee* on selected issues, I and II. In so doing, Mr. Mendenhall reiterates all errors, arguments and citation of authority in *Brief on the Merits by Appellant*, incorporated herein by reference, and in no way abandons other errors and issues not specifically addressed in this *Rebuttal*.

**I. The trial court erred in refusing to permit Mr. Mendenhall to stand before the jury in closing, a refusal which impermissibly interfered with his fundamental right to present his theory of defense, misidentification;**

“Seeing, as the old saw goes, is believing, and in the post-literate age the *visual is more persuasive than it used to be.*”

- *Washington Times*, © Dec. 14, 2001, Pg. A4. [emphasis added]

Respectfully, arguments of State’s counsel fail to take into account the unique facts of this case, including the fact that the jury at one point reported it was hopelessly deadlocked on all three counts. T. 407-408; CP 70. The theory of Mr. Mendenhall’s case was misidentification; his most prominent facial feature is his large, bulbous nose. As fact-finder, the jury was absolutely entitled to evaluate the credibility of Curtis Addison’s identification of Mr. Mendenhall – a duty further eroded by the trial court’s denial of Mr. Mendenhall’s impeachment rights, discussed in Issue No. 2, below. The fact that the trial court barred Mr. Mendenhall from standing before the jury and presenting his person to the jury was absolutely critical to his defense. In *Williams v. State*, 991 So.2d 593, ¶ 19, (Miss. 2008) the Mississippi Supreme Court found that it was error to hold such a display as “testimonial” sufficient to subject Mr. Mendenhall to cross-examination if he chose to so display himself to the jury.

In this case, arguments of State’s counsel to the contrary, Mr. Mendenhall humbly contends he was denied his fundamental right to present to the jury in a concrete manner his

defense of misidentification, a right guaranteed by both state and federal constitutions. AMENDS. VI; XIV, U.S. CONST.; art. 3, §§ 14; 26 MISS. CONST.

Most respectfully, Mr. Mendenhall submits that *Williams v. State* is in stark discord with a long line of U.S. Supreme Court and Mississippi Supreme Court and Court of Appeals cases regarding the fundamental right of a defendant to present his or her case, relevance and the standards on the admissibility of evidence.

Under the Sixth Amendment, citizens charged with a crime are guaranteed “a *meaningful* opportunity to present a *complete* defense.” *Crane v. Kentucky*, 476 U.S. 673 (1986). [emphasis added] See also, AMEND. XIV, U.S. CONST.; art. 3, §§ 14; 26 MISS. CONST.

In *Williams*, former Chief Justice Smith states that Mr. Williams was permitted to present his defense through questions and arguments of counsel. *Williams*, at ¶¶ 15; 16. Mr. Mendenhall respectfully disagrees, as questions and arguments of counsel are not considered evidence. Furthermore, before opening statements, the trial court instructed the jury, “The evidence which you are to consider consists of the *testimony* and *statements* of the witnesses and the exhibit(s) offered and received. You are also permitted to draw such reasonable inferences from the evidence as seem justified in light of your own experience. *Arguments, statements* and *remarks* of counsel are intended to help you understand the evidence and apply the law, but *are not* evidence.” CP 46; Instruction C-2. [emphasis added]

As juries are presumed to follow the instructions as given by the judge, as a matter of law, the jury disregarded the questions and arguments of counsel as evidence. In *Davis v. State*, 660 So.2d 1228 (Miss. 1995), the Court rejected defense arguments regarding allegedly improper closing remarks by the prosecutor. “Because the jury was instructed that closing argument was not evidence and was therefore instructed to disregard comments not supported by the evidence, this Court presumes that the jury followed the lower court's instructions and disregarded the

prosecutor's argument that was not supported by the evidence," the Court wrote. *Id.*, at 1249; [internal citations omitted].

Regarding the relevance of Mr. Mendenhall's efforts to present a complete defense, *Comments to MISSISSIPPI RULE OF EVIDENCE (MISS.R.EVID.)* 401 state "[e]vidence is relevant if it is likely to affect the probability of a fact of consequence in the case. [internal citations omitted] If the evidence has *any* probative value at all, *the rule favors its admission.*" Certainly, the credibility of Addison's identification of Mr. Mendenhall is central to the prosecution's case; i.e., whether it was Mr. Mendenhall who assaulted and robbed Addison the night of July 5. Therefore, Mr. Mendenhall would submit that the offer of his person before the jury was certainly relevant and clearly probative of whether he was the individual who committed the crime against Addison.

Mr. Justice Smith in *Williams* clearly acknowledged the trial court employed the wrong standard in classifying – and excluding – Williams' presentation to the jury of his elaborate gold teeth as testimonial in nature. *Williams*, at ¶ 19. Mr. Mendenhall agrees with this holding in *Williams*, but again, most respectfully disagrees with the conclusion in that case, that it was harmless error. *Id.*, at ¶ 21. The fact that the jury in Mr. Mendenhall's case initially deadlocked on all three charges and so notified the trial court is indicative that all twelve jurors were having grave difficulties with the State's case.

With all due deference to this esteemed Court, Mr. Mendenhall humbly submits to this honorable Court that it was structural trial error to deny him the fundamental right to present a *complete* defense by standing before the jury. Mr. Mendenhall submits this is shown by the tortured deliberations of the jury. Under MISS.R.EVID. 103(a), reversal for admission or exclusion of evidence may be had if "a substantial right of the party is affected." Mr. Mendenhall

would contend that the right to present a complete defense is a substantial right under both state and federal constitutional law, thus necessitating reversal and remand.

**II. The trial court fatally prejudiced the cause of Mr. Mendenhall in granting the state's Motion in Limine to bar impeachment of key state witness Curtis Addison with medical records showing alcohol consumption the night of the incident.**

With all due respect for State's counsel, the medical record showing Addison admitted to consuming alcohol the night of the assault was absolutely subject to the hearsay exception in Miss.R. Evid. 803(4) or statements made for purposes of medical diagnosis or treatment. Addison clearly made the statements at admission for purposes of treatment of his gunshot wounds. Whether an individual has imbibed alcohol is information upon which a treating physician would rely in treating a gunshot wound.

The trial court permitted counsel for Mr. Mendenhall to ask Addison whether he was drinking alcohol that night; defense counsel was *not*, however, permitted to impeach Addison with the medical record when Addison responded he did not drink alcohol. T. 241. It was vital to Mr. Mendenhall's attack on the credibility of Addison to question Addison with these records, subpoenaed by the state so that the jury could evaluate the credibility of Addison and his capacity to clearly observe and later recall the events of that evening.

As Mr. Mendenhall demonstrated in his *Brief on the Merits*, wrongful denial of a defendant's right to impeach violates Mr. Mendenhall's fundamental Sixth Amendment right to confront witnesses. *Brady v. Maryland*, 373 U.S. 83 (1963).

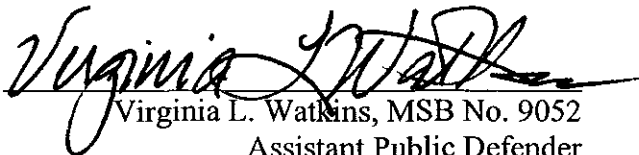
As the record qualified under Miss.R.Evid. 803(4) as an exception to the hearsay rule, it was an abuse of discretion to grant the state's *Motion in Limine* to bar further impeachment of Addison, the state's chief witness, regarding his use of alcohol the night of the incident. *See Smith v. State*, 733 So.2d 793, 799 (Miss. 1999).

### CONCLUSION

With all due respect for State's counsel, Mr. Mendenhall contends the fact that the jury initially deadlocked on all three charges shows that jurors had serious doubts as to his guilt. The exclusion of Mr. Mendenhall's offer to display his prominent bulb-shaped nose so that the jury could fully evaluate the credibility of Addison's identification of him essentially denied to Mr. Mendenhall his meaningful opportunity to present a complete defense. The ability of Mr. Mendenhall to impeach Addison regarding his use of alcohol that night further eroded his ability to effectively defend himself from the state's charges in violation of state and federal constitutional guarantees.

Therefore, with all due deference, Mr. Mendenhall humbly asks this honorable Court to reverse and vacate his conviction and remand for a new trial.

Respectfully submitted,

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

PUBLIC DEFENDER, HINDS COUNTY, MISSISSIPPI

**William R. LaBarre, MSB No. [REDACTED]**

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Certificate of Service

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

Honorable Robert Shuler Smith,  
DISTRICT ATTORNEY  
Hinds County Courthouse  
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Jackson, Mississippi 39225

Honorable Swan Yerger  
CIRCUIT JUDGE  
Hinds County Courthouse  
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Honorable James Hood III  
ATTORNEY GENERAL  
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And by United States Mail, postage prepaid, to

Mr. Rodney Mendenhall  
MDOC No. 131503  
Unit 32  
Parchman, Mississippi 38738

So certified, this the 6<sup>th</sup> day of February, 2009.

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