

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

HARVEY WILLIAMS, JR., a/k/a "Smokie"

APPELLANT

VS.

NO. 2008-KA-0844-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF IN SUPPORT OF Mr. HARVEY WILLIAMS PURSUANT TO M.R.A.P. RULE 17(h)

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INTRODUCTION TO SUPPLEMENTAL BRIEF IN SUPPORT OF MR. HARVEY WILLIAMS
PURSUANT TO M.R.A.P. RULE 17(h)

This is one of the unusual cases that occasionally come before this Court in which each issue/error standing alone is egregious enough to require the reversal and remand of the conviction for another trial unimpeded by errors. To allow this conviction to stand with such serious, numerous errors would be turning a deaf ear to the cry of fundamental fairness and justice. In the realm of criminal law this Court should be forever vigilant to ensure that trials provide the necessary elements of fairness. One of the prosecutors in this case embarked upon a willful and deliberate path of improper conduct and behavior. This Assistant District Attorney has been reversed four (4) times in approximately two (2) years by the Court of Appeals for her conduct and lackadaisical interest in even the basic fundamentals of a fair and impartial trial. It may be fairly inferred that the Assistant District Attorney seems to act with impunity toward the constitutional and ethical duties demanding a fair fact-finding process. The fact that she is reversed repeatedly also seems to have no impact on her trial behavior. (See: Petition for Writ of Certiorari, Point 2; Brief of Appellant, Page 19, footnote. 19).

The trial court granted a flight instruction over Mr. Williams' objection in this case which involved self defense. (C.P.60). This Court has clearly said before that the flight instructions *should not* be given in cases of self defense. *Banks v. State*, 631 So.2d 748 (Miss. 1994). It may be time for this Court to end the use of the flight instruction, for as this Court has often noted, even the innocent leave the scene of a crime for many reasons. The flight instruction is fraught with error and is an improper and unnecessary comment on the evidence by the trial court.

The trial court improperly prohibited the defense from bringing out relevant evidence that the deceased, Calvin Younger, was a dangerous and violent person. (C.P.43; Tr.23, 26; 188-189; 249-251; 260). Calvin Younger had robbed Mr. Williams at gunpoint. (Tr.550-555; 650-652). Calvin Younger bonded out of jail on the robbery charge even though he had left another man for dead on the side of the road on a previous occasion.(T.216;260;556). The night of the tragic but necessary shooting Mr. Williams was rapidly approached by the Calvin Younger in the parking lot of a night club. Calvin Younger saw Mr.

Williams and it was Younger who went out of his way to approach Mr. Williams while yelling something to the effect, “what’s up now m-f.” (Tr.540-42; 561). As Younger came toward Mr. Williams, Younger reached into his back pocket and pulled out a pistol. Mr. Williams fired in self defense.

Mr. Anthony Herrington, the Security Guard at the night club, had refused to allow the deceased Calvin Younger and his two cousins, Fletcher Watts and Joe Pugh, into the club no more than **twenty minutes** earlier. (Tr.192; 482-483, 682). Mr. Herrington did not see the actual shooting because cars blocked his view, but he did see Younger reach toward his back pocket before Younger went between parked cars heading toward Mr. Williams. Mr. Williams was not allowed to introduce this critical, corroborative testimony because the trial court held it was a discovery violation. The trial court did not hold that it was a willful attempt by Mr. William’s counsel to *gain a tactical advantage*. This was clearly noted and remarked in the Opinion of the Court of Appeals, yet the Appeals Court speculated in footnote 5 that the investigator for Mr. Williams’ counsel probably asked Mr. Herrington about the gun. The speculation by the Court of Appeals is *just* speculation and is not found in the record. Speculation should not be the moving force behind the destruction of a fundamentally fair trial. The Appeals Court nevertheless approved the radical exclusion of the only relevant and probative evidence Mr. Williams had to rebut the deceased’s cousins, Fletcher Watts and Joe Pugh, who claimed the deceased had no gun. The prosecutors also argued in closing the deceased had no gun when they knew Mr. Younger had a gun according to Mr. Herrington, and they convinced the trial court to exclude Mr. Herrington’s testimony on this issue.

The record discloses that neither Mr. William’s counsel nor either of the prosecutors was very prepared for this trial. The trial was replete with late discovery disclosures by both sides. (See Appellant’s Brief and Motion for Rehearing, footnote 3). It should not be Mr. Williams paying for all the discovery violations with his life in prison. Our basic concepts of a fundamentally fair trial forbid this punitive action. It should be noted that the State has consistently taken the position that the time when the deceased had a gun is so amorphous, vague, and uncertain that it is not relevant. With all due respect to my colleagues at the Mississippi Attorney General’s Office this position is very similar to the ostrich who

keeps his head in the sand to hide from the pride of lions rushing his direction. (Response in Opposition to Appellant's Petition for Writ of Certiorari, page 3, last full paragraph.)

The trial court had other less drastic methods or means available rather than the total exclusion of the probative and corroborative testimony of Security Guard Anthony Herrington who would testify that the deceased had a gun right before Mr. Williams arrived. This corroborative testimony was essential because the deceased had his two (2) cousins with him. Of course they said that Calvin Younger had a phone and not a gun, but not even a phone was found on the Mr. Young when the police arrived. A gun on the street is worth more than a wallet found with one hundred dollars in it. It is well known among police and criminal defense lawyers that guns often disappear in street shooting before any police arrive. It was entirely reasonable for Mr. Williams to believe that either of the deceased's cousins would take the gun and attack him or take the gun in order to hide the fact that the Mr. Younger had a gun.

This Court has recently held in two (2) cases that an accused on trial for a crime is entitled to have the jury instructed on their theory of the defense. *Banyard v. State*, No. 2006-CT-01843-SCT, (09/17/2010); *Brown v. State*, No. 2008-CT-00484-SCT, (07/22/2010); The Court of Appeals took heed and reversed another: *Lewis v. State*, No. 2008-KA-01995-COA (08/25/2010). In order for an accused to present his theory of the case corroborative evidence is essential to him and the fact-finder if it is available, relevant, and otherwise admissible. Many times a person accused of a crime may be the only one who has relevant evidence of the facts, much like in rape or sexual assault cases where the victim may be the only person with relevant evidence. However, where available corroborative evidence cannot be underestimated nor can the exclusion of it from the fact-finder be easily ignored. It follows that Mr. Williams was entitled to have his in-court testimony corroborated by Security Guard Anthony Herrington to rebut Fletcher Watts and Joe Pugh who claimed Mr. Younger had no gun. The trial court erred in with each of the rulings in this case, any of which require a reversal.

MR. WILLIAMS WAS DENIED THE SIXTH AMENDMENT RIGHT AND THE RIGHT UNDER THE MISS. CONSTITUTION TO PRESENT A DEFENSE; THE RIGHT TO COMPULSORY PROCESS; THE RIGHT TO A FUNDAMENTALLY FAIR TRIAL; AND THERE WAS A VIOLATION OF THE RULE SET FORTH IN BOX V. STATE, 437 So.2d 19 (Miss.1983), AND URCCC, RULE 9.04

Mr. Williams did not get a full and fair opportunity to present his defense. As pointed out in all of the Appellant's Briefs before the Court of Appeals and in the Petition for Writ of Certiorari, the trial court did not allow Mr. Williams to call Security Guard Anthony Herrington who would have corroborated that Calvin Younger possessed a gun right before the shooting. Mr. Younger's cousin Fletcher Watts testified that they arrived at Jay's Club about "10, 15 or 20 minutes" before the fatal shooting. (Tr.192). Mr. Watts did not admit that they were denied entrance because of the gun. That important detail came from Mr. Herrington, the Security Guard who knew both Mr. Younger and Mr. Williams, but did not consider himself friends with either. The trial court did not determine that Mr. Williams' counsel tried to hide evidence or failed to disclose it to obtain a tactical advantage. The trial court failed to properly follow *Box v. State*, instead choosing to employ the radical option of the exclusion of the most important corroborative evidence Mr. Williams had to support his testimony that the deceased had a gun, and to rebut or impeach the deceased's two (2) cousins who said the deceased did not have a gun. *Edmond v. State*, 955 So2d. 787 (Miss. 2007). Both sides in this trial fell short of being fully prepared and fully providing timely and complete discovery. (Supp.Tr.4; Tr.9; Tr.4). The trial court should have employed the *Box* procedures and granted the prosecution a continuance to investigate Mr. Herrington's testimony or grant a mistrial. Excluding relevant, probative evidence for a *non-willful* discovery lapse only punishes the accused by denying him of a fundamentally fair trial and depriving the jury from hearing relevant evidence.

The State claims there is no evidence that the deceased had a gun on that evening. There is evidence that the deceased had a gun shortly before Mr. Williams arrived. Fletcher Watts and Joe Pugh were cousins of the Calvin Younger and with him that evening. They testified that they all had only been in the area where the shooting took place for about "10, 15, or 20" minutes before the shooting. (Tr.192). Anthony Herrington informed the counsel for Mr. Williams and the prosecution on the day of the trial that

just before the shooting he refused to allow Calvin Younger or his cousins in the club because of the gun. (Tr.482-483). There is clear, unequivocal, and positive relevant evidence from an independent witness, Anthony Herrington, that the deceased possessed a gun. Mr. Herrington did not see all the shooting but he saw the deceased reaching toward his back pocket. Cars blocked Mr. Herrington's view of the actual shooting. (Tr.498). The integrity of the fact-finding process failed in this case due to the trial court's exclusion of Anthony Herrington's testimony.

THE GRANTING OF A FLIGHT INSTRUCTION IN A SELF DEFENSE CASE WHERE THE FLIGHT OF THE ACCUSED WAS REASONABLY EXPLAINED IS REVERSABLE ERROR.

The Opinion of the Court of Appeals is illogical if we value stare decisis in our law. This Court has previously stated its concern for the misuse of flight instructions. It is not necessary to repeat a detailed history of the flight instruction. A good history of the instruction is provided in *Pannell v. State*, 455 So.2d 785 (Miss 1984). It was also therein that the Court noted "flight is a circumstance consistent with innocence as well as guilt." *Id.*, at 789.

This Court has stated in *Banks v. State*, 631 So. 2d. 748, 752 (Miss. 1994) that "*Where the defendant is arguing self-defense, a flight instruction should be automatically ruled out and found to be of no probative value.*" This Court also went on to say:

A flight instruction will have particular prejudicial effect in a case where self-defense is argued. Where the person against whom self defense has been exercised is still alive and has the back up support of other persons, flight seems logical and necessary. In other words, in the present case it would seem to have been illogical for Banks not to run. To suggest and highlight, through the sanction of a court granted instruction, that the defendant's flight was possibly an indication of guilt suggests that the court does not accept the self-defense argument. *Banks* at 752.

In the present case Mr. Williams had previously been robbed at gunpoint by the deceased, Calvin Younger. After Mr. Williams pressed criminal charges Calvin Younger was arrested for armed robbery. He bonded out of jail and let it be known he was going to kill Mr. Williams. Calvin Younger was a dangerous man. He had seriously harmed several people before. (Tr. 556). Violence was his way of life or a significant part of his life. When Mr. Williams arrived at the club it was Calvin Younger who started

yelling to Mr. Williams, "What's up now m-f," and rapidly headed toward Mr. Williams. (Tr. 537-541). Mr. Williams did not seek out Calvin Younger. Mr. Williams saw Calvin Younger reach in his pocket and pull out a gun. (Tr.542; 561). Mr. Williams pulled a gun and shot Younger, thereafter he fled the shooting because there were a lot of people around and Mr. Williams did not know who was there to support Calvin Younger. (Tr.566). *Banks* is eerily familiar in its facts to this case. See also: *Tran v. State*, 681 So. 2d. 514, 515 (Miss. 1996); *Liggins v. State*, 726 So.2d. 180, 182 (Miss. 1998); *Lightsey v. State*, 493 So. 2d. 375 (Miss. 1986), (the defendant's burglary conviction was reversed due to the granting of a flight instruction).

In the case of *Shumpert v. State*, 935 So. 2d. 962 (Miss. 2006), this Court affirmed the defendant's manslaughter conviction finding that the flight instruction granted by the trial court was not error. Though the defendant raised defense of another, there was no evidence of self defense even from the man the defendant claimed he was defending. In the concurring opinion Justice Carlson wrote eloquently and cogently about the dangers of the flight instruction:

In sum, I can only imagine how many (or how few) criminal cases have been tried in this state, where the jury, in privately deliberating in the jury room, came to the conclusion, that "well, this might be a close case of the defendant's guilt, but because of this flight instruction that the judge gave us, let's find the defendant guilty." Stated differently, if the State of Mississippi, represented by the elected District Attorney in any one of our twenty-two circuit court districts, is concerned about whether sufficient evidence has been presented in a particular case to convince the jury of the defendant's guilt, to the extent that the State is willing to run the serious risk of placing the trial court in error by submitting a flight instruction, then, in my opinion, the State must have a weak case which is otherwise undeserving of a conviction. *Shumpert*, at 976-7

The trial court should not have granted a flight instruction. Mr. Williams' counsel objected to the instruction. The flight was reasonably explained and the granting of the instruction denied Mr. Williams a fair trial. This Court has warned before that flight instructions are not permitted in cases of self defense. The Court should reverse and remand due to the erroneously granted flight instruction. It may likewise be appropriate to condemn the future use of flight instructions as improper comments on the testimony and

as not probative. It appears that even after repeated warnings to trial courts and prosecutors the flight instruction is still asked for and given in cases where it is absolutely not warranted, thereby clouding the true issues in the case.

PROSECUTORIAL MISCONDUCT DENIED MR. WILLIMAS A FAIR TRIAL TO WHICH HE
WAS GUARANTEED BY THE FOURTEENTH AMENDMENT AND THE MISSISSIPPI
CONSTITUTION

The prosecutors in this case knew exactly what they were doing when they employed and introduced through their questioning improper and inflammatory evidence. It is straining credulity to call some of the improper questions evidence-the questioning was more appropriate for the *Jerry Springer Show*, a show on television once famous for its characters and the base topics. One of the prosecutors has shown before that she will denude the statue of the Lady of Justice if it gains her a win. In this case there are many, many instances of prosecutorial misconduct. By far one of the most serious is also one of the most factually misleading. The prosecutors in this case convinced the trial judge to exclude the highly relevant and probative testimony of Security Guard Anthony Herrington. Mr. Herrington was prepared to testify that the deceased, Calvin Younger, did have a gun with him right before he walked over to Mr. Younger and said to Mr. Williams, "what's up now, m-f." After preventing the jury from hearing this evidence, ADA Mansell then proceeded to argue to the jury that no one else saw Calvin Younger with a gun. (Tr.706). ADA Stanley argued that there was no self defense because no one else saw a gun. "Where's the gun," Stanley kept imploring to the jury. Both prosecutors knew there was evidence of a gun by an independent witness. It is ironic and sad that Mr. Williams' counsel can make a mistake with discovery that is unintentional and Mr. Williams loses his right to present important evidence to the jury; then the prosecutors can capitalize on this by deliberately and intentionally misleading the fact-finder.

Not content with misrepresenting the evidence the prosecutors embarked on a star-studded journey to introduce prejudicial and inflammatory evidence to the jury. Evidence like: Mr. Williams made Jays' Lounge Killer Jays (Tr.500); asking if Mr. Williams ever abused his girlfriend (isn't that like the trick question-"do you still beat your wife?")(Tr.581); asking how many kids Mr. Williams has by different women (Tr.579). There are many other prejudicial comments made in the record that can be

found in *Appellant's Brief*. Space does not permit the listing of them all now and they are referenced in Mr. Williams' prior filings in this Court.

The question to be asked with this issue is this: "What do any of these issues that were inquired into by the prosecutors have to do with self defense or credibility as defined in the *Mississippi Rules of Evidence*?" If the past cases from this Court are precedent upon which we can rely, these questions were asked by the Assistant District Attorneys solely to deny Mr. Williams a fair trial and nothing more. *McDonald v. State*, 285 So.2d. 177, 180 (Miss 1973). (See other cases on Page 9 of the Petition for Writ of Certiorari).

RULE 404 AND 405 OF THE MISSISSIPPI RULES OF EVIDENCE AND PRIOR DECISIONS OF THIS COURT WERE NOT HONORED BY THE TRIAL COURT, THEREBY PREVENTING MR. WILLIAMS FROM PROVING THAT THE DECEASED WAS THE AGGRESSOR AND A DANGEROUS MAN. THIS ERROR DENIED MR. WILLIAMS A FAIR TRIAL AND DENIED HIM DUE PROCESS.

The trial Court denied Mr. Williams the right to introduce relevant evidence of Calvin Younger's reputation for violence and to rebut evidence introduced by the prosecution portraying Mr. Younger as not having a gun on the evening of the shooting. *M.R.E.* 404(a) (2) and 405(a) allowed the evidence offered by Mr. Williams. The prosecution filed a motion to prevent Cassandra Younger, Calvin Younger's sister from testifying to her brother's violent past. (C.P.430). The prosecutor also asked to bar the testimony from Cassandra of the death threats Calvin Younger made about Harvey Williams. The trial court granted the prosecutors' motions. (Tr.23, 26). Mr. Williams was not allowed to cross examine Fletcher Watts on Calvin Younger's reputation though Watts was able to tell the jury that his cousin was not a violent person. (Tr.188). One must wonder how Watts defines a "violent person" when we consider the known actions of Calvin Younger. (Tr. 250) Defense counsel was not permitted to question Joe Pugh about Younger's argument with Mr. Williams. (Tr.251). Mr. Williams was not allowed to call Freda Luckett as a witness. Ms. Luckett ran into Calvin Younger as she was exiting the club. Calvin Younger told her he was going to kill Harvey Williams. The trial court ruled this testimony inadmissible. (Tr. 22-24). Un-communicated threats are admissible in evidence. *Gates v. State*, 484 So. 2d 1002, 1008 (Miss 1986) (Other cases are cited in Appellant's Brief filed with the Court of Appeals).

During the examination of Mr. Williams his counsel asked him if he was afraid of Calvin Younger and why and the trial court sustained the objection to that question. (Tr.554). There are many other examples of improper and erroneous rulings by the trial court that denied Mr. Williams a fair trial and require a reversal. The issues in this case involved who was the aggressor that evening, did Calvin Younger have a gun, and did Mr. Williams shoot him in self defense. We know from the record that Calvin Younger robbed Mr. Williams at gunpoint before the shooting. Mr. Williams used the lawful processes of justice by reporting the robbery. Mr. Younger threatened to kill Mr. Williams. Mr. Younger had repeated instances of violence in his past. Mr. Williams knew of these violent instances because Mr. Williams dated Calvin Younger's sister. (*Sprinkle v. State*, 137 Miss. 731, 102 So.2d 844 (1925) (Other cases are cited on page 4 of the Petition for Writ of Certiorari).

On the evening of the shooting Anthony Herrington would have testified that he turned Calvin Younger and his cousins away from the club because Calvin had a gun. We can certainly believe this because Calvin has used guns on people before. Mr. Williams did not get to introduce Mr. Herrington's testimony though the prosecutors were allowed to present their theory of the case through Fletcher Watts and Joe Pugh. The testimony of Mr. Herrington would have corroborated Mr. Williams and would have proven Calvin Younger had a gun. This would have helped further establish that Calvin Younger was the aggressor and that Mr. Williams acted in self defense. Though we know from the record that Calvin Younger approached Mr. Williams, the testimony of Mr. Herrington and the other testimony that the trial judge excluded showing the dangerous character of Calvin Younger would have provided essential, corroborating testimony in support of Mr. Williams's testimony.

CONCLUSION

Mr. Williams did not receive a fair trial. The multitude of errors and their seriousness blocked the fact-finder from making an informed verdict in this case. Mr. Williams was allowed under applicable law to introduce the prior bad acts and reputation of Calvin Younger yet the trial Court did not permit the evidence. The two (2) Assistant District Attorneys asked questions throughout the trial that had nothing to do with the issues but were designed to prejudice the jury against Mr. Williams. There was no relevance

for the questions asked by the prosecutors. The trial judge excluded a crucial witness due to a non-willful discovery violation without following *Box* or the *URCCC*, Rule 9.04. There were other errors during this trial that prevent Mr. Williams from receiving a fair trial.

Police officers have a saying they are fond of quoting when they are in a situation where they must draw their gun and act fast: "It is better to be judged by 12, then carried in a box by 6." This statement has a ring of truth to it, but it makes sense only if the trial by 12 is a fair trial. A fair trial did not occur for Mr. Williams and his conviction should be reversed. There is more than a reasonable likelihood that if these errors had not occurred, Mr. Williams would have been found not guilty by a jury.

HARVEY WILLIAMS, JR., a/k/a "SMOKIE"

BY: Merrida Coxwell
MERRIDA (BUDDY) COXWELL

CERTIFICATE OF SERVICE

This is to certify that I, Mérrida (Buddy) Coxwell, have this day mailed by United States mail, postage prepaid, and a true and correct copy of the above and foregoing *Brief in Support of Mr. Harvey Williams Pursuant to M.R.A.P. Rule 17(h)* to:

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This the 11th day of October, 2010.

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