IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CRIMINAL CAUSE NO.: NO. 2008-KA-01081-COA

CHRISTOPHER THOMAS
APPELLANT

VS.

STATE OF MISSISSIPPI
APPELLEE

APPELLANT'S BRIEF IN SUPPORT OF APPEAL

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CERTIFICATE OF INTERESTED PARTIES

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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.

Christopher Thomas, Appellant
Leigh Anne Cade, Attorney for Appellant
James H. Powell, III, District Attorney
Steven Waldrup, Assistant District Attorney
Wilson McNair, Assistant District Attorney
Honorable Jannie Lewis, Yazoo County Circuit Court Judge

CERTIFIED, this the 13th day of October., 2008.

LEIGH ANNE CADE

Attorney of Record for Appellant
Christopher Thomas

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II. STATEMENT OF THE CASE

This case involves the numerous errors made during the trial of Christopher Thomas on the charge of armed robbery.

On July 10, 2006, Christopher Thomas was indicted in the Circuit Court of Yazoo County, Mississippi, Cause No. 26, 0116, on five (5) counts of armed robbery in violation of Miss. Code Ann. § 97-3-79. A jury trial was held on April 1, 2008. On the day of trial, the State moved to have the indictment amended to change the name of one of the victims of the alleged armed robbery and said request was granted. The State subsequently moved to have Counts IV and V of the indictment dismissed and said request was also granted. At the end to the State's case in chief, and again at the close of the Defendant's case in chief, the Defense moved for a directed verdict. Said motion was denied by the Court. The jury eventually returned a verdict of guilty on all three (3) counts presented to them, and Mr. Thomas was sentenced to serve fifteen (15) years in the custody of the Mississippi Department of Corrections on each count to run concurrent with one another.

Following the trial, Mr. Thomas' trial counsel withdrew as counsel and current counsel was appointed to represent Mr. Thomas in this appeal. Thereafter, by and through current counsel, Mr. Thomas filed a Motion for Judgment Notwithstanding the Verdict, or in the Alternative, for a New Trial. A hearing was held on said motion and was subsequently denied. Mr. Thomas then filed this appeal.

III. SUMMARY OF THE ARGUMENT

Mr. Thomas should be granted a new trial due to the numerous errors made during his jury trial, such as Mr. Thomas being present before the jury while in restrains and the prosecution being allowed to engage in numerous acts of misconduct. Furthermore, Mr. Thomas' indictment was defective, in addition to the fact that the State was allowed to amend the indictment on the day trial, both in violation of the Defendant's due process rights. Mr. Thomas' rights were further violated as a result of the trial court's failure to conduct a proper Batson hearing and allowing unwarranted amendments to the Defendant's jury instructions. As a result of the numerous errors made during the course of the jury trial, the Defendant's fundamental right to a fair trial was severally infringed upon, and, as a result, the Defendant is entitled to a new trial.

IV. FACTS

On January 21, 2006 Christopher Thomas, along with his cousin, entered a small establishment, known as the Game Room, in Yazoo City, Yazoo County, Mississippi. Several people, including Jody Clark, Terry Collins and Arthur James, AKA Jones, were present in the establishment shooting pool and playing dice. Mr. Thomas stood in the corner for some time, then he and his cousin left the establishment. Shortly after the two men's departure, a man with some sort of cloth wrapped around his face entered the establishment, displayed a firearm and demanded money from several of the patrons, including Jody Clark, Terry Collins and Arthur Jones. He exited the establishment with an undetermined amount of money.

Officer Jason Bright with the Yazoo City Police Department responded to the robbery. Officer Bright secured the scene until Detective Larry Davis arrived. Some of the witnesses stated to law enforcement that they believed Christopher Thomas may have been the robber based on the similarity in clothing between the robber and Christopher Thomas. At that point Mr. Thomas became a suspect. Subsequently, Mr. Thomas turned himself in to authorities.

Christopher Thomas was indicted on July 10, 2006 in the Circuit Court of Yazoo County, Mississippi, Cause No. 26-0116, on five (5) counts of armed robbery, including the armed robbery of Jody Clark, Terry Collins and Arthur James. (C.P. 3-4; R.E. 3-4)). Trial began on April 1, 2008. On the day of trial, the prosecution made an oral motion to amend the indictment to change the name Arthur James to Arthur Jones. Said motion was granted over Defense's objection. (Tr. 10-11; R.E. 16-17). The State called three eyewitnesses and victims of the robbery, Jody Clark, Terry Collins and Arthur Jones, as well as Officer Jason Bright, during its case in chief. Prior to the close of the State's case, the State then moved to dismiss Counts IV and V of the indictment, which was granted. (Tr. 161; R.E. 55). At the close of the State's case,

Defense moved for a directed verdict, arguing that the identification of Christopher Thomas as the alleged robber was not proven by the State. (Tr. 172; R.E. 59). Said motion was denied without explanation. (Tr. 173; R.E. 60). The Defense then presented its case, calling Rosie Thomas and Christopher Thomas to the stand. At the close of the Defense's case, Defense's motion for a directed verdict was renewed and once again denied. (Tr. 203; R.E. 68). On April 1, 2008, the jury found Christopher Thomas guilty of three (3) counts of armed robbery. (C.P. 37-39; R.E. 7-9). He was sentenced to serve fifteen (15) years in the custody of the Mississippi Department of Corrections on each count to run concurrent with one another. Said Order was entered April 21, 2008. (C.P. 42; R.E.10).

On April 21, 2008, an Order was entered allowing Mr. Thomas' trial counsel, attorney Joe Holloman, to withdraw and current counsel was appointed for the purposes of appeal. (C.P. 43; R.E. 11).

On April 29, 2008, Christopher Thomas, by and through current counsel, filed a Motion for Judgment Notwithstanding the Verdict, or in the Alternative for a New Trial, and a hearing on said motion was held on June 10, 2008. (C.P. 44-45; R.E. 12-13). After hearing arguments from counsel for the Defense and State, said motion was denied without explanation. (Tr. 242; R.E. 75).

Christopher Thomas subsequently filed his Notice of Appeal on June 20, 2008. (C.P. 47-48; R.E. 14-15).

V. ARGUMENT

I. The Indictment Was Defective and Violated Defendant's Due Process Rights.

On July 10, 2006, Christopher Thomas was indicted on a five (5) counts of armed robbery. (C.P. 3-4; R.E. 3-4). Although multi-count indictments are permissible in limited

circumstances, the indictment in question failed to recite the justification for a multi-count indictment.

Although Defense counsel did not object to the indictment at the trial level, the Court should address the issue under the plain error doctrine. In Debrow v. State, 972 So.2d 550, 553 (Miss.2007), the Court held:

> Generally, issues not presented to the trial court are procedurally barred on appeal. *Williams v. State,* 794 So.2d 181, 187 (Miss.2001) (citing *Foster v. State,* 639 So.2d 1263, 1288-89 (Miss. 1994)). However, this Court will proceed under the plain error doctrine and review errors which affect a defendant's fundamental, substantive rights in order to prevent a manifest miscarriage of justice. *Williams,* 794 So.2d at 187 (citing *Gray v. State,* 549 So.2d 1316, 1321 (Miss.1989)).

Mississippi Code Annotated § 99-7-2 governs when it is proper to charge two or more offenses in a single count indictment.

> **99-7-2. When two or more offenses may be charged in single indictment; trial, verdicts, and sentences.**
>
> (1) Two (2) or more offenses which are triable in the same court may be charged in the same indictment with a separate count for each offense if: (a) the offenses are based on the same act or transaction; or (b) the offenses are based on two (2) or more acts or transactions connected together or constituting parts of a common scheme or plan.

The law is clear that there is only limited instances in which multiple offenses can be charged in the same indictment. In the instance case, the indictment fails to state any reason that would allow multiple offenses to be charged in one indictment.

In Quang Thanh Tran v. State, 962 So.2d 1237, 1241 (Miss.2007), the Mississippi Supreme Court stated:

> The government may not prosecute a criminal defendant "for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury. . . ." U.S. Const. amend. V. The purpose of an indictment is to satisfy the constitutional requirement that a "defendant be informed of the nature and cause of the accusation . . ." U.S. Const. amend. VI; Miss. Const. art. 3,

> § 26. *See also* U.R.C.C.C. 7.06 (indictment must include a "plain, concise and definite written statement of the essential facts constituting the offense charged and *shall fully notify the defendant of the nature and cause of the accusation.*") (emphasis added). The purpose of these requirements is to ensure that criminal defendants have a fair and adequate opportunity to prepare for and defend against the charges brought against them by the government. Therefore, in order for an indictment to be sufficient, "it must contain the essential elements of the crime charged." *Peterson,* 671 So.2d at 652-53 (citing *May v. State,* 209 Miss. 579, 47 So.2d 887 (1950)).

The Fourteenth Amendment of the United States Constitution states:

> **Amendment XIV. Rights Guaranteed: Privileges and Immunities of Citizenship, Due Process, and Equal Protection**
>
> SECTION. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In the present case, the failure of the indictment to recite the justification for a multi-count indictment has deprived the Defendant due process of law. The Defendant is entitled to a clear and concise statement of the essential facts constituting the offense charged. *Quang Thanh Tran,* 962 So.2d at 1241. The indictment in this cause fails to give justification for the multi-count indictment and, as such, did not give the Defendant a clear and concise statement of the facts giving rise to the charge. As such, the Defendant was deprived due process.

II. The Trial Court Erred by Allowing the Indictment to be Amended on the Day of Trial.

On the day of trial, the prosecution made an oral motion to amend Count III of the indictment to change the name of the alleged victim from Arthur Jones to Arthur James. Defense counsel objected arguing that said amendment would violate the Defendant's due process rights and that the Defendant was entitled to some sort of notice. Said objection was overruled and the

motion was granted. (Tr. 10-11; R.E. 16-17). Subsequently, Jury Instruction No. 4 was also amended to reflect the same name change. (C.P.20; R.E. 5).

Uniform Rules of Circuit and County Court Practice, Rule 7.09 states that an "[a]mendment shall be allowed only if the defendant is afforded a fair opportunity to present a defense and is not unfairly surprised."

In Leonard v. State, 972 So.2d 24, 28 (Miss.Ct. App.2008) the Court stated:

> Trial courts may amend indictments only to correct defects of form. *Spears v. State*, 942 So.2d 772, 774 (¶6) (Miss. 2006). In contrast, defects of substance must be corrected by the grand jury. *Id.* The relevant question is whether amending the indictment to correct the date of the offense amounts to a defect of form or of substance. Resolution of that question depends on the facts of the case and the context of a defendant's theory of the case. "[A] change in the indictment is permissible if it does not materially alter facts which are the essence of the offense on the face of the indictment as it originally stood or materially alter a defense to the indictment as it originally stood so as to prejudice the defendant's case." *Id.*

The prosecution wrongly stated to the judge that "What we have to prove was that somebody was robbed. We don't have to prove the name of the person." (Tr.10, R.E. 16).

In Carter v. State, 965 So.2d 705, 709 (Miss.Ct.App.2007), the Mississippi Court of Appeals stated the following:

> The State never sought an amendment of the indictment in this case to take out the identity of the victims of the robbery. Furthermore, the identity of the victim is an essential element of the crime of robbery. In *Coffield v. State*, 749 So.2d 215, 217(¶ 7) (Miss.Ct.App.1999) (quoting Miss.Code Ann. § 97-3-73) (Rev.1994), this Court noted: "Robbery is defined as the taking of 'the personal property of another. . . .' We are satisfied that the State is not required, as a critical element of these crimes, to either charge or to put on affirmative proof, *beyond the specific identity of the victim,* that the victim was a human being." The defendant in *Coffield* had argued that the indictment was "fatally defective for its failure to charge that the victim Lana Coffield [his estranged wife], was a human being." *Coffield,* 749 So.2d at 216-17(¶ 1).
>
> In *Burks v. State,* 770 So.2d 960, 963(¶ 12) (Miss.2000) (quoting *Hughes v. State,* 207 Miss. 594, 603, 42 So.2d 805, 807 (1949), citing *Upshaw v.*

> *State*, 350 So.2d 1358, 1362 (Miss.1977)), the Mississippi Supreme Court stated that "'an indictment must state the name of the victim of an offense where that is an element of the offense, and a failure to state it, or a material variance between statement and proof is fatal. . . .' A variance is material if it affects the substantive rights of the defendant." We have found nothing to indicate that the identity of a victim of a robbery is not an essential element of the crime of armed robbery. Thus, it appears to this Court that the State could not have amended the indictment to omit reference to the identities of the victims, even had it attempted to do so. In either case, there was a material variance between the indictment and the proof offered, since no evidence indicated the identity of any victim other than Rivera.

The Defendant, in the present case, was charged with the crime of robbery. The Court stated in *Carter* that the identity of the victim in the case of robbery is an essential element of the crime and that an indictment must state the name of a victim of an offense where that is an element of the offense. 965 So.2d at 709. Therefore, in the present case, the amendment of the indictment to change the name of the victim was a substantive change to the indictment as opposed to a permissible change to form. Substantive change can only be made by the grand jury. *Leonard,* 972 So.2d at 28. The amendment to change the name of the victim was not made by the grand jury in the present case and was thus improper. Furthermore, the subsequent amendment to Jury Instruction 4 resulted from the improper amendment to the indictment and therefore should not have be granted.

III. The Trial Court Erred by Allowing the Jury to Observe the Defendant in Restraints.

During voir dire examination of the jury, a short recess was taken by the Court. After the brief recess, Mr. Thomas' leg restraints were not removed prior to the jury being brought into the court room. Defense counsel notified the Judge of the restraints and the Judge instructed Defense counsel to keep the Defendant seated until the jury was taken out. However, it does not appear from the record that the jury was removed from the court room at that time. It appears that

Defense counsel was instructed to continue voir dire and the jury was not recessed until the end of voir dire. (Tr. 68-69; R.E. 20-21)

Although Defense counsel did not request a mistrial based on the Defendant being present in the court room with jurors while in restraints, the Court should still address the issue as plain error. In *Debrow,* the Court stated "this Court will proceed under the plain error doctrine and review errors which affect a defendant's fundamental, substantive rights in order to prevent a manifest miscarriage of justice." 972 So.2d at 553.

In Hickson v. State, 472 So.2d. 379, 383 (Miss.1985), the Court stated:

> The principle that there is a presumption of innocence in favor of the accused in a criminal prosecution is "fundamental".(fn2) *Estelle v. Williams,* 425 U.S. 501, 503-504, 96 S.Ct. 1691, 1692-93, 48 L.Ed.2d 126, 130 (1976). Its enforcement lies at the foundation of the administration of our criminal justice system. *Taylor v. Kentucky,* 436 U.S. 478, 483, 98 S.Ct. 1930, 1933, 56 L.Ed.2d 468, 474 (1978). Though not expressly written into the Bill of Rights, the presumption of innocence has long been recognized as the logical corollary of the principle that the prosecution bears the burden of proof beyond a reasonable doubt, a proposition which has been accorded federal constitutional status. *Jackson v. Virginia,* 443 U.S. 307, 315-16, 99 S.Ct. 2781, 2786-87, 61 L.Ed.2d 560, 571 (1979). This Court has been sensitive to subtle erosions of the presumption of innocence. *Friday v. State,* 462 So.2d 336, 338 (Miss.1985) (prospect of destroying presumption of innocence inherent in multicount indictment).
> The courts of other jurisdictions have long recognized the substantial danger of destruction in the minds of the jury of the presumption of innocence where the accused is required to wear prison garb, is handcuffed or otherwise shackled. *See, e.g., Brewster v. Bordenkircher,* 745 F.2d 913, 916-18 (4th Cir.1984); *Zygadlo v. Wainwright,* 720 F.2d 1221, 1223 (11th Cir. 1983); *Kennedy v. Cardwell,* 487 F.2d 101, 104 (6th Cir.1973); *Hernandez v. Beto,* 443 F.2d 634, 636-637 (5th Cir.1971); *State v. Crawford,* 99 Idaho 87, 95-96, 577 P.2d 1135, 1143-44 (1978); *Shultz v. State,* 131 Fla. 757, 758,179 So. 764, 765 (1938); *Blair v. Commonwealth,* 171 Ky. 319, 327-29, 188 S.W. 390, 393-94 (1916).

Clearly, being detained in restraints while in the presence of the jury violates defendant's fundamental right to a presumption of innocence and, therefore, should be addressed by this Court under the plain error doctrine.

In Williams v. State, 962 So.2d 129, 131 (Miss.Ct.App.2007), the Court stated:

> In general, a defendant has the right to be "free of shackles or handcuffs" when in front of the jury. *Smith v. State,* 877 So.2d 369, 379(¶ 17) (Miss.2004) (citations omitted). "However, where there is a risk of escape or the possibility of harm to other persons, restraint devices may be used in the judge's discretion." *Id.* (citing *Brown v. State,* 798 So.2d 481, 501(¶ 42) (Miss.2001)).

There is no evidence that at any time during the course of the trial did Mr. Thomas attempt to escape or pose a threat to anyone. Furthermore, Mr. Thomas was prejudiced by the restraints as he was unable to freely move and communicate with counsel. Furthermore, upon being notified of the shackles, the Court failed to immediately take a recess in order to have the shackles removed. Finally, the Court failed to question the jury as to whether or not they had seen the Defendant in the restraints. As such, Defendant should be granted a new trial.

IV. The Trial Court Erred by Not Making On the Record Findings that the Race Neutral Reasons for State's Peremptory Challenges Were Non Pretextual.

During the jury selection process made in chambers, Defense counsel made an objection to the States use of preemptory challenges. (Tr. 87; R.E. 22). After reviewing the make up of the possible jury, the Court found that there was a prima-facie case of a Batson violation. (Tr.87-92; R.E. 22-27). At that point the State was asked to give race-neutral reasons for its challenges. The State responded as follows:

MR. WALDRUP:	Yes, ma'am. The race-neutral reason for S1, Your Honor, is that Ms. Florshene Thomas stated that she was close personal friends with the whole family. I went back and asked her about her last name being Thomas. We got into a conversation about that. Because of her statement about being close friends with the family or knowing the family, that's our reason for striking her.
THE COURT:	Court finds a race-neutral reason and will accept Thomas as S1 S2?
MR. WALDRUP:	Dedrick Deonne Woodberry. We have two or three cases in our office right now on a Woodberry -- spelling the last name -- for

selling cocaine to MBN agents, and that's our basis for the challenges on Woodberry.

THE COURT: Court finds a race-neutral reason for Woodberry and will accept S2.
Harris?

MR. WALDRUP: Linda Harris is the one I tried to strike for cause. She knew three of the victims and she knew the defendant as well.

THE COURT: Court finds a race-neutral reason for Harris and will accept her as S3.
Rodney Jefferson?

MR. WALDRUP: Rodney Jefferson stated in questioning that he had seem the defendant around in the community, and during the process of picking the jury, I was informed by the law enforcement officers that he was a good friend with the defendant.

THE COURT: Court finds a race-neutral reason for Jefferson and will accept him as S4.
S5, Austin.

MR. WALDRUP: Mr. Austin, Your Honor, his wife was first cousin with one of the parties involved. He was related -- he was related by marriage to the defendant also and said -- but he said he could do it. But he said he was related to the defendant by marriage and then his wife was related to one of the victims by marriage but that he didn't really know either one of them. But it's because of that relationship that we chose S5.

THE COURT: Court finds a race-neutral reason for Austin and accept him as S5. Panel is tendered to the defense.

(Tr. 90-92; R.E. 25-27). In Hatten v. State, 628 So.2d 294, 298 (Miss.1993), our Supreme Court stated:

> This Court has not directly addressed the issue of whether a trial judge is required to make an on-the-record factual determination of race neutral reasons cited by the State for striking veniremen from a panel. The *Batson* Court declined to provide specific guidelines for handling this issue. This Court has articulated the general law in this state which provides that "it is the duty of the trial court to determine whether purposeful discrimination has been shown," by the use of peremptory challenges. *Wheeler v. State,* 536 So.2d 1347 (Miss.1988); *Lockett v. State,* 517 So.2d at 1349.

> In considering this issue, we today decide it necessary that trial courts make an on-the-record, factual determination, of the merits of the reasons cited by the State for its use of peremptory challenges against potential jurors. This requirement is to be prospective in nature. Of course, such a requirement is far from revolutionary, as it has always been the wiser approach for trial courts to follow. Such a procedure, we believe, is in line with the "great deference" customarily afforded a trial court's determination of such issues. "Great deference" has been defined in the *Batson* context as insulating from appellate reversal any trial findings which are not clearly erroneous. *Lockett v. State,* 517 So.2d at 1349-50. *Accord Willie v. State,* 585 So.2d 660, 672 (Miss. 1991); *Benson v. State,* 551 So.2d 188, 192 (Miss.1989); *Davis v. State,* 551 So.2d 165, 171 (Miss.1989), cert, denied, 494 U.S. 1074, 110 S.Ct. 1796, 108 L.Ed.2d 797 (1990); *Chisolm v. State,* 529 So.2d 630, 633 (Miss.1988); *Johnson v. State,* 529 So.2d 577, 583-84 (Miss.1988) Obviously, where a trial court offers clear factual findings relative to its decision to accept the State's reason[s] for peremptory strikes, the guesswork surrounding the trial court's ruling is eliminated upon appeal of a *Batson* issue to this Court.

In Puckett v. State, 737 So.2d 322, 334-35 (Miss.1999), the Court noted:

> Therefore, before the trial court is required to conduct a Batson hearing, it must first be shown that a prima facie case of purposeful discrimination exists. Specifically, Puckett must show that the State used peremptory challenges on black jurors in such a manner that gave rise to an inference of purposeful racial discrimination. However, it should be noted here that the State did not wait for a Batson challenge, but provided reasons for striking all jurors regardless of race or gender. Nonetheless, this voluntary action on the State's behalf should not be interpreted as eliminating Puckett's burden of establishing a prima facie case of purposeful discrimination. Upon review, this Court "must first ... determine[] that the circumstances of the State's use of peremptory challenges against minority venirepersons created an inference of purposeful discrimination." *Thorson v. State,* 653 So.2d 876, 898 (Miss.1994) (Smith, J. dissenting).
>
> If the trial court does make the determination that the defendant has properly established this inference, the burden then shifts to the prosecution to provide race-neutral reasons for each challenged peremptory strike. The defense must then provide rebuttal to the State's proffered reasons. The trial judge must then "make an on-the-record, factual determination, of the merits of the reasons cited by the State for its use of peremptory challenges against potential jurors." *Hatten v. State,* 628 So.2d 294, 298 (Miss. 1993).

In the present case, the trial court properly found that a prima facie case of purposeful

discrimination was present. The Judge then allowed the State to give race-neutral reasons for each of the peremptory strikes. However, the inquiry ended there. The trial court accepted the State's reasons without providing the Defense with an opportunity to rebut such proffered reasons, nor did the trial judge make a meaningful on the record factual determination as to the merits of the State's race-neutral reasoning for the challenges. As such, the Defendant was denied his fundamental right to a fair and impartial jury.

Although Defense counsel did not object to such action by the trial judge, this Court should address the issue under the plain error doctrine, as the Defendant's right to a fair and impartial jury is a fundamental right guaranteed by the Sixth Amendment of the United States Constitution, which states:

> **Amendment VI. Rights of Accused in Criminal Prosecutions**
>
> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

In *Debrow,* the Court stated "this Court will proceed under the plain error doctrine and review errors which affect a defendant's fundamental, substantive rights in order to prevent a manifest miscarriage of justice." 972 So.2d at 553. As such, this Court should find that this issue is not barred by Defense counsel failure to object during trial.

V. The Defendant was Denied a Fair Trial Due to Prosecutorial Misconduct.

A. The Trial Court Erred by Allowing the Prosecution to Comment On the Firing of the Firearm.

Christopher Thomas was indicted for five (5) counts of armed robbery. All five counts stated that Mr. Thomas put the victims in fear "by exhibition of a deadly weapon, to-wit: by

exhibiting a gun." All five counts track the same language. The indictment is void of any language charging the Defendant with firing a firearm. (C.P.3-4; R.E. 3-4).

During voir dire, the prosecution, while giving the jury panel a brief synopsis of the case, stated that the Defendant "[r]uns in and shoots a gun at the ceiling..." (Tr. 56; R.E. 19). Furthermore, during opening statements, the prosecution stated that the first officer on the scene "talked with witnesses to see if he could get a description of the person who did the shooting and robbing the people." At that point Defense counsel objected to any testimony regarding a shooting and after a short bench conference he withdrew his objection. (Tr. 112; R.E. 29).

The court should address this issue under the plain error doctrine. In *Debrow*, 972 So.2d at 553 (Miss.2007), the Court held that "this Court will proceed under the plain error doctrine and review errors which affect a defendant's fundamental, substantive rights in order to prevent a manifest miscarriage of justice." (citations omitted).

In the case at hand, the prosecution's comments concerning the firing of the weapon were made only to prejudice the jury. In Sheppard v. State, 777 So.2d 659, 661 (Miss.2000), the Supreme Court stated:

> Attorneys are allowed a wide latitude in arguing their cases to the jury. However, prosecutors are not permitted to use tactics which are inflammatory, highly prejudicial, or reasonably calculated to unduly influence the jury. *Hiter v. State,* 660 So.2d 961, 966 (Miss.1995). The standard of review that appellate courts must apply to lawyer misconduct during opening statements or closing arguments is whether the natural and probable effect of the improper argument is to create unjust prejudice against the accused so as to result in a decision influenced by the prejudice so created. *Ormond v. State,* 599 So.2d 951, 961 (Miss.1992).

The indictment only charges the defendant with "exhibiting a gun". (C.P. 3-4; R.E. 3-4). Miss. Code Ann. § 97-3-79 defines armed robbery as follows:

> **97-3-79. Robbery; use of deadly weapon.**
> Every person who shall feloniously take or attempt to take from the person

> or from the presence the personal property of another and against his will by violence to his person or by putting such person in fear of immediate injury to his person *by the exhibition of a deadly weapon* shall be guilty of robbery and, upon conviction, shall be imprisoned for life in the state penitentiary if the penalty is so fixed by the jury; and in cases where the jury fails to fix the penalty at imprisonment for life in the state penitentiary the court shall fix the penalty at imprisonment in the state penitentiary for any term not less than three (3) years. (emphasis added).

The statute does not require a showing that a gun was fired, only that a deadly weapon was exhibited. Furthermore, the indictment does not charge the Defendant with firing a firearm. The Prosecution's comment concerning the firing of the firearm were highly prejudicial and calculated to unfairly influence the jury and violated his fundamental right to a fair trial.

B. The Trial Court Erred by Allowing the Prosecution to Define "Exhibiting" During Opening Statement.

During opening statements, the prosecution inappropriately attempted to define "exhibiting a weapon." In particular, the prosecution stated "Not just robbery, armed robbery. Exhibiting a weapon. See, when you point and wave, your exhibiting a weapon." (Tr. 114; R.E. 30). Although Defense counsel failed to object, the court should consider this argument under the plain error doctrine which states that "[this Court] will proceed under the plain error doctrine and review errors which affect a defendant's fundamental, substantive rights in order to prevent a manifest miscarriage of justice." *Debrow*, 972 So.2d at 553 (citations omitted).

In Evans v. State, 919 So.2d. 231, 235, (Miss.Ct.App.2005), the Court stated,

> The defendant's failures are not the basis for our determining whether to notice as plain error a matter not brought to the attention of the trial court or an issue not addressed on appeal. We must consider whether a substantial right is involved. If the error affects a fundamental constitutional right, plain error recognition is appropriate. *Grubb v. State,* 584 So.2d 786, 789 (Miss.1991).
>
> It is not open to reasonable debate that the right—not to be convicted of an offense unless the State proves beyond a reasonable doubt each and every element of the offense-is a fundamental right anchored in our constitution

> and the jurisprudence of this state. And respecting fundamental rights, our law is well settled that a plea of guilty does not waive the failure to charge an essential element of the offense.

Miss. Code Ann. § 97-3-79 defines armed robbery as follows:

> **97-3-79. Robbery; use of deadly weapon.**
> Every person who shall feloniously take or attempt to take from the person or from the presence the personal property of another and against his will by violence to his person or by putting such person in fear of immediate injury to his person *by the exhibition of a deadly weapon* shall be guilty of robbery and, upon conviction, shall be imprisoned for life in the state penitentiary if the penalty is so fixed by the jury; and in cases where the jury fails to fix the penalty at imprisonment for life in the state penitentiary the court shall fix the penalty at imprisonment in the state penitentiary for any term not less than three (3) years. (emphasis added.

"The exhibition of a deadly weapon" is an essential element of the crime charged in the present case. Furthermore, the prosecution clearly defined "exhibiting a firearm" during his opening statements, and therefore it is unclear as to whether the jury depended on his definition of this element, or whether the jury depended upon the proper instruction of law given by the judge, when they came to their guilty verdict. Therefore, it is unclear as to whether the jury found the Defendant guilty, beyond a reasonable doubt, of each and every element of the crime charged, specifically, "exhibition of a deadly weapon," due to the prosecution's improper attempt to define this element of the crime during opening statements.

The law is clear that it is the court, not the prosecutions job to instruct the jury as to the law. Uniform Rules of Circuit and County Court Practice, Rule 3.05 states that "[a]ttorneys will not offer an opinion on the law." In Edge v. State, 393 So.2d 1337, 1340 (Miss.1981), the Mississippi Supreme Court stated that "[i]n the case of *Clemons v. State*, 320 So.2d 368 (Miss.1975), this Court reaffirmed the principle that it is the trial court, and not the prosecutor, who advises the jury on the law." In the present case, the prosecution gave his opinion and insight as to the meaning of exhibiting a weapon. The prosecutions remark were well outside the

general latitude that attorneys are given during opening and closing statements and resulted in prejudice. If the jury had a question as to the meaning of "exhibiting a gun", such question should have been presented to the trial judge and not resolved based on the prosecution's statement during opening statement. As a result, the Defendant's fundamental right to have the State prove beyond a reasonable doubt every element of the offense of armed robbery was violated.

C. The Trail Court Erred by Allowing the Prosecution to Comment on Facts Not in Evidence.

During closing statement, the prosecution stated "[i]f he had something over his eyes, he couldn't see so his whole face wasn't covered, folks. That's the thing. His whole face wasn't covered." At the point Defense counsel objected stating that the argument was contrary "to the evidence from the witness stand." Said objection was overruled. (Tr. 213; R.E. 71).

In Ross v. State, 954 So.2d 968, 1002-03 (Miss.2007), the Court found:

> Arguing statements of fact which are not in evidence or necessarily inferable from facts in evidence is error when those statements are prejudicial. *Blue v. State,* 674 So.2d 1184, 1214 (Miss. 1996), *overruled on other grounds, King v. State,* 784 So.2d 884 (Miss.2001); *see Randall v. State,* 806 So.2d 185, 212-14 (Miss.2001) (reversing and remanding for new trial in death penalty appeal partly because the prosecutor attempted to infer guilt from the sudden absence of gunpowder residue when absence of gunpowder residue was not in evidence); *West,* 485 So.2d at 689-90 (reversing and remanding for new trial in death penalty appeal partly because the prosecutor inappropriately implied in closing argument the defendant had threatened teenaged witnesses); *Augustine v. State,* 201 Miss. 277, 28 So.2d 243, 244-47 (1946) (reversing and remanding for new trial partly because the prosecutor made references to facts not on the record, including, but not limited to, references to a gun used to commit the crime when there was no evidence of a gun on the record). An arguing party may not appeal to a juror's prejudice by injecting prejudices not contained in some source of the evidence. *Sheppard,* 777 So.2d at 661 (citing *Nelms & Blum Co. v. Fink,* 159 Miss. 372, 131 So. 817, 821 (1930)).

The State presented three witness that were present during the armed robbery. The first

witness, Terry Collins stated that the robber "had a black tie sorta around his face or something." (Tr. 120; R.E. 31). Jody Clark testified that "[h]e had his shirt tied around his head...[b]ut he came back in with his shirt tied around his face..." (Tr. 134-135; R.E. 39-40). Arthur Jones stated that "his face was covered." He went on to state that "he left out and came back in with his face covered up." (Tr. 152; R.E. 50).

There was no evidence presented during trial regarding how much of the robber's face was covered. The prosecution had every opportunity during its examination of the witnesses to establish how much of the robber's face was covered and failed to do so. Therefore, the prosecution improperly commented as to whether or not the robber's eyes were covered. Such statement violated the Defendant's fundamental right to a fair trial.

D. The Trial Court Erred by Allowing the Prosecution to Make Improper Comments Regarding an Alleged False Statement Made by a Defense Witness that Was Not Properly Impeached.

The Defendant's mother, Rosie Thomas, testified that she had seen the Defendant on the evening of the robbery. She went on to testify as to what he was wearing on that evening. However, she was not asked, nor did she state, what time she saw the Defendant on that particular evening. (Tr. 177; R.E 61). On cross-examination, Mrs. Thomas testified that she went to bed around 11.35 but did not go to sleep. When asked about her work schedule she stated that she believed this happened on a Saturday and that she was working the day shift from six (6) in the morning until two (2) in the evening. (Tr. 179-180; R.E. 62-63).

Subsequent to Mrs. Thomas' testimony, Christopher Thomas was called to the witness stand. On cross examination, the following took place:

Q. Mr. Thomas, are you aware that on the night this robbery took place, your mama clocked in for work at eleven o'clock in the evening at the Yazoo City Police Department?

A. No, sir. I don't keep up with her schedule.

Q. Were you aware that the police department keeps up with those records?

A. I'm quite sure that they do, sir.

Q. So she couldn't have been there to see you, could she, the way that she testified if that's right, could she?

At that point, Defense counsel objected stating that it was an improper attempt to impeach the statement of a previous witness. The objection was overruled and the line of questioning continued. (Tr. 186-187; R.E. 64-65). At the close of the Defense's case, the following bench conference transpired:

MR. WALDRUP: I was just delivered this. This is Rosie's time clock.

THE COURT: Keep your voice down.

MR. WALDRUP: According to this, she got to work at like 2155, 9:55 on a Saturday and got off the following morning around six. According to this, she wouldn't have been at work when this took -- when this took place, but I don't have anybody here. They got the police chief on the way to rebut it. That's my -- that's my rebuttal.

MR. HOLLOMAN: Keep down your voice. They can hear you over there.

THE COURT: Bailiff, you can carry the jury back.

(Tr. 202; R.E. 67). However, it appears from the record that the police chief never arrived and there was no testimony given regarding Mrs. Thomas' time sheet. Furthermore, the time sheet was not admitted into evidence.

During its closing statement, the prosecution once again commented on the alleged inconsistency in Mrs. Thomas' statement. (Tr. 215-216; R.E. 72-73).

The prosecution, over Defense's objection, was allowed to improperly impeach Mrs. Thomas testimony through the testimony of Mr. Thomas. Mississippi Rules of Evidence, Rule 613 (b) states:

> (b) Extrinsic Evidence of Prior Inconsistent Statement of Witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

In the case at hand, the party making the alleged inconsistent statement was not afforded an opportunity to explain or deny same as required by M.R.E. Rule 613(b). Mrs. Thomas testified that she went to work at six and got off work at two. On cross examination of Mr. Thomas, the prosecution asked Mr. Thomas was he aware that his mother clocked in at eleven o'clock and therefore had lied in her previous testimony. (Tr. 187; R.E. 65). Such questioning was an improper attempt to impeach Mrs. Thomas' testimony. M.R.E. 613(b) clearly states that the witness should be afforded an opportunity to explain or deny any extrinsic evidence of an inconsistent statement. As such, the trial court erred by allowing the line questioning to continue and not instructing the jury to disregard the original question.

Furthermore, at the close of the Defense's case, during the bench conference, the prosecution made improper comments regarding what his rebuttal would be. It is clear from the record that both the Court and Defense counsel had to remind the prosecutor to keep his voice down. (Tr. 202). Because the police chief never appeared to testify and the time sheet of Mr. Thomas was never admitted into evidence, the prosecutor's improper comments at the bench warrant reversal.

In *Ross*, 954 at 1001-02, the Supreme Court stated:

> Attorneys are afforded wide latitude in arguing their cases to the jury but are not allowed to employ tactics which are inflammatory, highly prejudicial, or reasonably calculated to unduly influence the jury. *Sheppard v. State*, 777 So.2d 659, 661 (Miss.2001). We will review allegations of misconduct to determine "whether the natural and probable effect of the improper argument is to create unjust prejudice against the accused so as to result in a decision influenced by the prejudice so created." *Id.* In deciding the

> propriety of allegedly improper comments, we will consider them in the context of the case. *Ahmad v. State,* 603 So.2d 843, 846 (Miss.1992). A series of otherwise harmless errors in a closing argument may be grounds for reversal where, in the aggregate, those errors violate a defendant's right to a fair and impartial trial. *Howell v. State,* 411 So.2d 772, 776 (Miss.1982) (series of inappropriate comments by prosecution during closing argument grounds for reversal for violation of due process).
>
> Ross failed to object to a number of the statements about which he now complains. In general, the failure to object to the prosecution's statements in closing argument constitutes a procedural bar. *Spicer v. State,* 921 So.2d 292, 309 (Miss.2006). This contemporaneous objection rule applies in death penalty cases and may apply to the prosecution's closing argument. *Williams v. State,* 684 So.2d 1179, 1203 (Miss.1996). However, in extreme cases, a failure to object to questions which were violative of a constitutional right will not act as a procedural bar to consideration. *Wood v. State,* 257 So.2d 193, 200 (Miss.1972) (finding that consideration of inappropriate cross-examination by the State was not barred by defendant's failure to object). *See also Mickell v. State,* 735 So.2d 1031, 1035 (Miss.1999) ("[I]n cases of prosecutorial misconduct we have held [that] this Court [is not] constrained from considering the merits of the alleged prejudice by the fact that objections were made and sustained, or that no objections were made."); *Griffin v. State,* 557 So.2d 542, 552 (Miss.1990) ("Even without a timely objection, reversal may be required when the prosecuting attorney has commented upon the defendant's right not to testify.") (citations omitted).

Despite the fact the Defense counsel did not object, the court should address the issue as plain error. In *Debrow*, 972 So.2d at 553 (Miss.2007), the Court held that "this Court will proceed under the plain error doctrine and review errors which affect a defendant's fundamental, substantive rights in order to prevent a manifest miscarriage of justice." (citations omitted).

Although the statement in question was not made directly to the jury during opening or closing statement, the prosecution clearly spoke in such a manner to ensure that the jury overheard the conversation. Case law is clear that statements made that are inflammatory and highly prejudicial will not be tolerated. *Ross* at 1001. The statements made by the prosecution during the bench conference were statements about alleged facts that were not in evidence and were never introduced into evidence. Furthermore, the prosecution intentionally spoke in such a

manner to ensure that the jury overheard the conversation. Such conduct rises to the level of improper conduct warned against in *Ross* and should not be tolerated, and in fact denied the Defendant his fundamental right to a fair trial.

In addition, the prosecution once again commented on the alleged inconsistent statement during closing, despite the fact no evidence was ever presented to contradict Mr. Thomas' testimony that she got off work at two o'clock on the day in question.

E. The Trial Court Erred By Allowing the Prosecution to Request That the Defendant be Punished for Asserting His Right to a Jury Trial.

Subsequent to the jury verdict, but prior to sentencing, the prosecutor stated to the Court that " [n]ormally, I don't speak at sentencing like this, but I simply ask the Court to take into consideration the fact that he put us through this trial...[h]e should have taken his plea offer." Defense counsel objected to such an argument. (Tr. 235; R.E. 74).

In Gillum v. State 468 So.2d 856, 863 (Miss.1985), the Supreme Court stated:

> Gillum alleges that the trial court erred by increasing his sentence in punishment for not entering a guilty plea in violation of his right to trial by jury under U.S. Const. Amend. VI. and Miss. Const. Article 3, Section 26 (1890). He cites *Pearson v. State,* 428 So.2d 1361 (Miss.1983); *Williamson v. State,* 388 So.2d 168 (Miss.1980); and *Fermo v. State,* 370 So.2d 930 (Miss.1979), for the rule that:
>
> > A criminal defendant may not receive a harsher sentence solely, or even partially, because he refuses to plead guilty and proceeds to require the prosecution to prove his guilt. The rationale behind the principle is that the coercion or the inducement casts a chill over the exercise of guaranteed fundamental constitutional rights. The sentencing court may consider only legitimate factors and cannot base the sentence, either in whole or part, upon the defendant's exercise of his constitutional rights to a jury trial, [citations omitted]
>
> *Fermo,* 370 So.2d at 932.

Clearly, the prosecutor's comments were improper and violated the Defendant's fundamental right to jury trial.

F. The Numerous Acts of Prosecutorial Misconduct Amounts to Reversable Error.

In *Ross*, 954 So.2d at 1001-02, the Court stated that "[a] series of otherwise harmless errors in a closing argument may be grounds for reversal where, in the aggregate, those errors violate a defendant's right to a fair and impartial trial." (citations omitted). In the present case, the prosecution engaged in numerous acts of misconduct, and taken as a whole, the Defendant was denied his right to a fair trial based on these numerous acts of misconduct.

VI. The Trial Court Erred by Amending Jury Instruction D-5.

Jury Instruction D-5 stated that "[i]t is a question of fact for you to determine whether the gun claimed to have been used by Christopher Thomas was a deadly weapon in the manner claimed to have been used." However, the state objected to the language "in the manner claimed to have been used" and, over defense objection, said language was stricken and the instruction was given as amended. (C.P. 30; R.E. 6; Tr. 206-207; R.E. 69-70). The final instruction given to the jury read:

> It is a question of fact for you to determine whether the gun claimed to have been used by Christopher Thomas was a deadly weapon.

(C.P. 30; R.E. 6).

In Davis v. State, 530 So.2d 694, 700 (Miss. 1988), the Court noted:

> S-2 reads as follows:
>
> > It is a question of fact for the Jury to determine whether the pistol claimed to have been used by Eugene Davis was a deadly weapon ***in the manner claimed to have been used*** in this case.
> >
> > A deadly weapon may be defined as any object, article or means which, when used as a weapon is, under the existing circumstances, reasonably capable or likely to produce death or serious bodily harm to a human being upon whom the object, article or means is used as a weapon.
>
> In *Duckworth v. State,* 477 So.2d 935 (Miss. 1985), the instruction which was given by the court and upheld by this Court was identical to the one

above. (emphasis added). Therefore, the language used is the legally correct definition of deadly weapon.

The Supreme Court has upheld the "in the manner claimed to have been used" language in question. As such, said language was a proper statement of the law and should not have be stricken from the instruction.

In Ladnier v. State, 878 So.2d 926, 931-32 (Miss.2004), the Court recited the rule governing the denial of jury instructions.

> Mississippi's law is well settled as to appellate review of a circuit court's grant or denial of jury instructions:
>
> > Jury instructions are to be read together and taken as a whole with no one instruction taken out of context. A defendant is entitled to have jury instructions given which present his theory of the case; however, this entitlement is limited in that the court may refuse an instruction which incorrectly states the law, is covered fairly elsewhere in the instructions, or is without foundation in the evidence. *Heidel v. State,* 587 So.2d 835, 842 (Miss.1991) (citations omitted).

The Defendant was entitled to have the jury instruction given as offered by him unless it was an incorrect statement of the law. According to *Davis*, the stricken language was not an incorrect statement of the law. 530 So.2d at 700 . As such, the Defendant was entitled to have the instruction given as initially presented to the Court. Such denial of said instruction violated Defendant's rights and he is therefore entitled to a new trial.

VII. The Trial Court Erred by Overruling Defendant's Objections.

During the direct examination of Terry Collins, Mr. Collins was asked by the prosecutor if his story had ever changed, referring to his story of the events that took place the night of the robbery. Defense counsel objected, however, said objection was overruled. (Tr. 122; R.E. 32).

In Woods v. State, 973 So.2d 1022, 1028 (Miss.Ct.App.2008), the Court held that "[a] prior consistent statement may not be introduced to "refute all forms of impeachment or merely

to bolster a witness's credibility, but only to refute an alleged motive." *Owens*, 666 So.2d at 816 (citing *Tome*, 513 U.S. at 157)." In the case at hand, the State was attempting to have a prior consistent statement of Mr. Collins introduced only to bolster his credibility. Clearly this was improper and said objection should have been sustained.

Secondly, during direct examination of Officer Jason Bright, Officer Bright testified that he was the officer that responded to the call on the night of the robbery. However, he further testified that he called an Investigator to take control of the case. Following Officer Bright's testimony that he was not the investigator for this case, the state asked Officer Bright if there were any other suspects in this matter. Defense counsel objected, stating that it called for speculation, but said objection was overruled. (Tr. 167-168; R.E. 57-58). Mississippi Rules of Evidence, Rule 701 governs this issue.

> **RULE 701. OPINION TESTIMONY BY LAY WITNESSES**
> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness,(b) helpful to the clear understanding of the testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.
>
> [Amended March 2, 1987, effective October 1, 1987; April 17, 2000, effective December 1, 2000. Amended effective May 29, 2003 to prohibit opinion testimony under Rule 701 based on scientific, technical, or other specialized knowledge within the scope of Rule 702.]
>
> Comment
>
> The traditional rule regarding lay opinions has been, with some exceptions, to exclude them from evidence. Rule 701 is a departure from the traditional rule. It favors the admission of lay opinions when two considerations are met. The first consideration is the familiar requirement of first-hand knowledge or observation. The second consideration is that the witness's opinion must be helpful in resolving the issues. Rule 701, thus, provides flexibility when a witness has difficulty in expressing the witness's thoughts in language which does not reflect an opinion. Rule 701 is based on the recognition that there is often too thin a line between fact and opinion to

determine which is which.

> The 2003 amendment of Rule 701 makes it clear that the provision for lay opinion is not an avenue for admission of testimony based on scientific, technical or specialized knowledge which must be admitted only under the strictures of Rule 702.

The comment to Rule 701 of the Mississippi Rules of Evidence states that the Court should allow lay opinions when two conditions are met, the witness has first hand knowledge or observation and the opinion must be helpful in resolving the issue. In the case at hand, Officer Bright testified that he was not the investigator for this case and that his involvement in the case was to secure the scene upon his arrival on the night in question. He did not testify that he had any further involvement in the investigation after his involvement on the night in question and therefore did not have any first hand knowledge with regard to the investigation of the matter, including knowledge of any other suspects. As such, under M.R.E. Rule 701, his testimony regarding other suspects was inadmissible.

The Defense also made an objection to the improper impeachment of Rosie Thomas' testimony through Christopher Thomas' testimony which is fully discussed above in reference to prosecutorial misconduct.

The final objection made by the Defense was during the cross examination of the Defendant upon which the State asked whether the Defendant had ever owned a firearm. Defense counsel objected on the grounds of relevancy but said objection was overruled. (Tr. 192; R.E. 66). Mississippi Rules of Evidence, Rule 402, governs the inadmissibility of irrelevant evidence.

> **RULE 402. RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE**
>
> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of

> Mississippi, or by these rules. Evidence which is not relevant is not admissible.

The Defendant's prior ownership of a pistol is not an element to the crime of armed robbery. Such testimony was irrelevant to the charge at hand and was highly prejudicial. Such evidence should not have been allowed.

Due to the trial court allowing the above mentioned inadmissible testimony to be presented to the jury, the Defendant was denied a fair trial and as a result should be granted a new trial.

VIII. The Trial Court Erred by Denying the Defendant's Motion for Directed Verdict and Defendant's Motion for JNOV or in the Alternative Motion for a New Trial.

At the end of the State's case, the Defense, outside the presence of the jury, made an oral motion for a directed verdict stating the following

> "[T]he State has wholly and totally failed to show sufficient proof beyond a reasonable doubt that Chris Thomas was, in fact, the person who committed the crime. The only testimony that has been developed regarding identification has been through witnesses who said his face was obscured. They did not see the face of the person who allegedly committed this robbery. They've all given different descriptions of how the person -- how they were able to identify the person, none of which, Your Honor, we feel meets the test of evidence in a court of law to withstand a verdict of guilty."

(Tr. 172; R.E. 59). After hearing a brief rebuttal from the State the trial court denied the motion without explanation. (Tr. 173; R.E. 60). At the close of the Defense's case, the motion was renewed and once again denied without explanation. (Tr. 203; R.E. 68). Subsequent to the trial, Mr. Thomas' trial counsel withdrew and current counsel was appointed for the purpose of appeal. (C.P.43; R.E. 11). Mr. Thomas, by and through said counsel, filed a Motion for JNOV or in the Alternative, for a New Trial. (C.P. 44-45; R.E. 12-13). A hearing was held on said motion and the judge once again denied the motion without explanation. (Tr. 242; R.E. 75).

In Middelton v. State, 980 So.2d 351, 359-60 (Miss.Ct.App.2008), the court stated:

> As noted earlier, a motion for a new trial challenges the weight of the evidence, while a motion for JNOV challenges the sufficiency of the evidence. *Dilworth,* 909 So.2d at 736-37 (¶¶ 17-20). In reviewing the trial court's denial of a motion for a new trial, this Court must discern whether "[t]he verdict [is] 'so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice.'" *Id.* at 737 (¶ 21) (quoting *Bush v. State,* 895 So.2d 836, 844 (¶ 18) (Miss.2005)). Only where the "'evidence preponderates heavily against the verdict' should the trial court invade the province of the jury and grant a new trial." *Id.* (quoting *Amiker v. Drugs for Less, Inc.,* 796 So.2d 942, 947 (¶ 18) (Miss.2000)).
>
> In reviewing the denial of a motion for JNOV, an appellate court must determine, by viewing the evidence in the light most favorable to the nonmoving party, whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Brown v. State,* 907 So.2d 336, 339 (¶ 8) (Miss. 2005). Most importantly, "the critical inquiry is whether the evidence shows 'beyond a reasonable doubt that [the] accused committed the act charged, and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction.'" *Dilworth,* 909 So.2d at 736 (¶ 17) (citing *Carr v. State,* 208 So.2d 886, 889 (Miss.1968)).

In the case at hand, the prosecution failed to prove the identity of the robber was in fact the Defendant. Three witnesses to the robbery testified at trial. Terry Collins testified first. He stated that he recognized the defendant as the robber because of his shoes. Mr. Collins stated that "Um, he came in and, you know -- I knew -- I knew it was him because you know, he had the -- I spotted his shoes he had on when he came in and had -- had a black tie sorta around his face or something." (Tr. 120; R.E. 31). He went on to state during cross-examination that the robber had on black shoes with peanut butter soles, black pants and a black shirt. (Tr. 127; R.E. 35). However, when questioned regarding the statement he had given police on the night of the robbery, he admitted that he had told the officers that the robber had on brown shoes and a brown jacket. (Tr. 129; R.E. 37). Mr. Collins never testified as to how Mr. Thomas was dressed when he first entered the Game Room with his cousin on the night in question.

Jody Clark was the next witness to testify. He stated that he recognized the Defendant as the robber by his voice. (Tr. 136; R.E. 41). On cross-examination, he testified that the robber was wearing black pants and black-looking shoes with brown on them. He was not able to state what type of shoes they were, whether they were athletic or boots or what other type of shoes they may have been. (Tr. 142-143; R.E. 46-47). However, when asked how Mr. Thomas was dressed when he first entered the Game room with his cousin earlier that night, he stated that he was wearing black pants, black-looking shoes and a colorful button-up shirt. (Tr. 138-139; R.E. 42-43). He further testified that the robber had taken off his shirt and tied it around his face where as the other two witnesses testified that he had something black tied around his face. (Tr. 134; R.E. 39).

Arthur Jones was the final eye witness to testify. He stated that the robber was wearing all black, pants, shirt and shoes. (Tr. 155; R.E. 51). All three witnesses admitted that they were unable to see the robber's face. (Tr. 126, 146, 156; R.E. 34, 49, 52).

In the case at hand, the discrepancies in the witnesses testimony, as well as all three witnesses admissions that they were unable to see the robber's face during the commission of the robbery, make the identification of the Defendant as the alleged robber in this matter fall short of the level of proof required by the State. As such, the trial court should have granted the Defendant's motion for a JNOV or for a new trial. As stated in Middelton, '"the critical inquiry is whether the evidence shows `beyond a reasonable doubt that [the] accused committed the act charged, and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction.'"' 980 So.2d at 360. (citations omitted). The State failed to prove beyond a reasonable doubt that the defendant was in fact the robber in this matter.

IX. The Cumulative Errors Denied the Defendant a Fair Trial.

If the Court finds that the above listed errors are, in and of themselves, harmless errors, then Mr. Thomas is entitled to a new trial based on the fact that the cumulative effect of the numerous errors denied Mr. Thomas his fundamental right to a fair trial. In *Ross*, 954 So.2d at 1018, the Supreme Court found:

> Ross argues the cumulative effect of the various errors in the trial, even if harmless, requires reversal and remand. The cumulative error doctrine stems from the doctrine of harmless error, codified under Mississippi Rule of Civil Procedure 61. It holds that individual errors, which are not reversible in themselves, may combine with other errors to make up reversible error, where the cumulative effect of all errors deprives the defendant of a fundamentally fair trial. *Byrom v. State,* 863 So.2d 836, 847 (Miss. 2003). As an extension of the harmless error doctrine, prejudicial rulings or events that do not even rise to the level of harmless error will not be aggregated to find reversible error. As when considering whether individual errors are harmless or prejudicial, 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 charged. *See, e.g., Leonard v. State,* 114 Nev. 1196, 1216, 969 P.2d 288, 301 (Nev. 1998) (citing *Homick v. State,* 112 Nev. 304, 316, 913 P.2d 1280, 1289 (1996)). That is, where there is not overwhelming evidence against a defendant, we are more inclined to view cumulative errors as prejudicial. In death penalty cases, all genuine doubts about the harmlessness of error must be resolved in favor of the accused because of the severity of the punishment. *See Walker v. State,* 913 So.2d 198, 216 (Miss.2005).

In the present case, there is no overwhelming weight of evidence against the accused, more particularity, as discussed above, the Defendant's only connection to crime was based on the eye witness testimony of three witnesses who all stated that they were unable to see the face to the robber. Furthermore, armed robbery is a serious offense and the possible sentence is life imprisonment. Therefore, the Court should view the cumulative errors as prejudicial to the defendant and reverse this case for a new trial.

VI. CONCLUSION

Based on the foregoing, the Appellant prays that this Court will reverse the decision of

the Yazoo County Circuit Court, granting the Appellant's request that this cause be remanded for a new trial.

Respectfully Submitted this the 13th day of October, 2008.

CHRISTOPHER THOMAS

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AMENDED CERTIFICATE OF SERVICE

I, Leigh Anne Cade, the undersigned counsel of record for the Appellant, do hereby certify that I have this day mailed a true and correct copy of the above and foregoing Appellant's Brief in Support of Appeal and Appellant's Record Excerpts, via United States mail, postage prepaid, to the following:

Mississippi Office of the Attorney General
P.O. Box 220
Jackson, Mississippi 39205-0220

So Certified this the 20th day January, 2009.

LEIGH ANNE CADE