IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2008-KA-01269-COA

TERRY LEE MADDEN **APPELLANT**

VS.

STATE OF MISSISSIPPI **APPELLEE**

BRIEF OF APPELLANT

AN APPEAL OF THE CONVICTION FOR TWO COUNTS OF MURDER IN VIOLATION OF MISSISSIPPI ANNOTATED CODE SECTION 97-3-19 AND A SENTENCE TO TWO LIFE SENTENCES WITHIN THE CUSTODY AND CONTROL OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS

APPELLANT IS CURRENTLY INCARCERATED

(ORAL ARGUMENT REQUESTED)

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IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

TERRY LEE MADDEN **APPELLANT**

V. **NO.2007-KA-01064-COA**

STATE OF MISSISSIPPI **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record hereby 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.

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WITNESS the signature of counsel for Appellant on this the 10th day of February, 2009.

Johnnie E. Walls, Jr.

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STATEMENT OF THE CASE

The Appellant, Terry Lee Madden, was indicted on or about the 5th day February, 2008 by the grand jury prior to the April, 2008 Term, of the Tunica County, Mississippi Circuit Court in a multi-count indictment for murder in violation of Section 99-7-2 and 97-2-19 of the Mississippi Code Annotated of 1972, as amended. [(R. 8-9) (R.E. 8-9)] The Capias for the appellant was issued February 6, 2008. [(R. 16) R.E. 10)] The Appellant was served with the indictment and arraigned on the 12th day of February, 2008. [(R.10) (R.E.11)] The Appellant and the Appellee thereafter conducted discovery, and the matter proceeded to trial by jury on June 9, 2008.

The indictment charged that the Appellant unlawfully, willfully, feloniously, without the authority of law, and with deliberate design to effect death, did kill and murder a human being, to-wit: Andy McCorkle in Count I of the Indictment and Laura Willis in Count II of the indictment on July 14, 2007 in Tunica County, Mississippi.

The State filed a Demand for Notice of Alibi and for Reciprocal Discovery on May 13th, 2008. [(TR. 13-28) (R.E. 26-41)] No response was offered by the Defendant and the State thereafter filed a Motion In Limine to Exclude Alibi Witnesses on May 28, 2008 for failure of the defense to

timely notice alibi witnesses. On June 9, 2008, prior to trial the hearing was held on the State's Motion and the Motion was denied. The Court ruled that the Motion would be denied provided that no other alibi witnesses would be offered by the Defense. [(TR. 23) (R.E. 36)]. Just before the trial commenced, the State noticed the Court that one other witness had been tendered by the Defense that had not been disclosed, a law officer from Tallahatchie County, Mississippi, whose name came up during a taped statement by the Defendant to investigators. The Court perceived him to be an alibi witness, since he would testify about the foggy conditions the morning of the murders and that he saw the defendant in Sumner, Mississippi that morning. The Court refused to allow his testimony for non-disclosure in discovery. [(TR. 27) (RE. 40)]

The case proceeded to trial, the jurors were qualified, and voir dire examinations by the Court and counsel for the Appellee and Appellant were conducted. The trial jury was selected, and the trial commenced.

During the course of the trial defense counsel made objections to the State's use of several witnesses to alleged prior bad acts of the Defendant. After the particular witnesses testified, the Court ruled on the record that the probative value of the evidence about prior bad acts of the Appellant against the victim, Laura Willis, outweighed the prejudicial effect of the

testimony. [(TR. 275) (RE. 42)].

Counsel for the Appellant also initially objected to the State's use of two witnesses as experts. The first was Mark Winstead, an employee of Cellular South, who counsel perceived would testify about cell phone records. The Court determined Winstead would testify as an expert in the field of radio frequency coverage, a telecommunications technologist. Counsel withdrew his objection. [(TR. 310-311) (RE. 44-45)] The other expert witness to which Appellant's trial counsel objected was Robert Andrew Georghegan, the Director of Subpoena Compliance for Telepex, the parent company of Cellular South, who would testify as an expert to highly technical and scientific information. The Court overruled the objection because he was the records custodian for Cellular South. [(TR. 326) (RE. 46)]

Upon the conclusion of the State's case, Counsel timely moved for a directed verdict of acquittal which was denied. [(TR. 348) (RE.48)]. The defense proceeded with its case. The Appellant elected not to testify, was given the Culberson warnings, and the Court determined from the ***in camera*** testimony of Appellant Madden that he had been advised of his rights and that he intelligently chose not to testify. [(TR. 368-370) (RE.49-51)] The defense rested. No rebuttal was offered by the State. Counsel for Appellant renewed Appellant's Motion for a Directed Verdict and further

offered and requested a peremptory instruction, Instruction D-1. The Court denied the Motion on the grounds that a jury question was made for the defendant's guilt or innocence and also stated that the peremptory instruction D-1 would be denied at the appropriate time. [(TR. 375)(RE. 52)]

After closing arguments the jury retired at 10:10 A.M. for deliberations. At 2:15 P. M. the Court heard from the jurors stating they could not come to a verdict on Counts I and II, being divided eleven to one. The Appellee asked that the jury be instructed to continue to deliberate, while the Appellant asked the court to declare a mistrial. The Court instructed the jury to continue its deliberations with instructions. [(TR. 424-425)(RE. 53-54)] At 3:35 P.M. the jury reported that a verdict had been reached. The verdict reported by the jury foreman was "We the jury, find the defendant guilty of murder as charged in Count I of the indictment. and "We, the jury find the defendant guilty of murder as charged in Count II of the indictment." [(TR. 426) (RE. 55)] The jury was polled by the Court on the defense's motion. The judge declared that the verdict was unanimous and released the jury. [(TR. 427) (RE. 56)]

Directly after the jury was adjourned the Court announced and imposed upon the Appellant the sentence of life imprisonment to serve within an institution under the supervision and control of the Mississippi Department of Corrections for the murder of Andy McCorkle in Count I and

life imprisonment to serve within an institution under the supervision and control of the Mississippi Department of Corrections for the murder of Laura Willis in Count II. The sentence imposed for Count II was ordered to run consecutive to the sentence imposed for Count I. [(TR. 429) (RE. 58)].

The Appellant via trial counsel timely filed Appellant's "Motion For A J.N.O.V. Or In The Alternative, Motion for A New Trial on June 16, 2008. [(R. 159-160)(RE.59-60)] The Court denied the Motion on June 26, 2008. (R. 166) (RE. 63) Trial counsel, David Tisdell filed his Motion to Allow Counsel to Withdraw on July 2, 2008. [(R. 167-168) (RE.64-65)] Attorney Tisdell proceeded to timely file Appellant's Notice of Appeal on July 23, 2008. [(R. 175) (RE. 66)] The Court granted Attorney Tisdell's Motion Relieving him of representation of Terry Madden, the Appellant July 31, 2008. [(R. 193) (RE. 68)] Present counsel filed a Notice of Appearance of Counsel, Notice of Appeal, Designation of Record and Rule 11 (B)(1) Certificate of Compliance on July 28, 2008 [(R. 178-185) (RE. 69-76)]

SUMMARY OF THE ARGUMENT

Appellant contends that the verdict was against the overwhelming weight of the evidence and the verdicts evinced bias and prejudice against the Appellant. The Court erroneously failed to grant the Appellant's Motion for A Directed Verdict at the close of the States case in chief; the Court

failed to set aside the Verdict of the jury after considering Appellant=s Motion For a Judgment Not Withstanding the Verdict or in the alternative a New Trial. Appellant contends that the court erred in allowing phone records into evidence--phone records of Laura Willis as Terry Madden, Appellant, was the subscriber. The Court erred in allowing the testimony of Andy Geoghegan, as an expert. The Court erred in allowing testimony concerning prior bad acts of the defendant. The Appellant finally contends that he is entitled to have his convictions overturned or be granted a new trial, since the trial Court abused its discretion in denying Appellant=s motion for a New Trial and request for a judgment notwithstanding the jury verdict in this wholly and completely circumstantial evidence case.

Appellant further argues that the cumulative affect of the errors warrant this Court reversing his convictions for murder of Andy McCorkle and Laura Willis.

FACTS

The Appellant, Terry Madden, and victim, Laura Willis, had been involved in a romantic relationship for sixteen (16) years. [(TR. 127)(RE.83)] They lived together in Tallahatchie County, Mississippi until January of 2007. When the two separated Laura Willis during the last week of

January, 2007 moved in with and thereafter lived with her sister, Barbara Willis, for four months, then moved to Tunica and lived in an apartment in the Kirby Estates until her death. [(TR. 126-127) (RE. 82-83)] Laura Willis was employed at the Gold Strike Casino in Tunica County, Mississippi. She was dressed in her work uniform at the time of her death.

The victim, Andy McCorkle, was married to Gwen McCorkle and resided in Tallahatchie County, Mississippi. According to a statement by Gwen McCorkle, in 2002, Willis and McCorkle were involved in an affair which caused Gwen McCorkle to leave Tallahatchie County, Mississippi and move to Colorado. Eventually, the McCorkles reunited. [(TR. 128) (RE. 84)] Mrs. McCorkle stated she had no knowledge that her husband had renewed his affair with Ms. Willis. The police ruled her out as a suspect and began investigating Terry Madden closely.

The murders were committed in the early morning hours of July 14, 2007. Mike Gilmore, the Senior Vice President in charge of safety and operations for the Ozark Motor Lines, testified as to the location of McCorkle's truck. Using the Qualcomm Satellite Tracking System, the truck was positioned approximately 4 miles southeast of Robinsonville. It was parked there on Friday, July 13, 2007 when the engine was turned off at 3:31 p.m. The next time the truck's engine was started was logged at 6:52 a.m. on July 14, 2007. [(TR. 217) (RE.151)] Mr. McCorkle had parked his

vehicle across from the Buck Island Trailer Park on the evening of Friday the 13th (July 13, 2007) where it remained parked until the next morning of July 14.

Shundrikca Harris, a deputy of the Tunica County Sheriff lived in the Buck Island Trailer Park. On the morning of July 14, Deputy Harris left home for work around 5:45 am. She was driving her Sheriff's Department patrol car which was equipped with a video recorder which was turned on and running when she left for work. As she approached the exit of the Buck Island Trailer Park, the red Ozark truck driven by Mr. McCorkle and a blue 18 wheeler truck and trailer were parked side by side. Later that morning at approximately 7:20 a.m. she returned to her home at Buck Island to retrieve a "blue tooth device" for her cell phone. [(TR. 143) (RE.121)] As she approached, her video camera recorded that the red truck had been moved from its original position, and was sitting in the field next to where it was parked earlier. There was also a car parked there. The windows in both vehicles were broken by gunshots. [(TR. 135) (RE.113)] (States Exhibit S-50).

Upon entering the trailer park Deputy Harris did not personally notice what the camera had recorded. It was only when she was exiting the Park did she notice the vehicles, the red Freightliner-18 wheeler and the brown Chevrolet Malibu. She noticed how they were positioned and that the

windows were broken. She drove up to the Kirby Estates subdivision (where Laura Willis actually lived), to turn around, and she called her supervisor and for a backup. She waited for the backup. Once her back-up arrived, Deputy Harris returned to the scene. As she drove up three people had arrived and were outside of their vehicle and flagged her down indicating that there was a dead person in the car and that they knew the person in the car to be Laura Willis, a co-worker. [(TR. 136) (RE. 113)] Harris instructed them to move their cars and they left. She and the other law enforcement officers began to secure the scene.

Arthur Steven Chancellor was employed by the Mississippi Bureau of Investigation at the time and investigated the crime scene. He hypothesized that Laura Willis was shot first. Upon reaching the scene he found her car still in drive. The motor had been turned off for safety purposes by one of the Deputies that had arrived on the scene earlier, but the windshield wipers were still running. (TR.167) He continued to testify that once she was shot the car moved forward headed toward the milo field. A shell casing was found in a puddle of water next to the car of Laura Willis.

The investigator, Chancellor, testified further that Mr. McCorkle was shot next through the window of the truck, while he tried to pull off at a high rate of speed. A shell casing was found near the blue truck which was still parked next to where Mr. McCorkle's truck was parked originally. As

Mr. McCorkle tried to pull off he hit Ms. Willis car and veered off into the milo field where he was shot again. It was determined by the trajectory of the bullet that the assailant probably climbed up onto the running board of the truck and shot through the broken window. A shell casing was found in the driver's seat where Mr. McCorkle was found. He also determined that the shell casing came from a .40 caliber weapon. [(TR. 177-179,185) (RE.136-137, 144)]

No weapon was found. Nor were there any eyewitnesses to the shootings located. The State used several witnesses to circumstantially link Terry Madden to these crimes. First, witness Bobby Robinson from Robinson Guns and Ammo testified that Terry Madden purchased a .40 caliber weapon from him in April of 2005. (TR. 224, 228) Then, Clifton Bailey, a constable and deputy sheriff with the Tallahatchie County Sheriff's Department testified over the objection of the Appellant, that in January of 2006, while he was off duty, he heard tire screeches and someone hollering for help from a car. The woman in the car was Laura Willis. "She was saying: 'Somebody help me. Terry's trying to kill me.' " When he got to the road a gun was thrown out of the window. He picked the gun up off the ground and he saw Terry step out of Ms. Willis' vehicle and enter his vehicle. He identified the gun to be a .40 caliber weapon. He could not remember on which side of the vehicle the gun was tossed. (TR. 235)

Deputy Pat Tribble was called to catch up with the vehicle Terry Madden was driving. After catching up with him, Deputy Tribble stopped Madden. Madden turned around and followed Deputy Tribble to the Sheriff's Department. Tribble testified Terry was mad but low-key and upset. (TR. 239) Officer Tribble charged him with aggravated domestic violence because a weapon was involved. Madden admitted that he pushed and shoved her and they had a fight in the car. Officer Tribble testified that he had responded to previous calls where Laura Willis received bruises on her arms, but they made up and she dropped the charges. (TR. 240) Another witness, Haywood Wilson, a neighbor, testified that he heard and saw the Appellant and Willis arguing in their yard. He didn't like Madden because they raced motorcycles in front of his yard. On this particular morning, Wilson was working on his lawn mower. He heard screaming and looked up to see Madden hit Willis then state, "'Get out of my yard or I'm going to kill you" (TR. 246) This incident allegedly occurred in 2006.

Ms. Laura Willis moved away from Madden in January, 2007, according to Barbara Jean Willis' testimony. Laura Willis stayed with her for four month until she moved to Kirby Estates in Robinsonville, Mississippi. Madden would come over anytime he wanted to and she did not testify to there being any problems at her house between Madden and Willis while she lived with her. [(TR.126-127)(RE. 105-106)] Finally, Barbara Willis

testified that Madden called Laura Willis on her cell phone and said, "Laura would you please answer the cell phone? And she was afraid to answer because she didn't want to talk to him, and he said, "'Well, I heard you was going with a truck driver, " and he said, "Laura, please just answer this phone for me." He said, "You know if I find out you going with a truck driver, and you lying to me, I'm gonna kill you." Although this testimony was never objected to on the basis of hearsay or that no predicate was layed for its admission into evidence. It was never established when or where this phone call was made or even how she identified it as Madden's voice or whether she recognized Madden's voice on a telephone. Furthermore, the sister testified that she knew nothing about a truck driver.

The State used the cellular phone records in an attempt to link Terry Madden to the crimes. Laura Willis had an account with Cellular South. She was the owner and Terry Madden was one of the subscribers and an authorized user on her account. The number used by Madden was "(662) 902-8514." [(TR. 322)(RE. 174)]

Mark Winstead, a telecommunications expert testified about the Cellular South towers that are located in North Mississippi. He testified that each tower has a "wireless coverage footprint" or cell phone coverage area, which is "the expected area where a customer would be able to use their phone effectively." The coverage area of each cellsite or tower can be

measured by the use of a tool called "Wizard." The coverage area of the cell sites in the area he testified about varied but ranged from a radius of two to three miles to a radius of eight to nine miles.

A map was generated by witness Winstead to show the location of each tower in the area. (State's Exhibit 65-66) As shown by the said map the Bowdre Tower or Tower 269, which is located on Hambrick Road in Tunica County is in close proximity to the crime scene which is located near the Buck Island Trailer Park off Kirby Road. The crime scene was located within the three to four mile radius of the wireless coverage footprint of Tower 269. [(TR. 322) (RE. 174)]

The cellular phone records on the account of Laura Willis were subpoenaed and used by witness Robert Andrew Georghegan, custodian of the records for Telepex, the parent company for Cellular South, to testify that the record or log of calls indicated that at 6:52 a.m. a caller, using the cell phone number which was assigned to Appellant, made a *86 call which hit the Bowdre 269 Tower. (State's Exhibit 67) The time of 6:52 a.m. was paralleled with the time McCorkle started the engine in his truck. [(TR.331) (RE.183)] Georghegan admitted this system was designed to track phones, not people so he could not say who made the call. Additionally the State was exhaustive in pointing out towers that the Appellant's phone allegedly hit from the area of the crime scene or the wireless footprint within which

the crime scene was located to Sumner that morning. (States Exhibit 65-67)

Ultimately, Appellant's counsel established on cross-examination that a cell phone registering on a tower is not foolproof and that there are times the computer does not pick up calls or show calls unavailable to substantiate the location. [(TR. 341) (RE.192)] More importantly, however, there was no showing by this evidence that the calls emanated from the crime scene, as the system does not have the ability to pin point the exact location from where a call is made from within the "wireless footprint." As long as the called is made from inside the "footprint" there was no showing as to exactly where, inside that "footprint" the call was actually made—so it could not be shown, asserted, or proven beyond a reasonable doubt that the phone call was made from the crime scene, because it was just as reasonable to assume that the call could have emanated from any place within the 4 ½- mile radius of the "footprint."

The Appellant, on the otherhand, called some compelling witnesses who contradicted the timelines as a time that Appellant was present on the scene of the crime to commit the crimes. Witness Todd Logan was a neighbor that lived next door to the Appellant--as close as a "turn row" between the houses. He got up about 6:10 a.m. and rode to the Shell service station. When he got back to his house, he saw Terry Madden's wrecker next to the shop and heard metal clanging behind the wrecker and

he heard a motor cycle crank up. All this occurred between 6:30 a.m. and 7:00 a.m. [(TR. 348-358) (RE.199-208)]

Witness Robert Todd Clark another neighbor who lived across the street from the Appellant testified that he got up around 6:00 a.m. and got out of his house about 7:30 a.m. and went to the store. He noticed Appellant's shop door open and backed in front of the shop was his wrecker with a green Tahoe hooked to it. [(TR.360–361)(RE.210-211)] The Tahoe was owned by Cory Gee who testified that Madden picked up the keys on Friday, the 13th and the truck was gone when he got up on the 14th before 8:00 a.m. [(TR. 350-353) (RE.200-203)] He also saw Madden that morning around 8:00 a.m. James Morris was a former employer of Madden and lived in Webb about one-half mile from Sumner. He testified that Madden was at his shop about 8:05 a.m.

The State's witness, the sister of Laura Willis, testified on cross-examination that it took her one hour and twenty minutes to drive from Webb to Tunica. [(TR. 130) (RE.108)] Chuck Poe, an investigator with the Mississippi Bureau of Investigation, testified that he measured the distance from Madden's home to the crime scene in one hour and it was about 66 miles. [(TR. 214) (RE. 148)]

Terry Madden did not testify, but testimony from a lady that spent the night of July 13 with him until the early morning hours of July 14 verified

that he rose early that morning about 4:00 a.m. to say he had to take a load of scrap iron to Memphis. This testimony was developed no further and was not seriously challenged by the Appellee. No testimony was elicited from anyone as to what type of vehicle Madden allegedly drove on the morning of July 14, 2007. The State eluded to a fast motorcycle, but no eye witness testified that they saw or heard a motorcycle at or near the scene of the crimes. Additionally there was no testimony or other proof offered that ***the*** .40 caliber weapon used in the murders belonged to or was used by Terry Madden. There was no physical evidence whatsoever found on the scene or otherwise which linked Terry Madden to these crimes.

The only evidence elicited to attempt to prove Appellant's guilt was cloaked in hearsay statements by the victim's sister about alleged threats about **"a"** truck driver made on a cell phone against Laura Willis which were unsubstantiated; incidents of prior bad acts by the Appellant which allegedly occurred at least an entire year earlier; and the fact that the Appellant had at some time prior to the crimes owned a .40 Caliber pistol which he denied having, but which was never produced and never compared with the spent shells found on the scene of the crimes and projectiles gathered from the scene and the bodies of the victims.

The lack of any direct evidence whatsoever and the highly suspicious testimony of a sister in mourning, alleged prior bad acts, and

unsubstantiated hearsay, and a denial by the Appellant that he did not own a .40 Caliber pistol cannot reasonably be relied on to sustain a conviction of two murders in this case.

ARGUMENT

I. WHETHER THE JURY VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE AND THE JUDGE ERRED IN NOT GRANTING HIS MOTION FOR DIRECTED VERDICT AND REQUEST FOR PEREMPTORY INSTRUCTION AND HIS MOTION FOR JUDGEMENT NOTWITHSTANDING THE JURY VERDICT OR A NEW TRIAL DENYING THE APPELLANT A FAIR TRIAL?

The Court has outlined the standard for review for a determination of whether a jury verdict is against the overwhelming weight of the evidence as follows:

> " In determining whether a jury verdict is against the overwhelming weight of the evidence, this Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial". ***Herring v. State***, 691 So. 2d 948, 957 (Miss. 1997). The verdict must be so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. ***Id.*** at 957. ***Benson v. State***, 551 So. 2d 188,193 (Miss. 1989); ***McFee v. State***, 511 So. 2d 133 – 134(Miss. 1987), ***Collier v. State***, 711 So. 2d 458, 461 (Miss. 1998)(quoting ***Pleasant v. State***, 701 So. 2d 799, 802) (Miss. 1997).

The Appellant contends that to uphold the convictions in this case would sanction an unconscionable injustice. It is the lack of evidence linking

Terry Madden to these crimes that is unconscionable. There is no physical evidence of any kind belonging to or related to Madden that suggests his guilt beyond a reasonable doubt, especially to the exclusion of any other reasonable hypothesis of Madden's innocence, i.e., there is no DNA, no eye witnesses, no hand, finger, or footprints, no tire tracks, no confession or admission against interest or any other evidence that supports a fair jury verdict of the Appellant's guilt.

The lower Court erred when it failed to grant Appellant's Motion for Directed Verdict and subsequent Motion For Judgment Notwithstanding the Verdict (JNOV) which speaks directly to the sufficiency of the evidence. This standard is exhaustively established in ***McClain v. State***, 625 So. 2d 774, 778 (Miss. 1993). The court determined:

> "In appeals from an overruled Motion for JNOV, the sufficiency of the evidence as a matter of law is viewed and tested in the light most favorable to the State. The credible evidence... consistent with guilt must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. Matters regarding the weight and credibility of the evidence are to be resolved by the jury. We are authorized to reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty. (citations omitted.); see also ***Williams v. State***, 595 So. 2d 835, 838 (Miss. 1991); ***Roberts v. State***, 582 So. 2d 423, 424 (Miss. 1991)."

In order to meet the burden of proof of murder, the State has to prove beyond a reasonable doubt and to the exclusion of every other

reasonable hypothesis consistent with innocence that these human beings were killed by Appellant without authority of law by any means or in any manner with deliberate design to effect the death of the person killed or of any human being. Miss. Code Ann. Section 97-3-19 (1972 As Amended). The only element of the crime that the Appellee can and did prove is that there were two human beings killed on the date and time alleged with the use of a .40 Caliber weapon, to-wit: Laura Willis and Andy McCorkle. Again no physical evidence or testimonial evidence which either suggested or connected Terry Madden to the scene of these crimes during the times the crimes were committed or at any other time. No reasonable or fair minded juror could find the Appellant guilty under these set of circumstances.

II. WHETHER THE COURT ERRED WHEN IT DID NOT GRANT A JUDGEMENT OF ACQUITTAL BASE UPON THE STATES FAILURE TO MEET ITS BURDEN OF PROOF USING THE CIRCUMSTANTIAL EVIDENCE STANDARD?

"What is circumstantial evidence?", the Court rhetorically asked in **Keys v. State**, 478 So. 2d 266, 268 (Miss. 1985). The least adequate definition we can provide is that circumstantial evidence is evidence which, without going directly to prove the existence of a fact, gives rise to a logical

inference that such fact does exist." The Court continues to discuss that criminal cases do not always fall into "neat" categories as direct and circumstantial evidence. There are often shades of grey. All the State has in the case at bar are inferences, suppositions, speculation, guesswork and innuendo. There are no shades of grey. There is no direct evidence linking the Appellant to these crimes. No logical inference can be argued or reasonably made that he was at the scene at the time these crimes were committed based on the evidence presented. At best the evidence raises a suspicion that he "could" have been the perpetrator of these crimes, but it is elemental that a suspicion does not rise to the level of evidence to guilt beyond a reasonable doubt. The Court instructed the jurors on that point.

When the State fails to present any evidence, such as in the case at bar, to support a conviction, the Courts cannot permit a conviction to stand upon a mere suspicion. ***Brown v. State***, 556 So.2d 338, 340 (Miss. 1990); ***Shepard v. State***, 403 So. 2d 1287, 1288 (Miss. 1981); ***Wooldridge v. State***, 274 So. 2d 131 (Miss. 1973). The State may have had a suspicion that Madden committed these crimes but no direct evidence points to him at all.

The case at bar is purely circumstantial. When considering a circumstantial case, the court in ***Leflore v. State***, 535 So. 2d 68, 70 (Miss. 1988) stated, "Also it is necessary to bear in mind that in a circumstantial

evidence case, the State is required to ' "prove the accused's guilt not only beyond a reasonable doubt, but to the exclusion of every other hypothesis consistent with innocence." ' (Citations omitted). "The standard of review of a conviction based upon circumstantial evidence, must be distinguished from the burden of proof evaluated by the jury." Our standard is that a circumstantial evidence conviction will not be disturbed unless it is opposed "by a decided preponderance of the evidence." ***Stokes v. State***, 518 So. 2d 1224, 1227.

There is present in this case a "decided preponderance of the evidence" opposed to the guilty verdict. Not only those matters we have asserted previously but the court must consider the alibi witnesses, who were not impeached or found to have a motive not to be truthful: the neighbor who heard him early that morning between 6 and 7:00 a.m., more than sixty miles from the crime scene; The neighbor that saw the shop door open and a vehicle attached to the tow truck; and another who saw him at his shop about 8:00 a.m. that morning a few miles from Madden's shop.

III. WHETHER THE COURT ERRED IN OVERRULING THE APPELLANT'S OBJECTION TO RELEVANCE OF TESTIMONY OFFERED TO PROVE THAT THE PRIOR BAD ACTS OF THE DEFENDANT MADE THE APPELLANT GUILTY OF MURDER WHEN THE TESTIMONY WAS IN EFFECT HERESAY?

The Court committed reversible error when it allowed various witnesses to testify as to prior bad acts of the Appellant to prove to the jury that Madden acted in conformity there with and committed the crimes of murder against the victims, Willis and McCorkle. These prior bad acts were neither in close proximity to the crimes committed and were objected to by the Appellant on the grounds of relevance. The witnesses Clifton Bailey and Pat Tribble did not testify to what they personally witnessed or observed as to threats made to Laura Willis. They only testified to what they heard or what was told to them. In summation: Bailey testified he heard them arguing in a car; Willis allegedly said "he's trying to kill me;" a gun was thrown from the vehicle, he didn't recall whether it was thrown from the passenger or driver's side. The gun happened to be a .40 caliber. Officer Tribble is told to find Madden. Madden was found and followed him back to the Sheriff's office. Madden was upset but not out of control. Charges were made against Madden, but the case was later dismissed and the .40 caliber was returned to the Appellant. All of this occurred in January of 2006. The only eye witness testimony that the State presented to threats

made against Willis by Madden, also occurred in 2006 when they were obviously having problems, was offered by a witness that had an obvious dislike for Madden because of his loud motorcycle running back and forth in front of his home.

Willis' sister allegedly heard a voice on the cell phone threatening to kill her sister about a truck driver. There was, however, no predicate established for the testimony. There was no showing whether the statement was made in close proximity to the crime, or made in 2002 when according to Gwen McCorkle, the McCorkle victim's wife, admitted that she was aware that Willis and her husband were having an affair which was so bad that Mrs. McCorkle moved to Colorado to live. Madden and Willis had been together for sixteen (16) years. Willis left Madden in 2007 to live with this same sister, yet she testified she knew nothing about McCorkle.

The Appellant made no objection on the basis of hearsay, but did object on relevance. The Court determined that the testimony was prejudicial but that the probative value of the testimony outweighed its prejudicial effect. However, the jury was not apprised of when a recording of a voice allegedly heard by Willis' sister identified as Madden was made. The lack of development created a suspicion and was not the best evidence that the statement was ever made by Madden. It is just too speculative to have given the Appellant a fair trial.

Hearsay evidence not properly objected to may be considered by the jury for whatever probative value it may have. ***Murphey v. State***, 453 So. 2d 1290, 1294 (Miss. 1984) citing ***Young v. State***, 425 So. 2d 1022 (Miss. 1983); ***Sanders v. State***, 260 So. 2d 466 (Miss. 1972); ***Pepper v. State***, 200 Miss. 891, 27 So. 2d 842 (1946). In these cases and particularly the ***Murphey*** court recognized that no objections were made upon any ground. In the instant case, Madden did object to relevancy and hearsay as to the admission of cell phone records in which no testimony was available by the subscriber or the owner, Laura Willis who was one of the victims.

There is no hearsay exception applicable in this case to withstand the circumstantial evidence standard. The Court did not go far enough in rendering an explanation of its denial of the Appellant's objection and erred in its ruling on the matter which in effect denied the Appellant a fair trial. The fact that the jury was allowed to hear this hearsay gave rise for a verdict based on speculation. Assuming, *arguendo* , that all of the hearsay statements were made and the Appellant did threaten to kill victim Willis, it does not automatically follow that he was, based on the statements alone without some other evidence to substantiate same, killed her and her alleged truck driver lover.

IV. WHETHER THE CUMULATIVE EFFECT OF ERRORS WARRANT REVERSAL OF CONVICTION AND SENTENCE?

Genry v. State, 735 So. 2d 186 (Miss. 1999) states that the Court may reverse a conviction and sentence based upon the cumulative effect of errors that independently would not require reversal. It also stipulates that where there is no reversible error in part, there is none to the whole. ***Id.*** at 201. As asserted Appellant believes the admittance of hearsay evidence of prior bad acts was unduly and unjustly prejudicial, and probably does not rise alone to the level of a reversible error, but together with the lack of any other evidence which remotely sustains a guilty verdict, the cumulative effect was to allow the jury to speculate and draw a conclusion of murder without any evidence to support the verdict.

CONCLUSION

For the above stated reasons Terry Madden, Appellant herein, respectfully requests that this Honorable Court reverse and render his conviction and sentence herein, and/or remand his case to the trial court for a new trial or further appropriate proceedings.

Respectfully submitted,

Johnnie E. Walls, Jr.

CERTIFICATE OF SERVICE

I, **Johnnie E. Walls, Jr.**, attorney of record for Appellant, hereby certify that I have this day caused to be mailed by first-class mail, postage prepaid, a true and correct copy of the foregoing Brief of Appellant to:

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Witness the signature of counsel for Appellant on this the 10th day of February, 2009.

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