IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2008-KA-01509-SCT

MARVIN TERRELL KING — APPELLANT

vs.

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

(ORAL ARGUMENT REQUESTED)

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CERTIFICATE OF INTERESTED PERSONS

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

Mr. Marvin Terrell King, Appellant;

Howard Q. Davis, Jr., trial attorney;

Abbie L. Eason, Michael S. Smith II, and Phillip W. Broadhead, Esqs., Attorneys for the Appellant, Criminal Appeals Clinic, University of Mississippi School of Law, and **Leslie S. Lee, Esq.** Mississippi Office of Indigent Appeals;

Dewayne Richardson, Esq., District Attorney, Office of the District Attorney;

Kimberly Merchant, Esq., Assistant District Attorney, Office of the District Attorney

Jim Hood, Esq. Attorney General, State of Mississippi;

Honorable Margaret Carey-McCray, presiding Circuit Court Judge; and

Leland Police Department, investigating/arresting agency.

Respectfully submitted,

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STATEMENT OF ISSUES

ISSUE ONE:

WHETHER THE TRIAL COURT ERRED IN FAILING TO SUSTAIN THE APPELLANT'S MOTION TO SET ASIDE THE JURY'S VERDICT (J.N.O.V.), AS THE STATE'S CASE-IN-CHIEF FAILED TO MAKE OUT A LEGALLY SUFFICIENT *PRIMA FACIE* CASE BY CREDIBLE EVIDENCE.

ISSUE TWO:

WHETHER THE TRIAL COURT ERRED BY OVERRULING THE APPELLANT'S MOTION FOR A DIRECTED VERDICT OR A NEW TRIAL SINCE THE WEIGHT OF THE EVIDENCE PRESENTED DID NOT SUPPORT A VERDICT OF GUILTY BEYOND A REASONABLE DOUBT BY CREDIBLE EVIDENCE.

ISSUE THREE:

WHETHER A SUBSTANTIAL RIGHT OF THE APPELLANT WAS AFFECTED BY THE SPECULATIVE, CONCLUSATORY, AND HYPOTHETICAL BALLISTICS TESTIMONY GIVEN BY DR. STEVEN HAYNE THAT IMPROPERLY WENT FAR BEYOND THE SCOPE OF HIS EXPERTISE AS A FORENSIC EXAMINER.

STATEMENT OF INCARCERATION

Marvin Terrell King is presently incarcerated in the Mississippi Department of Corrections.

STATEMENT OF JURISDICTION

This honorable Court has jurisdiction of this case pursuant to ***Article 6, Section 146 of the Mississippi Constitution*** and ***Miss. Code Ann. 99-35-101 (Supp. 2004)***.

STATEMENT IN SUPPORT OF ORAL ARGUMENT

This case is very fact-intensive and the Appellant, through counsel, would respectfully request this Court to grant oral argument to present conflicts in the rulings of the trial court based on the evidence and testimony presented at trial that are alleged by the Appellant to be erroneous.

STATEMENT OF THE CASE

Of all the things that happened on the night of May 9, 2004, one fact is undisputed – the death of Woquin Robinson (hereinafter "Mr. Robinson") was unnecessary. Justice demands someone pay for this crime, but justice requires the right man pay for his crimes. Yet, sizable doubt exists as to who was actually shooting at the so-called Project Boys that night, as well as to who pulled the trigger on the gun that killed Mr. Robinson. Due to an incompetent investigation surrounding the shooting, as well as the deceit and betrayal of the

witnesses that took the stand against the Appellant, the wrong man is serving a life sentence for a murder he did not commit.

Many entirely different stories were told about the events which led up to the death of Mr. Robinson. On the night of May 9, 2004, the L & L Lounge was the popular place to be. The "ringleader" of this tragic turn of events, Byron Jones (hereinafter "Jones"), was at the L & L when he got into an argument with a fellow club-goer. (T. I. 28) Angry and frustrated as a result of the argument, he called the Appellant, Marvin King (hereinafter "Marvin"), looking for a ride home. (T. I. 29) As any good friend would do, Marvin got in the car with another friend, and they headed out to pick up Jones. Allegedly, the men had two guns in the car with them, a .38 caliber pistol and a more powerful SKS semi-automatic rifle. (T. I. 68-69) The driver of the car, Ja'Quarius Wright (hereinafter "Wright"), testified that Marvin brought these two weapons from his house to carry with them, keeping the SKS for himself and later passing off the .38 to Jones when he got in the car. (T. I. 78)

After picking up the ringleader, the three men rode around town until they noticed the Project Boys at a local gas station. (T. I. 73) It is unclear why the Project Boys, who were from a rival neighborhood, sparked the group's interest that night. According to Jones, it was Marvin who ultimately decided "to get" the Project Boys, and who instructed Wright to follow their car. (T. I. 31) However, Jones' and Wright's testimonies differ entirely about who initially brought up the idea of "getting" the men whom Jones argued with less than an hour earlier. According to Wright, it was the ringleader, Jones, who said, "There they go," referring to the Project Boys. (T. I. 73) Wright also made an initial statement to police

revealing Jones, still angry from his lounge experience, had expressed hatred towards the Project Boys when he first spotted them at the gas station. (T. I. 95) However, it is unclear as to whether Jones was referring to the man he had the altercation with at the L & L or the Project Boys in general. (T. I. 59) Furthermore, Wright testified that the ringleader was angry and hostile when picked up from the club (T. I. 70), and the ringleader himself testified he was so mad upon leaving the L & L, he kicked the door on the way out. (T. I. 28)

Either way, both Wright and Jones testified Marvin was in the car that followed the Project Boys down the street and into a neighborhood to take some of the passengers home. Testimony at trial revealed that Jones and Marvin were allegedly dropped off down the street in order to hide in the bushes and wait for the Project Boys to pass. (T. I. 35, 75-77) One of the Project Boys, Nacardis Williams (hereinafter "Williams"), was dropped off at his girlfriend's house seconds before the shooting commenced and was the sole eyewitness. (T. II. 167) Although he gave a statement to police and investigators that he saw "the Jones brothers" shooting at him, Williams did not testify at trial. (T. II. 167) The ringleader, Jones, testified at trial that yes, he did participate in the shooting, but claimed he did not shoot at Mr. Robinson's car. (T. I. 38-40)

The ringleader's brother, Derrick Jones, proves to be the missing piece to this puzzle. His alibi was never thoroughly investigated by police or included in the police file. (T. II. 149-152) The other witnesses, namely Wright and Jones, called by the State testified Derrick Jones was not with them that night. However, a police officer who responded to the shooting and attempted to investigate the case testified he actually saw Derrick Jones at the L & L

Lounge shortly before the shooting occurred. (T. II. 186) The alibi given by Derrick Jones was that he was with his girlfriend at a hotel in nearby Greenville. (T. II. 177) The police supposedly went to the hotel and had the clerk identify a photo of Derrick Jones to see if he had really been at the hotel. (T. II. 184) When it was learned he had checked into the motel that day, they crossed him off the suspect list and moved on with the investigation. However, nothing about this was in the police file or given to defense counsel at discovery. (T. II. 151-56) Uncertainty still exists about where Derrick Jones was in between the time he left the club and the time he checked into the motel. Unfortunately, due to an inadequate police investigation and the fact Derrick Jones is now deceased, no one will ever really know which version of these events is true.

After the shooting, Jones testified he and the Appellant fled on foot through some woods to another street. (T. I. 40-41) However, Jones' pre-trial statement to police was that Marvin called him and admitted to acting alone in the shooting and asked him if he would hold the gun. (T. I. 46) Jones admitted at trial this initial statement was a lie, told only because he was "under a lot of pressure." (T. I. 46)

The third man, Wright, who heard the shots on his way home, called Jones and Marvin to find out where they were. (T. I. 41, 79) After he came back and picked them up, the group went to Charles Thomas' (hereinafter "Thomas") house, a mutual friend, where they dropped off the SKS semi-automatic. (T. I. 43, 81) Thomas, who took the gun, testified it was Jones who gave him the gun. (T. I. 128) However, Jones and Wright, the driver of the car, testified Marvin was the one who passed the gun over (T. I. 43, 81) Despite the rampant

inconsistencies in testimony, the investigator chose to disbelieve and ignore the testimony of the man who actually received the gun, Thomas. (T. II. 148) The investigator only revealed Thomas' statement implicating Jones after being repeatedly questioned on cross-examination by defense counsel. (T. I. 147-48) The other gun used in the shooting, the .38 caliber pistol, was never recovered because the ringleader supposedly gave it to his brother who later sold it. (T. I. 45) This is the same brother, Derrick Jones, the sole eyewitness puts at the scene and whose alibi was never competently investigated.

Jones, Wright, and Marvin were all arrested for their involvement in this shooting. They were each indicted on counts of murder, conspiracy, and assault. (CP. 1-2, RE 23-24) However, Marvin was the only one who went to trial. At the time of the Appellant's trial, Jones had accepted a plea deal for manslaughter and was serving a twenty-year sentence concurrently with an eight-year sentence for an unrelated drug offense. (T. I. 46-47) The status of Wright's case was unknown at the time of trial; he testified before pleading guilty and did not know the exact status of his case. (T. I. 89)

The police never received the same story from any of those interviewed, and received multiple statements from many who were questioned. Eventually, all stories by those involved appeared to point the finger at Marvin, but with no conclusive evidence, only bare accusations. The end result of this tragic night was not only that one of the bullets from one of the guns shot by one of the men killed the victim, but also that someone is doing time for a crime no one can be assured he committed.

On the 22nd and 23rd days of August 2006, Marvin plead not guilty and stood trial

on one count of murder, two counts of aggravated assault, and one count of conspiracy in the Circuit Court of Washington County. (T. I. 1)

Following voir dire, a jury was seated and the State presented its case-in-chief. The State called nine witnesses to the stand, including Jones and Wright, both of whom were indicted along with Marvin. Other witnesses called by the State were Dr. Steven Hayne (hereinafter "Dr. Hayne") and two investigators with the Leland Police Department, Byron Vaughn (hereinafter "Vaughn") and Juan Overton (hereinafter "Overton").

As the State's first witness, Jones testified it was Marvin and he that did the shooting on the night of May 9, 2004. (T. I. 36-37) According to Jones, a verbal altercation occurred earlier that night at the L & L Lounge. (T. I. 28) After leaving L & L, Jones called Marvin and stated he had been involved in an altercation. (T. I. 29) According to Jones, Marvin and Wright then picked him up as he was walking home.

After being picked up, Jones testified the three men began riding around Leland until they saw Mr. Robinson's car parked in the Double Quick parking lot. (T. I. 31) After making a block around the Double Quick, the men parked in a vacant lot across the street and waited on Mr. Robinson's car to leave. (T. I. 32) According to Jones, Marvin then ordered Wright to follow Mr. Robinson's car. Having seen Williams at the Double Quick, the ringleader, Jones, stated he knew where the car was going – to take Williams to his girlfriend's house on Lewis Street, which also happens to be the same street Jones lives on. (T. I. 34-35) After following Mr. Robinson's car, Jones testified Wright dropped Marvin and he off at the corner of Wilson and Lewis Streets, which is different from the testimony later given by Wright.

After getting out of the car, Jones testified that Marvin hid behind the bushes at the corner of Wilson and Lewis while he stood at the corner awaiting Mr. Robinson's car to drive by. (T. I. 36) According to Jones, as Mr. Robinson's car entered the intersection at Wilson and Lewis, Marvin began firing from the bushes toward the car, at which time Jones stated he fired two shots in the direction of Williams in an attempt to "scare him." (T. I. 39-40) During the shooting, Jones testified Williams and he made eye contact.

After the shooting, Jones testified Marvin and he were picked up by Wright a short distance from where the shooting took place. (T. I. 41-42) According to Jones, the three went to Thomas' house where Marvin exited the vehicle with the rifle. After dropping off Marvin at Thomas' house, Jones was later dropped off at a corner store near his house. (T. I. 44) At this time, Jones testified he still had in his possession the .38 caliber handgun used during the shooting, which he later gave to his brother, Derrick Jones. (T. I. 45) Jones was arrested later that night, and admitted during his testimony to giving a false initial statement, one that placed the entire blame on Marvin. (T. I. 45-46)

On cross-examination defense counsel questioned Jones as to whose idea it was to "get" Mr. Robinson's car. Defense counsel asked Jones the following revealing questions:

Q. Did you tell Ja'Quarius: Man, I'm tired of this shit. I'm tired of those weak ass n*****s and this bullshit. Did you tell Ja'Quarius that?

A. No.

Q. So, if he said that, he would be lying?

A. King said that.

Q. If Ja'Quarius said you said that, he would be lying, right?

A. (No response.)

Q. If Ja'Quarius said that, he would be lying; is that right?

A. No, he wouldn't.

Q. No, he wouldn't?

A. (Witness shakes head negatively.)

Q. Did you say that, then?

A. Yes.

(T. I. 58-59, RE 32-33)

The State's next key witness was Wright. (T. I. 65) According to Wright, he and Jones are cousins. (T. I. 66) He also testified he was driving the car on the night of May 9, 2004, and dropped Marvin and Jones off and picked them up following the shooting. (T. I. 69) However, in contrast to Jones' testimony, Wright testified he dropped Marvin and Jones off at the intersection of Wilson and Hill Streets, not at Wilson and Lewis as Jones testified. (T. I. 77) On cross-examination, defense counsel questioned Wright concerning the two statements he gave to the Leland Police Department. (T. I. 92-102) During cross-examination, Wright also admitted giving a false initial statement to police.

The next witness called upon by the State was Vaughn, an investigator for the Leland Police Department. (T. I. 135) During direct examination, Vaughn stated he and another officer questioned Williams at the scene following the shooting. (T. I. 139) According to Vaughn, he and the other officer, Overton, came up with two suspects based on the

conversation with Williams – Byron Jones and Marvin King. However, during cross-examination when asked by defense counsel, Vaughn told a different story. After reviewing the statement given by Williams, Vaughn admitted that Williams, in his statement, stated he saw Byron Jones and Derrick Jones do the shooting, not Byron Jones and Marvin King as he testified to on direct examination. (T. I. 148) During his interview with Williams at the scene, Vaughn asked Williams was he sure he saw the "Jones boys" do the shooting, and Williams said yes, he was sure. (T. I. 149)

Based on the statement by Williams, Vaughn testified Jones was arrested the same day as the shooting, May 9, 2004. However, according to the report filed by Vaughn, Derrick Jones was unable to be located. (T. I. 150) Although, much to the surprise of defense counsel, Vaughn testified he was later able to locate Derrick Jones at a hotel in Greenville, Mississippi, nothing about which was provided in the police investigation or in the discovery furnished by the State.

On re-cross, defense counsel questioned Vaughn regarding his investigation into Derrick Jones' involvement in the shooting:

Q. Investigator Vaughn, I believe I asked you yesterday afternoon when we took the break, and you said you had gotten the card from the motel?

A. Yes.

Q. But you don't have a copy of that card in your file?

A. No, not at this time.

Q. And you didn't put anything in the file about this investigation as it pertains

to going to the motel?

A. No, I didn't, no.

(T. II. 161-62)

Following Vaughn's testimony, the State called Overton to the witness stand. (T. II. 163) Similar to the testimony given by Vaughn after being questioned by defense counsel, Overton stated during the crime scene investigation the night of the shooting, he gathered the names of two suspects – Byron Jones and Derrick Jones. (T. II. 167) He testified that, acting upon information provided by Williams, Jones was arrested and subsequently questioned at the Leland Police Department. During Jones' statement, a statement he admitted on the witness stand to not being completely truthful, he gave Marvin's name and advised Marvin was the shooter on the night of the accident. (T. II. 168) Like Vaughn, Overton testified to locating Derrick Jones at a hotel in Greenville, nothing about which was in any report provided by the Leland Police Department. (T. II. 177) Overton also testified to finding seventeen shell casings at the accident scene, which were sent to the Mississippi Crime Laboratory for comparisons and fingerprints. However, according to Overton, no fingerprints were retrieved from the seventeen casings. (T. II. 180)

On cross-examination, Overton admitted Thomas actually gave three statements to the police, although he testified on direct Thomas gave two. (T. II. 184) Overton also testified to the investigation into Derrick Jones. He even admitted the front desk clerk at the motel in Greenville identified Derrick Jones in a photo lineup:

Q. Couldn't I come to Greenville and check in as Derrick Jones at a motel?

A. Yes, but the clerk identified him by a picture, by a photo lineup.

Q. Did you say anything about that in your report?

A. No, I didn't.

Q. Did you say anything about the clerk even identifying him in your report?

A. No, I didn't.

Q. Don't you think that's important?

A. Yes.

Q. Well, why isn't it in your report?

A. Because we had excluded him from the investigation. He was never charged, he was only a suspect, so I didn't put it in the report.

(T. II. 184-85)

Overton also admitted to seeing both of the "Jones boys" leave the L & L Lounge around 2:00 a.m. (T. II. 187) The police received the 911 call at 2:29 a.m. (T. II. 282)

The State's final witness was Dr. Steven Hayne. (T. II. 202) Dr. Hayne was sworn in and stipulated as an expert by defense counsel in the field of clinical and forensic pathology. (T. II. 203) Following his autopsy report, Dr. Hayne also testified as to his opinion as an expert in the field of ballistics, in particular, which weapon actually killed Mr. Robinson. (T. II. 213-17. RE. 35-39)

At the close of the State's case-in-chief, defense counsel motioned to dismiss each of the four counts against Marvin. His motion was denied. (T. II. 219)

Following defense counsel's motion to dismiss, the defense put on its case-in-chief,

which included an opening statement and one witness, Thomas, who stated he knew Fred Jones, the "Jones boys'" father. He also testified Fred Jones works for the City of Leland. (T. II. 224) He also admitted the "Jones boys'" mother threatened him, stating, "because of you, bitch," only days before the trial. (T. II. 229)

After deliberating nearly two hours, the jury returned a verdict of guilty on all charges. (CP. 149-50, T. II. 271, RE. 25) Subsequently, as to count one, conspiracy to commit murder, Marvin was sentenced to twenty years. As to count two, murder, Marvin was sentenced to life in prison. Finally, as to counts three and four, aggravated assault, Marvin was sentenced to fifteen years on both. As there is a life sentence involved, all of the sentences were ordered to run concurrently. (CP. 151-52, T. II. 273-74, RE. 26-27)

The defense filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. (CP. 158, RE. 28-29) These motions were denied by the trial court. (CP. 164, RE. 30) Feeling aggrieved by the verdict and sentence of the lower court, the Appellant herein perfected this appeal to the Mississippi Supreme Court on July 28, 2008. (CP. 214, RE.31)

SUMMARY OF THE ARGUMENT

Due to the series of events beginning with an incompetent investigation surrounding the shooting death of Mr. Robinson, compounded by prosecution witnesses who gave mendacious testimony at trial, and a handful of admitted gang members who falsely placed the blame on the Appellant, Marvin is now serving a life sentence for a murder he did not

commit. It was clear the State's evidence was manipulated to make it appear as though Marvin fired the gun that killed Mr. Robinson. However, there was no conclusive, credible, nor believable evidence proving that Marvin was even present during the shooting, much less that he fired the gun whose bullet struck and killed Mr. Robinson. The jury in Marvin's trial found him guilty based on both legally insufficient and patently unreliable evidence that should have placed more than even a reasonable doubt in any rational juror's mind. Marvin was convicted by a jury who wanted and needed to see someone pay for this heinous crime in a city plagued by gang violence. However, justice requires the right person pay for this crime, and after examining the evidence put on by the State, it is clear Marvin King is not that person.

The Appellant first contends that the evidence put on by the State was legally insufficient to find him guilty of murder. The State did not satisfy its burden of presenting a *prima facie* case, as the evidence in no way proved his guilt beyond a reasonable doubt with respect to the elements of murder, even giving all inferences favorable to the prosecution's case. The botched police investigation, where key pieces of evidence were left out and suspects were prematurely crossed off the list, leaves reasonable doubt in any rational person's mind as to whether this case should have been allowed to go to the jury at all. The evidence put on by the State was not legally sufficient where a reasonable, fairminded juror could find beyond a reasonable doubt that Marvin committed each and every one of the elements of murder. In regard to the second issue, Appellant respectfully moves the Court

to reverse and render this case, thereby ordering him to be discharged from the custody of the Mississippi Department of Corrections.

The Appellant next contends the overwhelming weight of the evidence did not support a verdict of guilty beyond a reasonable doubt by credible evidence. Each of the State's witnesses, including two police investigators, provided drastically different stories regarding the events that occurred on the night of May 9, 2004. In fact, it is without dispute that the only eyewitness to the incident, Williams, stated to police the "Jones boys" were the shooters on the night of the killing. Despite that fact, Vaughn wrongly testified that it was Byron Jones and Marvin who did the shooting. Only during cross-examination by defense counsel did Vaughn admit to Williams' true statement – that it was the "Jones boys" who did the shooting, not Marvin. Moreover, Jones' testimony further evidenced the contradictions and inconsistencies among the State's witnesses. When first asked by defense counsel whose idea it was to get Mr. Robinson's car, Jones testified it was Marvin's idea. However, after further questioning, Jones admitted it was actually his idea to "get" Mr. Robinson's vehicle on the night of May 9, 2004.

As a result of these and other glaring contradictions, no dependable evidence exists to conclusively and reliably establish Marvin as the person who pulled the trigger of the gun that killed Mr. Robinson that night. Weak circumstantial evidence and fallacious testimony not rising to the level of "beyond a reasonable doubt," coupled with the jury's desire for someone to pay for the death of Mr. Robinson, produced an erroneous verdict not supported

by credible evidence. In regard to this issue, Appellant respectfully requests the Court reverse and remand this case to the lower court with proper instructions for a new trial.

Lastly, the Appellant contends that the court below erred in allowing Dr. Steven Hayne to testify outside the scope of his field of expertise in forensic pathology. Dr. Hayne's testimony regarding general ballistics and weaponry was "off the cuff" and clearly outside the field of his expertise. As this honorable Court has noted, juries are often in awe of expert witnesses, and therefore usually place greater weight on the testimony of an expert witness than that of a lay witness. As a result of Dr. Hayne's incredible testimony, the Appellant was effectively deprived of his substantial rights.

Favorable inferences granted to the prosecution's case-in-chief and to the jury's verdict must be based on credible evidence in order to be accorded any legal effect. Accordingly, this honorable Court should reverse and render this case, thereby discharging the Appellant from the custody of the Mississippi Department of Corrections, or in the alternative, reverse and remand this case for a new trial in accordance with the Court's findings.

ARGUMENT

ISSUE ONE:

WHETHER THE TRIAL COURT ERRED IN FAILING TO SUSTAIN THE APPELLANT'S MOTION TO SET ASIDE THE JURY'S VERDICT (J.N.O.V.), AS THE STATE'S CASE-IN-CHIEF FAILED TO MAKE OUT A LEGALLY SUFFICIENT *PRIMA FACIE* CASE BY CREDIBLE EVIDENCE.

The prosecution presented the jury with evidence that was patently unreliable and certainly not credible. It is offensive that Marvin was convicted of murder and sentenced to life in prison after the prosecution's legally insufficient case. This evidence consisted of the back-stabbing testimony of admitted "gang" members who were each responsible for telling multiple stories to police and the incompetent and incomplete facts of the police investigation itself. Marvin was convicted in a small town where the jury needed to send someone to prison for another senseless murder. However, a jury should not have even been asked to find Marvin guilty or not guilty after the state's case due to its legal insufficiency.

The prosecution was required to prove, beyond a reasonable doubt, that the Appellant committed the elements of murder, as set forth in ***Miss. Code Ann. § 97-3-19 (Supp. 2004)***: (1) That a person was killed without the authority of law and (2) the murder was done with deliberate design to effect the death of the person killed. They failed to do so in this case, presenting legally insufficient evidence so that no reasonable, fair minded juror could find Marvin guilty of murdering Mr. Robinson. The first element of murder was satisfied by the death of Mr. Robinson. Dr. Hayne and police investigators testified that Mr. Robinson had been killed. (T. I 137, T. II 178, 205) However, Mr. Robinson was *not* killed by Marvin, therefore neither element of murder was satisfied with respect to the Appellant.

This Court in ***Bush v. State***, 895 So. 2d 836, 843 (¶16) (Miss. 2005), stated:

> In ***Carr v. State***, 208 So. 2d 886, 889 (Miss. 1968), we stated that in considering whether the evidence is sufficient to sustain a conviction in the face of a motion for directed verdict or for judgment notwithstanding the verdict, the critical inquiry is whether the evidence shows "beyond a

> reasonable doubt that 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." However, this inquiry does not require a court to 'ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt.' Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

(quoting ***Jackson v. Virginia***, 443 U.S. 307, 315, 99 S.Ct. 2781, 61. L.Ed. 2d 560 (1979) (emphasis added)).

It is clear that the prosecution's case should not have convinced any rational, fair-minded juror that Marvin committed the elements of murder, and therefore, the Appellant respectfully contends that this case should be reversed and rendered.

A. The prosecution's witnesses gave glaringly inconsistent and blatantly contradictory testimony.

It is well-settled that the jury determines the credibility of witnesses. ***Solanki v. Ervin***, No. 2008-CA-01083-SCT, 2009 WL 2619186, at *13 (¶41) (Miss. Aug. 27, 2009). Incorporating this principle of law into the question central to this case of "could any rational trier of fact have found the essential elements of the crime beyond a reasonable doubt, even viewing the evidence in the light most favorable to the prosecution?", it is clear from the testimony that this "reasonable, fairminded juror" would have difficulty in sorting the truth from the lies admittedly told to police and the omissions acknowledged by the police during their investigation.

In viewing the prosecution's case-in-chief in this manner, it becomes clear that the State failed to make out even a *prima facie* case of murder against Marvin from the evidence

and testimony presented by the prosecution in its case-in-chief. By examining the State's witnesses' testimony, it becomes clear that the prosecution's legally insufficient evidence could not have convinced "any rational trier of fact . . . [to find] the essential elements of the crime" that the Appellant killed Mr. Robinson.

Jones and Wright, two of the prosecution's primary witnesses, were proven to be clearly not credible. They each presented contradictory testimony and were impeached with previous statements given to police and in the testimony that they actually gave at trial. These two self-styled "gang" members (and cousins) were the only two witnesses for the State to give testimony regarding what supposedly happened before, during, and after the shooting. Their testimony initially painted the same general picture of what happened, but differed in very important respects about who first saw Mr. Robinson and the so-called "Project Boys" at the Double Quick, whose idea it was to do the shooting, who handed the SKS assault rifle to Thomas, and where the shooters were positioned during the shooting. However, both men's testimony was ultimately impeached by their previous statements to police, and, during their mendacious testimony, it became obvious that each was acting for his own benefit and had become entangled in a web of lies and misstated facts. (T. I. 23-65, 65-104) While some of these facts may seem small and trivial on the surface, in a case such as this, where someone is serving a life sentence for murder, each and every fact is critically important in determining what truly happened that night.

Byron Jones, the angry ringleader, presented only self-serving, uncorroborated, and

not credible testimony. Jones admitted to participating in the shooting, but he asserts that he was not shooting at the victim, but instead at another gang member. (T. I. 38, 40, 46) However, he is the only one who had motive for shooting at the Project Boys. Jones testified that he left the club furious that night, and the driver of the car, Wright, testified that Jones said Derentez Blue (hereinafter "Blue") had been "watching" him. (T. I. 71) While Jones testified that Marvin and Mr. Robinson had "an altercation" at the club earlier in the night, no details of the fight were ever revealed after defense counsel made a hearsay objection (T. I. 33).

Jones testified that he was nervous on the witness stand because he "was involved and stuff like that," but that he "didn't pull the trigger" and "didn't shoot the gun that night." (T. I. 34). He then later went on to testify that he did shoot at Williams during the same time as Marvin was shooting at Mr. Robinson. Jones admitted during direct examination that he had lied to police in a statement to them when he was first arrested. (T. I. 46) In this initial statement, he denied any involvement in the shooting and said that Marvin had called him and admitted to everything and asked him to hold the gun for him. (T. I. 46)

On cross-examination, Jones was caught in another lie. (T. I. 59) Wright, the driver, told police that Jones had said, "Man, I'm tired of this shit. I'm tired of these weak ass n*****s and this bullshit." (T. I. 58, RE. 32-33) Jones initially testified that Marvin was the one who said that, but then admitted that he made the incriminating statement, but that he was talking about the person he had argued with at the L & L Lounge earlier in the evening,

and not the Project Boys. However, Wright's statement went on to reveal that Jones had said "They getting on my nerves with this shit...There goes another one" when he saw the Project Boys before the shooting. (T. I. 59) Jones could not explain why he made that statement when he saw the Project Boys, and insisted that he was really only mad at another person. (T. I. 59) This testimony clearly revealed that Jones was the only one who was angry that night, and had expressed his dislike for the Project Boys.

Jones testified that Marvin had told Wright, the driver, to call them when he was ready to pick them up. (T. I. 36) However, on cross-examination Jones admitted that he had told Wright that he would call him when they were ready. (T. I. 60) Wright testified that he had ended up calling Jones because he got worried when he heard the shots. (T. I. 79) Jones is the only person who testified that was present during the shooting, therefore he had every opportunity to place the blame on Marvin for Mr. Robinson's death. His contradictory and untrustworthy testimony did not render him a credible or convincing witness, and certainly could not be considered legally sufficient evidence put on by the State.

Wright was the second witness put on by the prosecution whose role was most likely to corroborate Jones' testimony. However, instead of accomplishing that goal, Wright showed more deceit, told more lies, and should have further proven to the jury that the prosecution could not prove beyond a reasonable doubt that Marvin was the shooter.

It is undisputed that Thomas somehow ended up with the SKS rifle that was supposedly used in the shooting. Jones testified that Marvin was the one who gave it to

Thomas after the shooting. (T. I. 43) Wright also testified that Marvin was the one that passed Thomas the gun, only to be impeached on cross-examination by his previous statement to police that it was in fact Jones who gave Thomas the gun. (T. I. 81, 101) Wright had talked with a police investigator and told him that Jones and Marvin had both given guns to Thomas. However, he chose to only point out during direct examination that Marvin had given Thomas a gun. In fact, he only mentions one gun being in his car after the shooting, instead of the two that he told police about initially. (T. I. 80) Thomas testified later that it was Jones that gave him the SKS rifle that he eventually turned over to police. (T. I. 128) While Thomas, Wright, and Jones testified that the SKS rifle had come from Marvin's house, it is clear that Jones was the one who used it during the shooting and then passed it off to Thomas. (T. I. 129, 80)

Wright testified that it was Jones who first saw the Project Boys at the Double Quick and said "There they go." (T. I. 73) Jones, however, testified that after they saw Mr. Robinson's car, Marvin said "Let's get him." (T. I. 31) Wright never testified that Marvin or Jones individually made any references to "getting" the Project Boys or their car, and instead only stated that "they" were making all of the plans. (T. I. 74-76) While Wright did corroborate Jones' story that Marvin was the one with the SKS, it is clear from the police statements and Thomas' testimony that Jones was the one who handed Thomas the SKS rifle. (T. I. 76) Wright, Thomas, and Jones all testified that Marvin got out at Thomas' house after the shooting. (T. I. 81) It is only logical to conclude that Jones was the one who had used the

SKS that night, and then given it to Thomas.

Wright also testified that Jones told him after the shooting that he had been hiding behind the bushes and not to tell anyone. (T. I. 82) However, Jones testified that Marvin was in fact the one hiding behind the bushes. (T. I. 36) It was impossible for the jury, from hearing Jones' and Wright's testimony, to understand what happened the night of the shooting. Therefore, the prosecution failed to present legally sufficient evidence to prove beyond a reasonable doubt that the Appellant committed this murder.

When Wright first talked to police, he told them he and Marvin had "been riding around" and hadn't seen Jones all day. (T. I. 86) At trial, he testified that he had lied because Marvin had asked him to tell police that story. (T. I. 85-86) After Wright was arrested, he told police that he saw Jones with the gun and that Jones had given it to Thomas. (T. I. 87) On direct examination, Wright testified that this statement was a lie, too. (T. I. 87) On cross, defense counsel pointed out that in fact Wright's first statement to police was not that he and Marvin had not seen Jones all day, but instead that he and Marvin had picked Jones up. (T. I. 94) Defense counsel also pointed out that Wright had told police, "Naw, he [Marvin] ain't have nothing on him" when asked if Marvin had a gun when he re-entered the car. (T. I. 98) Finally, Wright read from one of his previous statements to police that Jones told him that he had done the shooting, "I got tired of them. I shot at them. I shot at them." (T. I. 99) And while Jones never told Wright <u>where</u> he was shooting, it is easy to infer that he was shooting at the Project Boys because he was angry and wanted to take his frustration out on someone,

in part because Blue had been "watching him" earlier that night.

Wright also testified that while in custody, he talked to Jones who said he "didn't do any shooting." (T. I. 88) Jones admitted during the trial to participating in the shooting, again reinforcing the fact that no one knows exactly what happened and exactly who was shooting. Wright made another glaringly inconsistent statement when he testified that Jones did have a gun when they first went to Thomas' house, when he had previously said that he only saw Marvin with a gun when they got into his car to go to Thomas' house. (T. I. 87, 80) The prosecution's legally insufficient evidence should not have convinced a rational jury to convict Marvin, and he certainly should not be serving a life sentence because of this flimsy, self-serving story told by prosecution witnesses who, even giving all inferences favorable to the State's case, could not be believed and did not make out even a *prima facie*, basic case for the prosecution.

B. The incompetent and incomplete police investigation provided no legally sufficient evidence to find Marvin King guilty.

The prosecution's case was based not only on contradictory and impeached testimony, but also revolved around an incomplete, highly questionable police investigation. Both of the police investigators who testified in this case were full of blatant inconsistencies that were pointed out by defense counsel, and were ultimately forced to admit to leaving crucial details out of their reports. It should have been obvious to the prosecution that the police investigation was full of gaping holes, and more should have been done before bringing the case to trial against Marvin. Combined with the prosecution's key witnesses at trial, the

investigator's testimony clearly shows that there was not enough evidence against Marvin to even warrant a jury question.

The first police investigator to take the stand, Vaughn, clearly stated that the first suspects were Byron Jones and Marvin King. (T. I. 139) He told the court that after speaking to Williams, who was one of the Project Boys that had been in Mr. Robinson's car and had been shot at, these two men were identified as suspects. (T. I. 139) However, defense counsel caught him in a lie during cross-examination by bringing to the trial court's attention the fact that Williams had actually identified Jones and his brother, Derrick, as the two shooters. (T. I. 149) This statement is very powerful since Jones even testified that he and Williams made eye contact during the shooting. (T. I. 40)

However, police chose to ignore Williams' statement after they supposedly discovered that Derrick Jones had checked into a motel at some point that night. (T. I. 149-50) The actual police report only says that they were unable to locate Derrick Jones, and does not give any details as to the investigation into Derrick Jones' whereabouts. (T. I. 150) Vaughn testified on redirect examination that he and another officer had traveled to the hotel that Derrick Jones was supposedly staying in during the shooting. (T. I. 150) Apparently, the hotel clerk gave the police a card that showed who had checked in and at what time. (T. I. 151) The clerk then identified Derrick Jones as the man who checked in that night by looking at a photographic line up. (T. II. 177, 184) Not a single detail of Derrick Jones' possible involvement in the shooting or his hotel alibi were included in the police

investigation report. (T. II. 162) This police investigation report was turned over to the prosecution in order to aid them in their case against Marvin, and it was obviously incomplete, inaccurate, and misleading.

The prosecutors in this case should have requested more details and more thorough police work before bringing someone to trial for murder. The prosecution's burden of proof beyond a reasonable doubt that the Appellant was present and was the one who committed the murder of Mr. Robinson fell far short and any reasonable, fair-minded juror should not have been able to reach this conclusion based on the contradictory testimony of two witnesses who had been impeached, admitted to misleading the police investigation, and were conclusively shown to be making up their story as they went along.

The second police officer to testify, Overton, gave testimony that also clearly revealed the incompetency or calculation that surrounded the investigation into the shooting death of Mr. Robinson. He too testified that Williams told police that the "Jones boys" were shooting at him that night. (T. II. 167) He also admitted to the trial court that Derrick Jones was not included in the report, despite the fact that an eye-witness who had been shot at positively identified Derrick Jones as the shooter. (T. II. 184-85) Incredibly, neither investigator explained exactly how anyone found out that Derrick Jones had supposedly been at this motel. Overton only testified about speaking with Jones (and not Derrick) after Nacardis said that the Jones boys had been shooting at him. (T. II. 168) Overton incredibly and inexplicably testified that even though the purpose of an investigation is "to gather information in

reference to a case," since Derrick Jones was never charged with anything, he did not have to be included in the report. (T. II. 185) This completely unsatisfactory attempt at an explanation of his actions not only begs the question of Derrick Jones' exclusion as a suspect, it also entirely impeached his credibility as a neutral, detached agent of the police who would have acted reasonably during a murder investigation.

Unbelievably, Overton had actually seen Derrick Jones outside of the L & L Lounge the night of the shooting. (T. II. 185) On direct examination, he did not mention seeing Derrick Jones at the club when asked if he had seen anyone involved that night, but then later admitted that in fact he himself had seen him at the club at closing time. (T. II. 186) He did testify on cross-examination that he had seen Derrick Jones leave the club with a crowd that was "kind of rowdy" sometime around 2:00 a.m. (T. II. 186-87) He also acknowledged not looking into the identities of the other people that were with Derrick Jones when they left the club, even though this was an "important" detail. (T. II. 187) Both investigators testified that the shooting took place at some time around 2:00 a.m., Derrick Jones was spotted at the club at around 2:00 a.m., but was supposedly also at a motel "a little after 2:00." (T. II. 188) There is clearly not an accurate time line that reasonably warranted police to peremptorily cross Derrick Jones off the prime suspect list.

Overton gave very conflicting testimony about how many statements Thomas made to police, how many of these statements were included in the police report, and what the statements actually said. He initially reported that police learned from Thomas that Marvin

had given him the gun, but then revealed that Thomas' first statement to police said that it was Jones. (T. II. 170-71) He tried to regain any credibility that he might have had by saying that Thomas had also made an oral statement saying that Marvin had given him the weapon. (T. II. 175) This oral statement is no where in the police file. This is also different from Thomas' testimony that Jones did in fact give him the weapon.

These police officers that investigated the case and testified at trial for the prosecution left gaping holes in their report and then attempted to fill them in during the trial. This improbable evidence was legally insufficient to convict the Appellant of any crime, particularly that of murder. The only thing proven beyond a reasonable doubt was that each and every witness who appeared for the State at trial either was substantially or completely impeached in their testimony, rendering the prosecution's case-in-chief void of the proof necessary to establish each and every essential element of the indicted crime of murder.

Indeed, Marvin King's presence and participation in this murder was never conclusively established under this exacting standard of review and since "the facts and inferences considered in a challenge to the sufficiency of the evidence 'point in favor of the defendant on any element of the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty,' the proper remedy is for the appellate court to reverse and render [, i.e. reverse and discharge]." ***Bush***, 895 So. 2d at ¶16 (citations omitted).

The prosecution had the burden of proving beyond a reasonable doubt that Marvin

was guilty of murder. Not only did they fail to meet this burden, but they never had enough evidence to even bring a case forward against him. The trial judge erred when the motion for a directed verdict was denied at the end of the prosecution's case in chief, and when the motion for judgement notwithstanding the verdict (J.N.O.V.) was denied. The Appellant respectfully requests that this Court reverse and render this case, and discharge him from custody of the Mississippi Department of Corrections.

ISSUE TWO:

WHETHER THE TRIAL COURT ERRED BY OVERRULING THE APPELLANT'S MOTION FOR A DIRECTED VERDICT OR A NEW TRIAL SINCE THE WEIGHT OF THE EVIDENCE PRESENTED DID NOT SUPPORT A VERDICT OF GUILTY BEYOND A REASONABLE DOUBT BY CREDIBLE EVIDENCE.

In a city torn apart and bristling with lawless gang violence, the residents of Leland, Mississippi, were understandably seeking accountability for the heinous violence that occurred in the instant case. However, justice, and the protections guaranteed by our state and federal Constitutions, require the correct person be held accountable when such tragically incomprehensible acts occur. Incompetent police work, self-serving witness testimony, and the jury's desire to see someone, anyone, pay for the murder of Mr. Robinson produced an erroneous verdict not supported in any way by credible evidence. Despite such glaring inconsistencies and blatant contradictions in the testimony presented in the case before the Court today, Marvin was convicted and subsequently sentenced to life imprisonment on a measure of proof that could not be said to be legally sufficient, much less supportive of the

jury's unreasonable verdict.

Appellate review of a trial court's denial of a motion for a new trial looks to the weight of the evidence to determine whether a verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. ***Bush***, 895 So. 2d at ¶18 (citing ***Herring v. State***, 691 So. 2d 948, 957 (Miss. 1997)). As a result, the common standard of review for the denial of a post-trial motion seeking a new trial is abuse of discretion. ***Dilworth v. State***, 909 So. 2d 731, 736 (¶17) (Miss. 2005). In reviewing the trial court's action under this standard, "[a] greater quantum of evidence favoring the State is necessary for the State to withstand a motion for a new trial, as distinguished from a motion for J.N.O.V." ***Id.*** at ¶20 (emphasis added) (citing ***Pharr v. State***, 465 So. 2d 294, 302 (Miss. 1984)).

> However, the evidence should be weighed in the light most favorable to the verdict. A reversal on the grounds that the verdict was against the overwhelming weight of the evidence, unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict. Rather, as the 'thirteenth juror,' the court simply disagrees with the jury's resolution of the conflicting testimony. This difference of opinion does not signify acquittal any more than a disagreement among the jurors themselves. Instead, the proper remedy is to grant a new trial.

Dilworth, 909 So. 2d at ¶21 (citing ***Bush***, 895 So. 2d at ¶18 (footnotes & citations omitted) (emphasis added)).

In the recent case, ***Nelson v. State***, 10 So. 3d 898, 908 (¶41) (Miss. 2009), this Court reiterated the familiar rule established in ***Herring***, 691 So. 2d at 957:

> When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, we will only disturb a verdict when it is so contrary

> to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice.

Nelson, 10 So. 3d at ¶41 (quoting ***Jones v. State***, 904 So. 2d 149, 154 (¶14) (Miss. 2005)). In addition to the exigent rule developed in ***Herring***, this honorable Court, in ***Bush***, further articulated that the Court's power to grant a new trial should be invoked only in "exceptional cases" in which the evidence preponderates heavily against the verdict. ***Bush***, 895 So. 2d at ¶18. The facts of this case illustrate that this is just such the "exceptional" case described in ***Bush*** that warrants a new trial.

In the context of a defendant's motion for new trial, although the circumstances warranting disturbance of the jury's verdict are "exceedingly rare, such situations arise where, from the whole circumstances, the testimony is contradictory and unreasonable, and so highly improbable that the truth of it becomes so extremely doubtful that it is repulsive to the reasoning of the ordinary mind." ***Thomas v. State***, 92 So. 225, 226 (Miss. 1922) (emphasis added). Though this standard of review is high, the appellate court "does not hesitate to invoke its authority to order a new trial and allow a second jury to pass on the evidence where it considers the first jury's determination of guilt to be based on extremely weak or tenuous evidence. . ." ***Dilworth***, 909 So.2d at ¶22.

The Court's language in ***Thomas*** proves to be instructive when considered in light of the "evidence" put on by the State in this case. As declared by the Court in ***Thomas***, a jury's verdict may be overturned when the "testimony is contradictory and unreasonable, and so highly improbable that the truth of it becomes so extremely doubtful that it is repulsive to the

reasoning of the ordinary mind." ***Thomas***, 92 So. at 226 (emphasis added). Inconsistent and contradictory statements made by self-serving witnesses and evidence produced through superficial, careless police work were the cornerstones of the State's case-in-chief. The key witnesses for the State, including two police investigators, gave contradicting testimony – contradicting each other as well as their own statements made in pre-trial interviews. Only after a laborious cross-examination by defense counsel did the State's witnesses reveal their true colors, such as Vaughn's testimony concerning the identity of the persons implicated by the lone eyewitness as the shooters – the "Jones boys":

Q. One of them was Byron Jones, but the other one is not Marvin King, is it?

A. No. He stated here Derrick Jones.

Q. So, he saw Byron Jones and Derrick Jones?

A. Yes.

Q. And you asked him if he was sure, and he said yes?

A. Yes.

(T. I. 149)

As held by this Court in ***Thomas***, a jury's verdict may be overturned on issues relating to the weight and worth of the evidence presented at trial when the "testimony is contradictory and unreasonable. . ." ***Thomas***, 92 So. at 226 (emphasis added). From police investigators to expert witnesses, the blatant contradictions present in Appellant's case are

such that they rise to the level of becoming "repulsive to the reasoning of the ordinary mind." ***Id.*** Not only given by ordinary lay witnesses, testimony by two police investigators compounded the blatant contradictions present in Appellant's trial. While on the stand, Vaughn testified during direct examination that the lone eyewitness identified Jones and Marvin as the shooters. (T. I. 139) However, after being questioned on cross-examination by defense counsel, Vaughn reluctantly admitted Jones and Derrick Jones were identified as the shooters. (T. I. 148-49)

Following Vaughn's testimony, Overton merely compounded the blatant contradictions and glaring inconsistencies established during Vaughn's testimony. Despite an eyewitness having identified the "Jones boys" as the shooters, Overton admitted to clearing Derrick Jones based on his own self-serving statement of being checked into a Greenville motel at the time of the shooting. (T. II. 184-85) Furthermore, having been at the L&L Lounge prior to the shooting, Overton was asked on direct examination to identify any of the individuals involved in the investigation. (T. II. 176) In response, Overton identified only Byron Jones. However, after being questioned by defense counsel about this crucial part of the investigation on cross-examination, Overton admitted to not only seeing Byron Jones, but to also seeing Derrick Jones outside the L & L Lounge, along with a "rowdy" group, shortly before the shooting. (T. II. 186)

Blatant contradictions and glaring inconsistencies appeared not only in the police investigation testimony, but in the investigatory statements and trial testimonies of self-

serving prosecution witnesses as well. The State's first witness, Jones, who plead guilty to a lesser sentence for manslaughter prior to testifying at trial, did all that was expected of him at trial, naming Marvin as the murderer, even though the evidence indicated it was Jones who was involved in a fight at the L&L Lounge. (T. I. 46-47) After the fight, he admitted being angry at the other group of men that he eventually planned to attack. (T. I. 58-60) He also happened to be the brother of Derrick Jones, who eyewitness Williams implicated as the second shooter at the scene, but police never competently investigated Derrick Jones' whereabouts at the time of the killing or even pursued this natural lead in the case. (T. I. 56-57)

Jones had everything to gain and nothing to lose in his plea deal with the State, testifying against Marvin while protecting his brother at the same time. Furthermore, like the two police investigators, cross-examination was required in order to reach truthful testimony. (T. I. 58-59) When asked by defense counsel whose idea it was to "get" the Project Boys, Jones first placed the blame on Marvin. But Jones' fabrications were exposed and his credibility was completely impeached in this "blame-shifting" testimony that was key to the prosecution's case when, during that same cross-examination, he admitted he was the ringleader that night, not the Appellant:

Q. Did you tell Ja'Quarius: Man, I'm tired of this shit. I'm tired of those weak ass n*****s and this bullshit. Did you tell Ja'Quarius that?

A. No.

Q. So, if he said that, he would be lying?

A. King said that.

Q. If Ja'Quarius said you said that, he would be lying, right?

A. (No response.)

Q. If Ja'Quarius said that, he would be lying; is that right?

A. No, he wouldn't.

Q. No, he wouldn't?

A. (Witness shakes head negatively.)

Q. Did you say that, then?

A. Yes.

(T. I. 58-59, RE. 32-33)

Like Jones, Wright admitted to being a member of the ringleader's conspiracy that eventually killed Mr. Robinson. Also like Jones, Wright enjoyed family ties to the "Jones boys;" Wright and the "Jones boys" were second cousins who grew up together in the small town of Leland. (T. I. 66) Having not pled guilty before Marvin's trial, Wright had everything to gain by cooperating with the State in building a case against Marvin while protecting his cousins, who not only had both opportunity and motive, but actually were identified as the killers of Mr. Robinson by the sole eyewitness of the murder at the scene of the crime immediately after the shooting. (T. I. 149, T. II. 167-68, T. III. 303-07)

Although "exceedingly rare," the Court does recognize instances in which allowing

a verdict to stand would result in an "unconscionable injustice," such as in the case at bar. *See* ***Bush***, 895 So. 2d at ¶18. The manipulated evidence presented by the State was neither conclusive, credible, plausible, nor believable. In a town ravaged by "gang" violence and fighting, the jury's desire to see someone pay for the heinous act that occurred obviously interfered with their ability to act as a "reasonable, fairminded juror" in assessing and weighing the unconvincing evidence presented by the State. Even viewing the evidence presented at trial in the light most favorable to the jury's verdict, it cannot be said with any confidence that Marvin was established to even be present, much less firing the gun that murdered Mr. Robinson.

Due to the contradictory, unreasonable, and highly doubtful nature of the testimony elicited by the State, the evidence produced was not only incredible, but so implausible that it became "repulsive to the ordinary mind." ***Id.*** As a result of the jury's conviction-driven mentality, the verdict is "so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." ***Nelson***, 10 So. 3d at ¶41. The facts in evidence argued in Issue One, supra, also support the Appellant's contentions that the "contradictory and unreasonable" nature of the evidence which came from the prosecution's witnesses did not produce this "greater quantum of evidence favoring the State ... necessary for the State to withstand a motion for a new trial, as distinguished from a motion for J.N.O.V." ***Dilworth***, 909 So. 2d at ¶20. Therefore, the Appellant moves this honorable Court to reverse the verdict of the jury and the sentence handed down by the trial

court, thereby remanding this case to the lower court with proper instructions for a new trial on the merits.

ISSUE THREE:

WHETHER A SUBSTANTIAL RIGHT OF THE APPELLANT WAS AFFECTED BY THE SPECULATIVE, CONCLUSATORY, AND HYPOTHETICAL BALLISTICS TESTIMONY GIVEN BY DR. STEVEN HAYNE THAT IMPROPERLY WENT FAR BEYOND THE SCOPE OF HIS EXPERTISE AS A FORENSIC EXAMINER.

Despite the ringleader Byron Jones' confession that he was one of the gunmen involved in the killing, biased fingers ultimately pointed to Marvin King as being the person who fired the weapon that killed Woquin Robinson, including the "expert" testimony of Dr. Steven Hayne, the forensic pathologist who testified on behalf of the State, ostensibly concerning the cause and manner of Mr. Robinson's death.

When a party fails to preserve an issue by contemporaneous objection or by otherwise failing to bring the issue to the trial court's attention, the party may still raise the issue on grounds that the error having occurred was obvious or "plain" on the face of the proceedings. M.R.E. 103(d); ***Brown v. State***, 690 So. 2d 276, 297 (Miss. 1996). This honorable Court's holdings on the subject parallel the analysis set out by the United States Supreme Court in ***United States v. Olano***, 507 U.S. 725 (1993). Precisely stated, the plain-error doctrine requires not only the existence of an error, but also that either the error "resulted in a manifest miscarriage of justice *or* seriously affects the fairness, integrity or public reputation of judicial proceedings." ***Brown v. State***, 995 So. 2d 698, 703 (¶21) (Miss. 2008) (emphasis

added) (citing ***United States v. Atkinson***, 297 U.S. 157, 160 (1936)). For five pages within the record, Dr. Hayne gave unsupported, conclusatory testimony based outside the scope of his designated expertise of forensic pathology. (T. II. 213-17, RE. 35-39) Due to the nature of Dr. Hayne's incredible testimony, which fell outside of the area of expertise to which he was admitted as an expert, forensic pathology, and strayed far afield into the area of ballistics, the Appellant suffered a violation of a substantial, fundamental right.

In ***Edmonds v. State***, 955 So. 2d 787, 792 (¶8) (Miss. 2007), this honorable Court stated: "While Dr. Hayne is qualified to proffer expert opinions in forensic pathology, a court should not give such an expert carte blanche to proffer any opinion he chooses." ***Id.*** (emphasis added). In ***Edmonds***, there was no showing that Dr. Hayne's testimony was based on scientific methods and procedures, but not on pure opinion or speculation outside the admitted area of expertise. ***Id.*** Similarly in this case, Dr. Hayne's testimony during trial was unsupported and "off-the-cuff." Despite testifying as an expert in forensic pathology, Dr. Hayne went beyond his expertise in the case before this honorable Court by testifying in the field of ballistics and weaponry in general. (T. II. 213-17, RE. 35-39) The testimony of weapons expert Starks Hathcock, who mentioned nothing about muzzle velocity or penetration effects, further compounds the incredibility of Dr. Hayne's testimony. (T. II.189-202) For five pages in the record, Dr. Hayne testified in the area of ballistics and weaponry, at times going into totally unrelated and irrelevant areas of expert testimony, including muzzle velocity and the penetration effects of certain weapons on objects such as an

automobile. (T. II. 213-17, RE. 35-39) Such testimony was clearly outside the scope of Dr. Hayne's area of expertise and violated the Appellant's substantial rights.

The recent ruling by this honorable Court in the case of ***Wilson v. State***, No. 2007-DP-01218-SCT, 2009 WL 3031076 (Miss. Sept. 24, 2009) is instructive. In ***Wilson***, although no contemporaneous objection was made regarding Dr. Hayne's testimony at trial, the Court still looked to an issue regarding Dr. Hayne's testimony. ***Id.*** at ¶¶48-49. Although Wilson's argument was found to be without merit, Appellant contends the instant case is more in line with ***Edmonds*** in that Dr. Hayne's testimony was "off-the-cuff" and outside the scope of his expertise. Unlike the appellant's argument in ***Wilson*** that all verdicts involving testimony from Dr. Hayne should be summarily overruled, here the Appellant argues that, as a result of Dr. Hayne's unqualified testimony , his substantial right to a fair trial was violated, which ultimately resulted in a guilty verdict.

Unlike the testimony in ***Wilson*** in which the appellant challenges Dr. Hayne's credentials to testify as a forensic expert, ***Id.*** at ¶46, 48-49, the facts found in the instant case call for a different conclusion. During the Appellant's trial, Dr. Hayne went far beyond the scope of his expertise in forensic pathology. Although experts tendered in the field of forensic pathology may testify regarding what caliber of weapon resulted in a certain type of wound, Dr. Hayne's particularized testimony went far beyond the generalized assumption of indicating what caliber of weapon caused the wound received by Mr. Robinson. *See* ***Dycus v. State***, 875 So. 2d 140, 156 (¶51) (Miss. 2004), *vacated*, 544 U.S. 901 (2005). In

particular, Dr. Hayne testified that only a "long barreled weapon, a rifle type weapon" could penetrate two intermediate objects from 150 feet away and maintain enough velocity to inflict the type of wound received by Mr. Robinson. (T. II. 214, RE. 36) Dr. Hayne compounded the erroneous testimony by testifying as to the muzzle velocity of a .38 caliber handgun and a SKS rifle – stating that a .38 caliber handgun has a muzzle velocity of "750, 800 feet per second," while a SKS rifle has a muzzle velocity of "approximately 2650 feet per second." (T. II. 216, RE. 38) Dr. Hayne testified further that:

> Well, the velocities, counselor, correspond significantly to the amount of kinetic energy. As you increase the velocity, the amount of force goes up to the square. You multiply the velocity times the velocity.
>
> The velocity becomes a critical issue in determining amount of force in a bullet when it strikes a target. If you increase the mass of the bullet by doubling it, it increases the kinetic energy by a factor of two. If you double the velocity, the speed of the bullet, it increases the force by a factor of four. So, you can see that velocity is more important than mass, the weight of the bullet.
>
> Speed becomes a critical issue. The faster the bullet is going, the more the striking power, the more kinetic energy, the more force that the bullet has. That's why bullets are made with high velocity capability. Military rounds have high velocity weapons because of the injuries that they can inflict with them.

(T. II. 216-17, RE. 38-39).

The testimony delivered by Dr. Hayne was the same kind of "off-the-cuff" statements condemned by this honorable Court in ***Edmonds***. *See* ***Edmonds***, So. 2d at ¶10. Ballistics expert Starks Hathcock was present and testified for the prosecution and could have easily presented this testimony regarding "high velocity bullets," then Hayne could have based his opinions concerning the type of wound suffered by the deceased was consistent or inconsistent with such a weapon. But instead, Dr. Hayne once again strayed into an area of expert testimony that had absolutely no bearing on his role in performing autopsies, to testify only as to cause of death in a case. "While Dr. Hayne is qualified to proffer expert opinions in **forensic pathology**, a court should not give such an expert carte blanche to proffer any opinion he chooses." ***Edmonds***, 955 So. 2d at ¶8 (emphasis added). It is clear that the Court's instruction in ***Edmonds*** was to serve as a warning to trial judges to limit the scope of Dr. Hayne's testimonies and not allow him to proffer "off-the-cuff" remarks about any subject he chooses to be an "expert." As a result of Dr. Hayne's incredible testimony concerning the different weapons that may have caused the death of Mr. Robinson, Appellant suffered a violation of his substantial rights, which, given the magnitude that juries defer to the opinions of outspoken expert witnesses, it cannot be said with any confidence that the jury's verdict was not affected by this error in allowing the ballistics testimony.

Furthermore, the admission of Dr. Hayne's testimony by the trial court was error, but cannot be characterized as harmless error. Dr. Hayne's speculative testimony about the

ballistic characteristics of a splintered projectile that he ordered to be sent to the weapons division of the Mississippi Crime Laboratory (T. II. 212-17, RE. 34-39) affected a fundamental right of Appellant's, and, therefore, should be considered non-harmless reversible error. Without the testimony of Dr. Hayne concerning the hypothetical posed by the prosecutor that put the SKS rifle in Marvin's hands, the jurors would very likely have felt there was not enough evidence to tie the Appellant directly to Mr. Robinson's death. Without Dr. Hayne's testimony, there was certainly not enough evidence for a reasonable jury to convict someone of murder beyond a reasonable doubt based on the self-serving testimony of a single prosecution witness who had the motive, opportunity, and the means to commit this murder. *See* Issues One and Two, *supra*.

The Mississippi Supreme Court re-affirmed the elements of the harmless error test to be employed in claims of constitutional error in the case of ***Clark v. State***, 891 So. 2d 136, ¶29 (Miss. 2004), by holding:

> "This Court has held that even errors involving a violation of an accused's constitutional rights may be deemed harmless beyond a reasonable doubt where the weight of the evidence against the accused is overwhelming." ***Riddley v. State***, 777 So. 2d 31, 35 (Miss. 2000), *citing* ***Kircher v. State***, 753 So. 2d 1017, 1027 (Miss. 1999). Additionally, the United States Supreme Court [in ***Delaware v. Van Arsdall***, 475 U.S. 673 (1986)] has concluded that:
>
> > we hold that the constitutionality improper denial of a defendant's opportunity to impeach a witness for bias, like other confrontation clause errors, is subject to Chapman harmless-error analysis . . . Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. <u>These factors include the importance of the witness' testimony in the prosecution's case,</u>

> whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.
> ***Van Arsdall***, 475 U.S. at 684, 106 S. Ct. at 1438.

Clark, 891 So. 2d at ¶29 (emphasis added).

Justice Dickinson, in his dissent in ***Haynes v. State***, 934 So.2d 983, 994 (¶44) (Miss. 2006) (Dickinson, J., dissenting), stated that "Harmless errors are only those 'which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.'" ***Id.*** (quoting ***Chapman v. California,*** 386 U.S. 18, 22 (1967)). Dr. Hayne's testimony in this case was very important and significant to the jury. The fact that this testimony was speculative and beyond Dr. Hayne's area of expertise calls for reversible error. "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." ***Haynes***, 934 So.2d at ¶46 (quoting ***Fahy v. Connecticut***, 375 U.S. 85, 86-87 (1963)) (emphasis added). More than a reasonable possibility exists in Appellant's case that Dr. Hayne's testimony contributed to a conviction.

By attempting to directly tie the Appellant to the weapon allegedly involved in the shooting death of Mr. Robinson, Dr. Hayne's testimony clearly violated a substantial right of the Appellant. After hearing previous disputed testimony, Dr. Hayne attempted to tie the murder weapon to Marvin by making an uninformed assumption, clearly outside the scope of his expertise in forensic pathology, that the murder weapon was, in his expert opinion, a

"long barreled weapon, a rifle weapon." (T. II. 212-17, RE. 34-39) Although nothing more than mere "lead fragments" were found in the investigation upon which one could attempt to identify the murder weapon, Dr. Hayne clearly went beyond the scope of his expertise by endeavoring to prejudicially tie the recovered lead fragments to a weapon allegedly owned by Marvin in an effort to convince the jury that the "long barreled weapon" was the murder weapon, even though he could not conclusively identify the shattered bullet fragments as either coming from a .38 caliber or SKS projectile. (T. II. 213-14, RE. 35-36) Dr. Hayne's testimony in this regard was pure conjecture on his part. Through this inconclusive, highly speculative testimony, the prosecution hoped to bolster the self-serving testimony of the ringleader that fateful night through Dr. Hayne's testimony that would attempt to put the murder weapon, although unknown and undiscovered by any scientific basis, in the hands of the person that the State's primary witness said shot the SKS rifle at the car that Mr. Robinson was occupying. Once again, Dr. Hayne attempted to directly tie the accused to the crime without any "expert" basis for his conclusatory testimony that it was a rifle projectile, instead of a pistol bullet that killed Mr. Robinson.

As proof of his lack of knowledge in general ballistics and weaponry, the Appellant would point this honorable Court to Dr. Hayne's trial testimony. After finding the "lead fragments" Dr. Hayne attempts to use in tying the Appellant to the murder weapon, Dr. Hayne, after the autopsy, demonstrated his lack of expertise in identifying bullet fragments when he sent the fragments to the Mississippi State Crime Laboratory for further analysis.

(T. II. 217, RE. 39) Although a firearms identification specialist from the Mississippi Crime Laboratory testified immediately prior to Dr. Hayne, who mentioned nothing about the source, condition, or identification of the lead fragments, Dr. Hayne could not resist the temptation elicited by the prosecution to attempt to connect one of the recovered weapons to Marvin. Furthermore, absolutely no testimony was elicited from the weapons expert, Starks Hathcock, as to which weapon, the .38 caliber pistol or the SKS Kalisnikov rifle, ultimately was the weapon that killed Mr. Robinson. The weapons expert clearly served as a witness with the specialized training, education, and expertise who could have attempted to identify the ultimate murder weapon, and any extraneous testimony by Dr. Hayne regarding that matter was impermissible. Dr. Hayne's testimony concerning which weapon produced the "lead fragments" was clearly outside the scope of his expertise and cannot be described as merely "harmless" error.

"Juries are often in awe of expert witnesses because, when the expert witness is qualified by the court, they hear impressive lists of honors, education and experience." ***Edmonds***, 955 So. 2d at ¶9. An expert, such as Dr. Hayne, has more experience and knowledge in a certain area than the average person. ***Id.*** Therefore, juries usually place greater weight on the testimony of an expert witness than that of a lay witness. ***Id.*** Such is the case here. Despite the earlier testimony from a ballistics and weapons expert, Dr. Hayne chose to give incredibly speculative and highly prejudicial testimony that clearly fell outside the scope of his expertise as a forensic pathologist. If the prosecution wished to lay a

foundation for the conclusions testified to by Dr. Hayne, the ballistics expert, Starks Hathcock, could have certainly testified as to the type of projectile from which the lead fragments came. Since he did not provide such expert ballistics testimony, one could reasonably infer that no expert could identify the source of the shattered projectile, much less the person who fired the weapon. As the State's last witness, one may also reasonably infer that the jury gave unprecedented weight to Dr. Hayne's testimony. Such weight, combined with Dr. Hayne's incredibly irrelevant and highly prejudicial testimony, deprived the Appellant of his substantial rights, and the Appellant respectfully submits that as a result of the foregoing, this honorable Court should recognize the testimony at trial as plain error, thereby reversing the verdict of the jury and the sentence of the trial court and remand this case to the lower court with proper instructions for a new trial.

CONCLUSION

The Appellant herein submits that based on the propositions cited and briefed hereinabove, together with any plain error noticed by the Court which has not been specifically raised, the judgment of the trial court and the Appellant's conviction and sentence should be reversed and vacated, respectively, and the matter remanded to the lower court for a new trial on the merits of the indictment on a charge of murder, with instructions to the lower court. In the alternative, the Appellant herein would submit that the judgment of the trial court and the conviction and sentence as aforesaid should be vacated, this matter rendered, and the Appellant discharged from custody, as set out hereinabove. The claims of

error in this case are brought by the Appellant under ***Article 3, Sections 14, 23, and 26 of the Mississippi Constitution*** and the ***Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution***. The Appellant further states to the Court that the individual and cumulative errors as cited hereinabove are fundamental in nature, and, therefore, cannot be harmless.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Phillip W. Broadhead, Criminal Appeals Clinic Professor and attorney for the Appellant herein, do hereby certify that I have this day mailed postage fully pre-paid/hand delivered/faxed, a true and correct copy of the foregoing Brief of Appellant to the following interested persons:

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This the 24th day of November, 2009.

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