IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

PATRICK FRANKLIN,
APPELLANT

VS.

NO. 2008-KA-01923-COA

STATE OF MISSISSIPPI,
APPELLEE

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APPEAL FROM THE CIRCUIT COURT OF TUNICA COUNTY, MISSISSIPPI

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REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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REQUEST FOR ORAL ARGUMENT

There is sufficient dispute over the facts and law of this case to warrant oral argument. What actually occurred at trial is vastly important to a proper resolution of the issues, and oral argument might help answer any questions regarding the conflicting views over the record expressed by the state and Appellant. Moreover, the law is sufficiently complex that oral argument would be useful to the Court.

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STATEMENT OF THE CASE

The defendant will discuss significant differences between his and the state's version of the facts in the argument. Franklin would ask that if the Court has a question about the facts, it would read the actual record rather than relying on the state's version. That way, the Court does not have to make a determination of whether to believe Appellant's version or the state's version, it can make the decision from the record which is, after all, the definitive document.

SUMMARY OF THE ARGUMENT

The State misstates a number of Franklin's arguments and relies on arguments which directly conflict with one another and with arguments the prosecution made at trial. Moreover, in citing the law, the state relies on general pronouncements of law which are inapplicable to the situation in this case. Franklin will discuss specifics in his arguments. In addition, in many instances, the state's interpretation of the facts is quite different from what Appellant believes the record reflects.

ARGUMENT

I. THE EVIDENCE IS INSUFFICIENT TO SUPPORT FRANKLIN'S CONVICTION, OR, ALTERNATIVELY, IS SO WEAK THAT THE TRIAL JUDGE SHOULD HAVE GRANTED FRANKLIN A NEW TRIAL.

As Franklin pointed out in his initial brief, there were two disputed issues at trial: (1) did Franklin kill Taylor; and (2) if so, did the state fail to prove he did not act in self-defense. Appellant's Brief, p. 10. The State later argues that whether or not Franklin shot Taylor at all was not an issue; however, the Court can plainly look at the brief and see that it is an issue and can look at the transcript and see that a hotly contested issue was whether or not Franklin in fact shot Taylor.

The State concedes that in the altercation which resulted in his death, Taylor was drunk and had been using drugs. After at least two direct physical altercations with others, he went to his house, got a shotgun and fired the gun either at or over the heads of a crowd of nearby people.[1] The state, however, argues that because Taylor did not actually hit anybody with his first shot, Franklin is deprived of the right to defend himself or the crowd of people from deadly force being exercised by Taylor.

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[1] The only witness who testified that Taylor was shooting over the heads of the people in the crowd was Immona Davis. Davis, by her own testimony, did not see Taylor fire the shot. The undisputed testimony is that the crowd scattered as a result of Taylor's actions in firing his gun.

That argument lacks both logic and law. First of all, no law requires a bystander to wait until Taylor actually shot someone before whoever shot him could act in self-defense. Significantly, the state cites no such law, merely relying on the usual cant of the evidence presenting a jury question. The problem with the state's argument, however, is that a jury question is not created when there is no conflicting evidence. Here, the evidence establishes unequivocally that Taylor was shooting either over the heads of (the state's version) or into a crowd of people when he was shot. The state does not dispute that this is what occurred. Under those circumstances, there was no jury question.[2] The issue is one of law. Does an armed, drunken man who has a shotgun which he is firing at or near a crowd of people pose a threat of imminent death or bodily injury to those people?

The answer to that question requires no extended discussion. "The classic example of depraved heart murder, as taught in law school, is the example of one shooting into a crowd." *Dowda v. State*, 776 So.2d 714, 717(¶ 18) (Miss.Ct.App.2000) (Irving, J. dissenting). Moreover, even shooting a firearm vertically into the air can be potentially fatal. *E.g., Center for Disease Control and Prevention website:* http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5350a2.htm (accessed 8-24-2010); *Gibson v. State,* 731 So.2d 1087, 1094 (Miss. 1998) ["knowingly shooting a gun **near** a very large crowd of people" supports conviction for aggravated assault]; *Readus v. State,* 997 So.2d 941, 944 (Miss. App. 2008) [evidence established depraved heart murder where defendant "fired shots inside an apartment that contained unarmed individuals"]; *People V.*

[2] The state cites the case of *Williams v. State,* 37 So.3d 717 (Miss.App. 2010) for the proposition that the issue of self-defense is a jury question. That case, however, is not on point because the facts were disputed. In that case, the defendant claimed he was assaulted by the victim; the victim denied he assaulted the defendant. The case of *Wade v. State,* 748 So.2d 771 (Miss. 1999), also cited by the state is similarly inapposite. In that case, the evidence showed that the defendant who had previously been assaulted, left, got a gun, and returned to the scene where she shot the victim. In that case, the defendant's intent was an issue unlike here where there is no issue that Taylor was acting in a manner which endangered others. Not insignificantly in *Wade,* the Court found that the evidence did not support murder, only heat of passion manslaughter.

Johnson, 58 Misc.2d 937, 329 NYS2d 265 (1972) [depraved indifference established where individual shot a pistol **a foot over a person's head**]; *People v. Carter*, 40 A.D.3d 1310, 1312, 838 N.Y.S.2d 192, 195 (N.Y.A.D.3 Dept. 2007) ["wildly shooting **near** people" placed others in peril of being shot]; *People v. Robinson*, 180 A.D.2d 767, 768, 580 N.Y.S.2d 80 ["firing gun on a public street in the direction of at least two individuals, and in **close proximity** to several others, was legally sufficient to establish that [defendant] acted with a 'depraved indifference to human life'"]; *People v. Rivera*, 15 A.D.3d 247, 248, 780 N.Y.S.2d 158, 159 ["firing wildly" in proximity to others evinced depraved indifference to human life] [emphasis added].

Here, the burden was on the state to show that the person who shot Taylor was not acting in self-defense. Contrary to what the jury was instructed, Franklin did not have to justify shooting Taylor. In order to prove Franklin did not act in self-defense, the state had to show that no one was in danger from Taylor's firing into or near a crowd of people. This the state failed to do. In fact, the evidence is to the contrary. Can there be any doubt that if the shoe were on the other proverbial foot and Taylor had killed or wounded a member of the crowd, the state would be arguing vehemently that Taylor's actions evinced depraved indifference to the lives of others.

Moreover, it bears repeating that the issue here in determining sufficiency of the evidence is not whether or not Taylor could have killed someone by firing his shotgun over their heads, what is at issue, assuming it was Franklin who fired the weapon, is whether the evidence establishes beyond a reasonable doubt that he did not have a reasonable belief that Taylor might kill or seriously injure someone else. Again, this is not a jury question because the evidence on that question is uncontradicted.

Clearly, as a matter of law, a person who is confronted with a drunken, angry man who is firing a firearm at or near a crowd of people has a right to act to protect those people even if his belief is in fact wrong, so long as it was reasonable. *See,* cases cited in Franklin's initial brief].

Apparently, the crowd felt threatened because people ran.[3] At that point, someone shot Taylor who then fired one or more additional shots with the shotgun before getting to his house and collapsing under the carport. Tr. 212. Franklin was entitled to an acquittal as a matter of law, and this Court should reverse his conviction and direct a verdict in his favor.

Alternatively, the Court should grant a new trial because the conviction is against the overwhelming weight of the evidence. There is an additional problem with the evidence in that the reliable evidence further fails to show that Franklin was the shooter. On this question, the state is correct as a general principle that Immona Davis' testimony that she saw Franklin shoot Taylor establishes a jury question, the resolution of which is ordinarily left to the jury. However, as Franklin pointed out in his initial brief this rule does not apply where her testimony is improbable, internally inconsistent and contradicted by other evidence.

As Franklin demonstrated in his initial brief, this Court has rejected testimony from such witnesses. "Courts are not required, **they are not permitted**, to lay aside common sense and the exercise of that critical judgment which years of experience with witnesses will produce, and accept as true any and every statement which some witness may be so bold as to make, simply because the witness, who has, in all reasonable probability, substituted an after-acquired imagination for facts, has sworn to it [emphasis added]" *E.g., Jakup v. Lewis Grocer, Inc.,* 190 Miss. 444, 453, 200 So.2d 597, 600 (1941).

The only direct evidence that Franklin shot Taylor came from Immona Davis, a clearly interested witness.[4] The testimony of her own brother and mother contradict her account of

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[3] Although Immona Davis testified that Taylor fired into the air, she also testified that she did not see him fire the shot. Tr. 208, 212. Consequently, her opinion that is not even based on observation is not worthy of any belief.

[4] The state argues that Franklin claimed that the only evidence supporting the notion that Franklin shot Taylor was Davis' testimony. That, however, is not what Franklin argued. Franklin argued that Davis was the only person who said she saw Franklin shoot Taylor. Plainly Derrick Hughes testimony corroborated Davis' testimony to the extent that he claimed he saw Franklin

where she was at the time of the shooting. Moreover, her brother, who saw Franklin on Elm Street, immediately prior to the homicide testified that although he saw Franklin, **he** did not see a gun. Furthermore, the prosecution failed to introduce the written statement Immona claimed she gave police on the night of the crime stating she saw Franklin with the firearm giving rise to an inference that there was no such statement. Moreover, her written statement given on May 24th, after her brother had been in jail for four days, makes no mention of her trial claim that Taylor fired into the air. Her testimony was so thoroughly discredited that it is unworthy of belief.[5] Because the conviction was against the weight of the evidence, the Court should grant a new trial.

II. THE COURT ERRED IN OVERRULING DEFENSE OBJECTIONS TO THE PROSECUTION'S CROSS-EXAMINATION OF MISTY BOWLING ABOUT OPINIONS IN HER PRIOR INCONSISTENT STATEMENTS AND ERRED IN ALLOWING THE PROSECUTOR TO USE HER PRIOR OPINION AS SUBSTANTIVE EVIDENCE OF FRANKLIN'S GUILT.

The state argues that it was proper to impeach Misty Bowling with her prior written statement and her alleged statement to the prosecutor because on direct examination she said that she thought Franklin was joking when he threatened Taylor.[6] Franklin, of course, did not argue

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with a gun earlier that evening. Franklin never claimed otherwise. As for Dr. Hayne's testimony, all his evidence shows is that Taylor was shot with a .22, a fact which Franklin never contested. Dr. Hayne, however, was not able to tell if the shot came from a .22 rifle or a .22 revolver. Not insignificantly, Lenario Davis admitted that he had owned a .22. Furthermore, contrary to what the state seems to be claiming, there was no evidence which ever connected Franklin to the rifle whose butt was found near the shooting; nor was there any evidence connecting that firearm to the crime. Finally, the state's ballistics expert was unable to connect the .22 casings found in Franklin's yard (which, incidentally plainly had nothing to do with the instant crime which was committed elsewhere), to the .22 which killed Taylor. T. 108-09. Consequently, it could be said that the introduction of the .22 casings found in Franklin's yard was actually more prejudicial than probative, given the rather large number of people who in all likelihood possessed similar .22 firearms in the neighborhood.

[5] Derrick Hughes, who placed a gun in Franklin's hands earlier that evening, recanted his testimony after the trial adding an additional reason for granting a new trial because of the unreliability of the evidence. *See,* Proposition III.

[6] The state contends that Franklin argued that Misty's written statement was admitted. Again, the state misstates Franklin's argument. What Franklin argued was that her testimony about what

that the prosecutor was not entitled to impeach her with her prior statement. What Franklin objected to was impeachment with the alleged statements she made to the prosecutor and then using her prior statements to show that Franklin was guilty because Misty believed that he was telling the truth in her prior statements when she said she thought Franklin had killed Taylor because he had threatened to do so.

The state, however, argues, that the prosecutor did not ask the jury to use Boling's statements as substantive evidence of Franklin's guilt; therefore, there was no error. The prosecutor's closing argument, however, speaks for itself:

> We heard Misty Boling, **who told the truth in her statement** when she didn't know what was going [to] happen. When she didn't know she was going to be on that stand in front of him. And then she tried to back up. But that statement was down in writing. We know the defendant threatened Derrick Taylor **and that she thought he meant it** [emphasis added].

Tr. 313-14.

The clear inference from this argument is that not only did Franklin threaten Taylor, his good friend, Misty Boling thought he was telling the truth. Therefore, you should believe that Franklin not only threatened Taylor, but he meant it and furthermore that he carried out his threat. Contrary to what the state claims, this argument plainly asks the jury to believe Misty's prior inconsistent statement that Franklin meant to kill Taylor and furthermore that he did so. What the prosecutor is asking the jury to do is to find that Franklin was the person who killed Taylor and that he did so premeditatedly and with malice because he had made a sincere threat to do so on the night Taylor was killed. No other interpretation is rationally possible, the state's argument notwithstanding. It is one thing to argue that she made inconsistent statements about

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her statement said was admitted. In any event, that is a distinction without a difference. The law does not require that the written statement be admitted before the admission of its substance is reversible error. The state has cited no authority for such a proposition because there is none.

joking, it is quite another to argue that the jury should rely on the prior inconsistent statement which was not made under oath to convict Franklin.

In any event, Misty's opinion is irrelevant. The proper action for the state to take in the face of Misty's unsolicited opinion would have been for the state to ask the court to instruct the jury to ignore it. It was not proper to ask the jury to rely on an unsworn, hearsay statement for affirmative proof that she believed him to be telling the truth and, therefore, believed that he had killed Taylor. Rule 607, Miss.R.Evid. permits impeachment by prior inconsistent statements; however, it does not allow the introduction of such statements unless they are relevant to a non-collateral issue and unless they can pass through the test of M.R.E., Rule 403 that they are more probative than prejudicial. *Hansen v. State,* 592 So.2d 114, 134 (Miss. 1991); *Heflin v. State,* 643 So.2d 512, 517-18 (Miss. 1994), overruled on other grounds, *Owens v. State,* 666 So.2d 814, 817 (Miss. 1995) [cases cited in *Heflin* at 517-18] [prior inconsistent statements not admissible unless both relevant and material and are more probative than prejudicial]. Misty's opinion was a non-relevant collateral issue which the state improperly used to urge the jury to convict Franklin because even his good friend believed he had carried out his threat.

In *Hooker v. State,* 516 So.2d 1349, 1354 (Miss. 1987), in order to rebut a charge of fabrication of evidence, the trial court allowed the prosecution to admit a letter from a prosecution witness, the defendant's former wife, stating her belief in the defendant's guilt. The Court held that the opinion was inadmissible and reversed. *See also, West v. State,* 249 So.2d 650, 652 (Miss. 1971) [prejudicial error to permit introduction of opinion of police that defendant was guilty].

Franklin, in his initial brief pointed out that there was an additional problem with the prosecution's examination of Misty. The prosecutor tasked Misty if **he** had talked to her before at least once and possibly twice and if she recalled telling him that she thought Franklin was serious

when he made that threat. Misty testified that she did not remember telling him that. The prosecutor threatened her with perjury. Again, the Court overruled the defendant's objection. Tr. 120. The prosecutor put on no evidence that his allegation that Misty was lying about their conversations was true.

The state argues, however, that because Misty had made the statement to the police, it was permissible for the prosecutor to ask about statements to him without introducing them into evidence. This argument misses the point. The prosecutor in effect testified as an unsworn witness, regardless of whether he had a "good faith" basis for asking the questions.[7] The question is not whether he acts in "good faith," it is whether or not he has acted as an unsworn witness against the accused. Plainly, he did. Simply because Misty may have made the statement to the police, it does not follow that she said the same thing to the prosecutor. The state's argument fails the logic test.

Here the prosecutor used his credibility against the witness to show that Misty on at least three occasions said Franklin was serious about killing Taylor that night. He then not only did Misty believe Franklin was the culprit, he himself believed Misty was telling the truth. *United States v. Puco,* 436 F.2d 761, 762 (2nd Cir. 1971) [prosecutor unfairly places his credibility against that of the witness by inferring statements were in fact made]. He then used the power of his office to vouch for the credibility of Misty's initial statement and those which were made to him to argue that Franklin was the one who shot and killed Taylor because he had told Misty in her out of court statements that he intended to do so. Plainly this was reversible error in a case where the evidence was by no means clear that (a) Franklin was the one who shot Taylor; (b) if he did, he did not do so in self-defense. It is worth noting that regardless of whether or not Franklin held any animus toward Taylor, the fact remains that Taylor was shooting into or near a

crowd of people thereby endangering the lives of others. Whether Franklin had previously threatened Taylor does not negate his right to defend himself or others.

III. THE TRIAL COURT ERRED IN NOT GRANTING A NEW TRIAL ONCE DERRICK HUGHES RECANTED HIS TRIAL TESTIMONY WHERE THE RECANTATION REVEALED A MATERIAL DISCOVERY VIOLATION BY THE STATE WHICH DENIED FRANKLIN HIS CONSTITUTIONAL RIGHTS TO PRESENT A DEFENSE AND CROSS-EXAMINE HUGHES, THE ONLY OTHER WITNESS WHO CLAIMED TO HAVE SEEN FRANKLIN WITH A GUN.

On the one hand, the states at trial and on appeal that Derrick Hughes provided significant corroboration to Immona Davis' testimony that Franklin killed Taylor by putting a gun in Franklin's hand. On the other hand, the state says "the fact of Hughes remembering seeing Franklin holding the gun is not in issue. Franklin holding the gun would only be relevant and material if Franklin were claiming that he did not have the gun and did not shoot Taylor. Taylor's theory, however, was that he shot Taylor and did so in the defense of self or others." Appellee's Brief, p. 13. Therefore, according to the state, it does not really matter if the state withheld evidence which would have impeached his testimony that Franklin had a gun that night because Hughes' testimony was not all that important. According to the state, "Hughes did not hurt Franklin's case." Appellee's Brief, p. 15.

As for the state's claim that whether Franklin fired the fatal shot was not an issue at trial or on this appeal, the state must have read a different record than Appellant. Again, the record speaks for itself. The state argued vehemently that Immona Davis' testimony, bolstered by that of Hughes, supported the notion that Franklin was the shooter and negated the defendant's argument that the proof failed to show he was. Tr. 328-29.

To cite a few examples, in order to counter the defense argument that the evidence on this point was insufficient, the prosecutor argued: "She [Immona Davis] said, 'I saw the defendant

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[7] Of course, the prosecution could have demonstrated his "good faith" beyond a reasonable doubt

kill Deck Taylor.' And that's why he's beating up on her because she's the only one that saw it or the only one that would come up and say that she saw it. He desperately wants to discredit her and she refused to back down." T. 328. If the only issue were self-defense, there would have been no need for Franklin to attempt to impeach Davis about her testimony that she saw Franklin pull the trigger. Likewise, there would have been no need for the defense to try to impeach Hughes. Plainly, the transcript shows that Franklin went to great lengths to try to impeach both of these witnesses.

The prosecution at trial argued "we have two witnesses: Immona Davis and Derrick Hughes, who put a gun in the defendant's hand. So I ask you who puts a gun in anyone else's hand, anyone?" T. 329.

Astonishingly, the state argues that it was immaterial that Hughes' pending arson charge was not revealed to the jury at the time of his testimony. Needless to say, the state cites no authority for the notion that the fact that a witness has a pending case before the very court where he is testifying is not exculpatory evidence which should have been revealed to the defense so that it could have been revealed to the jury.

The state further argues that the fact that Hughes initially denied seeing Franklin with a gun shows that he not believe favorable testimony would help him with his pending charges. While that might be one, albeit strained, construction, another plausible construction is that Hughes did not want to lie under oath but reluctantly did so when intimidated by the state. In making its argument that this Court should adopt one construction over another, the state misses the point. The point is that it was up to the jurors to decide whether or not Hughes was credible. The jurors, therefore, should have been provided with relevant evidence regarding any motive to falsify his testimony so that they, not the prosecution, could resolve this issue. The jury might

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by the simple expedient of introducing proof that Misty made the statements to him.

well have found that at the time he made the statement that he saw Franklin, he had a motive to curry favor with the state. However, we do not know what the jury might have found had it heard the evidence because it did not.

Certainly, the circumstances surrounding the prosecution's failure to provide information about the charge, the curious lunch officers had with him the day of trial lend support to the notion that Hughes was nothing, if not reluctant to repeat that statement under oath at trial.

Again, the trial judge missed the point as well. It does not matter whether or not Hughes' recantation is true or not. What matters is that Hughes had pending charges and the prosecution knew of those charges and did not disclose that evidence to the defense. Furthermore, it does not matter whether or not the officers or prosecutor actually promised or threatened Hughes to get him to provide the initial statement or his trial testimony. In short, it does not matter if Hughes was telling the truth when he said officers promised to help him in return for his testimony. What matters, as Franklin pointed out in his initial brief, is whether or not the jury could have concluded that Hughes believed he might benefit in return for favorable statements or testimony. As Franklin pointed out in his initial brief, it does not matter if Hughes had an actual deal. Courts have consistently rejected the notion that the right to exculpatory evidence or cross-examination is dependent upon an actual deal. *E.g., United States v. Hall,* 653 F.2d 1002, 1008 (5th Cir.1981). The state cites not contrary authority.

Rather, in abrupt contrast to its previous arguments, the state argues that the error was harmless "because Hughes was denying that he saw Franklin with a gun on the night Taylor was shot and killed." Appellee's Brief, p. 17. The state cannot have it both ways. Having argued at trial and in proposition I that Hughes' testimony showed that Franklin had a gun on the night in question, it cannot now argue that his testimony did not show that. *Bailey* v. *Estate of Kemp,* 955 So.2d 777, 782 (Miss. 2007) [a party cannot assert, to another's disadvantage, a right inconsistent

with a position it has previously taken and "when it would be unconscionable to allow a person to maintain a position inconsistent with one to which he acquiesced, or from which he accepted a benefit"]; *United States v. Crawford*, 438 F.2d 441, 445 (8th Cir. 1971) [government is estopped from arguing on appeal that evidence it relied on at trial was not prejudicial]; *Sears, Roebuck & Co. v. Devers,* 405 So.2d 898, 900 (Miss.1981) *overruled on other grounds, Adams v. U.S. Homecrafters, Inc.*, 744 So.2d 736 (Miss. 1999); *Webb v. Jackson,* 583 So.2d 946, 953 (Miss. 1991).

At trial, the prosecution used Hughes' statement that he saw Franklin earlier with a rifle to argue that his testimony corroborated Immona's testimony and that it was particularly worthy of belief because Hughes, unlike Immona, "**had no dog in that fight** [emphasis added]." Tr. 314. The prosecutor had previously elicited testimony that Hughes considered himself to be a friend of Taylor, Lenario Davis and Patrick Franklin.[8] Tr. 161. At the time the prosecutor made that statement, he knew that Hughes had a pending arson charge and that he therefore did have a "dog in the fight."

The state argues that the judge's decision not to grant a new trial because of the withheld evidence and the prosecution's violation of the prohibition against using misleading evidence should not be disturbed because it was a proper exercise of the judge's discretion. However, as Franklin pointed out both here and in his initial brief, the trial judge's ruling was based on a clear misapprehension of law, a contention which the state makes no effort to dispute. Therefore, the standard of review in this court is de novo, not abuse of discretion.

In order to show a *Brady* violation, a defendant need not demonstrate that the withheld evidence probably would have resulted in an acquittal, the standard for newly discovered

[8] That Hughes was also a friend of Lenario supports the notion that Hughes made the initial statement to the police in order to exculpate Davis intending later to deny it if called to testify at

evidence. Where a prosecutor has failed to reveal exculpatory evidence, constitutional error occurs "if the omitted evidence creates a reasonable doubt that did not otherwise exist." *Id.* at 112. *Accord, Kyles v. Whitley,* 514 U.S. 419, 434 (1995) ["The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence"]. Furthermore, the test is not whether after discounting the inculpatory evidence in light of the undisclosed evidence, there would not be sufficient evidence left to convict. *Id.* at 434-35.

In determining whether nondisclosed evidence is material, the court considers the cumulative effect of the suppressed evidence. *Id.* at 436. Once a reviewing court determines that material evidence was suppressed, there is no need for further harmless error analysis. *Id.* at 435.

Although the state now claims that Hughes' trial testimony was not material, clearly that was not so. Even if the state had not relied on that evidence to support Franklin's guilt both at trial and here on appeal, there can be no doubt that the fact that a material witness has a pending criminal charge is exculpatory evidence which due process requires must be revealed to the defendant.

Furthermore, because the prosecution relied on evidence which it knew to be false (Hughes had no dog in the fight), **an even more favorable standard of review applies than the one for suppression of exculpatory evidence**. In *United States v. Agurs*, 427 U.S. at 103, the Court held that due process was offended where the government relied on evidence which it knew or should have known was false. Where the government has gained the benefit from misleading testimony, a more defense friendly standard of materiality applies than in determining whether or not the prosecution suppressed favorable evidence. The conviction "must

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trial. The jury might also have inferred that Hughes reluctantly incriminated Franklin under oath

be set aside if there is **any reasonable likelihood** that this evidence could have affected the judgment of the jury [emphasis added]." *Id.*

In view of the prosecution's suggestion that Hughes' evidence was reliable because he was friends with both the deceased and the defendant and that he had no reason to slant his testimony, there is a reasonable likelihood that Hughes' testimony affected the judgment of the jury. Franklin is entitled to a new trial. We know that there is a reasonable likelihood that the testimony affected the verdict because the prosecutor explicitly directed the jury to consider the testimony in reaching a verdict.

IV. THE TRIAL COURT COMMITTED PLAIN ERROR IN FAILING TO INSTRUCT THE JURY THAT PRIOR INCONSISTENT STATEMENTS ARE ADMISSIBLE ONLY FOR IMPEACHMENT, NOT AS SUBSTANTIVE EVIDENCE.

The state argues that Franklin did not cite any cases holding that it was plain error for the judge to fail to instruct the jury that prior inconsistent statements are not admissible as substantive evidence.[9] Again, the state is incorrect. Specifically, Franklin cited *Harrison v. State,* 534 So.2d 175, 179 (Miss. 1988) which holds that a trial judge could *sua sponte* instruct but that it was harmless error in that case for him to fail to do so.

Moreover, Franklin cited *Moore v. State,* 755 So.2d 1276, 1280 (Miss. App. 2000). In that case, the state introduced statements from accomplices implicating Moore after the witnesses at trial denied Moore participated in the crime. The defendant failed to request an instruction limiting the use of the evidence to impeachment only. Notwithstanding this failure to object, the Court found plain error. The Court reversed because it found that without a limiting instruction, "a principle of law applicable to this case was not explained to the jury, and the jury

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at trial only because he believed he had to do so in order to curry favor with the state.

[9] Actually, what the state says is that the defendant cited no cases that the trial judge was required to sua sponte instruct the jury. That argument, however, is misleading in that it implies

was improperly allowed to consider the witnesses' prior statements as evidence of Moore's participation in the crimes charged. Consequently, the jury instructions were inadequate to render a fundamentally fair trial." *Id.* at 1280.

There can be no doubt that where a defendant is convicted on the basis of unreliable hearsay evidence, his due process rights to a fair trial and his Sixth Amendment rights to cross-examination and confrontation are violated. Unreliable statements do not satisfy the constitutional demands for admissibility so both the due process and confrontation clauses require exclusion. *E.g., Idaho v. Wright,* 497 U.S. 805, 821 (1990).

The state argues that it was harmless error to fail to instruct because the jury probably would not have followed the instruction anyway pointing out that Franklin had argued that such instructions are frequently difficult for juries to follow. Again, the state misses the point. The state cannot improperly argue that the jury should use the statements as substantive evidence and then in turn argue that the error was harmless because a properly instructed jury would have ignored the instruction anyway.

In any event, the error in this case is plain because the prohibition against the use of such evidence has been established beyond cavil. Moreover, it is an error that this Court should recognize because it had a fundamental impact on the jury's decision. Indeed, the prosecution argued that the jury should convict because Misty believed her good friend Patrick Franklin meant to kill Franklin and did kill Franklin. No other inference is possible from the prosecution's argument.

V. THE INSTRUCTIONS GIVEN BY THE TRIAL COURT ON SELF-DEFENSE WERE PLAIN ERROR. ALTERNATIVELY, COUNSEL RENDERED CONSTITUTONALLY INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO OBJECT.

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that the Court has not reversed for the failure to instruct even in the absence of a request. Plainly, this Court has.

No instruction clearly placed the burden on the state to prove the absence of self-defense beyond a reasonable doubt. The state argues, however, that instruction D-1 told the jury to acquit if they found self-defense. That is not the same, however, as telling the jury that the burden is on the state to demonstrate absence of self-defense. In fact, D-1 tells the jury to acquit if they find the killing was justified. In otherwise, the proof must show that Franklin was justified in acting in self-defense. That is an incorrect statement of the law regardless of whether or not the defendant requested it.

Furthermore, neither D-1 nor S-6 could cure the defect in S-1 because both are themselves incorrect. Both D-1 and S-6 tell the jury that the defendant must be in imminent danger **in fact**. They deprive him of the right to act if he reasonably believes the danger is imminent. In other words, the test is not whether or not the jury believes Franklin's actions were in fact reasonable, the test is whether a person in Franklin's situation would have believed his actions were reasonable. In short, even though a person's belief of imminent death or serous bodily harm may in fact be wrong, he is nevertheless authorized to use deadly force where the circumstances were such as to make his belief reasonable. *Griffin v. State,* 495 So.2d 1342, 1354 (Miss. 986) [danger may be real or apparent]; *Johnson v. State,* 908 So.2d 758 , 764 (Miss. 2005).[10] Moreover, there can be no question that deadly force as a matter of law is reasonable in order to repel deadly force. *Burton v. Waller,* 502 F.2d 1261, 1275 (5th Cir. 1974) [applying Mississippi law].

This Court has condemned instructions such as D-1 which direct the jury that they must find the killing was justified because, among other flaws, such instructions shift the burden of proof to the defendant. For example, in *Hathorn v. State,* 102 So. 771, 774 (Miss. 1925), the jury

[10] "If a party has 'an apprehension that his life is in danger' and believes 'the grounds of his apprehension [are] just and reasonable' a homicide committed by that party is in self-defense."

was instructed that "before a killing can be justified on the ground of self-defense it must appear to the reasonable satisfaction of the jury from the whole evidence that the defendant at the time he cut and stabbed the deceased had reasonable ground to believe and did believe that the deceased was about to kill him or do him great bodily harm, and that the defendant had reasonable cause to believe and did believe that there was immediate danger of such design on the part of the defendant being accomplished." The Court held that the instruction should not have been given, as it does not devolve upon the defendant to prove it is necessary, nor is it necessary that it should appear to the reasonable satisfaction of the jury, but all that is necessary is that the proof in the case raises a reasonable doubt in the mind of the jury. *See also, Bell v. State,* 207 Miss. 518, 530, 42 So.2d 728, 732-38 (Miss. 1949) [only required that he raise a reasonable doubt that the homicide was justifiable.]

The state attempts to distinguish the instruction condemned by the Court in *Reddix v. State,* 98 So. 850 (Miss. 1924). In that case, the jury was instructed that in order to justify the killing of deceased on a plea of self-defense it was incumbent on the defendant to show: that at the time of the homicide he was in imminent danger, at the hands of deceased of his own life, or of great bodily harm." *Id.* The state reasons that this instruction differs from D-1 in that it says that it is the defendant's duty to show self-defense; whereas, according to the state, D-1 imposed no such burden. D-1, however, states that the jury must find that Patrick Franklin was justified in the killing of Derrick Taylor [in order to return a verdict] of not guilty." R.I/172. There is little difference between telling that it that to acquit it must find the killing was justified and telling the jury that the defendant must justify the killing before it can acquit.

Nor is there significant difference between the instruction condemned in *Hathorn v. State, supra,* which told the jury that it must appear to the jury that the killing was justified in

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Id. at 764. *Accord, Bell v. State,* 52 So.2d at 731 ["The law authorizes action on reasonable

self-defense. As the Court in Hathorn noted, it is not necessary that the defendant prove the killing was justified, nor is it necessary that it appear justified to the jury. D-1, in short, is a clear misstatement of the law. Consequently, it cannot cure the failure of S-1 to place the burden on the state to prove lack of self-defense because it too shifts the burden. This is so regardless of whether or not the language appears in the statute. A statute cannot overrule the defendant's constitutional right to proof beyond a reasonable doubt. That this is so is so axiomatic as to require no citation.

Moreover, the state's argument that general instructions on the burden of proof cured any error, the state's argument is again misplaced. Those instructions are general and do no more than point out that the state must prove "the essential elements" of the offense beyond a reasonable doubt without telling the jury that one of those elements is absence of self-defense. In the absence of an instruction telling the jury that absence of self-defense was an essential element, such a general instruction could not cure a more specific instruction telling the jury that it must find that the killing was justified by self-defense. *Hogan v. State,* 854 So.2d 497, 500 (Miss.App. 2003) [an abstract statement of the law . . . provides little, if any, concrete assistance to jurors].

The problem then with the state's argument that other instructions cured the error is two-fold. First of all, as Franklin pointed out in his initial brief, the so-called curative instruction (D-1) is in fact incorrect. As this Court has repeatedly held, although under certain circumstances, an instruction may cure omissions in others, it is difficult to say that a correct instruction can cure an incorrect one because taken as a whole, they will not correctly state the law.[11] There will be a

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appearances, . . . and the danger may be either real or apparent [citations omitted]"].

[11] While an incomplete instruction may be supplemented by another instruction and can therefore be said to have been cured, a correct instruction simply cannot cure one that is wrong.

conflict, and it is not possible to tell which of the two the jury followed. *E.g., Thompson v. State,* 602 So.2d 1185, 1190-91 (Miss. 1992).

There can be little doubt that counsel renders constitutionally ineffective assistance of counsel in requesting an instruction that destroys his client's chances of prevailing on the issue of self-defense. What that indicates is that counsel has not fulfilled his function of familiarizing himself with applicable law. *See Kubat v. Thieret,* 867 F.2d 351, 370 (7th Cir.1989) [finding that defense counsel's failure to object to jury instructions that misstated Illinois law was deficient performance under *Strickland*]; *Reagan v. Norris,* 365 F.3d 616, 621-622 (8th Cir. 2004) [failure to object to instruction omitting essential element was ineffective assistance resulting in prejudice to defendant where jury could have believed defense]; *Lucas v. O'Dea,* 179 F.3d 412, 419 (6th Cir.1999) [counsel's failure to object to erroneous jury instructions "rendered his defense ... meaningless" and was prejudicial under *Strickland*]; *Gray v. Lynn,* 6 F.3d 265, 268-67 (5th Cir. 1993) [trial counsel was ineffective in failing to object to defect in jury instruction]. There is no principled reason for distinguishing between a case where counsel requests the defective instruction and when he fails to object to such an instruction.

A criminal trial is not a forum for the state to play "gotcha." The object of our adversary system is to ensure that a defendant has a trial before a fair and impartial judge and jury that has been properly instructed on the elements which it must find. There can be no doubt that a properly instructed jury is part of a defendant's constitutional right to a fair trial. Arguably, there may be some circumstances where the evidence is so overwhelming that no reasonable juror could have failed to find the defendant guilty. That, however, is not the case here.

This Court should unequivocally denounce the instructions given in this case and reverse Franklin's conviction.

VI. THE STATE'S CLOSING ARGUMENTS DEPRIVED APPELLANT OF A FAIR TRIAL.

Franklin argued that the prosecutor committed reversible error at closing argument. In an argument designed to draw attention to the defendant's failure to present evidence, the prosecutor argued about the large number of witnesses and the thoroughness of the police investigation. The state argues, however, that taken in context, the state was not commenting on the defendant's failure to call witnesses. The context, however, does not support the state's claim. The prosecutor first argued that it put on four or five witnesses. He then argued that the state interviewed numerous other witnesses, friends, relatives, unrelated people in the community and got statements from "everybody they could find." T. 311. The state then determined to release Lenario and arrest Franklin. The prosecutor then argued that they had put on all the evidence they could because "who is in control of what evidence is left at the scene of a crime? . . . The criminal." T. 312. He then vouched for Misty's credibility by stating that she told the truth in her statement and we "know the defendant threatened Derrick Taylor and that she thought he meant it." Tr. 314.

The prosecutor subsequently argued that the defendant's reasonable doubt argument was "magic tricks" and "misdirection." Tr. 327. He then claimed that the defendant had failed to put the gun in any other person's hand. "So I ask you who puts a gun in anyone else's hand, anyone? Forget Lenario Davis or keep him in. Who else puts a gun in any other person's hand, the gun that killed Deck Taylor. Who? What evidence? Where? When? How? Where are they? Nowhere. Nowhere. What evidence do you have to contradict the state's case?"

> What have they given you to knock it down? Odell? *** Lenario Davis' mother. . .
>
> ***
>
> This evidence is before you. Ask yourselves what is there that's knocked it down. I would suggest to you – I would argue to you, . . .that there is nothing. Nothing. The State's case stands unassailed, intact. It's what you have. You took an oath as jurors to look at the evidence and decide the facts and follow the law.

Tr. 328-30.

In summary, the prosecutor identified any number of witnesses who were available and had been interviewed by the police and suggested that by not calling them, the defendant had failed to rebut the state's case. Most egregiously, coming on the heels of this statement, he pointed out that Franklin himself had been interviewed multiple times by the police.[12]

The state's argument in its brief notwithstanding, the prosecution's argument was designed to suggest that Franklin did not call the witnesses or testify because their testimony and his would have been unfavorable. The prosecution's references to Franklin's interviews juxtaposed near the questions about where are the witnesses to rebut the state's case clearly invited the jury to infer that by not testifying or putting on affirmative proof, Franklin had failed to prove his innocence. Such comments are patently improper.

CONCLUSION

This Court should reverse and render a judgment of acquittal because the evidence is insufficient to support the conviction. Alternatively, the evidence is so weak and contradictory that the Court should grant a new trial. In addition, numerous evidentiary and instructional errors combined with the erroneous arguments of the prosecutor deprived the defendant of a fair trial. *Griffin v. State, supra.*

RESPECTFULLY SUBMITTED,
PATRICK FRANKLIN, APPELLANT

BY: s/*Julie Ann Epps*
ATTORNEY FOR APPELLANT

CERTIFICATE

[12] In *United States v. Garza*, 608 F.2d 659 (5th Cir. 1979), the Fifth Circuit found plain error when a prosecutor suggested that the case had been investigated by the "government's vast investigatory network" and implied that the investigation showed the witnesses were telling the truth.

I, Julie Ann Epps, Attorney for Appellants, do hereby certify that I have this date mailed, by United States Mail, first class postage prepaid, the original and three copies of the foregoing to the Clerk of this Court at PO Box 249, Jackson, Mississippi 39205-0249 and a true and correct copy to:

Honorable Jim Hood Attorney General P. O. Box 220 Jackson, MS 39205	Honorable Albert B. Smith, III Circuit Court Judge P. O. Drawer 478 Cleveland, MS 38732	Lawrence Y. Mellen District Attorney P. O. Box 2514 Tunica, MS 38676

This, the 26th day of August, 2010.

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