IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

PATRICK FRANKLIN,
APPELLANT

VS.

NO. 2008-KA-01923-COA

STATE OF MISSISSIPPI,
APPELLEE

****

APPEAL FROM THE CIRCUIT COURT OF TUNICA COUNTY, MISSISSIPPI

****

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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BRIEF OF APPELLANT

CERTIFICATE OF INTERESTED PARTIES

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 refusal:

Patrick Franklin, Appellant

Honorable Jim Hood, and staff, Attorney General, Counsel on Appeal

Honorable Albert B. Smith, Circuit Court Judge, Trial Judge

Charles W. (Chet) Kirkham, Assistant District Attorney Eleventh Judicial District, prosecutor at trial

John Keith Perry, Defense Attorney at trial

Julie Ann Epps, Attorney for Appellant on appeal

This, the 22nd day of March, 2010.

SJulie Ann Epps
COUNSEL FOR APPELLANT

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STATEMENT OF THE CASE

Course of the Proceedings and Dispositions in the Court Below:

On August 14, 2007, the grand jury of Tunica County indicted Patrick Franklin for the depraved heart murder of Derrick Taylor on May 20, 2006. R.I/11.

Franklin was tried by jury on June 25-26, 2008, the Honorable Albert B. Smith, III, presiding. The jury found Franklin guilty, and the judge sentenced him to life in the custody of the Mississippi Department of Corrections. RE/11-12.

Defendant filed motions for a judgment notwithstanding the verdict and for new trial alleging, among other errors, that the evidence was insufficient or against the overwhelming weight of the evidence. R.II/196-200. Subsequently, at a hearing on the motions, Franklin produced an affidavit and from Derrick Hughes recanting his trial testimony. R.II/202. At trial Hughes had testified that his statement that he saw Patrick Franklin with a rifle the night Derrick Taylor was probably true. Tr. 157-74.

STATEMENT OF INCARCERATION

Franklin is confined by the Mississippi Department of Corrections pursuant to this conviction.

Statement of Facts:

On May 20, 2006, at about 11:00 p.m. when Derrick Taylor was shot and killed near his home on Cypress Drive in Tunica, Mississippi, the neighborhood was filled with people who were socializing on the streets after an afternoon of barbequing and drinking. Taylor had been partying since earlier that day. Tr. 112-13. At the time of his death, his blood alcohol level was .27. Tr. 196. He also had trace amounts of cocaine in his blood. Tr. 197. According to the pathologist, Taylor would have been significantly impaired. Tr. 196.

That afternoon, Taylor and the Appellant, Patrick Franklin, had been partying at the home of Misty Boling along with other friends. Tr. 112-13. Misty testified at trial that she had been drinking that day, was "heavily under the influence" and did not now remember if anything got tense between Taylor and Franklin. Tr. 115. She admitted that she made a statement. After being shown the statement she, she admitted that things got tense between Franklin and Taylor because Taylor was playing with her hair and would not stop. Tr. 116.

She maintained that Franklin threatened Taylor in a "jokingly manner." Tr. 117. The prosecution, over defense objection, allowed the prosecution to impeach her with her prior

statement where she said she thought Franklin meant it. Tr. 118-19. The prosecutor then asked 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. Significantly, the prosecutor never presented any sworn testimony that Misty had in fact told him any such thing. Tr. 120.

The prosecutor, once more over objection, questioned her about what she meant when she put in her statement: "I believe he did kill Derrick Taylor because he told me he was going to kill him that night." Ms. Boling testified that she did not remember putting that in her statement. Tr. 123. She reiterated her testimony that the two were joking. According to her, nobody left the party at that time, and according to her, both Taylor and Franklin were laughing. Tr. 125.

Derrick Hughes testified that later that day, he saw Taylor and Franklin on the street arguing. Franklin did not hit Taylor. When Franklin left, he did not seem upset. Tr. 166, 170.

At some point after that altercation, Taylor took a couple of swings at Lenario Davis who struck Taylor in the mouth knocking out some teeth. Tr. 247. According to Davis, Taylor got up and ran toward his like "as if he was going to get something." Tr. 247. Davis believed Taylor was mad at Davis for knocking his teeth out. Tr. 247.

As Taylor got to his house, three men jumped out of a car and beat up Taylor.[1] Tr. 247. Taylor apparently retrieved a shotgun from the house and then started back up Cypress toward the corner where he fired the shotgun scattering the crowd which included several children. Someone then shot Taylor who went back to his house where he died under the carport from a .22 caliber gunshot wound to the chest. Tr. 98, 192.

[1] Franklin was not one of the three. Tr. 171.

The police arrived shortly after Taylor died and began to interview witnesses. They collected the .12 gauge shotgun belonging to Taylor. Tr. 87. As a result of their investigation, Lenario Davis was taken into custody. Unfortunately, police delayed testing him for GSR (gunshot residue) until three or four hours later. Tr. 145. By that time, his hands tested negative for GSR. Tr. 141. The State's forensic expert testified that after about four hours, gunshot residue would disappear. He also testified that if Davis had washed his hands or wiped them on his clothing or hair, the results of the test on his hands would be negative. Tr. 145. Davis' clothes were not testified for GSR. Tr. 155.

Lenario Davis was taken into custody the night of the shooting and held for the crime for approximately four days until Immona Davis, his sister, made a statement saying she saw Franklin shoot Taylor. Tr. 91. That same day Derrick Hughes made a statement that at some unspecified time earlier in the evening, he saw Franklin carrying a rifle while he was going through Hughes' yard.[2] Tr. 91. Initially when testifying at trial, Hughes could not remember telling police that he saw Franklin with the rifle. Subsequently, when confronted with his statement, he testified that it would have been true if he put it in his statement. Tr. 160.

Immona Davis testified at trial that she was standing around with some twenty or so friends on the street when she heard a gunshot which she did not think anything about until she saw Patrick Franklin walking down the street with a rifle or something that, according to her, was not a handgun.[3] Tr. 208, 218. Then she "heard the second gunshot which came from Patrick Franklin." Tr. 208. The first shot came from Derrick Taylor who was coming from his house on Cypress Street carrying a shotgun. Tr. 208-09, 211.

Although she did not see Taylor fire his first shot, according to her, he fired into the air. Tr. 212. Although according to her, she remained on the corner, other people were scared and

[2] Hughes testified he was a friend of Davis, Franklin and Taylor. Tr. 161.

ran. According to Davis, she saw the shot from Franklin's gun hit Taylor because he fell back, shot again, and ran home, falling in his carport. Tr. 212. According to her, Franklin said, "'You all don't have to run. I got this.'" Tr. 213. Afterwards, Franklin ran off but came to Sharon Lane's house after the police came and asked for turpentine. Tr. 213-14.

Immona further testified that she saw Taylor "get into it" earlier that day with her cousin Reginald Jones. Tr. 210. According to her, after her brother's "altercation happened, I saw my brother run[4] down the street as if, you know, he knew Deck was going to get a gun or something." Tr. 215. Her brother stopped and told her about the fight with Deck Tr. 217. Her mother came and met her brother outside.[5] Tr. 217.

Although Immona claimed she had made a written statement the night of the crime implicating Franklin, the state failed to produce that statement at trial although testimony from the police showed that she was interviewed the night of the shooting.[6] Tr. 91. In her written statement given on May 24th, Immona never said that Taylor's first shot was into the air. *Exhibit D-2 for Id.*

Lenario Davis admitted that on May 20th, he was just coming off Cypress Street with his cousin, Regis Jones, and Damien Hughes[7] at about 11:00 when Taylor accosted them and shoved Damien in the chest. Tr. 244-45. Taylor then started "saying a lot of little stuff out of his mouth" to Davis and then came toward Davis swinging. Tr. 245. Davis hit Taylor and knocked Taylor's

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[3] Immona was 15 at the time. Tr. 216.
[4] Later, she said he was "walking" towards the house. Tr. 217.
[5] This testimony contradicts her earlier testimony that at the time of the shooting, she believed her brother was "supposedly" inside her grandmother's house on Elm. Tr. 215. In an attempt to explain he inconsistency, she said she did not see her mother meet her brother because the shooting had already occurred when that happened, and she was at Sharon Lane's house by that time. Tr. 218.
[6] At the time Immona allegedly gave a statement to the police that night, she knew her brother had knocked Taylor's teeth out and that he had been arrested for the crime. Tr. 219.
[7] Neither Damien Hughes nor Regis Jones testified. Damien Hughes is Derrick Hughes's nephew. Tr. 243-44.

teeth out. He ran to his grandmother's house at 1164 Elm Drive because when Taylor got up, "his body language was telling me like as if he was going to get some type of weapon or something. So I ran - -." On the way to his grandmother's hosue, he met his mother who had heard that he had just gotten into it with somebody.[8] Tr. 236, 243.

Davis said he saw Franklin when Davis was running down Elm Street. Tr. 237. However, he did not see Franklin with a rifle. Tr. 255. According to him, he sat around for five or ten minutes and then Brandi Sanders pulled up in her car and told him to get in. They rode to her house and then went to Sharon Lane's house. Tr. 237. He was not on Elm Street when the shooting occurred and did not "hear [] no shooting period." Tr. 251. Significantly, he contradicted Immona's testimony that he had stopped at the corner on his way to his grandmother's house and told her about the fight with Taylor. Tr. 248.

Davis initially testified that he gave only one statement to the police; however, he admitted that he may have given four. *See, Exhibits D-3 and D-4 for ID [tape recorded statements of Davis].*

Davis initially denied that he had a .22 pistol, but admitted that he had told police that he caught a charge in Memphis because he had a .22 pistol. He admitted that he told police when he was arrested for killing Taylor that he had found it in the bayou when he was 14. Tr. 254. Davis testified that he had lied when he told police he found it in the bayou. He had found it in a back street after a football game. Tr. 255.

Police secured two warrants for Franklin's house. The only physical evidence even remotely incriminating Franklin consisted of four spent .22 shell casings found outside

[8] Both the testimony of Davis and his mother show that Davis was not at his grandmother's house at the time of the shooting but was still on the streets.

Franklin's residence.[9] Tr. 93-94. Testimony from Derrick Hughes established that Franklin had a rifle which he used for target practice in the bayou by his house on Elm Street. Tr. 171-72.

Police at some point recovered the wooden butt of a rifle or long gun located next door to an abandoned house on Elm Street. Both Lenario Davis and Patrick Franklin lived on Elm Street. Tr. 95, 99. Police were unable to connect the butt with the crime.

After his motion for directed verdict was overruled, the defense called Odell Harris to testify. Harris testified that he was on his way home from his sister's house and was on Elm Street when he heard the shot and saw everybody running. He did not see Patrick Franklin with a rifle. Tr. 255-56. He admitted that that night he was drunk and that he had had two beers earlier that day before he came to court. He testified that he drank "[e]very day I can get it." Tr. 266.

Bridget Davis, the mother of Immona and Lenario, testified that she was sitting inside her uncle's house reading when her cousin, Regis Jones, knocked on the door and said Deck was outside shooting because "earlier they had some little altercation going on." When he saw Deck again, he started running. Tr. 271. As a result of what he told her, she and her brother went outside to try to find Lenario. She met him close to her grandmother's house on Elm Street. He was with some more guys. Tr. 272. She asked him if he had been shot. Tr. 271. She testified that while she was inside she and her brother thought they had heard a shot. Tr. 271-72.

She did not see her Immona on the corner. Tr. 274. She did not clear the corner. Tr. 275. In her written statement given the next day, she said she asked the teenagers to leave the corner

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[9] These cartridges were not discharged at the time of the offense because the offense allegedly occurred on Cypress Street. Eugene Bridges, Commander of the Tunica County Sheriff's Department confirmed that there was no evidence that the shell casings were in any way related to the case. Tr. 100. Franklin's house was on Elm. The only arguable relevance of the evidence was to confirm Derrick Hughes's testimony that at an unspecified past time, he had seen Franklin shooting a .22 rifle into the Bayou as target practice. Tr. 171-72. The evidence, therefore, showed only that Franklin had at one time possessed a .22 rifle. Taylor was killed by a .22 round; however, the ballistics expert was unable to state whether or not the round came from a rifle or a ubiquitous .22 pistol known as a "Saturday Night Special."

and that **afterwards**, she heard gunshots being fired. Tr. 277-80. Her statement contradicted her trial testimony and that of her daughter that Immona was at the corner when the shots were fired.

Franklin's request for peremptory instruction was denied. Tr. 288.

SUMMARY OF THE ARGUMENT

This is one of those rare cases where the evidence is insufficient to support the verdict. Alternatively, the evidence is so flimsy and unreliable, this Court should grant a new trial.

Next, the prosecution committed reversible error in failing to tell the defense that their witness, Derrick Hughes, whom the prosecution argued "had no dog in this fight," had in fact been indicted by the prosecutor's office for arson; and, therefore, had considerable incentive to curry favor with the prosecution by putting a rifle in Franklin's hands.

Furthermore, assuming *arguendo* that Franklin is not entitled to a new trial or discharge, the trial court and prosecution erred in introducing prior inconsistent statements as substantive evidence of guilt.

The instructions wholly failed to instruct the jury on the issues of self-defense and the use of prior inconsistent statements.

Finally, cumulative error in the prosecutor's argument requires reversal because those errors may have caused the jury to credit otherwise weak evidence in order to convict Franklin.

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.

A. Standard of Review:

1. *Sufficiency of the Evidence:*

The due process clauses of both the state and federal constitution forbid a conviction where the reliable evidence fails to show the Defendant's guilt of each and every element of the

offense beyond a reasonable doubt. U.S.Const., Amends. VI and XIV; Miss.Const, Art. 3, Sections 14 and 26; *Jackson v. Virginia*, 443 U.S. 307 (1979); *Carr v. State,* 208 So.2d 886, 889 (Miss.1968). 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. *Jackson v. Virginia,* 443 U.S. at 315.

Should 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 discharge. However, if a review of the evidence reveals that it is of such quality and weight that, having in mind the beyond a reasonable doubt burden of proof standard, reasonable fair-minded men in the exercise of impartial judgment might reach different conclusions on every element of the offense, the evidence will be deemed to have been sufficient. *Dilworth v. State,* 909 So.2d 731, 736 - 738 (Miss. 2005).

One Court has described the *Jackson* standard for sufficiency of the evidence as follows:

> The Court of course does not mean that whenever the record supports conflicting inferences, no matter how weak, the prosecution wins, for not only would this be no more stringent than the standard of review in a civil case but also the prosecution would only fail in its proof where there was a total absence of probative evidence, which is the "no evidence" standard rejected in *Jackson.* If *Jackson*'s beyond a reasonable doubt standard is to have any meaning, we must assume that when the choice between guilt and innocence from "historical" or undisputed facts reaches a certain degree of conjecture and speculation, then the defendant must be acquitted. *Ulster [v. County Court v. Allen*, 442 U.S. 140 (1979)] clarifies that this degree of inferential attenuation is reached at the least when the undisputed facts give equal support to inconsistent inferences. In short, we read the quoted passage from *Jackson* to mean that the simple fact that the evidence gives some support to the defendant does not demand acquittal. However, if the evidence fails to give support to the prosecution sufficient to allow a reasonable juror to find guilt beyond a reasonable doubt, a verdict must be directed despite the existence of conflicting inferences.

Cosby v. Jones, 682 F.2d 1373. 1383, n.21 (11th Cir. 1982).

2. Weight of the Evidence:

A motion for new trial challenges the weight of the evidence. More evidence of guilt is necessary for the state to withstand a motion for a new trial, than is required to withstand a motion for JNOV.

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. *Id.* at 737.

Although the circumstances under which this Court will disturb a 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 [internal citations omitted]." *Id.* at 737. Despite this high standard, "[t]his Court has not hesitated 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 [,] even where that evidence is sufficient to withstand a motion for a directed verdict [internal citations omitted]." *Id.*

B. The Merits:

As far as this case is concerned, there were two issues in dispute that the prosecution was required to prove beyond a reasonable doubt:

(1) First, that Franklin killed Taylor; and if so,

(2) that he was not acting in self-defense. *Sloan v. State*, 368 So.2d 228, 229 (Miss. 1979) [Defendant is not required to prove that he acted in self-defense, and, "if a reasonable doubt of his guilt arises from the evidence, . . . he must be acquitted"].

Assuming that the evidence is sufficient to show that it was Franklin and not someone else who fired the fatal shot, a defendant has a right to use a deadly weapon if it reasonably appeared to him to be necessary to protect himself or others from death or great bodily harm at the hands of the deceased. *Cook v. State,* 12 So.2d 137, 138. 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). The use of deadly force is reasonable, as a matter of law, in order to repel deadly force. *Burton v. Waller,* 502 F.2d 1261, 1275 (5th Cir. 1974) [applying Mississippi law].

Here, the undisputed evidence showed that shortly after being in two physical altercations, a drunken and angry Derrick Taylor went to his house and got a shotgun and fired it. A crowd of people who were on a nearby street corner scattered.[10] 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.

It should require no extended discussion that when a drunk, angry person is firing a shotgun at or near a crowd of people, he in fact was placing those people in danger of serious bodily harm. At the very least, a reasonable person surveying that situation might have a reasonable belief that Taylor intended to inflict serious bodily harm. In fact, had Taylor killed

[10] 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.

someone in the crowd, he would have been guilty of depraved heart murder. Indeed, this Court has on more than one occasion said

> [t]he classic example of depraved heart murder, as taught in law school, is the example of one shooting into a crowd. Certainly the shooter knows in that example that his act of pulling the trigger could cause the death of another even though he had no specific intent of causing the death of any specific person.

Dowda v. State, 776 So.2d 714, 717 (Miss.App. 2000) (Irving, J. dissenting); *Readus v. State*, 997 So.2d 941, 944 (Miss.App. 2008) [affirming depraved heart murder conviction where defendant fired gun in apartment containing unarmed individuals and children].

As a matter of law, Franklin was entitled in defense of himself and/or others to shoot and kill Taylor, and the trial court should have sustained his motion for directed verdict, peremptory instruction and/or motion for jnov. *Griffin v. State, supra; Johnson v. State,* supra; 908 So.2d 758, 764 (Miss. 2005); *Burton v. Waller,* 502 F.2d 1261at 1275 [use of deadly force is reasonable in order to repel deadly force].

Assuming for the sake of argument, however, that a reasonable juror could have found beyond a reasonable doubt that Franklin did not act in self-defense, the evidence is so weak and contradictory that the Court should have granted a new trial. This is so because the reliable evidence fails to support that Franklin did not act in self-defense; and, moreover, it fails to show he was in fact the shooter. The only witness who testified that Franklin shot Taylor was Immona Davis, the sister of Lenario Davis. Not only was she an interested witness, her evidence was improbable, internally inconsistent and contradicted by her mother and brother on the material point of where she was at the time of the crime.

In a number of cases, the Mississippi Supreme Court has found that similar evidence was so improbable that it would not support a verdict. *E.g., Rucker v. Hopkins,* 499 So.2d 766, 769 (Miss. 1986); *Jakup v. Lewis Grocer, Inc.,* 190 Miss. 444, 453, 200 So.2d 597, 600 (1941) ("We concur with the learned and experienced trial judge that the statement could not be safely

accepted and acted upon. 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."); *Truckers Exchange Bank v. Conroy,* 190 Miss. 242, 199 So. 301 (1940) [holding that a jury should not be permitted to consider evidence where it is manifest that no reasonable man engaged in a search for truth, uninfluenced by proper motives or considerations would accept or act on the evidence]; *Elsworth v. Glindmeyer*, 234 So.2d 312, 318-320 (Miss. 1970).

In *Sykes v. State*, 45 So. 838 (Miss. 1908), the Court reversed a murder case where the principal witness for the state was the wife of decedent. She had been arrested and examined twice for the crime. Both times, she denied knowing anything about the killing. After her second statement, she implicated the defendant and testified at trial that he came to decedent's house after she and decedent had retired, and killed him with an ax, after which she and accused buried the body. In that case, the Court held that her testimony was too unworthy of belief to sustain a conviction. *Accord, Carter v. State*, 166 So. 377, 377 (Miss. 1936) [chief witness gave contradictory statements]; *Cook v. State*, 248 So.2d 434 (Miss. 1971) [Where case was weak on issue of whether defendant was drunk and instructions were abstract, fairness required that another jury pass on evidence]; *Hux v. State*, 234 So.2d 50, 51 (Miss. 1970) [Although sufficient to survive request for peremptory instruction, "defendant's guilt is in such a state of serious doubt that this Court believes that another jury should be permitted to pass upon the matter"]; *Quarles v. State*, 199 So.2d 58, 61 (Miss. 1967) [Evidence sufficient to survive peremptory instruction, but so weak that another jury should be allowed to pass on evidence]; *Mister v. State*, 190 So.2d 869 (Miss. 1966) [testimony of witness who resembled an accomplice was so

inconsistent that defendant was entitled to new trial]; *Miller v. State*, 198 Miss. 217, 22 So.2d 164 (1945) [Although evidence sufficient to withstand request for peremptory instruction, where conviction based on inconsistent testimony of the accomplice, court would reverse for new trial]; *Abele v. State*, 138 Miss. 772, 103 So. 370 (1925) [reversed where case based on unsubstantiated testimony of accomplice].

As in *Sykes*, the only direct evidence that Franklin shot Taylor came from Immona Davis, a clearly interested witness. The testimony of her own brother and mother contradict her account of 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. 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.[11]

This 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.

A. Standard of Review:

Although the admissibility of evidence generally rests within the discretion of the trial court, a trial court abuses its discretion where its decision to admit evidence results from legal error. In that case, a *de novo* standard of review applies. *Jones v. State,* 856 So.2d 389, 393-94

[11] 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.

(Miss.App. 2003). Allowing the use of prior inconsistent statements as substantive evidence is legal error.

B. The Merits:

The trial court erred in overruling the defense objections to the prosecution's questions to Misty Bowling for a number of reasons, any one of which constitutes reversible error standing alone. Alternatively, when viewed for their cumulative effect, the prosecution's questions, coupled with his use of Boling's prior inconsistent statements as substantive evidence of guilt in argument, were prejudicial error.

In this case, Immona Davis was the only person who claimed to have seen Patrick Franklin shoot Derrick Taylor. She only made this claim four days after the shooting after her brother had been arrested for killing Taylor. Her attempts to exculpate her brother at the expense of Franklin, therefore, must be viewed with skepticism. Moreover, despite the fact that, according to her, numerous other people were on the street with her when the shots were fired, nobody who was there corroborated her testimony. Finally, as Franklin demonstrated previously, her trial testimony is riddled with internal inconsistencies and is inconsistent with both her brother's testimony and that of her mother on material particulars.

In short, in order to secure a conviction, the prosecution desperately needed additional proof to bolster her dubious testimony. In order to do so, the State erroneously utilized the prior inconsistent statements of witnesses, Misty Boling.

Ms. Boling testified on direct examination that earlier on the day of the shooting both Taylor and Franklin were at her house partying along with other friends. Tr. 112-13. In response to a question by the prosecution if things had gotten tense between Taylor and Franklin, Misty testified that she had been drinking that day, was "heavily under the influence," and did not now remember if anything got tense between Taylor and Franklin. Tr. 115.

After being shown the statement she had made to police, she recalled that things got tense between Franklin and Taylor because Taylor was playing with her hair and would not stop. Tr. 116. She then testified that Franklin's manner was joking. Tr. 117.

Where the problem comes in is that the court, over defense objection, then allowed the prosecution to impeach her with her prior written statement and with statements she allegedly made to the prosecutor where she said she thought Franklin meant it. Tr. 118-19. The prosecutor then asked 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 objections to this line of inquiry. Tr. 120.

The prosecutor, once more over objection, questioned her about what she meant when she put in her statement: "I believe he did kill Derrick Taylor because he told me he was going to kill him that night." Ms. Boling testified that she did not remember putting that in her statement. Tr. 123. The prosecutor did not introduce her statement.

In closing argument, not only did the prosecutor ask the jury to rely on her prior statement and opinion as to Franklin's guilt as substantive evidence, he vouched for its truth:

> 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 first problem with the prosecution's questions to Ms. Boling is that unsworn prior inconsistent statements are hearsay.[12] Although such statements may be used to impeach a witness' credibility where the witness takes the stand and testifies differently on a **material**

matter, they are not admissible as substantive evidence of an accused's guilt. *Moffett v. State,* 456 So.2d 714, 718 (Miss. 1984), M.R.E. 801(d)(1)(A).

As the prosecutor's closing argument makes clear, the purpose of admitting Misty's prior statements to show that she "told the truth in her statement." In other words, the prosecutor argued that the jury should convict Franklin because Boling's unsworn statement showed that she told the truth in that statement,[13] not only when she said that the threat was real, but because her statement showed she believed that Franklin had killed Taylor.

Notwithstanding this Court's repeated condemnation of the use of unsworn prior inconsistent statements such as Boling's as substantive evidence, prosecutor' continue to do so. *E.g., Bailey v. State,* 952 So.2d 225 (Miss. App. 2006) [for impeachment only]; *Moore v. State*, 755 So.2d 1276 (Miss. App. 2000) "rule seems to be universal that the impeaching testimony does not establish or in any way tend to establish the truth of the matters contained in the court-of-court contradictory statement"; *Moffett v. State,* 456 So.2d at 719 [firmly embedded in hornbook and case law that unsworn prior inconsistent statements are admissible only for impeachment];*Brown v. State,* 340 So.2d 338, 341 (Miss. 1990) [not admissible for truth]; *Davis v. State,* 431 So.2d 468, 473 (Miss. 1983) [admissible only to impeach]; *Sims v. State*, 313 So.2d 388, 391 (Miss. 1975) [only for impeachment].

In *Moffett,* the Court described the rule against the use of unsworn prior inconsistent statements as substantive evidence as firmly embedded in hornbook and case law. *Moffett,* 456 So.2d at 719. The Court stated that the rationale of the rule is that such statements had not been purified by oath, and that impeachment evidence functioned to impeach the credibility of the

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[12] It was also error for the prosecution to impeach this witness and Derrick Hughes without first showing surprise or unexpected hostility. *Wilkins v. State*, 603 So.2d 309, 322 (Miss. 1992).

[13] Improper for prosecutor to vouch for the credibility of the witnesses, or express personal opinions about the evidence. *E.g., Walker v. State*, 740 So.2d 873 (Miss. 1999) [error to interject

witness's direct testimony. *Id.* at 720. The Court went on to recognize that most jurors have difficulty distinguishing between impeachment evidence and substantive evidence. *Id.* In *Moffet,* the Court reversed even though the judge had correctly instructed the jury not to use the impeaching statements as substantive evidence of the defendant's guilt or innocence. *Id.*

In Franklin's case, not only were the statements erroneously used for their truth, the portion of Misty's statement where she states she believed that Franklin intended to kill Taylor and did kill him was totally inadmissible because it was a *personal* opinion on the guilt of the accused. Such opinions are not admissible because they are irrelevant and immaterial. *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].

In *Hooker v. State,* 516 So.2d 1349, 1354 (Miss. 1987), 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].

In this case, the admission of Misty's opinion that Franklin was guilty was even more prejudicial because she initially denied that she believed Franklin was serious when he threatened Franklin, and the prosecution portrayed her as a reluctant witness against Franklin. Tr. 314.

Who, for example, can forget the turning point for the defense in the classic Agatha Christie film, "Witness for the Prosecution," when Marlene Dietrich, who has testified as a

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facts not in evidence]; *Tubb v. State*, 217 Miss. 741, 64 So.2d 911 (1953) [vouching, facts not in

witness against her husband in his murder trial, is impeached by damning letters which she had previously written. As a result of her impeachment, the jury not only infers that her incriminating testimony was false but that her husband's claim that he was with her at the time of the crime must be true. *See,* Carey, James; "Charles Laughton, Marlene Dietrich and the Prior Inconsistent Statement," 36 *Loyola University Chicago Law Journal* 433, at 434.

There is additional error in the prosecution's examination of Misty. After Misty denied knowing if Franklin meant his threat, 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 was true.

This and other courts have repeatedly condemned such tactics by the prosecutor. For example, in *Scott v. State,* 446 So.2d 580, 584 (Miss. 1984), the prosecutor asked the witness if she had made certain statements before the grand jury but never introduced the transcript of the grand jury proceedings. The Court noted that in such a case, the only rebuttal to the prosecution's questions becomes the witness' denial. The Court held that there were two vices with such questions. First of all, the jury is more likely to believe the witness made the statements because of the prosecution's insistence she did which effectively makes the district attorney an unsworn witness against the defendant.

Likewise in *Flowers v. State*, 842 So.2d 531, 552 (Miss. 2003), the Court condemned practice of prosecutors'

> asking of questions without a factual basis [that] leaves an impression in the mind of jurors that the prosecutor actually had such facts in hand and that the insinuations through questioning contained some truth. This leaves false

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evidence, personal experience and opinion]

> and inadmissible ideas in the minds of jurors that cannot be adequately rebutted by the testimony of witnesses or instructions from the court.

Flowers v. State, 842 So.2d 531, 552 (Miss. 2003). Since the defense cannot cross-examine the district attorney, a defendant is denied his right to counsel and fundamental fairness. *Scott v. State,* 446 So.2d at 584; *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].

Moreover, the practice of asking a witness if he made a statement and when he denies it, not introducing evidence that he did has likewise been repeatedly condemned. *Walker v. State,* 740 So.2d 873, 884 (Miss. 1999); *Flowers v. State,* 733 So.2d 309, 329 (Miss. 2000).

The trial court should have sustained Franklin's objections. The failure to do so is reversible error. *Hooker v. State, supra; Chapman v. California, supra.*

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.

The second witness the prosecution called to bolster the doubtful testimony of Immona Davis was Derrick Hughes. Tr. 157-75. Hughes was another resident of White Oak Subdivision who had given a statement to the Sheriff's office. Tr. 159. When asked if he had seen Patrick Franklin with a gun, Hughes responded that he did not remember. The prosecutor then confronted him with a statement he had made on May 24, 2006, that at some unspecified time earlier in the evening, he had seen Franklin carrying a rifle. Tr. 161. After being asked about the statement, he testified that it would have been true if he put it in his statement. Tr. 160.

After the trial, however, Derrick Hughes executed an affidavit stating:

> I Derrick Hughes hereby share, the follow is true and correct, when I was in court on the patrick franklin case, I was acting a witness on the behalf of the State of Mississippi, because promisings to help me on criminal matter that I have pending in tunica county. I told Detectives involve [sic] that I did not recall seeing patrick franklin with a Riffle on the night that Derrick Taylor was shoot and killed, when they should me a copy of the statement I suppose to have made, I told them, I don't remember making the statement. They took me to lunch, Detective telling me He's going to take care of me, and I want make it clear that, I didn't see him with a riffle on the night Derrick Taylor was shoot and kill [spelling and punctuation in the original].

TR. 202

At a hearing on the motion for new trial/jnov, Ricky Isabel and Commander Eugene Bridges of the Tunica County Sheriff's Department[14] denied discussing Hughes' arson case with him and denied promising him anything for his testimony. Tr. 342-353.

However, Bridges admitted that on that morning a couple of patrolmen had gone by to pick up Hughes for the murder trial and brought him in and put him in custody. At the time, Hughes had an outstanding warrant for an arson indictment.[15] Tr. 347. According to Bridges, he took Hughes to lunch because "[w]e had a problem getting him for the case. He also had a warrant on him for arson and I wanted to make sure he got back to court because he was trying to leave in the morning." Tr. 347. Bridges paid for the lunch. Tr. 348.

With all due respect to Commander Bridges, taking Hughes to lunch so that he would not run off after Hughes had been placed in custody for an arson charge seems odd, to say the least. If, as Bridges testified, the officers who picked Hughes up from his house "brought him and put him in custody," there would seem to be no need to take Hughes out of custody to make sure he

[14] Bridges was the commander on the crime scene who testified earlier at the trial. Tr. 86-100. His testimony occurred shortly before noon. Hughes testified shortly after lunch. Tr. 3-4.

[15] "The indictment shall be kept secret until the defendant is in custody or has been released pending trial." Miss. Code Ann. §13-7-35(4). Therefore, the defense had no way of knowing Hughes had a pending charge at the time of the trial.

did not run off.[16] Tr. 347. Hughes' pending charge surely constituted reason to hold him in jail. In fact, at the time of the hearing on the motion for new trial on October 29, 2008, Hughes was still in jail awaiting trial on the arson charge. Tr. 353. Hughes' willingness to execute an affidavit that he had lied at the state's instigation is easily explained by this fact which shows that if any promise of help had been made, it had not been forthcoming.

Whether or not a deal in fact existed, the hearing established three facts: (1) Hughes had a pending Tunica Count arson case when he testified; (2) the fact of the lunch, coupled with the charge, constituted evidence from which a jury could infer that Hughes might expect to benefit from incriminating Franklin; (3) the DA knew Bridges was taking Hughes to lunch. Tr. 351.

At the hearing, counsel for Franklin argued that had he known of the pending arson charge and the unusual preferential treatment of an arrestee being lunched at the expense of Bridges, it would have provided something he could have explored on cross-examination to show that Hughes had a motive to curry favor with the state. At the very least, the jury could have inferred that Hughes might reasonably believe he would receive a good deal if he made the state happy by helping to convict Franklin. Tr. 340. When counsel for the defendant attempted to call Hughes to testify, the Court said: "I'm not—I don't need to hear from him. He's—he's not going to add to this, other than some sort of self-serving statement." Tr. 352.

The Court overruled the motion for new trial finding that

> There is other evidence indicating the defendants [sic] is guilty. *** And there is no evidence that the original statement was improper or false, other than a [sic] after-the fact affidavit . . . . And I understand you said it was the catch point or the turning point, . . . But I don't agree. I think there was other evidence and I recall the case now that the jury could have found absent a statement that was something to the effect: "Well, I guess if it's in there, it's true."

RE 13-14.

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[16] Commander Bridges did not make a notation of the lunch in the logbook at the Sheriff's Department. Tr. 351.

Ordinarily, the decision to overrule a motion is subject to an abuse of discretion standard of review unless the judge has made an error of law which means this Court employs a *de novo* standard. *Jones v. State, supra.*

It is well established that *Brady v. Maryland*, 373 U.S. 83 (1963) imposed on prosecutors the broad disclosure obligation to produce any evidence which might be exculpatory. *See, United States v. Bagley,* 473 U.S. 667 (1985) [right to exculpatory evidence includes impeachment evidence]. In *United States v. Agurs,* 427 U.S. 97, 107 (1976), the Court imposed a duty regardless of a specific request from the defendant. The appropriate standard for the requirement that the prosecutor produce exculpatory evidence is based on the prosecutor's overriding duty to ensure that justice is done. For this reason, a prosecutor's suppression of evidence is treated differently than newly discovered evidence which comes from a neutral source. *Id.* at 111.

Consequently, a defendant need not demonstrate that the withheld evidence probably would have resulted in an acquittal, the standard for newly discovered 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.

There can be little doubt that Hughes' trial testimony was material. Having argued that Hughes statement that he had seen Franklin that day or night with a rifle gave unbiased corroboration to Immona Davis' testimony that Franklin was the one who shot Taylor, the prosecution should not now be heard to argue that Hughes' evidence was not material. *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).

Even without the prosecution's reliance on Hughes' evidence, courts have repeatedly held that the fact that a witness for the prosecution has pending criminal charges is exculpatory evidence which must be revealed to the defendant. This is so that the defendant can cross-examine the witness to show an incentive to curry favor with the prosecution.[17] *E.g., State v. Williams,* 844 So.2d 832, 835 (La. 2003) [a witness's bias or interest may arise from arrests or pending charges or the prospect of prosecution even when he has made no agreements]; *People v. Coyer,* 142 Cal.App.3d 838, 191 Cal.Rptr. 376 (1983) [prosecution must furnish list of all criminal charges pending against its witnesses].

In the instant case, the trial judge in effect found that Hughes' arrest and lunch with the chief investigating officer were not material because the judge accepted as true the testimony from Isabel and Bridges that no deal was made. The problem with that rationale, which is based on a faulty legal premise, is that whether or not a promise of assistance was in fact made is irrelevant. "[T]he crucial factors were the witness' motive, state of mind and expectation in testifying." *United States v. Dickens,* 417 F.2d 958, 961 (8th Cir. 1969). Courts have consistently

[17] The right of a defendant to engage in such cross-examination is an essential requirement for a constitutionally fair trial. *Smith v. Illinois,* 390 U.S. 129 (1968).

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).

Indeed, courts have said that the right of cross examination: "is so important that the defendant is allowed to "search" for a deal between the government and the witness, even if there is no hard evidence that such a deal exists. What tells, of course, is not the actual existence of a deal but the witness' belief or disbelief that a deal exists." *Id.* (quoting *United States v. Onori,* 535 F.2d 938, 945 (5th Cir. 1976). *Accord, United States v. Landerman,* 109 F.3d 1053, 1061-1065 (5th Cir. 1997); *United States v. Anderson,* 881 F.2d 1128, 1138, 279 U.S.App.D.C. 413, 423 (D.C. Cir. 1989) ["[t]he permissible scope of exploration on cross-examination is not curtailed by the absence of promises for leniency, for the defense may attempt to show government 'conduct which might have led a witness to believe that his prospects for lenient treatment by the government depended on the degree of his cooperation'"]; *United States v. Iverson,* 637 F.2d 799, 804, 205 U.S. App.D.C. 253, 258 (D.C. Cir. 1980).

Thus, the trial court committed legal error in finding that the evidence shown by Hughes' recantation was not material. The prosecutor should have disclosed not only Hughes' pending indictment for arson, but should have also disclosed the unusual lunch between the chief investigator for the case and Hughes.

Assuming arguendo that a trial judge can make a ruling that the two Sheriff's Department witnesses were more credible than Hughes without hearing testimony from Hughes, the trial judge was clearly incorrect in holding that the information in Hughes' recantation was not material. First of all, 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. Tr. 161.

Coincidentally, Hughes' statement exculpating Davis was made on May 24th, the same day that Immona Davis made her statement exculpating her brother. Had the jury known of the lunch and pending charges, it might have inferred that although Hughes was willing to lie to police in his unsworn statement in order to help his friend Lenario, he drew the line at committing perjury at trial until he thought it might help him with his own case.

In determining whether or not a new trial was warranted, the trial judge denied relief because there "is other evidence indicating the defendants [sic] is guilty." RE 13. Again, the trial judge made legal error by applying a sufficiency of the evidence standard. The United States Supreme Court has explicitly rejected this test. 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. *Kyles v. Whitley*, 514 U.S. at 434-35. The appropriate test is whether or not there is a reasonable probability that the result would have been different. A "reasonable probability" does not mean something greater than 50%; the test instead requires us to decide "whether in ... [the] absence [of the evidence, the defendants] received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id* at 434; see also *United States v. Bagley,* 473 U.S. at 678.

Given the importance of the prosecution's need to have a disinterested person put a gun in Franklin's hand, withholding the evidence of Hughes' motive to fabricate requires reversal.

Not only, however, did the prosecution withhold exculpatory evidence, in arguing that Hughes "had no dog in the fight," the prosecutor made an argument which was seriously misleading. Tr. 314. Given that Hughes had just been arrested on an indictment for arson, Hughes did indeed have a dog in the fight—his own.

A prosecutor has an affirmative duty not to present false or misleading information to the jury. *Napue v. Illinois*, 360 U.S. 264 (1959). Evidence is false where it creates a misleading impression of facts known by the government not to be true. *Hamric v. Bailey*, 386 F.2d 390, 394 (4th Cir. 1967).

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 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.[18]

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.

Counsel for defendant failed to request a limiting instruction telling the jury that prior inconsistent statements are admissible solely for impeachment purposes, not as substantive evidence. The issue in the instant case, is the trial judge should have given such an instruction under the particular facts of this case and/or was counsel ineffective in failing to request one.

[18] This Court should also consider the prosecutor's misleading statement in the context of Franklin's argument that cumulative error in the prosecution's argument constituted reversible error.

Rule 105, M.R.E. states:

> When evidence which is admissible as to one part or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

As this and other courts have observed, upon request, the trial judge should give a cautionary instruction when such evidence is admitted. *Id. See, Brown v. State,* 755 So.2d at 1280 [court could give an instruction on limited application of the evidence]; *Harrison v. State,* 534 So.2d 175, 179 (Miss. 1988) [trial judge could *sua sponte* instruct]; *Bailey v. State,* 952 So.2d at 238. At the same time, courts have observed that it is unlikely that the jury is able to compartmentalize evidence limiting the use of prior inconsistent statements to impeachment regardless of how well they are instructed. *Harrison v. State,* at 179; *Flowers v. State,* 773 So.2d 309, 327 (Miss. 2000).

For example, in *Moffet,* 456 So.2d at 720, although the trial judge instructed on the proper use, the court opined that the error was not cured. The Fifth Circuit has said, "we have acknowledged, as have many others, that the legal distinction between using a statement to destroy credibility and to establish the stated fact 'is a fine one for the lay mind to draw.' *Dowell, Inc. v. Jowers, 5 Cir.* 1948, 166 F.2d 214, 219, 2 A.L.R.2d 442, certiorari denied 334 U.S. 832, 68 S.Ct. 1346, 92 L.Ed. 1759. " *Slade v. United States,* 267 F.2d 834, 839 (5th Cir. 1959).

Where the prosecution argues that the evidence should be used substantively, this Court has noted that even a well-instructed jury would "have had a difficult chore distinguishing between the substantive and impeachment evidence." *Brown v. State,* 755 So.2d at 341. *See also, discussion of the history of Rule 607 in Wilkins v. State, supra* at 319 [permitting a jury to hear such testimony and then instructing it not to consider it except for "impeachment" has been called by one scholar "a pious fraud." Morgan, *Hearsay Dangers and the Application of the Hearsay Concept,* 62 Harv.L.Rev. 177, 193 (1948)]; *King v. State, supra.*

This Court has held that a trial judge commits plain error by failing to instruct that such statement may not be used as substantive evidence. In *Moore v. State,* 755 So.2d 1276, 1280 (Miss. App. 2000), the prosecution introduced two statements from accomplices implicating Moore after the witnesses took the stand and denied that Moore had participated in the crime. 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 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. They were plain error, or alternatively, counsel's failure to object was constitutionally ineffective. *See,* discussion in the next Proposition.

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.

Errors in instructions which cut off the right to self-defense, or indeed any defense, are so prejudicial to the right to a fair trial that they are plain error. *McMullen v. State*, 291 So.2d 537, 541 (Miss. 1974) [instruction cutting off right to self-defense was plain error]. Alternatively, they can constitute ineffective assistance of counsel in violation of the state and federal constitutions. *See, e.g., 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].

In addition to being deficient for not telling the jury to consider prior inconsistent statements only for impeachment, the instructions are deficient for another significant highly reason. They fail to correctly or coherently instruct the jury on the law of self-defense. At trial, the court gave three substantive instructions to the jury: The first one (S-1) read:

> If you find from the evidence in the case beyond a reasonable doubt that on or about May 20, 2006, Derrick Taylor was a living human being and the defendant, Patrick Franklin, did unlawfully, willfully and feloniously act in a manner

eminently dangerous to others and with a depraved heart regardless of human life, kill and murder said Derrick Taylor by shooting him and said act resulted in the death of Derrick Taylor whether or not the defendant had any particular premeditated design to effect the death of Derrick Taylor, then you shall find the defendant Patrick Franklin guilty of Murder.

Tr. 306.

The next two substantive instructions involved self-defense. The first (D-1) read:

The killing of a human being by the act procurement or omission of another shall be justifiable when committed in the lawful defense of one's person—one's own person or other human being where there shall be reasonable grounds to apprehend a design to commit a felony or to do some great personal injury, and there shall be imminent danger of such design being accomplished. If you find the –if you, the jury, find that Patrick Franklin was justified in the killing of Derrick Taylor, you will return a verdict of not guilty.

R.I/172.

The next instruction (S-6) read:

The Court instructs the jury that one who claims self-defense as a defense to his actions may not use excessive force to repel the attack but may only use such force as is necessary – reasonably necessary under the circumstances. If you find from the evidence beyond a reasonable doubt that the defendant Patrick Franklin caused bodily injury to Derrick Taylor by shooting him when the shooting was used with more force than reasonably necessary under the circumstances of this case, then the defense of self-defense would not apply to this case.

Tr. 307.

All three instructions have significant flaws. First of all, Instruction S-1 fails to require the state to prove beyond a reasonable doubt that the defendant did not act in self-defense. Instead, it allows conviction if the jury finds only three elements: (1) Taylor was a human being; (2) Patrick Franklin killed Taylor; (3) Taylor was willfully acting in a manner eminently dangerous to others and with a depraved heart regardless of human life. In other words, the instruction attempts to define the essential elements of the offense of depraved heart murder. It omits, however, the essential element that the defendant was not acting in lawful self-defense.

In *Boyles v. State*, 223 So.2d 651, 654-55 (1969), *cert. denied, Boyles v. Mississippi*, 396 U.S. 1005 (1970), the Court held that an instruction which omits the language and "not in necessary self-defense" is defective for failing to include an essential element of homicide. As this Court has said, where "there are facts which, if believed by the jury, would make the homicide justifiable or excusable or reduce it to manslaughter, the instruction should be qualified to take these facts into consideration." *Pittman v. State*, 297 So.2d 888, 893 (Miss. 1974)

Moreover, because S-1 was the only instruction which told the jury what the essential elements of the offense were, there was no instruction which placed the burden on the state to prove the absence of self-defense beyond a reasonable doubt. Put another way, the instructions failed to tell the jury that absence of self-defense was an element of the charge.

The burden of proof in a case involving self-defense is on the prosecution to prove as an essential element that the defendant did **not** act in self-defense. *Sloan v. State*, 368 So.2d 228, 229 (Miss. 1979) [Defendant is not required to prove that he acted in self-defense, and, "if a reasonable doubt of his guilt arises from the evidence, . . . he must be acquitted"]. Because the only instruction on the essential elements of the offense fails to include absence of self-defense as one of the elements, there is no instruction placing the burden on the state to prove absence of self-defense. Neither of the other two substantive instructions (S-6 or D-1) places the burden on the state. Consequently, the instructions are erroneous for failing to require proof beyond a reasonable doubt that the defendant was not acting in self-defense.

As for instruction D-1, this instruction in fact shifts the burden to the defendant to "justify" his actions. In *Reddix v. State,* 98 So. 850 (Miss. 1924), the Court condemned a similar instruction which said: "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."[19]

According to the Court, the instruction shifts to the defendant the burden of proving his innocence, and does not authorize an acquittal if the evidence, leaves the question of his guilt in reasonable doubt. In addition the instruction suffers from the vice that it deprives the defendant of the right to act if he has reasonable grounds to believe that he was in imminent danger of losing his life, or suffering some great personal injury at the hands of deceased. *Id.* at 850-51.

Both D-1 and S-6 both 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).[20] 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].

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[19] *See also, Hathorn v. State* 102 So. 771, 774 (Miss. 1925), condemning an instruction which in effect stated 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. *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.]

[20] "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."

As this Court has repeatedly held:

> A charge which postulates, as one of the elements of self-defense, real intent on the part of the assailed to take life or do some grievous bodily harm to the assailant, is erroneous. Such intent need not exist in fact. If it be evidenced by a present act or demonstration, inducing in the mind of the slayer a reasonable belief that the danger to his life or person was then imminent, this is enough.

Godwin v. State, 19 So. 712 (Miss. 1896) 40 C.J.S. Homicide § 204.

Because none of the instructions placed the burden on the state to prove absence of self-defense, and they were confusing and contradictory on the issue of reasonable appearances, this Court should find plain error and reverse. Alternatively, counsel rendered ineffective assistance of counsel.

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

In closing argument the prosecutor made numerous improper remarks, which taken singly, or cumulatively constituted reversible plain error because they deprived Franklin of a constitutionally fair trial and impinged on other constitutional rights as Franklin will show. Alternatively, counsel was ineffective in failing to object.

In an argument designed to suggest that there were other witnesses who were not called who substantiated the prosecution's theory, the prosecutor argued that

> [t]hen they [the police] went out and they talked to other witnesses. They found relatives. They found friends. They found unrelated people in the community, people who had been out there. They talked to everybody they could find and got statements from them. And you heard some of those witnesses here.

Tr. 311.

The prosecutor then vouched for the credibility of Misty Boling:

> Who else did we here hear [sic] from? We heard Misty Boling, who told the truth in her statement when she didn't know what was going happen, when she didn't know she was going to be on that stand in front of him. And then she tried to back

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Id. at 764. *Accord, Bell v. State,* 52 So.2d at 731 ["The law authorizes action on reasonable appearances, . . . and the danger may be either real or apparent [citations omitted]"].

up. But that statement was down in writing. We know the defendant threatened Derrick Taylor and that she thought he meant it. She said that.

Tr. 314.

Later in rebuttal closing, the prosecutor argued that the defense attorney in arguing reasonable doubt was engaging in "magic tricks" and "misdirection." Tr. 327. He then continued:

> Don't think about the facts. Don't think about the evidence. The defendant would love for this case to be about the fact that Deck Taylor was a drunk and Lenario Davis was thug. Maybe they were. I don't know. *** It does not matter. What does matters [sic] is what you heard from this stand, what evidence is up here. Any contradictory evidence, absolutely.
>
> ***
>
> I'm just going to come back to one other point that I brought up to you about contradictory evidence. And this relates to Immona Davis. We have two witnesses, 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? 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?
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> ***
>
> 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.

Defense counsel made no objection to any of the argument; however, this Court has repeatedly held that "in cases of prosecutorial misconduct, we have held 'this Court has not been constrained from considering the merits of the alleged prejudice by the fact that objections were made and sustained, or that no objections were made.'" *Randall v. State,* 806 So.2d 185, 210 (Miss. 2001) [quoting *Mickell v. State,* 735 So.2d 1031, 1035 (Miss. 1999).

In *Randall,* the Court found error because of the prosecution's comments on the accused's failure to call witnesses when the witnesses were equally available to both the state and the defendant. *Id.*

In Franklin's case, the prosecutor identified numerous witnesses who were available and interviewed by the police whom the defendant did not call. Moreover, he identified the defendant as a witness by pointing out that Franklin had been interviewed multiple times by the police.[21]

Plainly, the prosecution's argument was designed to suggest that the defendant did not call these witnesses because the testimony would have been unfavorable. This is so because after interviewing them, the police released Lenario Davis. In addition, from the prosecution's references to the interviews of the defendant, the jury could infer that the defendant did not testify because, he, like Boling and Hughes, would be subject to impeachment by his statements given to the police.

Not only is it unacceptable to refer to the defendant's failure to call witnesses, it is federal and state constitutional error to comment, even indirectly, on a defendant's failure to testify. Furthermore, it is a violation of both the state and federal constitution to shift the burden of proof to the defendant by suggesting he has the duty to call witnesses or produce evidence.[22] This Court has repeatedly reversed because of such comments.[23]

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[21] 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.

[22] U.S. Const., Amend. V; Miss. Const., Art. 3, Section 26. *Griffin v. California*, 380 U.S. 609 (1965); *Livingston v. State*, 525 So.2d 1300 (Miss. 1988); see also, Section 13-1-9, Miss. Code Ann. (1972) [Failure of accused to testify shall not operate to his prejudice or be commented on by counsel].

[23] *Martin v. State*, 26 So.2d 169 (Miss. 1946) [reversal because stated evidence was "undisputed"]; *Lambert v. State*, 199 Miss. 790, 25 So.2d 477 (1946) ["Where is the testimony that he did not do it? . . . "There's no denial];" *Chatman v. State*, 244 Miss. 659, 145 So.2d 707 (1962) [reversal because prosecutor said evidence was "undisputed"]; *Clark v. State*, 260 So.2d 445, 446 (Miss. 1972) ["if they had any evidence . . . they could have presented it"]; *Brown v. State*, 340 So.2d 718, 722 (Miss. 1976) ["It's undisputed. You haven't heard anyone dispute this testimony . . . ."]; *Peterson v. State*,

For example, in *Randall,* the prosecutor argued: "'Where is the evidence? What evidence do you have of that? You can't guess or speculate. *Something has to be given to you'.* [emphasis in original]." The prosecution then argued: "'All the evidence that you have before you supports that, demands that *There is no evidence or exhibit that some other person did this'* [emphasis in the original]." *Randall,* at 212. The Court found that this argument unconstitutionally shifted the burden to the defendant to produce evidence. *Id.*

Finding the cumulative impact of the prosecutor's argument was reversible error, the *Randall* Court held that "[w]hile the State may properly comment on facts in evidence, the truth of the matter before us is that the jury could reject Randall's version of events *and* still find that the State did not prove each and every element beyond a reasonable doubt. The jury's choice was not an 'either, or.' *** Randall had no burden to create reasonable doubt."

In the instant case, the prosecution's references to Franklin's failure put on proof were far more extensive than in *Randall.* In fact, the entire thrust of the prosecution's argument was directed to showing that because other witnesses, including the defendant, were available to testify, the defendant's failure to call them meant they would have corroborated the prosecution's case.

Compounding the other errors in the case, the prosecutor also argued that the jury should use Misty Boling's prior inconsistent statement that she believed Franklin to be guilty as evidence of guilt. He further vouched for its truth.

Improper vouching typically occurs in two situations: (1) the prosecutor places the prestige of the government behind a witness by expressing his or her personal belief in the

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357 So.2d 113, 115 (Miss. 1978) [said that state's witness was the only witness who took the stand and said what happened and she said that he did it]; *Wilson v. State*, 433 So.2d 1142 (Miss. 1983) ["Where was the explanation . . . ?"]; *West v. State*, 485 So.2d 681 (Miss. 1986); *Stringer v. State*, 500 So.2d 928 (Miss. 1987); *Whigham v. State*, 611 So.2d 988 (Miss. 1992) [Plain error to say that the evidence is unopposed, unimpeached, unrebutted].

veracity of the witness, or (2) the prosecutor indicates that information not presented to the jury supports the witness's testimony. *United States v. Edwards,* 154 F.3d 915, 921 (9th Cir.1998).

Arguments such as the ones the prosecutor made in this case have been repeatedly condemned because

> [t]he power and force of the government tend to impart an implicit stamp of believability to what the prosecutor says. That same power and force allow him, with a minimum of words to impress on the jury that the government's vast investigatory network, apart from the orderly machinery of the trial, knows that the accused is guilty or has non-judicially reached conclusions on relevant facts which tend to show he is guilty [citations omitted].

United States v. Garza, 608 F.2d 659, 663 (5th Cir. 1979).

Because the errors involve constitutional violations,[24] the burden shifts to the state to show beyond a reasonable doubt that its improper argument did not affect the jury's verdict. *Chapman v. California, supra.* The state cannot do so because there is no direct evidence of Franklin's guilt other than the untrustworthy testimony of Immona Davis, whose brother not only had the motive to kill Taylor, but also had the means—a .22 caliber pistol.

Taken together, the cumulative impact of the errors rendered Franklin's trial constitutionally unfair. *Griffin v. State*, 557 So.2d 542 (Miss. 1990); *White v. State*, 532 So.2d 1207 (Miss. 1988); *Stringer v. State*, 500 So.2d 928 (Miss. 1986);

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.*

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[24] *Donnelly v. DeChristoforo,* 416 U.S. 637, 646 (1974) [misleading arguments or those which preclude the jurors to rationally deliberate violate due process of law];

RESPECTFULLY SUBMITTED,
PATRICK FRANKLIN, APPELLANT

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

CERTIFICATE

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 22nd day of March, 2010.

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