BEFORE THE SUPREME COURT OF MISSISSIPPI

DERRICK TURNER — APPELLANT

VS. — CAUSE NO. 2009-KA-0330

STATE OF MISSISSIPPI — APPELLEE

CERTIFICATE OF INTERESTED PERSONS

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

1. Derrick Turner, Appellant;
2. Sanford Knott, counsel for Appellant;
3. Forrest Allgood, Assistant District Attorney of Oktibbeha County, Mississippi, counsel for State;
4. The Honorable Lee J. Howard, Circuit Judge for trial of State vs. Turner

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AND NOW the Appellant, Derrick Turner, puts forth the following issues for review:

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ISSUE NO. 2: WHETHER THE LOWER COURT ERRED IN NOT GRANTING APPELLANT'S IMPEACHMENT INSTRUCTION?

ISSUE NO. 3: WHETHER THE LOWER COURT ERRED IN NOT GRANTING APPELLANT'S INSTRUCTION REQUIRING ACQUITTAL WHERE ACCOMPLICE'S TESTIMONY WAS IMPEACHED, UNREASONABLE, OR SELF-CONTRADICTORY?

ISSUE NO. 4: WHETHER THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE?

STATEMENT OF THE CASE

This Court is called upon to review the alleged errors of the trial court proceedings in a capital murder case arising out of Oktibbeha County, Mississippi. The trial, which took place from November 3 to 6, 2008, ended in a conviction and life sentence without possibility of parole against the accused, Derrick Turner. Following the denial of the post-trial motion to set aside the conviction on February 5, 2009, an appeal was timely filed raising concerns about rejected jury instructions and the sufficiency and weight of the evidence. Now, this Court is asked to reverse the conviction and discharge Mr. Turner, the Appellant, or in alternative, grant him a new trial.

On the morning of August 20, 2001, firefighters were called to 226 Reed Road in Starkville, Mississippi about a house fire.[1] What they discovered inside the residence, ***inter alia***, was the body of Juanita Miller who was barely alive. Mrs. Miller had lived with her husband, Lee Miller, who testified that he left the residence at approximately 8:45 a.m. and visited, among other places, the car washes the two (2) owned. T. 135-136. When he returned at approximately 9:45 a.m., he found emergency and fire personnel present and smoke coming from the residence. The house was ransacked and approximately six hundred dollars ($600.00) were stolen. T. 145. Mrs. Miller later died at the hospital.

Several fire personnel and investigators were called to testify by the State. Stewart

[1] 226 Reed Road is located on the corner of Reed Road and Westside Drive. Just across Westside Drive going north is a mobile home park called Lander's Trailer Park.

Teague, a fire fighter, testified that he and another rescuer entered the premises and discovered the blood soaked body of Mrs. Miller, and managed to pull her outside. Realizing that she was still alive, he had the paramedics to attend her. Roger Mann, the Fire Marshall, testified that the fire was not accidental in nature and that there were at least six points of origin. Once the fire appeared to be an act of arson, the Starkville Police Department was called in and began the crime scene investigation.[2] Kirk Rosehan, a fire behavior specialists, testified that the residence was equipped with smoke detectors which were activated and audible inside the house during the fire.

Investigator William Lott of the Starkville Police Department testified that after arriving at the residence that morning, he and his team began to put a list of suspects together who were known criminals in the area. That list did not include Derrick Turner (hereafter "Appellant). Sixty to ninety (i.e., 60 to 90) individuals were interviewed during the initial investigation including six (6) suspects, all of which were ruled out, except a Devail Hudson. The crime lab was called in, as well as, a search dog to scent out the trail of Hudson. However, no one with knowledge of the murder was found so the investigation stalled. T. 403. Later, a break in case occurred on January 6, 2002, when a Bentore Riley came to the police station and gave two (2) statements about his knowledge of the crime. Id. According to Lott, he admitted that he was a look-out when Devail Hudson, Derrick Turner, and others entered the residence of Mrs. Miller on August 20,

[2] Dr. Stephen Hayes, who also testified, performed the autopsy on August 22, 2001 and ruled the death a homicide.

2001. On cross-examination, Lott admitted, however, that Riley lied to him at least four (4) times (T. 455), but that he, nevertheless, believed Riley's testimony that Appellant was involved because Riley came forward and voluntarily gave a statement even though law enforcement originally had no knowledge of his involvement. T. 457. Lott, also, testified that Turner gave inconsistent statements about his whereabouts on August 20, 2001. First, Turner, during an interview on January 14, 2001, said that on August 20, 2001, he was at work for a construction company, but he might have passed through or stopped near the area of Westside and Northside Drive. After verifying that Turner had not worked with the construction company on August 20, 2001, he was re-interviewed on February 13, 2002, at which time Turner, again, stated that on August 20, 2001, he was at work to the best of his knowledge. When advised that he did not begin working for the construction company until September 11, 2001, Lott testified that Turner's response was that he must have been at home asleep.[3] T. 422-429.

Jamie Bush of the Mississippi Crime Laboratory testified that he and two (2) other forensic scientists visited the Miller residence to examine abnormalities of the structure and fingerprints and found no sign of forced entry other than the front door that was entered by the Starkville Fire Department. T. 349.[4] After observing the sewing room and the spattering of blood found therein, Bush opined that the victim was bent over or either

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[3]An employee from Hodges Construction, Dina Addy, testified that Turner did work for the company in 2001, but did not begin employment until September 11, 2001. T. 460.

[4] There were, also, no fingerprints of value found. T. 349.

lying on the floor when she was struck, possibly, by an iron that was left and found to be covered in blood. Bush, also, testified that there were multiple suspects who caused damage to the house after noticing how the house was ransacked, drawers were pulled out, and money was left behind undiscovered. He, too, determined that there were six (6) separate fires set. However, Bush could not rule out that there could have been only one (1) or two (2) participants. T. 378.

Paulette Weible, a dog handler, testified for the State that on August 23, 2001 (i.e., three days after the incident), she was given an item of clothing belonging to suspect, Devail Hudson, in order for her bloodhound dog to scent and mark a trail. From a point on Lander's Trailer Park, the dog eventually led her to the back door of the Miller's residence, and thereafter, back to the trailer park to a mobile home belonging to Hudson's girlfriend. T. 388-391.

The State witness, Ms. Deanise Stephens, a former driver for Meals on Wheels, testified that on August 20, 2001, between 10:00 a.m. and 10:30 a.m., she delivered a meal to the grandmother of Destiny Moore, another suspect, and parked her vehicle on a steep curb on Westside Drive. After she entered her vehicle to leave, she attempted to pull in and turn around at Lander's Trailer Park to go back to her office. However, she could not initially do so because the area was blocked by four (4) or five (5) black males standing there talking. The only two that she recognized were Bentore Riley and Devail Hudson after seeing their pictures in the newspapers. T. 263-268.

The primary witness for the State was Bentore Riley who testified that six (6) males, including Derrick Turner, were involved in committing the murder of Juanita Miller. According to Riley, he was walking from his grandmother's house near the Miller's property toward the corner of Northside and Westside on the morning of August 20, 2001,when he saw Devail Hudson, Destiny Moore, Derrick Turner, and others at the corner talking. An argument between Riley and Moore ensued over some tennis shoes. When that ended, the group, lead by Hudson, began to talk about robbing the Miller's residence and killing Mrs. Miller if she were found to be in the house. T. 161. Then the other guys, with Riley being the look-out, left and entered the back door of the residence. Within seconds, thereafter, Derrick Turner ran out and fell to the ground and was followed by the others, minutes later. They all met at Lander's Trailer Park. On cross-examination, Riley testified, *inter alia*, that Devail Hudson re-entered the residence alone to kill Mrs. Miller and that he, Riley, was neither a look-out nor involved in the murder at all. R. 12-70. The trial court, however, permitted an instruction to the jury that Riley was an accomplice to the murder of Mrs. Miller. The jury later returned a verdict of guilty for capital murder against Appellant, Derrick Turner.

SUMMARY OF ARGUMENT

Juanita Miller was murdered on August 20, 2001, by intruders who had no right to enter her residence. The State's proof at trial rested on, principally, the uncorroborated testimony of an accomplice, Bentore Riley. Without Riley's testimony, there was no

evidence or even a suggestion that Appellant was involved. When reviewing his testimony cautiously and suspiciously, the trial court erred in its finding that there was sufficient evidence to convict Appellant Turner. The rule of this Court that impeached, unreasonable, or self-contradictory evidence, could not support a conviction was not applied herein. This was evident given that the record illustrated that Riley was substantially impeached, and gave unreasonable and self-contradictory statements about who he was and the circumstances involved in this case. In the end, Appellant should have been discharged.

Even if not discharged, Appellant, was, nevertheless, entitled to an impeachment instruction that centered upon the false statements of Riley that were acknowledged by the State. While the trial court gave a general impeachment instruction, it did not go far enough to instruct the jury that it could disregard the witness who had lied. It was error for the trial court to refuse the proposed jury instruction which correctly stated the law, not otherwise covered by other instructions, and was supported by the evidence.

As a related issue to the previous "sufficiency of evidence" argument, Appellant's proposed jury instruction that the jury could not convict Turner if Riley's testimony was substantially impeached, unreasonable, or self-contradictory was improperly refused. The instruction, without question, was a correct statement of the law, was certainly not covered at all in any other instruction, and was supported by the evidence. Thus, the lower court committed an error.

Lastly, the weight of the evidence favored Appellant given the vast discrepancies in Riley's testimony. Riley testified, *inter alia*, that Devail Hudson entered the residence a second time after Appellant and others came out of the residence and that he knew that Hudson was going to kill Mrs. Miller. It should have been clear to the lower court that even if Appellant were present during the first visit, it was during the second visit of the residence, wherein, Mrs. Miller was killed. Furthermore, Turner presented alibi witnesses who corroborated that he was in Tupelo, Mississippi during the time of the home invasion.

Appellant, therefore, argues that because of the errors committed by the lower court, his conviction should be overturned.

ARGUMENT

THE COURT ERRED IN NOT SETTING ASIDE THE JURY VERDICT DUE TO INSUFFICIENCY OF THE EVIDENCE

The use of Bentore Riley's testimony was insufficient to prove that Turner participated in the murder of Juanita Miller.

A directed verdict, preemptory instruction, and motion for judgement notwithstanding the verdict, all challenge the sufficiency of the evidence presented to the jury. Sneed v. State, 2007-KA-00381 (Miss. App. 8-252009) (citing Hawthorne v. State, 835 So. 2d 14, 21(Miss. 2003). When reviewing the sufficiency of the evidence, "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 reasonable doubt." Id.

In reviewing the evidence in the light most favorable to the State, it can be said based upon the evidence, that Mrs. Miller was murdered by more than one assailant who entered the Miller residence by the back door on the morning of August 20, 2001. The suspects set six (6) different fires hurriedly and left the residence towards Lander's Trailer Park. While the Millers had a substantial amount of money in the house that was left behind, approximately $600.00 in cash was taken.

Bentore Riley's testimony, however, must be reviewed with great caution and suspicion given that the uncorroborated testimony of an accomplice can not support a conviction if testimony is found to be unreasonable, self-contradictory, or substantially impeached. Riley v. State, 1 So.3d 877, 882 (Miss. App. 2008). Riley's testimony was uncorroborated. First, Riley claimed that he was walking towards the corner of Northside and Westside Drive the morning of August 20, 2001, when he came upon six (6) guys: Derrick Turner, Davail Hudson, and four (4) others. Hudson- according to Riley - led a discussion to rob the Miller's residence and expressed the intent to kill Mrs. Miller if she were found to be inside the residence. Next, all the guys, except Riley, ran into the house. Appellant came back out of the house within seconds. At some point thereafter, Hudson gave Turner a watch as his share of the cut. T. 163, R. 78.

There was no corroborative evidence on any material part of Riley's testimony. The fact that Riley knew exactly which door the suspects entered was no great revelation. Riley could have learned the point of entry through other sources, like the media given the

high profile nature of the case. Remember, Riley was not interviewed until five (5) months later, and on cross-examination, he admitted that he did not see the suspects open the back door to the Miller's residence. R. 37. Also, there was no witness that said that the Millers lost a watch or even saw Derrick Turner at any corner the morning of August, 20, 2001.[5] Given that there was no corroborative evidence that supported to Riley's testimony, the Court should look to see if Riley's testimony was substantially impeached, self-contradictory, or unreasonable.

A. Riley's testimony was impeached.

The record is replete with impeached and inconsistent testimony of Riley. Riley testified that no police officer talked with him on the day of the murder although he unsuccessfully tried to call law enforcement. T. 164,169. However, on cross-examination, Riley claimed that he called 911 twice. (R.39-40.), spoke with secretary (dispatcher), and reported that a burglary was in progress. R. 194. When law enforcement did not come, he called 911 again. This time law enforcement came out, interviewed him via a detective, and took a written statement from him. R. 38-40. Detective Lott of the Starkville Police Department, a witness called by the State, testified to just the opposite: the police department on August 20, 2001, did not interview Riley and received no 911 call. There was no record of Riley having talked with law enforcement at all that day. T. 400-403. As to a written

[5] Remember, Denise Stephens, only recognized Devail Hudson and Bentore Riley talking to other guys (unknown) at the entrance to Lander's Trailer Park. By contrast, Riley claimed that the guys were at the corner of Westside and Northside Drive talking.

statement by Riley, the prosecutor acknowledged that there was no additional written statement. T.197. When asked if he previously testified in State v. Devail Hudson, (the co-defendant's trial) and if he had called and been interviewed by police, Riley answered that he had. (T.201). But after being shown the transcript of his testimony, he acknowledged that his call and being interviewed by the police were not contained therein. (T. 202-203).[6] As to possible threats made against him, Riley testified that in his first written statement, he informed the police of the threats by the co-defendants. However, the first written statement contained no threats by anyone. R. 26. The same was true regarding Riley's testimony that he told the co-defendants "to go to hell," in response to their request for him to be a look-out. R. 32.

B. Riley's Testimony Was Contradictory and Unreasonable.

Riley, on cross-examination, admitted to using an alias of "Marquelius Tigger" in court documents. In fact, he attempted to convince the Chancery Court in Oktibbeha County, Mississippi that his real name was Marquelius Tigger. T. 168. Riley has, also, used aliases like "O.Peppy," "Bubba," and "Tupac." Riley, as Tigger, falsely stated in court documents that he was married to Terry Abdul Tigger (T. 169), that his mother was "Muriel" (T. 169), and that he had children. T.170. However, Riley admitted on the stand that he was not married, did not have children, and his mother was named Ethel. T.169-170). Riley even claimed in court documents that he told the officer who arrested him that his real name was

[6] Devail Hudson was tried and convicted of the capital murder of Juanita Miller Bentore Riley, also testified in that case.

Marquelius Tigger. T. 215.

Riley also caused to be filed a document called "Statement of Relevant Facts" in which he described that on **August 18, 2001**, he noticed a group of guys standing at the corner of Northside Drive and Westside Drive. R. 84-90. Of course, here Riley contradicts himself with respect to the date of the incident. In any event, Riley described, next, the dispute over tennis shoes with Destiny Moore. But then added:

Q You indicated, "After argument with the guy known as Destiny Moore, a non-co-defendant defendant summoned the authority off his cell phone"?
A Yes, Sir.
Q "That would identify as an Atlanta, Georgia residence"?
A Yes, Sir. [p. 208]
Q "And number to the non-residence of the mistaking residence known as Hoggens"?
A Hagans.
Q Hagans. By the way, who are you referring to as Hagans?
A My cousin, Raphael Hagans.
Q Okay. All right. That's the first I've heard of him. Is that the first time you have ever testified about him today?
A Yes, Sir.
Id; T. 209.

Apparently here, Riley was describing himself as the "authority" who was attacked by the others to get him off his phone.

Riley, also, testified that he watched the suspects enter the back door while he was at the entrance to Lander's Trailer Park, the "X" at State's Exhibit 5. Clearly from the Exhibit, Riley would not have been able to see the Miller's back door. Detective Lott admitted that

between the entrance and the back door was a house which would have obstructed one's vision. T. 438.

Finally, Riley admitted that his capital murder case would not be resolved until he cooperated with the prosecution and testified against Turner (T.199), but that **if** law enforcement would release him, he would then tell all that he knew. T.215. At this point, however, Riley admitted that as to his role in the murder, the prosecution did not believe his testimony that he was not involved. T. 220. He also clarified at this point of his testimony that he was more familiar with Hudson and all the other guys than Turner, and he did not know Turner's name at the time of the incident. Id.

The trustworthiness of Riley's testimony was shaken to the core. No rational jury could believe that Riley was credible. As demonstrated, Riley's testimony was substantially impeached, unreasonable, and contradictory. In fact, Riley even conceded that law enforcement did not believe him relative to his personal involvement in the murder. Because of the nature of Riley's testimony, it could not have been considered substantial evidence. And without Riley, there was no evidence before the jury that Derrick Turner was present on the Miller's premises and knowingly participated in the murder of Juanita Miller. Therefore, this Court should reverse the conviction and discharge the Appellant.

THE TRIAL COURT ERRED IN REJECTING THE DEFENSE'S IMPEACHMENT INSTRUCTION

Because the State admitted that its witness, Bentore Riley, was untruthful in his testimony and prior statements, Appellant's impeachment instruction should have been

granted.

In reviewing jury instructions, this Court has repeatedly held that it does not review instructions in isolation, but together as a whole. Ellis v. State, 790 S.2d 813,815 (Miss. 2001)(citing Higgins v. State, 725 So.2d 220, 223 (Miss 1998). However, the defendant is entitled to have his theory of his defense presented through the instructions as long as the instructions correctly state the law, not fairly covered elsewhere in the instructions, and are supported by the evidence. Id. The trial court does not commit reversible error in refusing to grant a redundant instruction. Ellis; at 815; Laney v. State,786 So.2d 1242, 1246 (Miss. 1986).

In the case *sub judice*, Appellant, first contends that the following instruction was improperly rejected:

INSTRUCTION NO.

> The testimony of a witness may be discredited by showing that the witness testified falsely concerning a material matter, or by evidence that at some other time the witness said or did something, or failed to say or do something, which is inconsistent with the testimony the witness gave at this trial.
>
> Earlier statements of a witness were not admitted in evidence to prove that the contents of those statements are true. You may consider the earlier statements only to determine whether you think they are consistent or inconsistent with the trial testimony of the witness and therefore whether they affect the credibility of that witness.
>
> If you believe that a witness has been discredited in this manner, it is your exclusive right to give the testimony of that witness whatever weight you think it deserves. I remind you that a defendant has the right not to testify. When the defendant does not testify, however, his testimony should be weighed and credibility evaluated in the same way as that of any other witness. D-2

R. 74

This impeachment instruction was required to be given as it correctly stated the law, was not otherwise covered by the other instructions, and was supported by the evidence as well be seen next.

First, the proposed jury instruction was a correct statement of the law. It was taken from the Pattern Jury Instruction manual, § 1.11 and approved by the 5th Circuit Court of Appeals. See U.S. v. McDonald, 620 F.2d 559 (5th Cir.1980). Also, similar instructions have been approved by this Court as a proper impeachment instruction. In Ellis v. State, infra., the following was initially rejected at trial, but later approved on appeal:

> "The testimony of a witness or witnesses may be discredited or impeached by showing that on a prior occasion they may have made a statement which is now inconsistent with or contradictory to their testimony in this case. In order to have this effect, the inconsistent or contradictory prior statement must involve matter which is material to the issues in this case.
>
> The prior statement of the witness or witnesses can be considered by you only for the purpose of determining the weight or believability that you give the testimony of the witnesses or witnesses that made them. You may not consider the prior statement as proving the guilt or innocense of the defendant." Id. at 814-815.

Comparing the Ellis instruction to the proposed one here, there is essentially no difference between the first two (2) paragraphs contained therein. Each instructs the jury that the testimony at trial which is different from prior statements may be grounds for the witness to be discredited or impeached. The additional language of the proposed instruction "that the witness testified falsely," does not change the law of impeachment. Without question, one who testifies falsely concerning material matter may be considered a discredited

witness by the jury in some respects and credible in others.[7] Cite omitted.

Additionally, Appellant's impeachment instruction was not an improper comment upon the evidence. T. 534. This Court has amply held in Swann v. State, 806 So. 2d 1111 (Miss. 2002) and in many cases preceding it, that such instructions were not an improper comment. Id. (citing McGee v. State, 608 2d 1129,1135 (1992).[8]

Next, the proposed instruction was not otherwise covered by another instruction and was supported by the evidence. The lower court granted the following instruction:

INSTRUCTION NO. C. 01

> "...You are the sole judges of the facts in this case. Your exclusive province is to determine what weight and what credibility will be assigned the testimony and supporting evidence of each witness in this case. You are required and expected to use your good common sense and sound honest judgment in considering and weighing the testimony of each witness who has testified in this case..." R. 71.

A general instruction on weight and credibility of a witness's testimony, together with cross-examination of the witness concerning the inconsistent statements and closing arguments about the inconsistencies, is sufficient grounds to refuse an impeachment instruction. See Swan. This principle is inapplicable, however, where either the witness admits to lying or the State concedes that the witness lied by giving inconsistent statements different from his trial testimony. Ellis v State, 790 So.2d 813 (Miss 2001).

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[7] The last paragraph of the proposed instruction, D-2, essentially explains the weight to be given a defendant who does not testify in the case and, again, is a correct statement of law.

[8] While not made an issue, an improperly worded instruction that otherwise is admissible, should be reformed or corrected by the trial judge or by counsel. Harper v. State, 478 So. 2d 1017, (Miss. 1985).

For instance in Ellis v. State, the defendant was convicted of murder of a business owner based upon the testimony of an accomplice. The accomplice, during trial, told the police that he had **lied** when he first told the police that he had not seen anyone shots fired at the defendant. At the close of the case, the defense requested an impeachment instruction. Said request was denied, but the lower court granted a credibility instruction that was more detailed than the one the trial court granted *sub judice*. Even then, this Court later held that the proposed instruction by the defense was not a comment on the evidence because the witness admitted during trial about lying in his prior statement to the police. Such refusal to grant the instruction was fatal and required a new trial. Id.

However, a different fact pattern was presented in Swann which was a capital murder case involving the death of a Tupelo resident. The defendant was convicted, principally, upon the testimony of an accomplice who gave investigators as least two inconsistent versions or what occurred. The accomplice was cross-examined about the prior inconsistencies. **But at no time did the accomplice admit to lying or that State concede that she had lied or had given false testimony different from prior statements.** The proposed impeachment instruction was properly rejected given the court's general impeachment instruction was given and the inconsistent statements were thoroughly highlighted.

The same result in Swann occurred in Harris v. State, 861, So2d 1003 (Miss. 2003), wherein, the defendants were convicted of murder after a fight had broken out in a

club in Madison County, Mississippi. Two (2) primary witnesses testified about what they saw. One gave the investigator a statement that she took cover from the shooting "down behind" her car. Id. 1020. The other witness's initial statement to the investigator was that one (1) of the co-defendants had a gun, but at trial she denied that he did so and that she only heard the gunfire. This Court, after reviewing the impeachment rule, cautioned that the "holding was not intended to completely deny defendants an impeachment instruction, but found that where the instruction is offered to highlight inconsistent statements concerning collateral matters, error was less likely to be found. Id. 1020-1021. The Court went on to find that the material statements of the witnesses were consistent. Id. 1021. At no time was there a suggestion by the witnesses or State that the inconsistent statements were **intentional**.[9]

The case *sub judice* is more like the Ellis case. Bentore Riley not only testified numerous times inconsistently with his prior statements, but the State also admitted before the jury that Riley was a liar. First, Bentore Riley maintained at trial that he was not an accomplice to the murder to Juanita Miller. The State maintained that he was and the Court even granted a jury instruction to that effect. As stated earlier, even Riley acknowledged that the State did not believe his statement about his innocence in the death

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[9]The latest case found to deal with the impeachment instruction was Bolden v. State, 2008-KA-00108-COA (Miss.App. 4-7-09). However, the offered impeachment instruction had more to do with preventing the prior inconsistent statements from being admitted as substantive evidence of guilt. Here, the defense called a witness whose testimony was favorable, but whose out of court statements were indicative of guilt. Thus, it has no real analytical value to the issue *sub judice*.

of Mrs. Miller. Riley testified that he called and was interviewed by the police on the day of the murder at Lander's Trailer Park, that he had visited the police station, and reported that he had been assaulted by those involved with the murder. Riley, also, claimed to have told the prosecutor the same thing each time he was interviewed by the prosecutor and had given a written statement of what occurred. The State admitted that none of this was true as there was no record of either. In fact, Detective Lott testified that Riley lied to him at least four (4) times about, *inter alia*, his involvement in the murder. Riley admitted giving false statements about his name, his marital status, and other issues relating to his family in chancery court in which he described certain allegations surrounding the death of Mrs. Miller.

The Court can now see clearly why the defense requested an impeachment instruction that contained language dealing particularly with "false testimony." The fact that Riley committed perjury upon the stand in inescapable. Even the trial judge commented that Riley's testimony about giving a **written statement** about the incident **on the day of the murder** was new to him, too, in light of his prior testimony in Hudson v. State which involved another co-defendant in this case.

In the end, the proposed impeachment instruction was not accurately covered by the general credibility instruction and was supported by the evidence. The trial court erred in not granting Appellant his proposed impeachment instruction. Such failure resulted in reversible error.

THE TRIAL COURT COMMITTED ERROR IN NOT GRANTING THE DEFENSE'S INSTRUCTION REQUIRING ACQUITTAL FOR IMPEACHED, UNREASONABLE, OR CONTRADICTING TESTIMONY OF ACCOMPLICE

Because the jury was never instructed that Appellant could not be convicted by uncorroborated testimony of an accomplice whose testimony was self-contradicting, unreasonable, or substantially impeached, error was committed by the trial court.

The defense offered the following instruction:

> *The Court instructs the jury that the uncorroborated testimony of an accomplice that is unreasonable, self-contradictory or substantially impeached at trial is not enough to convict an accused of an offense. If you find that Bentore Riley's testimony was either unreasonable, self-contradictory, or substantially impeached, his testimony alone may not be used to convict Derrick Turner of capital murder.* D. 8. R. 75.

First and foremost, the defense here is not addressing the failure of the Court to grant a cautionary instruction regarding accomplices. A cautionary was granted informing the jury that the testimony of an accomplice must be view with caution. Smith v. State, 901 So.2d 292,298 (Miss. 2005) (the uncorroborated testimony of an accomplice must be viewed with great caution and suspicion).

What is also clear is that the uncorroborated testimony of Bentore Riley was unreasonable, self-contradictory, or substantially impeached, and, therefore, could not support a conviction. Riley v. State, So.3d 877, 882 (Miss. App. 2008)(citing Jones v. State, 368 So.2d 1265 (Miss. 1979). In Jones, this Court held:

> "[t]he rule is well settled that, while a conviction may be sustained on the uncorroborated testimony of an accomplice, it is equally well settled that such conviction should not be upheld where such testimony is improbable,

> self-contradictory, and unreasonable on its face, and equally where it is impeached by unimpeached witnesses." Jones, at 1269 (quoting Creed v. State, 176 So.596,597 (Miss.1937).

Now compare the following instruction approved in Riley to the earlier instruction the defense proposed:

> "if you find the testimony of Martin Ickom, an alleged accomplice of the defendant in this case, to be uncorroborated by other evidence, then and in that event, you should view such testimony with great caution and suspicion and that it must be reasonable and not improbable or self-contradictory or substantially impeached."Id. 882.

The instruction here is very similar to the instruction *sub judice* while Turner's instruction may be worded differently than the instruction above in Riley, it is a correct statement of the law.

The proposed instruction, additionally, was not covered by any other instruction by the Court. The jury never was informed by the Court that it had the right and duty not to convict Turner if Riley's testimony alone was improbable, self-contradictory, or substantially impeached. As previously observed, this Court reviews all instructions together, not just one in isolation to determine if the jury was adequately instructed. Here, the jury was hampered in its ability to acquit Turner. By comparison, Court of Appeals found that reversible error was committed when a self-defense instruction failed to inform the jury of its duty to acquit if it found the defendant acted in self-defense. Woods v. State, 996, So.2d 100 (Miss. App. 2008) (citing Reddix v. State, 731 So.2d 591, 595 (Miss. 1999).

Finally, there was an adequate basis for the instruction. The only fact witness for the

State was Bentore Riley. Without his testimony, there was no evidence that Turner had any contact with Riley, the co-defendants, or visited Miller's residence on August 20, 2001. Given the inconsistent statements and outright untruths given by Riley, the proposed jury instruction was required to be given. Therefore, the trial court committed error in rejecting the instruction.

THE VERDICT WAS AGAINST OVERWHELMING WEIGHT OF EVIDENCE

Even when one accepts the evidence favoring guilt, the weight of the evidence favored Appellant because of the discrepancy of Riley's testimony as compared with Turner's alibi evidence.

In determining whether the jury verdict is against the overwhelming weight of the evidence, this Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial. Powell v. State, 806 So.2d 1069,1081 (Miss. 2001). Only when the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice, will this Court disturb it on appeal. Id. Thus, the scope of review on this issue is limited in that all evidence must be construed in the light most favorable to the verdict. Id.

The Court has already examined the discrepancies in Riley's testimony. Additionally, Riley testified that Hudson went into Miller's residence twice, the last time alone. In his prior written statement, Riley claimed that, during this subsequent visit, he knew Hudson was

going to kill Mrs. Miller. Now with Riley having been a known accomplice, it was more reasonable to believe that Riley knew Hudson's intent the second time because he was also there. In any event, the State's proof was that essentially, Hudson killed Mrs. Miller during his second visit, not the first. Even if the jury accepted Riley's statements that Turner was present and entered the Miller's residence, Turner had no involvement with the murder since he extracted himself from the crime before her death.

Now turning to Turner's defense of alibi. The greater weight of the evidence as between State witnesses and the defense witnesses favored the Appellant. Mary Turner, the mother of the Appellant, testified that on August 20, 2001, that between 9:00 a.m. and 9:15 a.m., she and the Appellant were in route to Tupelo, Mississippi and actually made it there around 10:15 a.m. T. 478. They visited Turner's sister, Sherbert Buckhalter, at work at Hardees Restaurant. An employment application was filled out by Turner at the restaurant during that morning and left on file. T. 480. Mary Turner was certain of the date because when she subsequently returned to work the next day at Fred's Dollar Store, the death of Mrs. Miller was the primary news story about which her co-workers were talking. T. 474. Sherbert Buckhalter, also, testified and confirmed Mrs. Turner's version. Shannon Williams, an employee of Hardees, too, testified that she remembered Turner visiting the store and filling out the employment application, although she could not remember the exact date in 2001. T. 492-500.

The overwhelming weight of the evidence favored the Appellant, Derrick Turner.

Therefore, a new trial was required to be granted by the trial court.

CONCLUSION

FOR THE FOREGOING REASONS, Appellant's conviction should be reversed or in the alternative, a new trial should be granted.

RESPECTFULLY SUBMITTED, this the 29th day of September, 2009.

DERRICK TURNER, APPELLANT

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CERTIFICATE OF SERVICE

I, Sanford Knott, attorney for Derrick Turner, do hereby certify that I have on this date caused to be electronically filed a true and correct copy of the foregoing Appellant's Brief to the following:

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This the 29th day of September, 2009.

Sanford Knott

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