2009-KA-00596-COA T

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:

1. Gary Tubby, Defendant-Appellant;
2. Julie Ann Epps, counsel for Appellant on appeal;
3. James E. Smith, III, counsel for Appellant at trial;
4. The State of Mississippi, Jim Hood, AG.;
5. Robert Brooks and Steven Kilgore ADAs attorneys for state at trial;
6. Honorable Marcus D. Gordon, Circuit Judge.

This, the 22nd day of January, 2010.

COUNSEL FOR APPELLANT

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STATEMENT OF THE CASE

(i) Course of the Proceedings and Dispositions in the Court Below:

Willie Wayne Tubby and Gary Tubby, II, were indicted in the Circuit Court of Neshoba County for burglary of a dwelling with intent to steal on or about August 8, 2008. RE 8. They were tried by jury, the Honorable Marcus D. Gordon, presiding. At the close of the case, the trial judge dismissed the case again Willie Wayne Tubby. Gary Tubby was convicted of the charge in the indictment. RE 5.

Tubby, a nineteen year old, first offender, was sentenced to serve 11 years in the Mississippi Department of Corrections. RE 6-7. His Motion for New Trial was overruled. R.I/24. He timely appealed his conviction. R.I/28-29.

(ii) Statement of Facts:

Around noon on August 8, 2008, Denise Goodin was at her home on Road 602 in Neshoba County because one of her children was sick. She noticed a car that was behaving suspiciously and called her father who lived nearby. She saw two men exit the car, but she could not identify them. R.II/18-20.

Her father called her and said that two men were breaking into the mobile home across the road from her. Shortly thereafter, the police arrived. After talking to her father, she called

911R.II/22-23. The mobile home is several hundred yards off the road, and she did not see anyone breaking into the trailer because a row of bushes obscured her view of the trailer. R.II/24.

Richard Hamilton, Ms. Goodin's father, investigated and found a car parked on a road near some land owned by his aunt. R.II/28. He wrote down the tag number and called his daughter and told her to all the police. R.II/29. He then investigated further. Because he knew that the "Haynes" did not come there very often, he went to the trailer because he believed they might be trying to break in there. R.II/29.

He pulled up to the trailer on the south side of the house and went around to the back of the trailer. He first saw Willie Tubby standing outside about four or five feet from the back door. R.II/30-31.

According to him, when he looked up, he saw Gary Tubby come out the back door. He told Gary to stop, and when he did not, Hamilton said, "'Stop or I'll shoot.'" R.II/32. Hamilton testified that when both turned and ran, he shot in the air. R.II/32. He chased them and shot into the air again two or there times. He located Willie Tubby hiding in the roadbed and took him back to the trailer where they waited for the sheriff's deputies to arrive. R.II/33.

A photograph of the trailer (Exhibit D-1) shows that the door opens from the north side of the trailer. Consequently anyone standing on the south side of the trailer would not be able to see anyone standing on the steps or just inside the house if the door was open as Mr. Hamilton testified. R.II/38.

Jeff Hames testified that his name was Jeff "Hames," not "Haynes" as charged in he indictment. R.II/51. He owned the trailer located at 1110 Road 602. He also has another home in Pelahatchie. R.II/47. He was not staying at the trailer at the time of the alleged burglary. Someone called and let him know what had happened. R.II/49. He came and checked the trailer,

and nothing was missing or disturbed inside the house. The back door was messed up. He has not repaired it yet, he just fastens it on the inside. R.II/52.

Ralph Sciple, an investigator for the Neshoba County Sheriff's Department, got the call about 2:00 and went to the trailer. Mr. Hamilton had Willie Tubby in custody, and the deputies caught Gary Tubby a little way down the road. R.II/54.

He placed Gary Tubby in his truck and brought him back to the trailer where he advised him of his rights. No one else was present in the truck. After being given his Miranda warnings, Tubby said "that he had been riding with Willie Tubby and that it was his idea to break into something and to steal something to sell." R.II/83.

Subsequently, Sciple questioned Tubby again on August 11th at his office at the sheriff's office. Again, no one else was present. According to him, Tubby made the following statement which Sciple wrote out and Tubby signed:

> I had been drinking Friday 8/8/08. I don't remember much. I remember that me and Wayne Tubby were together and it was my idea to break into something to get something to sell for money. Me and Wayne went to this trailer. I opened the back door with my knife and then someone came around the trailer and said, Stop, and I ran.

R.II/88.

Sciple did not recover any fingerprints or any other evidence from inside the trailer showing that Gary Tubby had entered the trailer. R.II/91.

Sciple testified that the door of the trailer opens to the outside toward the south where Hamilton said he was. Gary Tubby never said he went inside the trailer. R.II/92.

Willie Tubby gave the following written statement:

> On Friday me and Gary were looking for some broken A.C. We saw two in front of a trailer. I parked my car in a little road, got out to go ask. Nobody was there. Gary went around back and I heard a noise and went to go see. It was Gary trying to get into the back door. That's when I heard a car door close and someone said, "Stop or I'll shoot." I got pushed out of the way and fell into the bushes two times.

R.II/92.

After the close of the state's case, the prosecutor moved to amend the indictment to show that the last name of the owner of the property was "Hames" rather than "Haynes." Counsel for the defendants objected to the amendment because they had spent considerable time and effort trying to locate property owned by "Jeff Haynes" but were unable to do so and because the amendment was one of substance. R.II/101. The trial judge overruled the objection holding:

> The objection is overruled. It's an amendment as to the form, not to the substance of the indictment. You may do so. Whenever you ask to do it by interlineation, you've got to give the Court a little short order permitting that.

R.II/101.The trial court then overruled the Defendants' motions for directed verdict. R.II/102.

Gary Tubby testified that he and Willie were walking down the road picking up cans when they saw the trailer. R.II/106. He went to the back of the trailer to urinate. He thought he saw some cans he could collect, so he went over to check. When he did so, he thought he saw someone in the trailer. He went to the door and knocked. "He messed with [the door but didn't get it open." That was when Mr. Hamilton shot directly at him. R.II/103-04. He did not get inside the trailer. R.II/104.

After the close of the defendants' case, the trial court sustained Willie Tubby's motion to dismiss the case against him and overruled Gary Tubby's motion. R.II/ 113-14.

The jury found Gary Tubby, "guilty as charged." RE 5.

SUMMARY OF THE ARGUMENT

The trial court committed reversible error in allowing the state to amend the indictment as to the name of the owner of the property. Cumulative prosecutorial misconduct requires reversal. The jury verdict is against the overwhelming weight of the evidence

ARGUMENT

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOWING THE STATE TO AMEND THE INDICTMENT AS TO THE NAME OF THE OWNER OF THE PROPERTY.

A. Standard of Review:

Whether an indictment is defective is an issue of law requiring de novo review. *Conley v. State,* 790 So.2d 773, 781 (Miss. 2001).

B. The Merits:

No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial on the issues raised by that charge . . . are among the constitutional rights of every accused. *Cole v. Arkansas*, 333 U.S. 196, 201, 68 S.Ct. 514, 517, 92 L.Ed.2d 644, 647 (1948); *Tarpley v. Estelle*, 703 F.2d 157, 160 (5th Cir. 1983).

The standard governing the sufficiency of the indictment is well-settled. An indictment must contain:

1. the essential elements of the offense charged;

2. sufficient facts to fairly inform the defendant of the charge against which he must defend;

3. sufficient facts to enable him to plead double jeopardy in the event of a future prosecution for the same offense. *Hamling v. United States*, 418 U.S. 87, 177, 94 S.Ct. 2887, 2907, 41 L.Ed.2d 590 (1974); *Love v. State*, 52 So.2d 470, 472 (Miss. 1951) ["must charge all of the essential elements of the statutory crime, and is void for failure to do so"].

These requirements are grounded in several fundamental constitutional rights of the defendant. First, the Sixth Amendment to the United States Constitution and Article 3, Section 26 give the accused the right to be informed of "the **nature and cause** of the accusation [emphasis added]." *Wilson v. State*, 221 So.2d 100, 104 (Miss. 1969) [Section 26 requires

statement of essential elements]; *State v. Sam*, 154 Miss. 14, 122 So. 101, 102 (1929) [Section 26 providing that the accused is entitled to be informed of the nature and cause of the accusation requires that the indictment allege the essential elements of the offense].

In addition, due process notions of fundamental fairness require basic notice of the events for which a defendant must answer in court. *U.S.Const.*, Amend. V and XIV. *Miss.Const.*, Art 3, Section 14.

Likewise, Article 3, Section 27 of the Mississippi Constitution requires indictment by grand jury in felony cases. *See, also, U.S.Const.*, Amend. V; *Rhymes v. State*, 638 So.2d 1270, (Miss. 1994) [Section 27 requires an indictment for felonies so that only a grand jury can amend essential elements of the offense].[1]

Moreover, the Fifth Amendment and Art. 3, Section 22 protect a defendant from being twice put in jeopardy for the same offense by requiring that all essential legal and factual elements of the offense be set forth in the indictment. *Russell v. United States*, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962); *Rutherford v. State,* 196 Miss. 321, 17 So.2d 803, 804 (1944).

As a general rule, the requirement that the indictment contain the essential elements of the crime may be satisfied by pleading the offense "in the words of the statute" ***so long as*** those words fully, directly, expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense.[2] *Hamling v. United States*, 418 U.S. at 117, 94 S.Ct. at 2907; *Love v. State*, 52 So.2d at 471.

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[1] Neither the prosecutor nor the trial judge can alter the indictment to fit the proof. *United States v. Prejean*, 494 F.2d 495 (5th Cir. 1974). Another purpose of the indictment is to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances. *United States v. Cruikshank*, 92 U.S. (2 Otto) 542, 558, 23 L.Ed. 588 (1876).

[2] "In an indictment upon a statute, it is not sufficient to set forth the offence in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty

There is an exception to this rule, however. While the statutory language may be used "in the general description of an offence, but it must be accompanied with such a statement of the *facts and circumstances* as will inform the accused of the specific offence, coming under the general description with which he is charged [emphasis added]." *United States v. Hess*, 124 U.S. 483, 487, 8 S.Ct. 571, 31 L.Ed. 516, 518 (1974); *Russell v. United States*, 369 U.S. 749, 764, 82 S.Ct. 1038, 8 L.Ed.2d 240, 251 (1962) ["Where guilt depends so crucially upon such a specific identification of fact, our cases have uniformly held that an indictment must do more than simply repeat the language of the criminal statute"]; *Spears v. State*, 175 So.2d 158, 162 (Miss. 1965) ["While the language of the statute is general in its terms, when you come to the offense, specific acts should be alleged, which acts on their face show a violation of the law"].

To this end, Rule 7.06, UCCCR, states that an "indictment shall be a plain, concise and definite written statement of the *essential facts* constituting the offense charged and shall *fully* notify the defendant of the nature and cause of the accusation [emphasis added]."

Put another way,

> It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, "includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species--it must descend to particulars."

United States v. Cruikshank, 92 U.S. 542, 558 (U.S.1875).

For example, this Court has held that it is not sufficient to charge merely that the defendant burglarized a dwelling; the indictment must charge the specific ownership of the building.[3] *Crosby v. State*, 191 Miss. 173, 2 So.2d 813 (1941). Moreover, the Court has held that

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or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished." *United States v. Carll*, 105 U.S. 611, 612, 26 L.Ed. 1134 (1881).

[3] Burglary requires that the breaking and entering be of a building owned by another.

the ownership of the dwelling is an essential element of the offense of burglary which must be pled and proved as charged by the grand jury. *Wright v. State,* 94 So. 716, 717 (Miss. 1923).

Because it is an essential element of the offense, the ownership of the building is not one of form, but rather is one of substance. Amendments of substance may be made only by the grand jury. *Quick v. State*, 569 So.2d 1197, 1199 (Miss. 1990).

Although it deals with a constructive amendment, rather than a formal amendment, the case of *Stirone v. United States,* 361 U.S. 212 (1960) is instructive in showing what sorts of amendments will be allowed to an indictment regarding facts which are pled regarding essential elements of the offense. In *Stirone,* the defendant was charged with interference with interstate commerce under the Hobbs Act by extortion. The indictment charged as the interstate commerce nexus, the importation of **sand** into Pennsylvania to be used in the construction of a steel mill. After the trial began, the government was allowed to produce evidence and to argue that the extortion also impacted the exportation of **steel** from Pennsylvania. The jury was charged that Stirone's guilt could rest either on a finding that the sand was imported from another state or that the concrete into which it went was used to build a steel mill which would ship steel out of the state. The Court held that the district judge erred in allowing the prosecution to alter the basis on which Stirone could be convicted. "**Although the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same**. And the addition charging interference with steel exports here is neither trivial, useless, nor innocuous [emphasis added]." *Stirone,* 361 U.S. at 217.

Most courts have held that while not all changes in the indictment require grand jury action, the central question to be determined is whether the alteration is such as to alter the legal or factual elements necessary to prove an essential element of the offense. This distinction is set out thoroughly in *United States v. Adams,* 778 F.2d 1117 (5th Cir. 1985). Although *Adams,* again

is a case involving a constructive amendment rather than a formal amendment, the analysis is the same. *Stirone,* 361 U.S. at 217. The Court of Appeals in *Adams* described the analysis as follows:

> *Stirone* requires that courts distinguish between constructive amendments of the indictment, which are reversible *per se,* and variances between indictment and proof, which are evaluated under the harmless error doctrine. **The accepted test is that a constructive amendment of the indictment occurs when the jury is permitted to convict the defendant upon a factual basis that effectively modifies an essential element of the offense charged. . . .** In such cases, reversal is automatic, because the defendant may have been convicted on a ground not charged in the indictment. . . . If, on the other hand, the variation between proof and indictment does not effectively modify an essential element of the offense charged, "the trial court's refusal to restrict the jury charge to the words of the indictment is merely another of the flaws in trial that mar its perfection but do not prejudice the defendant." [citations omitted and emphasis added.]

Adams, 778 F.2d at 1123. In *Adams,* the Court reversed where the indictment charged the defendant with falsifying an application for a firearm by giving a false name, but the proof and the instructions added the falsification of the defendant's address. Altering the indictment to allow conviction on a different **factual basis** was found to be an improper amendment of the indictment because it altered an essential factual element of the offense.

That is precisely what occurred here. The trial court allowed the prosecution to amend the factual basis of an essential element of the offense. Such amendments are reversible without inquiry into prejudice because it means that the defendant was convicted on a charge not made by the grand jury. *Lester v. State,* 692 So.2d 755, 775 (Miss. 1997) [quoting "*Stirone v. United States*, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960)(in which the Supreme Court held that amending the essential facts in the indictment was reversible error per se without any inquiry

into prejudice"], overruled on other grounds in *Weatherspoon v. State*, 132 So.2d 158 (Miss. 1999).[4]

As this Court held in *Rhymes v. State,* 638 So.2d 1270, 1275 (Miss. 1994):

> It is well settled in this state ... that a change in the indictment is permissible if it does not materially **alter facts which are the essence of the offense on the face of the indictment** as it originally stood or materially alter a defense to the indictment as it originally stood so as to prejudice the defendant's case. *Wilson v. State,* 574 So.2d 1324 (Miss.1990) citing *Ellis v. State,* 469 So.2d 1256, 1258 (Miss.1985), quoting from *Shelby v. State,* 246 So.2d 543, 546 (Miss.1971) [emphasis added].

Here, the prosecution, over the Defendant's objection, was allowed to alter facts which are the essence of the offense. Such an amendment was one of substance and prejudiced the defense by requiring them to comb the countryside for a non-existent owner of the dwelling. R.II/101. The amendment of the indictment; therefore, requires reversal.

II. CUMULATIVE PROSECUTORIAL MISCONDUCT REQUIRES REVERSAL.

A. Standard of Review:

Because no objection was made to the complained of errors, review is under the plain error standard.

B. The Merits:

It should be obvious that the principal issue with regard to the jury's decision was witness credibility. More specifically, the jury had to decide if Tubby was telling the truth about whether or not he entered the building or if Hamilton was telling the truth or was mistaken about whether or not he saw Tubby inside the building. This is so because no person other than Hamilton put Tubby inside the building; nor did Tubby's own statements to the Investigator do so. Moreover,

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[4] *Lester* also hold that failure to request a continuance does not bar the Court from considering the issue because the "trial court would still have lacked the authority to amend the indictment, even if a continuance had been granted." *Id.*, 692 So.2d at 775.

Willy Tubby's statement does not place Tubby in the house but only on the porch attempting to open the door.

Tubby argued that because Hamilton had fired his weapon at Tubby, Hamilton had a motive to tailor his testimony to put Tubby inside the house so that Hamilton would not be subject to being charged with unlawfully discharging his firearm. R.II/125-26. At trial, the prosecution made several egregious arguments which had a seriously negative impact on the jury's decision and denied Tubby his right to a fair trial.

First of all, most seriously, the prosecutor argued that "[Gary Tubby] didn't steal anything. Do you know why? Thank God for good neighbors. **Mr. Hamilton isn't facing any charges and he never will face any charges stemming from this incident** [emphasis added]." R.II/130.

No prosecutor could fail to know that every court has repeatedly condemned prosecutorial arguments which are based on facts not in evidence, relate the prosecution's personal experience to the jury, 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 facts not in evidence]; *Tubb v. State*, 217 Miss. 741, 64 So.2d 911 (1953) [vouching, facts not in evidence, personal experience and opinion]; *United States v. Thomas*, 728 F.2d 313, 319-20 (6th Cir. 1984), *overruled on other grounds, United States v. Carroll,* 26 F.3d 1380 (6th Cir. 1994) [facts not in evidence]; *United States v. Sanchez*, 176 F.3d 1214, 1223 (9th Cir. 1999) [error to make insinuations not based on evidence].

The unsworn testimony of the prosecutor in this case is so clearly improper and was so clearly calculated to make disparage Tubby's defense that Hamilton was mistaken or lying. *Lawn v. United States*, 335 U.S. 339, 359-60, n. 15, 78 S.Ct. 311, 2 L.Ed.2d 321 (1980); *Tubb v. State*, 217 Miss. 741, 64 So.2d 911 (1953) [Improper to argue facts based on personal knowledge

only]; *Sanderford v. State*, 178 Miss. 705, 174 So. 814, 815 (1937) [Reversible error to argue facts not proved]; *Collins v. State*, 408 So.2d 1376 (Miss. 1982) [Allusions to non-record evidence required reversal despite admonition to disregard]; *Dugan Drugs Stores, Inc. v. United States,* 326, 835, 837 (5th Cir. 1964); *Handford v. United States,* 249 F.2d 295, 296-98 (5th Cir. 1958); *United States v. Carter*, 236 F.3d 777, 785 (6th Cir. 2001); *Washington v. Hofbauer,* 228 F.3d 689, 700 (6th Cir. 2000) [citing *Donnelly v. DeChristoforo,* 416 U.S. 637, 646, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)].

Arguments such as the one 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 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).

Counsel for Tubby, however, failed to object. Therefore, on appeal the error is subject to plain error review. A review under the plain error doctrine is necessary when a party's fundamental rights are affected, and the error results in a manifest miscarriage of justice. *Williams v. State*, 794 So.2d 181, 187-88 (Miss.2001). To determine if plain error has occurred, this Court must determine "if the trial court has deviated from a legal rule, whether that error is plain, clear or obvious, and whether the error has prejudiced the outcome of the trial." *Cox v. State*, 793 So.2d 591, 597 (Miss. 2001) (relying on *Grubb v. State*, 584 So.2d 786, 789 (Miss.1991).

This Court has repeatedly held that it is reversible error for the state to inject extraneous and prejudicial matters into the trial and may be reversible error even in the absence of a specific

objection. *Smith v. State*, 457 So.2d 327, 333-34 (Miss. 1984); *Tudor v. State*, 299 So.2d 682 (Miss. 1974); *Howell v. State*, 411 So.2d 772, 776 (Miss. 1982). Thus it is clear that the prosecutor deviated from a legal rule which was clear, plain and obvious.

Moreover, the prosecution's error was prejudicial. A prosecutor's improper arguments "'carr[y] with [them] the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence [citation omitted].'" *United States v. Murrah*, 888 F.2d 24, 27 (5th Cir. 1989). The improper arguments in the instant case were particularly egregious because the jury had to make a decision about whether or not to believe disbelieve Mr. Hamilton when he claimed Tubby had entered the trailer. Since Hamilton was the only witness who put Tubby in the house, and his testimony was somewhat suspect because the open door would have blocked his view, the prosecutor's conduct was particularly prejudicial.

Because credibility was the only real issue, the error could not have been harmless.. *See, e.g., United States v. Gradsky,* 373 F.2d 706 (5th Cir. 1967) [vouching error not harmless where credibility was the issue]; *United States v. Crutchfield*, 26 F.3d 1098, 1103 (11th Cir. 1994) [reversing for prosecutorial misconduct where "[t]he prejudicial effect of [the misconduct cannot be disputed, as this case turned largely on the jury's credibility determinations of the several witnesses who testified"]; *United States v. Sanchez*, 176 F.3d 1214 (9th Cir. 1999) [cumulative effect of prosecutorial misconduct undercutting defendant's credibility was not harmless]; *United States v. Watson*, 171 F.3d. 695 , 700-01 (D.C. Cir. 1999) [error not harmless where "credibility was key"]; *United States v. Manning*, 23 F.3d 570, 575 (1st Cir. 1994), *cert. denied*, 519 U.S. 853 (1993) [prosecutorial misconduct not harmless where it "significantly interfered with the jury's ability to make an essential and liminal credibility determination"]; *United States v. Eyester*, 948

F.2d at 1208 [vouching not harmless where issue was government witness credibility relative to defense witnesses].

This right of one criminally accused to a fair trial is a "fundamental liberty" secured to the accused by the Fourteenth Amendment to the Constitution of the United States. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 1692-93, 48 L.Ed.2d 126, 130 (1976); *Drope v. Missouri*, 420 U.S. 162, 172, 95 S.Ct. 896, 904, 43 L.Ed.2d 103, 113 (1975). This Court in a variety of contexts has condemned conduct by the prosecuting attorneys that has substantially deflected the jury's attention from the issues it has been called up to decide, that interjects appeals to bias, passion or prejudice.

Moreover, the Court has said, "[w]here such conduct is so substantial that the accused's right to a fair trial is substantially impaired, the trial judge should declare a mistrial." *Hickson v. State,* 472 So.2d 379, 384 (Miss. 1985). *See also West v. State,* 485 So.2d 681 (Miss. 1085) ["It is the duty of the presiding judge, as well as trial attorneys on both sides, in the conduct of a criminal case to see that the constitutional rights of an accused are not violated;" *Hawkins v. State*, 224 Miss. 309, 330, 80 So.2d 1 (1955), ["where a constitutional error was violated affecting an accused's right to a fair trial the case will be reversed, regardless of the overwhelming proof of guilt"].

As long ago as 1950, this in *Brooks v. State,* 209 Miss. 150, 46 So.2d 94 (1950) held:

> Constitutional rights in serious criminal cases rise above mere rules of procedure.... Errors affecting fundamental rights are exceptions to the rule that questions not raised in the trial court cannot be raised for the first time on appeal....
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> We neither condone nor reward inaction. But we cannot affirm where due process has been so lacking that a conviction has resulted without proper consideration of constitutional and fundamental rights. (Citations omitted).

Id. at 209 Miss. at 155-56, 46 So.2d at 97. *See also, Randall v. State,* 806 So.2d 185, 232 (Miss. 2001); *Gallion v. State*, 469 So.2d 1247, 1249 (Miss. 1985); *Smith v. State*, 457 So.2d 327, 333-36 (Miss.1984); *Read v. State*, 430 So.2d 832, 837-41 (Miss. 1983).

This Court should reverse Tubby's case for a new trial. The prosecution's improper conduct rendered Appellant's trial fundamentally unfair in violation of the Sixth and Fourteenth Amendments and corresponding sections of the Mississippi Constitution. *Panzavecchia v. Wainwright,* 658 F.2d 337 (5th Cir. 1981); *Maurer v. Department of Corrections*, 32 F.3d 1286, 1289 (8th Cir. 1994) [vouching testimony found to have invaded the jury's exclusive province of determining credibility to the extent that it denied defendant due process of law]; *United States v. Hilton*, 772 F.2d 783, 786 (11th Cir. 1985) [when improper bolstering testimony goes to the character for truthfulness of the only witness to repudiate the defendant's claim, admission of such testimony is reversible error].

In addition to the prosecutor's vouching argument about Hamilton, the prosecutor also improperly injected Tubby's underage drinking as a reason for finding him guilty.

In his cross-examination, after Tubby testified he had been drinking the day of the alleged burglary, the prosecutor asked Mr. Tubby:

Q. Mr. Tubby, your're 19?

A. Yes.

Q. Do you know the legal drinking age in Mississippi?

A. Yes, sir.

R.II/112.

In closing, the prosecutor then argued Tubby's underage drinking as a reason to disbelieve him and to convict him ["He had never done anything illegal; but he was drinking under age that day"]. R.II/130.

Again, the defense did not object; however, every prosecutor by now should know that interjecting evidence of other offenses as a reason for conviction is improper. The rule against using prior offenses as evidence of guilt is so well known as to require little discussion. The prosecution's use of the evidence to invite the jury to find Tubby guilty violated the proscription of M.R.E., Rule 404 against the misuse of character evidence as substantive evidence of guilt. *United States v. Fortenberry*, 860 F.2d 628 (5th Cir. 1988) [Even if evidence was properly admitted for some purposes, argument suggesting use for improper reasons was defective[. Inflammatory evidence of other bad acts by an accused is presumed harmful. *Tudor v. State*, 299 So.2d 682 (Miss.1974), and it is reversible error to introduce extraneous and prejudicial matters before a jury. *McDonald v. State*, 285 So.2d 177 (Miss.1973).

In an additional error designed to undermine Tubby's credibility, the prosecutor asked him repeatedly on cross-examination to state if the other witnesses were lying. For example, the prosecutor asked if Mr. Hamilton was lying when he said the door was open. R.II/107. With regard to the statements Sciple said Tubby had made, the prosecutor asked: "So now Investigator Sciple is lying." R.II/108. Later, the prosecutor asked, "So when he said that he read you your rights in the truck, he was lying?" R.II/108. Later, "So Mr. Hamilton was lying when he came around and said that he didn't shoot at you and that the door is open, Is that right?" R.II/109. Again, "[a]nd Investigator Sciple lied about the statement and everything in it and whether he Mirandized you. Is that right?" R.II/109. "So out of our witnesses, you're the only one telling the truth." R.II/109.

Again, by now a prosecutor should know that he cannot ask the defendant on cross-examination to opine regarding the veracity of a witness' testimony. *United States v. Sanchez,* 176 F.3d 1214, 1219-20 (9th Cir.1999) (holding that a prosecutor's questions were in error because they "compelled [the defendant] to give his opinion regarding the credibility of a deputy

marshal"). As one court has stated, "the predominate, if not sole purpose of such questioning is simply to make the defendant look bad." *State v. Graves*, 668 N.W.2d 860, 872 (Iowa 2003). For this reason, a majority of courts to addressing this issue have determined that such questioning is categorically improper. Payne, Rebecca, *Admissibility of Testimony Concerning the Truthfulness or Untruthfulness of a Witness*, 35 The Colorado Lawyer 37 (December 2006).

> The general concern about "were they lying" questions is that asking one witness to express an opinion as to the veracity of another witness calls for improper comment on another witness' testimony, and that it is the province of the jury to determine the credibility of witnesses. *See State v. Casteneda-Perez,* 61 Wash.App. 354, 810 P.2d 74, 78-79 (1991). Further, it is perceived as unfairly giving the jury the impressions that in order to acquit, they must determine that witnesses whose testimony is at odds with the testimony of the defendant are lying. *See id.*

State v. Pilot, 595 N.W.2d 511, 516 (Minn. 1999). *See also*, *United States v. Geston*, 299 F.3d 1130, 1135-37 (9th Cir. 2002) [reversing on "due process" grounds defendant's convictions for assault and use of force under color of law, because trial judge allowed prosecutor to cross-examine law enforcement officers about veracity of other witnesses' testimony]; *United States v. Jae Shik Cha*, 97 F.3d 1462 (9th Cir. 1996); *United States v. Richter*, 826 F.2d 206, 208-09 (2d Cir. 1987) [finding, in prosecution for conspiracy to distribute methamphetamine and money laundering, trial judge erred by allowing government counsel to cross-examine defendant about whether other witnesses were lying when they testified inconsistently with his testimony]; *State v. Casteneda-Perez,* 810 P.2d 74, 79 (Wash. App. 1991) [holding prosecutor's questions asking witnesses whether other witnesses were lying was "contrary to the duty of prosecutors, which is to seek convictions based only on probative evidence and sound reason"]; *State v. Flanagan,* 801 P.2d 675, 679 (N.M. 1990) ["Whether the defendant believes the other witnesses were truthful or lying is simply irrelevant."]; *People v. Berrios,* 298 A.D.2d 597, 750 N.Y.S.2d 302, 302 (2002) ["Whether the defendant believed that the other witnesses were lying is irrelevant.]

Mississippi also prohibits the questioning of a witness about the credibility of another witness. With the proper foundation, a witness can be asked for an opinion as to the other witness's **character** for truthfulness or untruthfulness under M.R.E. 608, but the witness cannot be asked to give an opinion as to the truthfulness of the witness's statements. Such questions are irrelevant to the extent they invade the province of the jury. *Hart v. State*, 637 So.2d 1329 (Miss. 1994). It is the jury's role to evaluate credibility of witnesses and decide the relative reliability of the facts.

Again, defense counsel failed to object to the prosecution's attempts to make Tubby look bad and impeach his credibility. Although the error might not be reversible standing alone, this Court can consider it in determining cumulative error.

The Mississippi Supreme Court has held that "[t]he standard of review which this Court must apply to lawyer misconduct during opening statements or closing arguments is "whether the natural and probable effect of the improper argument is to create unjust prejudice against the accused so as to result in a decision influenced by the prejudice so created." *Sheppard v. State*, 777 So.2d at 661 (Miss.2001) (citing *Ormond v. State*, 599 So.2d 951, 961 (Miss.1992)); *Chambers v. Mississippi*, 410 U.S. 284, 298, 93 S.Ct. 1038, 1047 (1973) [reversing based on various evidentiary errors resulting in a denial of due process].

III. III. THE JURY VERDICT IS AGAINST THE OVERWHELMING WEIGHT 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, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Matula v. State*, 220 So.2d 833, 836 (Miss. 1969).

Courts are not required to believe testimony which is inherently incredible or which is contrary to the physical facts. The Mississippi Supreme Court expressed the rule in *Teche Lines v. Bounds*, 182 Miss. 638, 179 So. 747, 749 (1938):

> 'If there be any one thing in the administration of law upon which the decisions, the texts, and the general opinion of bench and bar are in agreement, it is that evidence which is inherently unbelievable or incredible is in effect no evidence * * *. And * * * the overwhelming weight of authority throughout the country is that believable or credible evidence in civil cases is that which is reconcilable with the probabilities of the case and that bare possibilities are not sufficient. Where evidence is so contrary to the probabilities when weighed in the light of common knowledge, common experience, and common sense that impartial, reasonable minds cannot accept it other than as clearly an improbability, it will not support a verdict.

In a number of cases, the Mississippi Supreme Court has found that 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 Misss. 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).

Here too, Mr. Hamilton's testimony that he could see that Gary Tubby was in the house contradicts the laws of physics because the opened door would have kept him from seeing inside the house. Because Mr. Hamilton's testimony is improbable, this Court should reverse Tubby's conviction.

CONCLUSION

The trial court erroneously allowed the indictment to be amended on an essential factual element of the crime. Therefore, this Court should reverse Mr. Tubby's conviction.

Furthermore, because the prosecution committed errors which had the cumulative effect of prejudicing the jury on the major issue in the case—withess credibility, the Court should reverse.

Finally, the Court should reverse because the evidence fails to support Mr. Tubby's guilt.

RESPECTFULLY SUBMITTED,
GARY TUBBY, APPELLANT

BY: 
ATTORNEY FOR APPELLANT

CERTIFICATE

I, Julie Ann Epps, Attorney for Appellant, do hereby certify that I have this date mailed, by first class mail, postage prepaid, the original and three copies of the foregoing to the Clerk of this Court in Jackson, Mississippi at PO Box 249 Jackson, Mississippi 39205 have mailed by United States Mail, first class postage prepaid, a true and correct copy to the Honorable Marcus D. Gordon, Circuit Judge, at PO Box 220, Decatur, Mississippi 39327, Jim Hood, Attorney

General, PO Box 220, Jackson, Mississippi 39205 and Mark Duncan, PO Box 603, Philadelphia, Mississippi 39350.

This, the 22nd day of January, 2010.

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