IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF ALABAMA

CRIMINAL APPEALS NO. 94-1552

RODNEY KARL STANBERRY,

APPELLANT,

vs.

STATE OF ALABAMA,

APPELLEE.

ON APPEAL FROM THE CIRCUIT COURT OF

MOBILE COUNTY, ALABAMA

CC 92-2313, 2314, 2315

APPELLANT'S BRIEF AND SUPPORTING ARGUMENT

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STATEMENT OF FACTS

The Defendant was charged with three offenses (1) attempted murder (CC 92-2313), Robbery 1st (CC 92-2314), and Burglary 1st (CC 92-2315). The Defendant was charged on each count by the June, 1992 session of the Mobile County Grand Jury. (CC-22, 24, 26) The trial of these cases began on April 4, 1995, and testimony concluded on April 7, 1995 whereupon the jury returned a guilty verdict as to each charge. The Defendant was sentenced to twenty (20) years in prison, said sentences to run concurrent with each case.

Prior to the trial of the matter, the defense discovered, through a private investigator, that another individual by the name of Terrell Moore, wherein Mr. Moore confessed to the District Attorney's Office, the investigating police officers, the defendant's investigator and the defendant's attorney that he (Mr. Moore) had in fact committed the crimes for which the Defendant was charged, was aided by two other individuals living in the State of New York, and that the Defendant, Mr. Stanberry, did not participate in the crime. Said testimony was recorded on video and audio cassette. (R-22-32)

Mr. Moore was called by the District Attorney's Office to testify before the Grand Jury and was granted immunity, a copy of which is presented in the record as Court's Exhibit No. 1, wherein the State granted immunity to Mr. Moore for his testimony at the Grand Jury proceedings, but that in the event he were to testify at trial, he would not be granted said immunity. Mr. Moore then proceeded to obtain private counsel, namely, the Honorable Bob Clark of Mobile, Alabama, and when called to testify at trial, Mr. Moore took the Fifth Amendment right to remain silent. (R-686) The trial court, the Honorable Ferrill D. McRae, ruled in the Motion in Limine, prior to jury selection, that in the event Mr. Moore took the Fifth Amendment and refused to testify at trial, then the Defendant would not be able to use his video taped statement, nor his audio taped statement which clearly and unequivocally exculpates the Defendant from these crimes. (R-32)

The testimony at trial proceeded as follows:

LARRY JOHNSON MALONE, JR.

(DIRECT EXAMINATION)

The State's first witness was Mr. Larry Johnson Malone, Jr., and eleventh grader at Leflore High School. (R-67) Mr. Malone testified that at the time of the shooting of the victim, he was fifteen (15) years old and lived across the street, or at a location where he could observe the home of the victim, Valerie Finley. (R-68) On the morning of the shooting, Mr. Malone identified through State's Exhibit No. 39, that being a photograph of the Defendant's brown Bronco automobile as having been parked at the Finley home on the morning of the shooting. (R-70) Mr. Malone arrived at the Finley home with his little brother, found the front door locked and when no one answered his knocking on the door, he went to the back door. (R-70-72) The back door was cracked slightly opened. (R-72) Mr. Malone entered the house and located the victim, Valerie Finley, on the floor of her bedroom, lying on a pile of clothes. (R-73) Mr. Malone sought help from his mother and called 911. (R-74) Mr. Malone remained at the home when the police and Mike Finley arrived and when Ms. Finley was taken away in an ambulance. At that time he had no idea what had happened to her. (R-75)

(CROSS-EXAMINATION)

On cross-examination, Mr. Malone stated that he observed the vehicle that he identified as Mr. Stanberry's vehicle at the Finley home at approximately 8:30 a.m. or earlier in the morning. (R-77) The vehicle was parked in the driveway facing the house. (R-77) Mr. Malone arrived at the back door of Ms. Finley's home at approximately 9:00 or 10:00 that morning. (R-76) Apparently the shooting occurred on March 2, 1992.

During cross-examination, it was revealed that Mr. Malone had difficulty with his memory due brain surgery in 1989. (R-83) The surgery resulted from a blood clot in the brain. (R-83) He admitted that he could not remember things as well now, after the surgery, as he could before the surgery. (R-84) The surgery also resulted in speech problems and seizures, as well as memory problems, and caused him to walk with a limp. (R-84)

It was further revealed that Mr. Malone attended learning disability classes at Leflore High School. (R-85) He takes dilantin on regular occasion, three (3) times a day, and was taking dilantin on the morning of the shooting. (R-85)

Further cross-examination of Larry Malone revealed that Mr. Malone suffered from poor memory but related to the jury that he saw Mr. Stanberry's Bronco parked in the victim's driveway at approximately 8:30 a.m. or earlier on the morning in question. (R-77) He saw the

Bronco from across a cul-de-sac circular drive from his home which was located across a circular cul-de-sac type drive. The witness testified that he suffered from memory problems due to surgical procedures and brain damage from years past. (R-83)

Mr. Malone denied having spoken to the Defendant's private investigator, Mr. Ryan Russell, during a fish fry at a friends house and insisted, instead, that he spoke to Mr. Russell while at school. (R-102) Mr. Malone also denied knowing an individual by the name of Willie White. (R-103)

DR. ERIC WEBER

(DIRECT EXAMINATION)

The State's next witness was Dr. Eric Weber, a neurosurgeon employed with University of South Alabama Medical Center. (R-108) Dr. Weber testified that he provided medical services to the victim, Ms. Valerie Finley. When asked to related what information the doctor received as far as a history of Ms. Finley during her stay in the hospital, the defense objected as to hearsay, said objection overruled by the Court, and the Court proceeded to take it upon itself to examine the witness to establish proper basis for the State's questions. (R-110)

Dr. Weber testified that Ms. Finley suffered from a gunshot wound to the head and brain damage. (R-113) Surgical procedures were required to remove bone fragments from the brain. (R-114)

The doctor recovered what he testified to be bullet fragments from her brain, but did not find a flattened bullet in Ms. Finley's head. (R-116) Ms. Finley was discharged from the hospital on April 6, 1992. (R-116)

He further testified that Ms. Finley developed a seizure disorder as a result of the injury to her head. (R-116) She also developed a condition where cerebral spinal fluid leaked from her brain through her nose (R-117), the threat being that leakage of fluid indicates an opening to the cerebral brain portion of the victim's head and thus makes her susceptible to infection or contracting meningitis. (R-117)

Ms. Finley also lost her ability of movement in her left arm, use of her left hand and lost all function in both of her legs. (R-118) In the doctor's opinion, Ms. Finley would never walk again. (R-118)

(CROSS-EXAMINATION)

Cross-examination of Dr. Weber revealed that, although he is not a ballistics, the bullet fragments that he found in Ms. Finley's head were consistent with a bullet having ricocheted off of her head leaving bone and bullet fragments inside the skull. (R-124) The main portion of the bullet would have deflected off of Ms. Finley's head. (R-124)

CAPTAIN FRANK DEES, PRICHARD P.D.

(DIRECT EXAMINATION)

The State's next witness was Captain Frank Dees with the Prichard Police Department. (R-134) Captain Dees testified that he responded to the victim's home on the morning of the shooting which was located in Whistler, Alabama, still in Mobile County. (R-134, 135) He arrived at the home of Ms. Finley at approximately 11:20, at approximately the same time as the paramedics. (R-135) When Captain Dees entered the home, he found Ms. Finley lying on the floor. (R-136) A sofa was found turned upside down in the home, and Captain Dees determined that was Ms. Finley's normal way of house cleaning, according to a neighbor, Ms. Malone, who was present at the time. (R-136)

(CROSS EXAMINATION)

On cross-examination, Captain Dees testified that he did not recall a black man coming into the house on the day in question, and informing him that guns had been stolen. (R-144)

Captain Dees did not speak to Cora Malone or Larry Malone on that day. (R-149)

TESTIMONY OF EMMET ROGERS

(DIRECT EXAMINATION)

The State's next witness was Mr. Emmet Rogers, a neighbor of the victim. (R-151) His home was located down the street, in a position such that a car would have to circle around the cul-de-sac, come out and come by his house to travel down that street. (R-152)

On the morning in question, at approximately 11:30 a.m., Mr. Rogers saw the paramedics and policemen come to the victim's home. (R-154) He initially heard from others that Ms. Finley had fallen and bumped her head. (R-154) At approximately ten (10) minutes to 8:00 that morning, he saw a brown Bronco with two other cars, a blue and white Pontiac and a plum-colored convertible Pontiac with gold wire wheels, in the cul-de-sac area. (R-155, 156) Three (3) men were present, two guys were in one car and the third was standing beside a vehicle. (R-155) Mr. Rogers identified one of the individuals as "Tyrone". (R-155) He could

not, however, identify the other two individuals. (R-160) He further testified that he did not know Rodney Stanberry or Rene Whitecloud. (R-160)

The witness further testified that there were no obstructions present that would obstruct Tyrone's view of the Bronco at its location. (R-161) The weather was clear, without rain, and full daylight existed. (R-160)

The witness testified also that the next day, on Tuesday, at approximately 4:30 or 5:00 in the afternoon, he saw Mike Finley, the victim's husband, get into the Bronco with a shotgun and drive away. (R-162) He could not see who was driving the Bronco. (R-163)

He again saw the Bronco the next day, Wednesday night, sitting in Mike Finley's driveway at approximately 8:30 or 9:00 p.m. (R-163) In his words, the Bronco seemed to be "partying in the driveway", (R-163) further explaining that the individuals were standing around in the driveway drinking and socializing. (R-164)

(CROSS-EXAMINATION)

On cross-examination, Mr. Rogers testified that he told the private investigator, Mr. Ryan Russell, that there were two cars and not three present in the cul-de-sac. (R-184) However, he immediately recanted his testimony and stated that he told Mr. Russell that there were three cars instead of two, and that the audio tape must have been changed. (R-185) Mr. Rogers could not recall telling Mr. Russell, the private investigator, that he did not tell the police about three cars. (R-192)

Mr. Rogers stated that when he looked out his door on the day in question, he never saw the Bronco in the Finley driveway. (R-195, 196) Neither did he notice any distinguishing marks on the Bronco. (R-197) He ultimately stated that he could not be sure that he saw the same brown Bronco in question. (R-198) Mr. Rogers also testified that he had never seen the brown Bronco in that neighborhood before. (R-199) The witness ultimately clarified that he saw three cars in the median, two Grand Prixs and a Bronco. (R-206) He saw no other cars at that time. (R-206)

Mr. Russell took his statement at a fish fry at Willie White's house there in the neighborhood. (R-209) Mr. Rogers also testified that he observed the private investigator speak to Larry Malone, Jr. at the fish fry. (R-218)

Despite not being able to distinguish any particular features about the Bronco other than the chocolate brown color, Mr. Rogers could not be certain that the Bronco he saw on the day of the shooting was the same Bronco he saw the next day. (R-221) He was making an assumption in that regard. (R-221)

OFFICER EDDIE RAGLAND, PRICHARD P.D.

(DIRECT EXAMINATION)

The State's next witness was Officer Eddie Ragland of the Prichard Police Department. (R-225) Officer Ragland did not respond to the scene on March 2, 1992. (R-225) Officer Ragland did respond the following Wednesday, approximately two days after the shooting. (R-226) He learned that several guns were missing from the residence at the time of the shooting and that Mr. Finley had gotten the guns back. (R-226) Mr. Finley found the guns in the woods. (R-226) Mr. Finley further informed Officer Ragland that someone told him that the guns were there and that he could go get them. (R-227) Officer Ragland did not recover any of the guns stolen in this case. (R-230)

Officer Ragland processed the gun safe and area for latent fingerprints. (R-230, 231) He was not able to find any fingerprints of value. (R-231) Office Ragland could not state whether Rene Whitecloud's fingerprints were on the safe or Rodney Stanberry's or Mike Finley's as well. (R-232)

Officer Ragland admitted that if Captain Dees or other individuals testified that Officer Ragland was on the scene on that Monday, the day of questioning, that the would be incorrect. (R-235, 236) The only persons present when Office Ragland took the photographs on that Wednesday was himself and Mike Finley. (R-235)

Officer Ragland did not request a list of the guns taken in the burglary, nor did he ask to see that guns that were taken. (R-238) Mr. Finley did inform Officer Ragland that the guns were found in a pillow case. (R-239) Officer Ragland also took photographs of a mask and gloves lying on the kitchen counter on Wednesday. (R-239)

Officer Ragland did not fingerprint the back door, drawers in the house, the front door, microwave or television, or keys for fingerprints. (R-241, 242) Neither did he fingerprint a purse belonging to the victim. (R-242) Officer Ragland did not search for hair samples. (R-242) He did not look inside the mask to see if there were hair samples. (R-242, 243)

Again, Officer Ragland did not look at the guns retrieved by Mr. Finley and he did not fingerprint the guns. (R-244) Neither was he requested to fingerprint the guns. (R-244) Officer was not aware of a shell casing and bullet being recovered from the house. (R-245)

MR. MICHAEL FINLEY

(DIRECT EXAMINATION)

The State's next witness was Mr. Michael Finley (R-238), whom the Court allowed the State to call as a hostile witness. (R-224) Mr. Finley testified that he was the former husband of Valerie Finley. (R-249) He was also hunting friends with Rodney Stanberry. (R-249) The would go hunting together and visit various gun shows together. (R-249) Mr. Stanberry would come by his house on various weekends. (R-249)

Mr. Finley had known Rodney Stanberry for three or four years and considered him a good friend. (R-250) Good enough friends, in fact, that he let Mr. Stanberry use his Sam's Wholesale card. (R-250)

Mr. Finley also testified that Mr. Stanberry drove a brown Bronco with a sticker on the back that said, "One Night Stand". (R-250) Mr. Stanberry had been to Mr. Finley's house before and have even eaten dinner there and knew the kinds of guns that Mr. Finley owned. (R-251) They would target shoot together. (R-251)

Ms. Finley owned a pistol of her own and always kept it loaded. (R-252) Mr. Finley kept his guns in a locked vault, a vault locking at both top and bottom. (R-253)

Mr. Finley had met Rene Whitecloud through Rodney Stanberry one time when they visited his home approximately a week before Ms. Finley was shot. (R-254, 255) Mr. Whitecloud and another individual were friends of Rodney's from New York. (R-255) He did not let Mr. Whitecloud see his gun vault or let him inside his house. (R-255) Ultimately, Mr. Stanberry and his friends had been to the house approximately three times before the shooting. (R-256) Mr. Whitecloud was also known as "Ponytail" due to the fact that he had a long ponytail. (R-258)

Mr. Finley further testified that the Defendant worked for BFI and drove a truck to and from the Chastang landfill. (R-259) BFI is a waste management company. (R-260) Mr. Finley did not know the route drive by the Defendant during his work. (R-260)

On the Saturday before the shooting, Mr. Finley, his wife, Rene Whitecloud and the Defendant went target shooting in Axis, Alabama. (R-261) Mr. Whitecloud used a 9mm pistol when he was target shooting. (R-262) The Sunday before the shooting, Mr. Finley and his wife traveled to Mississippi and did not return until approximately 10:00 p.m. (R-264)

Mr. Finley left for work Monday morning at approximately 6:30 a.m. (R-264). Mr. Finley further testified that when he arrived home on the day of the shooting at approximately 12:00 noon, he discovered his gun vault opened and dresser drawers opened. (R-268) Mr. Finley testified that four rifles, including a shotgun, were missing as well as five pistols. (R-268-270) There also was a stun gun missing. (R-270) Also, some pocket knives, another knife, ammunition was taken from the vault and some jewelry was taken. (R-270-272) In addition, a pillow case was missing. (R-274)

Mr. Finley spoke to Rodney Stanberry the next day at the hospital when Mr. Stanberry visited Ms. Finley. (R-275) Mr. Finley learned from Mr. Stanberry that Ms. Finley had been shot and Mr. Finley then related that information to the doctor. (R-275)

On Tuesday afternoon at approximately 5:00 p.m., Mr. Stanberry came by the home. (R-276) Mr. Stanberry then drove Mr. Finley to a wooded area to search for the guns. (R-276-278) At one point, when they had pulled over and were searching the sides of the road, Mr. Finley noticed the pillow case from his bed. The guns were found also. (R-279) Mr. Finley and Mr. Stanberry then took the guns as well as the jewelry and other items back to Mr. Finley's home. (R-280) Inside the pillow case was found a mask and some gloves. (R-261)

State's Exhibit Nos. 42 and 43 were photographs of Mr. Stanberry along with a man named "Ponytail", Ihoe (a/k/a Wish) and another unidentified person. (R-285-287) Mr. Stanberry gave these photographs to Mr. Fletcher. (R-285)

When Ms. Finley became conscious several weeks later, Mr. Finley asked her if Stanberry had come in the house on her and she nodded her head affirmatively. (R-289) The individual known as "Ponytail" was also one she nodded affirmatively to. (R-289)

(CROSS-EXAMINATION)

On cross-examination, Mr. Finley testified that Rodney Stanberry introduced him to two friends from New York, one named Ihoe and another named Rene, who had come to Mobile for purposes of Mardi Gras. (R-294) When Mr. Finley went target shooting on the

Saturday before the shooting with Rodney and the other two men, the other two expressed an interest in buying Mr. Finley's guns. (R-295) Mr. Finley refused to sell them the guns. (R-296) Mr. Stanberry told Mr. Finley that it was not a good idea to sell them the guns because they were from New York. (R-296)

Mr. Finley introduced the men to Mr. Charles Hurn, a gun collector in the area. (R-298) They purchased guns from Mr. Hurn. (R-298) One of the guns purchased was 9mm Glock pistol. (R-298) They also purchased a twenty-five (25) caliber and a 380. (R-298)

During the target practice, Rene and Ihoe were shooting the Glock 9mm pistol. (R-301) A third individual was with them that day named Taco. (R-300)

On cross-examination, Mr. Finley testified that on the morning of the shooting, he left for work at approximately 6:30 and exited the house through the back door, locking it behind him. (R-303) At work, he spoke to a co-worker about taking his daughter to Chuck E. Cheese pizza restaurant that evening, and as a result, called his wife at approximately 8:30 or 9:00 a.m., spoke to her, and told her plans for the evening. (R-305) He recalls the time because that was his break time at work for non-smokers. (R-305)

Mr. Finley left $10.00 at the head of the bed for his wife to put gas in one of their automobiles. (R-305, 306) There was a '91 Ford Festiva and an old Subaru vehicle in their driveway that morning. (R-305)

After the shooting, Mr. Finley got into the vehicle and found $5.00 change stuffed over the sun visor and the car had gas in it. (R-306, 307)

The next phone call he received was at approximately 11:45 a.m. at work, from his sister-in-law telling him that his wife had had a bad fall. (R-307) Mr. Finley did not speak to police officers on the day of the shooting. (R-309) When discovering that his guns had been stolen, he did not call the police, but instead went straight to the hospital to visit his wife. (R-309) Later that night is when he called the police and told them of the stolen guns. (R-310)

Mr. Finley spoke to Mr. Stanberry at 1:00 or 2:00 that afternoon when Mr. Finley called Mr. Stanberry from the hospital. (R-310) Mr. Finley asked the whereabouts of Mr. Stanberry's friends from New York because he suspected them of being the people involved because they had been trying to buy his guns earlier. (R-310) When Mr. Finley asked for Mr. Stanberry's help, Mr. Stanberry told him that he would get back with him in a couple of hours

and, in fact did, and told him that he had learned that his friends had been involved with the burglary of his house, the shooting of his wife and the stealing of his guns. (R-311) Specifically, he identified Ihoe as the one who shot Ms. Finley. (R-311) Mr. Stanberry said that his friends may have already gone back to New York. (R-312)

The State objected to any hearsay statements that Mr. Finley may have testified to regarding contents of conversations from Mr. Stanberry and the Court sustained those objections. (R-312)

In response to the conversation with Mr. Stanberry, Mr. Finley went back to his home, retrieved his shotgun and went to the bus station on Government Street looking for the other individuals. (R-313) Mr. Finley was not able to locate the individuals at the bus station. (R-314)

Later that evening, when Mr. Stanberry visited the hospital, Mr. Finley talked to him about his friends and their involvement in front of Ms. Finley's family members. (R-316)

Mr. Finley stated that he spoke to Rodney Stanberry again on Tuesday, the day after the shooting, and again, as always, Mr. Stanberry had been driving his brown Bronco. (R-317) Mr. Stanberry related that he had a conversation with the men in New York and, based on that conversation, Mr. Finley and Mr. Stanberry went to the wooded area and recovered the guns. (R-316) He then notified the police that he had retrieved the guns. (R-316)

On Wednesday, Mr. Finley again visited his wife in the hospital and wore the jewelry that had been stolen from him in the burglary. (R-321, 322) Once Ms. Finley family had seen him wearing the jewelry and he had told him that he had recovered it, they started acting differently toward him. (R-322)

On Wednesday morning, Mr. Finley went to see Detective Fletcher at the Prichard Police Department and gave him a list of the guns taken. (R-323) He also gave Detective Ragland the glove and mask previously referenced earlier. (R-324)

After Wednesday, several neighbors came by to help him clean up the house, and during the clean-up process, a 9mm shell casing and bullet were found. (R-325) The bullet was found in a damaged condition in the bedroom. (R-326)

On Wednesday night, after the clean-up, Mr. Stanberry visited Mr. Finley at his home. Mr. Stanberry provided several photographs of himself, along with the men from New York,

to Detective Fletcher. (R-326) Those were previously identified in the direct examination. (R-326)

Further cross-examination revealed that Tyrone Dortch, Mr. Finley's neighbor, never told Mr. Finley that he saw Rodney Stanberry come into his home. (R-328)

Mr. Finley stated that he did not tell his wife that morning that his wife would be coming by during the day to pick up a deer stand. (R-328) It was not deer season at the time of the shooting. (R-328) At one time, he had told her that he would leave a deer stand for Rodney to pick up during November and January, but he did not tell her that the month of the shooting. (R-329)

On Thursday or Friday of that week, Rodney Stanberry and Mr. Finley called the New York Police Department, spoke to a lady by the name of Detective Hardy, whose name they also gave to Detective Fletcher. (R-330)

After the shooting, Ms. Finley's attitude toward Mr. Finley had changed drastically. (R-330) She began asking him about their old, blue 1966 Chevy automobile which he had sold approximately a year and a half to two years before. (R-330, 331) These conversations occurred while she was in the Rotary Hospital, approximately thirty (30) days after the shooting. (R-331) She and Mr. Finley never went back home together after the Rotary Hospital. (R-331) Ms. Finley filed for divorce in 1993. (R-332) Mr. Finley had been granted temporary custody of the children pending the outcome of this case. (R-332)

Cross-examination of Mr. Finley revealed that Mr. Finley, along with the Defendant, Mr. Stanberry and Rene, all went to a Dairy Queen in Semmes, Alabama for the purpose of Rene purchasing a gun from Mr. Charles Hurn, the gun collector. (R-342) Mr. Hurn sold a Glock 9mm, a 380 and a 25 caliber pistol to Rene. (R-343) Further cross-examination revealed that Mr. Finley had accidentally discharged his 9mm pistol in his and Ms. Finley's bedroom approximately two (2) months before the shooting. (R-356)

(RE-DIRECT EXAMINATION)

Mr. Finley testified on cross-examination that by the time the officers and the district attorney had asked him not go get rid of the guns that had been stolen, they had already been sold by Mr. Finley a year after the incident, and a year before he had asked him not to get rid of the guns. (R-362) Mr. Finley also gave Detective Fletcher the name and number of a New

York detective assisting in the investigation of this case, as well as photographs of the people from New York. (R-362, 363)

On further cross-examination, the prosecutor asked Mr. Finley directly: "Did you hire those guys in New York to come down here and shoot Valerie and kill her?" To which Mr. Finley responded: "No sir." (R-368) Mr. Finley also knew that Rodney Stanberry did not go into his house on the day in questions. (R-369) Mr. Finley further clarified that on the afternoon of the shooting, Mr. Stanberry called him at the emergency room waiting area at U.S.A. Hospital and told him that she had been shot, the house had been robbed, and he identified the guy that shot her. (R-370) After learning this information, he told the doctor what had happened and this confirmed the doctor's suspicions about what was problematic with Ms. Finley while in the hospital. (R-371) Mr. Finley identified the bullet in Ms. Finley as being a "hard-ball", which is a round-nosed 9mm shell. (R-371) Mr. Finley compared the hard-ball round to the bullet that had accidentally misfired in his gun weeks before the incident wherein that bullet was a hollow-point. (R-371, 372)

Mr. Finley also testified that he had given his Taurus 9mm weapon to the police who tested it in ballistics and it was determined that it was not the same weapon that shot Ms. Finley. (R-372)

After Mr. Finley's testimony, the Court, during a recess, heard a Motion to Suppress the Defendant's statement. (R-370-437) The Motion to Suppress was three statements made by the Defendant to police officers without Miranda warnings. The Court ruled that the State could not use the statements of the Defendant because they were made by him pursuant to police questioning and the police officer considered Mr. Stanberry the prime suspect in the case. In fact, interrogation occurred by Assistant District Attorney, Buzz Jordan. (R-426, 427) However, the Court did allow the State to use these statements of the Defendant in their cross-examination of the Defendant if he took the stand. (R-437)

MS. VALERIE FINLEY

(DIRECT EXAMINATION)

The State's next witness was the victim, Ms. Valerie Finley. (R-438) Ms. Finley testified that she knew the Defendant Rodney Stanberry as "Stan", a friend of her husband's.

(R-446) Ms. Finley testified that Mr. Stanberry had two friends from New York, one known as "Ponytail" because of his hair. (R-448)

Ms. Finley initially woke at 3:00 in the morning, but went back to sleep and finally roused herself out of bed when she heard the doorbell ring. (R-449)

On the morning in question, their children were sleeping over at their grandmother's house. (R-451) Her husband, Mike Finley, allegedly told her that Mr. Stanberry was coming by that morning to pick up a tree stand and she felt that was a little unusual since deer season was over. (R-452)

When to doorbell rang, she got up and went into the hall and could see a man with a ponytail at her back door. (R-453) The Defendant's brown Bronco was allegedly parked in the driveway. (R-454) Ms. Finley stated that Mr. Stanberry was standing at the front door. (R-457) When she unlocked the front door, Mr. Stanberry allegedly told Ponytail to come around to the front and Mr. Stanberry entered the house first, Ponytail following behind. (R-457, 458) Ponytail then pulled a gun. (R-458) She was then directed by Ponytail to sit down behind the couch. (R-458, 459)

Allegedly, Mr. Stanberry asked her where the keys to the gun vault were, and when she said she didn't know, they got agitated and Mr. Stanberry allegedly grabbed her keys out of the dead-bolt lock and told her not to scream or holler because Ponytail would kill her. (R-460) Mr. Stanberry allegedly took the key to the gun vault and opened the vault. (R-465) In the meantime, Ponytail was holding a gun to her head. (R-465)

Mr. Stanberry then exited the bedroom with the pillowcase where he then supposedly put guns into the pillowcase. (R-468) Ponytail asked about taking the VCR, microwave and stereo, but Mr. Stanberry allegedly replied that they don't have enough room to carry all of that. (R-469) The next thing she knew, she was in the hospital. (R-469) She did not hear a gunshot or feel a gunshot. (R-469)

Ms. Finley testified that neither Mr. Stanberry nor Ponytail had a mask on. (R-470)

She further stated that her husband, Mike Finley, did not call her on the morning of the shooting, contrary to Mr. Finley's testimony. (R-484) She did, however, relate that they were supposed to have a birthday party for their daughter, Tiffany, at Chuck E. Cheese's that afternoon. (R-484)

(CROSS-EXAMINATION)

Cross-examination revealed that, after her release from Rotary Rehab, Ms. Finley moved in with her mother and stayed approximately a year. (R-490)

She further stated that the closest time frame she could give for the shooting was before 12:00. (R-495). Ms. Finley allegedly never met another individual from New York by the name of "Wish" or Ihoe. (R-498) She further testified that Mr. Finley left for work at approximately 6:55 to 7:00 that morning. (R-504, 508) She then spoke to her sister on the telephone for two (2) until she heard the doorbell ring. (R-508, 509)

Ms. Finley's testimony regarding the length of time of her telephone call changed from three (3) to four (4) hours to two (2) hours to more than an hour. (R-512)

Further cross-examination revealed that Mike Finley told her almost month of the hunting season that Rodney Stanberry would come by to pick up the deer stand. (R-513) Ms. Finley did not recall telling the police that the doorbell rang. (R-514) Instead, she told them that someone was banging on the door. (R-514)

Ms. Finley knew that Rodney Stanberry and her ex-husband, Mike Finley, both had quite a few guns and they both attended gun collections on numerous occasions. (R-518, 519)

On her cross-examination, Ms. Finley testified that Rodney Stanberry was also holding a gun, contrary to her direct examination testimony. (R-521) Her testimony changed even further in that she first saw Stanberry holding a gun while standing over her, pointing it her head. (R-521) Her testimony changed again by saying that both Stanberry and Ponytail then wandered through the house individually while the other held a gun on her. (R-522) Her testimony changed even further by stating that her husband, Mike Finley, had gloves and a mask introduced by the State. (R-524) She also insisted that she told the investigating officers that Stanberry held a gun on her and that he had a mask and gloves like those introduced by the State. (R-523, 524)

Neither of the individuals in her house had on gloves while they were going through the drawers in her bedroom and other places. (R-525)

Contrary to the State's evidence, Ms. Finley testified that she did not turn her couch over on regular occasions when cleaning her house. (R-528)

Ms. Finley stayed at University of South Alabama Medical Center for approximately one (1) month after the shooting, and first awoke approximately a week after the shooting. (R-530) She testified that she recognized, in a photo spread presented to her by a man and woman from the Prichard Police Department, the photographs of Mr. Stanberry and Ponytail. (R-530) That was the first time that she had spoken to the police. (R-531) Her sister and mother informed her that her ex-husband, Mike, had shown up at the hospital with the jewelry that he claimed had been stolen in the burglary. (R-532)

While in the hospital, Ms. Finley became suspicious of her husband being involved when she learned that he had recovered his guns. (R-534) Mr. Finley informed her that Horace Reynolds was the one that had shot her, but she still insisted that the Defendant had been the one who shot her. (R-534) Ms. Finley never informed the police of that conversation, but she did tell her family. (R-535)

At some point during her conversations with police officers, Ms. Finley told either the officer or her sister or another female while in the room that she did not know who shot her. (R-540-542) She later testified that she did not know which of the two shot her, but that she knew one of them did. (R-542)

Mr. and Mrs. Finley, at the time of the trial, had an on-going divorce action and they were battling over custody of the children. (R-545) The divorce action was continued numerous times so that the criminal trial could come to conclusion. (R-545) Ms. Finley testified that she thought her husband hired someone to kill her. (R-545)

Ms. Finley could not recall on the stand whether she saw a white female in the Ford Bronco parked in her driveway on the morning of the shooting. (R-547)

Contrary to her prior testimony, Ms. Finley told Officer Labaron Smith that the other guy went in the back door. (R-550) In her statement to police officers, Ms. Finley told them that during the incident in question, she told Stan that the key was in the front door. (R-556, 557). However, she denied at trial that she told him that. (R-557)

Several inconsistencies appeared in Ms. Finley's statement that were pointed out to the jury. (R-578-584) After her testimony, the State rested.

MR. TYRONE DORTCH

(DIRECT EXAMINATION)

The Defendant presented his first witness, Mr. Tyrone Dortch, the next-door neighbor to the victim, Valerie Finley. (R-526) Mr. Dortch testified that on the morning in question, he and a friend of his, Tony Mauldin, were working on automobiles at approximately 8:00 or 9:00 that morning in the median, outside from his and Ms. Finley's home. (R-589) Mr. Dortch noticed a Mercury Capri, faded gray in color with a Rally stripe, parked in Ms. Finley's driveway at about 9:00 that morning. (R-594)

His friend, Tony Mauldin, drove a dark brown Toyota automobile and had driven his automobile there that morning. (R-595) After working on his automobile for approximately an hour and a half to two hours, he observed two black men coming from the back of the Finley house, and they got into the car with an Army-like fatigue sack in their possession. (R-596) One of the individuals he recognized as a tall, brown-skinned man with a low haircut. His name, he never knew, but was present and waiting outside the courtroom as a witness. (R-598) Mr. Dortch stated that it was definitely not Rodney Stanberry. (R-598)

Mr. Dortch never saw Mr. Stanberry's brown Bronco in the Finley's driveway on the day in questions. (R-599) Mr. Dortch was familiar with Mr. Stanberry's brown Bronco because he had seen it many times in the neighborhood. (R-599, 600) Mr. Dortch observed the two men get in the faded gray car and drive away. (R-602) He got a good look at them because their car almost bumped into his. (R-602) Mr. Dortch did not know anything was wrong in the Finley home and he ultimately left approximately twenty (20) to thirty (30) minutes after the two men left. (R-604) When he left, Mr. Dortch drove to Autozone to purchase a water pump for his vehicle, stayed in the store approximately fifteen (15) to twenty (20) minutes and then drove the twenty (20) minute drive back to his house. When he arrived, he saw paramedics at the Finley home. (R-605, 605) Mr. Dortch's receipt for the water pump stated that he purchased it at 12:05 p.m. (R-605) Mr. Dortch did not recall either of the two men coming out of the Finley home having a ponytail. (R-609)

Mr. Dortch did observe Mr. Stanberry come down the street later that day in his brown Bronco with the "One Night Stand" bumper sticker. (R-609, 610)

The police officers did not talk to him when he came back to work on the car. (R-606, 615)

(CROSS-EXAMINATION)

On cross-examination, the prosecutor asked Mr. Dortch to go outside the courtroom, retrieve the individual who he saw leaving Ms. Finley's home and bring the individual back into the courtroom. The witness complied and the identity of the individual was Terrell Moore. (R-616-618) Mr. Dortch could not tell what was inside the bags when he saw them coming out. (R-631)

Prior to calling the next witness, the Court let Mr. Nixon make his Motions for Directed Verdict of Acquittal at the close of the Government's case because it did not give him the opportunity to do so at the close of the Government's case. (R-646-650) The defense attorney argued strenuously on the burglary count because the State had failed to proved an unlawful entry and/or that they unlawfully remained in the house with the intent to commit a crime. (R-650) The Court denied these motions. (R-650) The defense also challenged the degree of injury to the victim, and again the Court denied that ground for Directed Verdict of Acquittal. (R-651)

The Court then took up a lengthy discussion and argument and counter-arguments by the defense and State in regards to whether or not the statement of Terrell Moore, the individual who had confessed to committing the crime with other individuals, not being the Defendant, and who was to take the Fifth Amendment if called to the stand at trial. (R-645-686) The defense argued strenuously for the admission of Mr. Moore's statement, either audio tape, video tape or written statement wherein he admits committing the crime against Ms. Finley, not only to the Defendant's private investigator, Ryan Russell, but to the District Attorney and the investigating officers. (R-680-684) The Court denied the defense permission to use Mr. Moore's statement if he takes the Fifth. (R-685, 686)

TESTIMONY OF MR. TERRELL MOORE

(DIRECT EXAMINATION)

Mr. Moore was then called to the stand to testify for the defense. (R-686) Mr. Moore chose not to answer any questions on the stand until his attorney, Bob Clark, was present with him. (R-687)

TESTIMONY OF MS. BRENDA GAY

(DIRECT EXAMINATION)

The defense then called Ms. Brenda Gay, the sister of the victim, Valerie Finley. (R-688) Ms. Gay testified that she had talked to Valerie Finley on the morning in question from approximately 5:30 to sometime after 7:00 and could hear Mike Finley in the background. (R-688, 689) She could not recall what time Mike Finley left. (R-689) The next time she talked to Valerie Finley that morning was just after 9:00 a.m. where she talked to her for approximately thirteen (13) minutes and then said, "Hold on, somebody's at the door." (R-691) She never returned to the phone. (R-691)

After listening to a taped conversation introduced by the defense the day before, Ms. Gay identified her voice on the tape as saying that Valerie told her she did not know who did it to her. (R-694) Valerie made this statement to her sometime while she was in the hospital after the shooting. (R-695)

TESTIMONY OF MR. TERRELL MOORE

(DIRECT EXAMINATION)

After Ms. Gay was finished testifying, Terrell Moore was again called to the stand with his attorney, Bob Clark, present. (R-705) Mr. Moore was treated as a hostile witness. (R-706) Mr. Stanberry's attorney questioned Mr. Moore in detail about his involvement with the shooting of Valerie Finley on March 2, 1992. (R-706-709) Mr. Moore responded to every single question with the response: "I plead the Fifth Amendment." (R-706-709) The substance of the questions asked by Mr. Stanberry's attorney was the information contained in Mr. Moore's statement to the effect that he and a man named "Wish" had gone into Ms. Finley's home, robbed the home, stole guns from the home and that "Wish" shot Ms. Finley. 0(R-706-709) At the conclusion of his direct examination, defense attorney moved to introduce the statement of Terrell Moore and that motion was denied. (R-709)

TESTIMONY OF MR. TONY MAULDIN

(DIRECT EXAMINATION)

The Defendant's next witness was Mr. Tony Mauldin, a friend of Tyrone Dortch who was assisting Mr. Dortch in the repair of automobiles outside the Finley home on the day in question. (R-713, 714) Mr. Mauldin drove a dark brown Toyota automobile at the time. (R-718) Mr. Mauldin described seeing "a kind of gray faded out brown car, looked like it was a two tone and it was a Capri, mid-sized car." (R-719) He also saw two people get into the car

as it was leaving but he never saw their faces. (R-720) The car almost pinned Mr. Mauldin to his car when they backed out of the driveway. (R-721) Mr. Mauldin never did see a brown Bronco that morning. (R-721) Mr. Mauldin's Toyota was a four-door vehicle. (R-721)

Mr. Mauldin denied knowing Rodney Stanberry, Mike Finley, Valerie Finley or Terrell Moore. (R-721) Mr. Mauldin's testimony corroborated the testimony of Tyrone Dortch in regards to the trip to and from Autozone to purchase a water pump and the time spent doing that. (R-722-724)

On redirect examination, Mr. Mauldin was absolutely clear that the vehicle backing out of the driveway was a Mercury Capri and not a Bronco. (R-730)

TESTIMONY OF MR. BRUCE HICKBOTTOM

(DIRECT EXAMINATION)

The Defendant's next witness, Mr. Bruce Hickbottom, was a co-worker at BFI with Mr. Stanberry and had been working there for six (6) years. (R-731) He had worked with Mr. Stanberry since his employment began at BFI. (R-732) Mr. Hickbottom arrived at BFI at approximately 4:00 a.m. and parked right in front of Mr. Stanberry's brown Bronco. Mr. Stanberry's vehicle was parked in the same place that it had been parked for years. (R-733)

During a 10:00 a.m. break, Mr. Hickbottom walked outside and saw Mr. Stanberry's vehicle still parked in the parking lot. (R-733) Mr. Hickbottom also saw Rodney Stanberry at 12:00 noon in the breakroom at the BFI building. (R-734) He struck up a conversation with Mr. Stanberry about taking the CDL license test. (R-734)

TESTIMONY OF MR. HENRY JOHNSON

(DIRECT EXAMINATION)

The Defendant's next witness was Mr. Henry Johnson, the operations manager at BFI in Mobile, Alabama. (R-738) Mr. Johnson testified that Rodney Stanberry drove a front-loader garbage truck for them. (R-738) In March of 1992, Rodney drove the same route everyday. (R-739) Each day he fills out a daily driver's report. He is also required by the Federal Government DOT Regulations to fill out vehicle inspection report of the truck. On that daily driver's report, he puts on it the time he starts, fuel consumption and total miles driven. He also writes information for BFI as far as the tonnage he has disposed of on that day. He also writes down the time he arrives at the first container and the time he picks up the last container, as

well as any mechanical breakdown time and any of his time associated with the truck not actually picking up trash. (R-739, 740)

Mr. Johnson was asked to gather the records for March 2, 1992. The records indicate that Rodney was assigned to truck no. 989 and that he started that morning at 2:59 a.m. (R-743) He finished at 11:55 a.m. (R-743) His last stop was at 8:43 a.m. (R-743)

Rodney had down time that morning from 4:41 a.m. to 5:29 a.m. due to a top lid door being stuck on the truck. (R-745) He also had a flat tire from 9:05 a.m. to 9:37 a.m. (R-745, 746)

Rodney was driving a route on the south end of Mobile County, from Dauphin Island and Bayou La Batre to Hamilton Boulevard. (R-746). When Rodney was finished picking up debris, he had to go dump it at the sanitary landfill in Chestang, Alabama located in Mobile County. It's a thirty-two (32) mile drive. (R-747) With the truck loaded, it would take an hour to an hour and ten (10) minutes to get there. (R-747)

At approximately 6:00 to 6:30 a.m., Mr. Johnson spoke to Rodney personally over the radio in their respective vehicles. (R-745)

MR. JOHN FREDERICK ROBINSON

(DIRECT EXAMINATION)

The Defendant's next witness was Mr. John Frederick Robinson, also a co-employee of Rodney Stanberry's at the time in question. (R-752, 753). He testified that he repaired a flat tire on Mr. Stanberry's vehicle at approximately 9:00 a.m. that morning. (R-756) The repair was finished at 9:32 a.m. (R-756) He also repaired the brakes on Rodney's vehicle. (R-757) Rodney Stanberry was dressed in a normal BFI uniform that day. (R-758) Rodney was found by the witness in the breakroom talking on the telephone when he informed him that his vehicle was repaired and ready to go. (R-758)

MR. FRED BRYANT

(DIRECT EXAMINATION)

The Defendant's next witness was Mr. Fred Bryant who was working at the Chastang landfill in March of 1992. (R-767) Mr. Bryant testified that Rodney Stanberry brought his truck in to the landfill at 10:40 a.m. on March 2, 1992. (R-768) He had the ticked that was signed by himself and Stanberry at that time. (R-768)

MR. PALMER MCDONALD

(DIRECT EXAMINATION)

The Defendant's next witness was Mr. Palmer McDonald, the safety and personnel manager at BFI. (R-774) In March of 1992 he was assistant operations manager. (R-774) This witness offered little additional testimony.

MR. DENNARD EUGENE JONES, a/k/a TACO

(DIRECT EXAMINATION)

The Defendant's next witness was Mr. Dennard Eugene Jones, a/k/a/ Taco. (R-781) Taco testified that he had gone target shooting with Mike and Valerie Finley and a man named Wish and Rene Whitecloud the Saturday before the shooting. (R-785) Wish had brought a lot of guns of his own to shoot and everyone shot them. (R-786) Terrell Moore was not there, but Taco identified Terrell Moore's car as a blue gray Mercury Capri. (R-786)

In fact, Taco had introduced Terrell Moore to Rodney Stanberry that same week. (R-786) The night before Ms. Finley was shot, Taco spent the night at the Motel 6 on the Beltline Highway in Mobile, Alabama with Wish and Rene Whitecloud. (R-788) He heard them discussing the Finley's that night. (R-789) When Taco woke up on that Monday morning, Wish was already gone. (R-790)

After Taco got out of the shower that morning, he saw Terrell Moore and Wish again at the hotel room at some time before noon. (R-791) He stated that Wish was "acting kinda frank. He looked like he was mad, like he was upset." Terrell Moore was acting nervous. (R-791) After speaking with Terrell and Wish, Taco asked Terrell to take him home and Terrell complied. (R-792) He drove Taco home in a "Capri Mustang". (R-792) When he got in the car, he saw several guns in a big green Army bag. (R-793) On the way home, Terrell Moore dropped Wish and Rene off at the Warren Inn Apartments on Airport Boulevard. (R-794) Mr. Moore then went by his ex-girlfriend's house and he took the green bag out and he placed it underneath the house in the back. (R-794)

After he was dropped off at home, Mr. Moore called Rodney Stanberry and Mr. Stanberry returned his call at approximately 1:00 or 1:30 that afternoon. (R-795) Taco told Rodney Stanberry where the guns were. (R-795)

After talking with Mr. Stanberry, Taco took Rodney Stanberry to where the guns were, showed him where the guns were and Rodney retrieved the guns. (R-796) These were the same guns that were taken from Mr. Finley and were returned to Mr. Finley by Rodney Stanberry. (R-796)

RODNEY CARL STANBERRY

(DIRECT EXAMINATION)

After Taco testified, the Defendant's next witness was the Defendant himself, Mr. Rodney Carl Stanberry. (R-819) Mr. Stanberry's nickname is Stan. (R-819) In March, 1992, Mr. Stanberry drove a commercial front loader garbage truck for BFI in Mobile, Alabama. (R-819, 820) Mr. Stanberry testified that prior to the date of the shooting, he had visited Mike Finley and Valerie Finley at their home approximately fifty (50) times or more, eating dinner with them, playing with their children and generally visiting with them. (R-823, 824) Mr. Stanberry testified that he had known Rene Whitecloud and Angel Melendez, otherwise known as Wish, since the age of seventeen (17). (R-824)

In March of 1992, Mr. Stanberry had contacted Rene by telephone and they had discussed coming to Mobile for Mardi Gras to visit Mr. Stanberry. (R-826) They arrived approximately a week before the day of the shooting. (R-826) The day after they all arrived, Mr. Stanberry took them to Mr. Mike Finley's home to show them a deer head that he had gotten from his last hunting session which was being stored in Mr. Finley's deep freezer. (R-830) A few days later, Mr. Stanberry had spoken to Wish and Rene again and he brought them to Mike Finley's house again because Mike had discussed with them finding some guns for them. (R-831) Mr. Finley did not want to sell them any guns. (R-832) Mr. Stanberry advised Mike Finley against selling the guns because it was illegal to own handguns in New York City. (R-832) Wish and Rene had also offered to buy Mr. Stanberry's guns. (R-832) When Mike Finley told Rene and Wish that Mr. Stanberry had advised them not to sell them guns, they got angry. (R-833)

Mike Finley, Valerie Finley, Mr. Stanberry, Rene and Wish had all driven to a Dairy Queen for the purpose of getting Rene and Wish some guns from another individual. (R-833) Mr. Stanberry witnessed Rene buy a several handguns, those being a Glock 9mm pistol, a 380 caliber pistol and a 25 automatic. (R-835)

On Sunday, they had all gone target practicing with their new guns. (R-835, 836) When they went target shooting, Mike Finley brought an AK-47, a Tech-9, a Tech-22, a 380 and an M-11. (R-837) When Rene and Wish saw Mike Finley's guns, they were amazed and spent some time shooting them. (R-837, 838) Later that night, he went to the hotel to say goodbye to Rene and the rest of the crowd before they went back to New York. (R-839, 840)

On the morning in question, Mr. Stanberry arrived at work at approximately 2:00 a.m. to 3:00 a.m. in order to drive his work vehicle. (R-841) Mr. Stanberry drove a route a the south end of Mobile County, and on his last stop, got a flat tire. It was shortly before 9:00 a.m. (R-842) When that happened, he called the shop and was instructed to bring the truck in for repair. (R-843) That took approximately fifteen (15) minutes to arrive at work. (R-843) He arrived at the main shop at approximately 9:00 and while it was being repaired, he went to the breakroom. (R-844) While in the breakroom, Mr. Stanberry called the hotel room and talked to Taco and then Rene. (R-844) Mr. Stanberry told Taco he had hoped to drop by that morning to say a final goodbye, but that he had to go by the Baldwin County Courthouse to register for his CDL driver's license. (R-846)

When his truck was ready, he discovered he also had to have a brake adjustment. He clocked out of the shop area at 9:37 a.m., turned around and came back for a brake job that lasted approximately ten (10) to fifteen (15) minutes. (R-846, 847) He then proceeded to the landfill and arrived there at approximately 10:40 a.m. (R-847) While traveling up I-65 towards the landfill, he passed by the hotel where Rene and the others were staying and saw the faded out Capri that belonged to Terrell Moore. (R-848) He stayed approximately fifteen (15) minutes at the landfill and returned to BFI headquarters with an empty truck arriving there at approximately 11:55 a.m. (R-849) He then filled the truck up with fuel, parked it and went inside but forgot to clock out. (R-849) Mr. Stanberry left BFI at approximately 12:15 that afternoon. (R-851) When he arrived home, he learned that Taco had called him several times before he had arrived.

Mr. Stanley talked to Taco again on the phone and was informed that his friends had robbed Mike Finley's house whereupon Mr. Stanberry asked where they were. (R-852) While he was on the phone with Taco, Mr. Finley called him as well at approximately 12:30. (R-853)

Mr. Stanberry then related to Mr. Finley that Taco thought the others were at the bus station. (R-853) Mr. Stanberry went there as well in hopes of retrieving his friends guns. (R-854)

While he was at the bus station, Rene and Wish pulled up in a cab but did not have the guns with them. (R-854) They told him they were sorry and told him that Taco knew where the guns were. (R-855) Mr. Stanberry then went and found Taco who showed him where the guns were. (R-856) Taco retrieved the guns and placed them in Mr. Stanberry's vehicle. (R-856) Mr. Stanberry then went back to the Finley residence at approximately 2:00 in the afternoon. (R-856) Later that day, he visited Valerie at the hospital, spoke with various people, and when he arrived home again, received a call from Rene who said that Angel Melendez had shot Valerie. (R-861) Mr. Stanberry was angry with Rene because he did not tell him that Valerie had been shot. (R-861)

The next day, Mr. Stanberry told Mike Finley about how he had retrieved the guns and returned them to Mr. Finley. (R-861, 862) He took Mike Finley with him to go look for the guns. (R-862)

Following that, Mr. Stanberry made a call a police officer in New York by the name of Detective Hardy who was a friend of his. (R-866) He did so for the purposes of assisting in the investigation and apprehension of the individuals who shot Valerie Finley. (R-866, 867) Mr. Stanberry also turned over photographs of Rene Whitecloud and Angel Melendez, a/k/a Wish, to Detective Fletcher. (R-867) He also went in on his own to see Detective Fletcher at the Prichard Police Station and made a statement. (R-868)

Mr. Stanberry explained that he did not initially tell the police about the guns because Taco had threatened to name Mr. Stanberry as a participant if he release Taco's name to the Police Department. (R-871) Mr. Stanberry got a tape recording of Taco threatening to name Stanberry in the case if he went to the police. (R-872)

The defense moved to admit the tape into evidence and the Court reserved ruling on the matter. (R-876)

The Defendant vehemently denied ever being present at the Finley's home on March 2, 1992, the day of the shooting and having any involvement in it. (R-880, 881)

(CROSS-EXAMINATION)

On cross-examination, Mr. Stanberry surmised that due to the presence of a mask in the bag where the guns were found, either Ihoe or Wish had been wearing the mask at the time of the robbery and possible would have identified as Mr. Stanberry when Ms. Finley opened the door. (R-885-892)

The defense rested its case at the conclusion of Mr. Stanberry's testimony. (R-924)

REBUTTAL TESTIMONY OF MS. VALERIE FINLEY

Ms. Finley was recalled as a rebuttal witness and she testified that after having seen Terrell Moore, the individual who pleaded to Fifth Amendment on the stand, she positively identified him as not being one of the persons who committed the crime against her. (R-925)

The Defendant then again moved for directed verdict of acquittal base on the State's failure to prove a prima facie case as to each and every element of each and every count. (R-927) The Court denied the motion. (R-928)

The Court refused to allow the deposition testimony of Mr. Moore to go to the jury and he refused the taped conversation between Mr. Stanberry and Taco, wherein Taco admitted that he would frame Mr. Stanberry, to got to the jury. (R-931)

The Court's jury charges were lengthy, lasting approximately thirty (30) pages within the transcript. (R-941-956) The defense objected to the Court's refusal to give defense's requested jury charges numbers 1, 6, 7 and 13 and argued that they were all accurate statements of the law and should have been given. (R-957) In addition, the defense objected to the Court instructing the jury on the law of conspiracy and the elements therein for reasons that conspiracy was not a charge or element of any of the offenses charged in the indictments. (R-957)

The Court did in fact charge the jury on conspiracy, and in doing so, stated the following:

> "So, again, conspiracy or common purpose to do an unlawful act need not be shown by positive testimony, as I have stated, nor need it be shown that there was any prearrangement to do the specific act complained of. So, it being present without pre-concert, two or more persons enter into a common illegal venture and one of them did the deed of violence and the other was present, aiding, abetting, encouraging or giving countenance to the unlawful act or ready with the perpetrator's knowledge of his intent to render assistance if necessary, to lend assistance if it should become necessary, then the other is as guilty as the actor himself. Therefore, in short, ladies and gentlemen of the

jury, and accessory or accomplice is an associate in crime, a partner and a partaker in the guilt." (R-947)

The jury deliberated and returned a verdict of guilty to burglary in the first degree, robbery in the first degree and attempted murder as all charged in the indictment. (R-964)

The Court sentenced the Defendant on May 11, 1995 to twenty (20) years in each case, said sentences to run concurrently with one another. (R-980) The Court set an appeal bond of $20,000.00 in each case. (R-981)

After the sentencing, the defense filed a Motion for New Trial and the Court held a hearing on that motion on July 28, 1995. [Motion for New Trial (R-1) (Court Record or CR-116)]

As grounds for the motion, the defense argued that the Court erred in refusing to allow into evidence the tape-recorded conversation between Donald (Taco) Jones and the Defendant, the video and audio taped confessions of Terrell Moore and the transcript of the interrogation of Terrell Moore by the Assistant District Attorney, Mr. Joe C. Jordan and Detective Labaron Smith. (CR-116) In addition, the defense argued among its several arguments that the State failed to produce to the Defendant a statement indicating that one of the witnesses had changed her testimony in regards to factually significant evidence, i.e. the testimony of Ms. Brenda Gay, the victim's sister wherein she testified at trial that she had placed a phone call to Valerie Finley and spoke to her at 8:00 in the morning instead of 9:00 which was consistent with other factual witnesses' testimony regarding seeing a similar vehicle to that of the Defendant's in the neighborhood of Valerie Finley on the morning in question. (R-9 Motion for New Trial) The defense argued that her written statement indicated that the time of the telephone call was 8:00. (R-5, 6) The defense formulated its alibi defense around the time period of 9:00 to 9:15 a.m. because that was the State's evidence that the crime was committed at that period of time due to the testimony of Ms. Gay having been on the phone when Ms. Finley answered the door and the ensuing events occurred. (R-8, 9)

As an additional ground for the Motion for New Trial, the Defendant claimed that there was a denial of due process for the State to refuse to extend use immunity for the defense witness Terrell Moore for his testimony at trial even though they had extended him the same

immunity at Grand Jury and during the District Attorney's own investigation of the witness. (CR-117)

The defense also argued prosecutorial misconduct in failing to comply with the Court's "opened file" discovery order wherein the State District Attorney took the statement of Larry Johnson Malone, a/k/a Pig, who is the young boy neighbor who testified that saw the Defendant's Bronco in the area at 9:00. (R-13, Motion for New Trial) The defense attorney stated that he was not provided information of this witness or his testimony from the State as he was entitled to receive under open file discovery. (R-13, Motion for New Trial) The State kept the contents of the statement under the guise of the District Attorney's own investigation of the witness, as his own notes and therefore work product rather than the statement of a witness made by the investigating team for the State. (R-15, 18, 19 Motion for New Trial)

On July 28, 1995, the Court denied the Motion for New Trial.

STATEMENT OF THE CASE

The Defendant was charged with the offense of attempted murder in Case No. CC 92-2313, the offense of robbery first degree in Case No. CC 92-2314, and burglary first degree in Case No. CC 92-2315. All cases were tried concurrently and all motions, hearing dates and court dates applied to all cases concurrently. The Defendant was arraigned on each case on July 27, 1992 and plead not guilty. On October 15, 1992, the Defendant's trial attorney, the Honorable Ken Nixon, appeared of record and filed numerous pretrial motions such as motions to produce, motions to suppress, motions to dismiss, and the like. (CR-1-5).

The trial of this case was continued several times by the request of either side and/or both sides on some occasions. The trial was held from April 3, 1995 through April 7, 1995. The Defendant was found guilty of each charge and sentenced to twenty (20) years in each case. (CR-5)

Sentencing was scheduled for May 11, 1995 and the Defendant was so sentenced. (CR-6). On May 11, 1995, the Defendant posted an appeal bond and execution of his sentence was suspended pending appeal. (CR-6). On or about June 9, 1995, the Defendant filed a Motion for New Trial and that motion was heard and subsequently denied on July 28, 1995. This appeal follows.

ISSUE ONE

DID THE TRIAL COURT ERR IN REFUSING TO ADMIT INTO EVIDENCE A CONFESSION OF A THIRD PERSON WHO CONFESSED TO COMMITTING THE CHARGED OFFENSES AND WHICH COMPLETELY EXONERATED THE DEFENDANT WHEN THAT THIRD PERSON EXERCISED HIS 5TH AMENDMENT RIGHT TO REMAIN SILENT AND TO NOT GIVE EVIDENCE AGAINST HIMSELF?

The trial court erred in not allowing the statement(s) of Mr. Moore to be admitted into evidence. Alabama law, if different now than what the appellant is arguing should be such that an accused individual should be allowed to admit the statement of another that implicates that declarant and specifically exonerates the defendant for the crime charged.

The defendant will argue several different reasons for the admission into evidence of the subject statement. He asks this court to consider them separately and severally and to rule in his favor.

The defendant has a constitutional right to have witnesses called to testify on his behalf in any trial. U.S. Constitution, 6th Amendment. The 48 page statement of Terrell Moore (CR 1036-1083) unequivocally exonerates the defendant from any liability in this case. The statement was taken under oath, before a court reporter, pursuant to Rule 32(d)(2) of the Alabama Rules of Civil Procedure. Mr. Moore had been duly sworn, as indicated in the statement. He made the statement in the presence of his attorney (Mr. Robert Clark) and the Assistant District Attorney, Mr. Joe Carl "Buzz" Jordan. He was subject to any and all questioning by the District Attorney. The defendant encourages this court to read the statement in its entirety before making a ruling in this case.

When called to the stand to testify at the defendant's trial, Mr. Moore exercised his 5th Amendment right to remain silent and refused to testify. He was therefor unavailable for testimony.

Hearsay evidence is inadmissible. However, numerous occasions arise, allowing exceptions to the hearsay rule. One such occasion is prior testimony of a person. As stated in McElroy's Alabama Evidence, §245.07(3):

> "The testimony of a witness, in a former trial or action, given (1) under oath, (2) before a tribunal or officer having by law the authority to take testimony and legally requiring an opportunity for cross-examination, (3) under circumstances affording the party against whom the witness was offered an opportunity to test his credibility by cross-examination and (4) given in a litigation in which the issues and parties were substantially the same as in the present cause, is receivable as evidence in the present trial, (5) when the personal attendance of the witness to testify in the present trial is not feasible."

In the case at bar, the trial or action would be either the testimony before a court reporter and/or the Grand Jury. The statement was made under oath. It was made before a court reporter duly authorized to take sworn statements, and the District Attorney clearly had the right and opportunity to cross-examine the witness. The case involved the same criminal conduct, the same parties, the same victim, the same defendant, and the same witnesses as those in the present case. The personal attendance of Mr. Moore at the defendant's trial was no longer feasible because he had invoked his 5th Amendment Rights to remain silent, thus making him unavailable for testimony.

The reason for this exception to the hearsay rule is that the testimony is absolutely necessary to the defendant's defense. Mr. Moore's testimony would be entirely lost if it is not allowed in as evidence. Mr. Moore's testimony is trustworthy and reliable because the party against whom it is now offered (the state) had the opportunity to cross-examine the witness in the former proceeding while he was under oath, and because Mr. Moore is clearly making a statement against his own interest.

In the case of Woodward v. State, 21 Ala.. App. 417, 109 So. 119 (1926), the court ruled that a co-defendant's testimony for the state at a former trial was admissible against the accused when the co-defendant raised his 5th Amendment privileges against self incrimination in the then present trial. Raising the 5th Amendment privilege against self incrimination is a valid ground for nonproduction of a witness. McElroy's Alabama Evidence, §245.07(8).

The U.S. Supreme Court has also ruled that such an incriminating statement should be admissible into evidence. In the case of Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), the U.S. Supreme court ruled in a very similar case to the one at bar, that the statement of a third person admitting the crime alleged against the defendant, was admissible, and that the trial court's refusal to allow said statement into evidence was reversible error. Few rights are more fundamental than that of an accused to present witnesses in his own defense.

Specifically, the court ruled that:

> "The Supreme Court, Mr. Justice Powell, held that where third person on separate occasions orally confessed murder with which petitioner was charged to three different friends, under circumstances which bore substantial assurances of trustworthiness, and where such person made, but later repudiated, a written confession, exclusion of the testimony of the persons to whom the oral confessions were made, under hearsay rule, coupled with State's refusal to permit petitioner to cross-examine the third person under Mississippi's common-law 'voucher' rule after petitioner called such third person as witness when the State failed to do so, deprived petitioner of a fair trial."
> Chambers, supra.

In addition, Rule 804(b)(3) of the Federal Rules of Evidence, which has now been adopted by Alabama in its new Rules of Evidence, clearly states that:

> "A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. *A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.*" (Emphasis added.)

In Turner v. State, 584 So.2d 864, 868 (Ala.Cr.App. 1990), this court very succinctly stated the reason for allowing declarations against interest. The court ruled:

> "[T]he theory underlying the hearsay exception for declarations against interest is that people do not make statements that are disadvantageous to themselves without substantial reason to believe that the statements are true. Reason indicates that the disadvantage must exist at the time the statement is made; otherwise it can exert no influence on the declarant to speak the truth. That the statement may at another time prove to be disadvantageous, or for that matter advantageous, is

without significance. This characteristic of contemporaneity is implicit in the cases, though seldom discussed...."

Turner, citing McCormick on Evidence Sec. 279 at 824-825 (E. Cleary, 3d ed. 1984).

Stanberry's case clearly contained sufficient corroborating circumstances to indicate the trustworthiness of the statement. Mr. Moore's statement is clearly contrary to his pecuniary or proprietary interest. He made the statement, admitting the crime to private individuals. He then made the statement to Stanberry's private investigator. He then obtained the services of legal counsel, Mr. Bob Clark, one of the most respected criminal defense attorneys in this state, and again made the statement under oath, before a certified court reporter in the presence of the prosecuting attorney and Mr. Clark.

In William Bush v. State, 1995 WL 706857 (Ala.Cr.App. 1995), the court ruled:

> "....when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." Rouse v. State, 548 So.2d 643, 645-46 (Ala.Cr.App.1989) (quoting Ohio v. Roberts, 448 U.S. 56, 65-66 (1980)) (footnotes omitted). When a state's witness is unavailable and prior recorded testimony of the witness is admitted, the requirements of the Confrontation Clause are met if that prior testimony is marked with such truthworthiness that there is no material departure from the reason of the general rule, and if it bears indicia of reliability that would afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement. Ohio v. Roberts; Mancusi v. Stubbs, 408 U.S. 204 (1972); Rouse v. State; Miles v. State, 366 So.2d 346 (Ala.Cr.App.1978)."
>
> Bush, at *56.

If the state can use prior statements, so can the defendant.

Other corroborating testimony comes from all of the witnesses called to testify other than the victim. The defendant showed documentary proof that he was at work at the time in question. He provided evidence of the other individual's motive(s) to commit the offense. Even Taco's testimony of Moore's actions in hiding the guns taken in the robbery is very strong in the defendant's favor.

being given in the event Mr. Moore testified at trial. The state, in effect, deprived the defendant of clear and incredibly convincing exculpatory evidence by denying the witness the opportunity to testify at trial. Had he done so, Mr. Moore's testimony would certainly have exonerated the defendant. Clearly the jury could have and more than likely, would have, found the defendant not guilty of all charges.

By doing so, the state deprived the defendant of due process by stealing incredibly important evidence from him.

When speaking of statements given under immunity, non-statutory grants of immunity have been the focus of discussion in numerous cases before the State Supreme Court and the Court of Criminal Appeals. See Gipson v. State, 375 So.2d 514 (Ala.1979); Ex parte Johnsey, 384 So.2d 1189 (Ala.Crim.App.1980), cert. denied, 384 So.2d 1191 (Ala.1980); Higdon v. State, 367 So.2d 991 (Ala.Crim.App.1979). In many of these cases, the holding of the appellate court has been limited to the particular facts of the case at hand and, thus, a general rule of law has not developed which could be applied in all non-statutory immunity cases in Alabama. As a result, cases arise wherein we are called upon to determine, as in the case sub judice, whether a particular grant of immunity is valid. In order to improve upon the method by which we deal with these cases, and to provide the bench and bar with guidelines in this area, we take this opportunity to clarify the law in Alabama with regard to non-statutory grants of immunity.

In Ex parte Graddick, 501 So.2d 444, 456 (Ala. 1986), the Alabama Supreme Court held that grants of immunity play a vital role in the performance of the duties of prosecuting attorneys, and that without this method of obtaining valuable testimony prosecuting attorneys would be severely hampered in their efforts to gain convictions. Id., at 456. We shouldn't lose sight of the fact that a prosecutor's role is not to just gain convictions, but rather, it is to seek the truth; to seek justice. Too often society equates "justice" with "conviction". How often have we heard a disappointed president or law enforcement officer or a prosecutor state how determined they are to bring the suspect to justice, or how sorry they are that the suspect "escaped justice". Justice should be sought in this case by using the powers of immunity for the benefit of the defendant as well as for the benefit of the State.

In the huge majority of cases dealing with "immunity", it is the state that seeks to introduce immunity protected testimony against a defendant standing trial. Very rarely are the tables reversed and a defendant seeks to introduce testimony that has turned out to be exculpatory to him after the state has granted the immunity to the declarant. Such is the case here. The state knew of the exculpatory nature of Mr. Moore's statement, but refused to grant him immunity if he testified at trial. What more powerful theft of exculpatory evidence could there be than for the state to say, "O.K., we know you committed this offense, and we know that your statement will exonerate the defendant, but if you take the stand and testify, we'll prosecute you."

As we all know, the government is required to disclose to the defendant all exculpaorty evidence. See Brady v. Maryland, 373 U.S. 83, 87 (1963). Here, the state has disclosed the exculpatory evidence, but then placed it outside the defendant's grasp by effectively assuring that Mr. Moore will not testify. The government may not interfere with the accused's ability to present a defense by placing evidence material to the defense outside the reach of the defendant. Hilliard v. Spalding, 719 F.2d 1443, 1445-56 (9th Cir. 1983). The government may not unilaterally deport an alien witness without good faith determination that he/they possess no evidence favorable to the defendant. U.S. v. Balenzuela-Bernal, 458 U.S. 858 (1982).

The argument can be clearly made that the state saw the defense value of Mr. Moore's statement and placed it outside the reach of the defendant. Mr. Stanberry's jury never heard or saw Mr. Moore's statement.

In Ohio v. Roberts, 448 U.S. 56, 65-66 (1980), the U.S. Supreme Court ruled that the previous testimony of a witness given at a preliminary hearing was admissible in the defendant's trial when that witness proved to be unavailable because the defendant had the opportunity to cross-examine her at the preliminary hearing. There was no violation of the "Confrontation Clause" of the 6th Amendment.

The same should be true for Mr. Stanberry in the case at bar. The state had every opportunity to question Mr. Moore and thus did not suffer any 6th Amendment right to confrontation of the witness. Mr. Moore became unavailable when he invoked the 5th Amendment after he was questioned by the prosecutor in the presence of a court reporter.

The old adage, "What's fair for the goose is fair for the gander" should apply in Mr. Stanberry's situation. If the state can use out of court statements of other persons to assist them in obtaining a conviction, why can't a defendant use the same type statement to assist himself in being acquitted? The current rules of evidence in Alabama now allow such statements, so why not now?

The trial court erred in not allowing the statement(s) of Mr. Moore to be admitted into evidence. Alabama law, if different now than what the appellant is arguing should be such that an accused individual should be allowed to admit the statement of another that implicates that declarant and specifically exonerates the defendant for the crime charged.

ISSUE TWO

DID THE TRIAL COURT IMPROPERLY CHARGE THE JURY ON THE LAW CONCERNING CONSPIRACY WHEN THE DEFENDANT WAS NOT CHARGED WITH THE OFFENSE OF CONSPIRACY?

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As pointed out in the statement of facts above, the trial judge charged the jury on "conspiracy" even though the defendant was not charged with conspiracy. In the case of Ex parte Farrell, 591 So.2d 444, 447 (Ala. 1991), the court held that, ""Aiding and abetting" is one possible element of complicity. Sec. 13A-2-23(2). Conspiracy is a crime in and of itself, independent of complicity. Sec. 13A-4-3. Complicity is a theory for imposing criminal culpability, for which aiding and abetting may be an element. Sec. 13A-2-23."

The defendant submits that the court's charge on conspiracy was a fatal variance with the crimes charged against him in the indictments. He was never placed on notice that "conspiracy" was something that he had to answer to.

As pointed out in these courts of appeals, when the court charges the jury on a separate crime to that charged in the indictment(s), a material and fatal variance occurs.

> "The policy behind the variance rule is that the accused should have sufficient notice to enable him to defend himself at trial on the crime for which he has been

indicted and proof of a different crime or the same crime under a different set of facts deprives him of that notice to which he is constitutionally entitled." House v. State, 380 So.2d 940, 942-43 (Ala.1979) (emphasis added).

See also Hightower, 443 So.2d at 1274. "The defendant is called upon to answer only the specific charge contained in the indictment." Hightower, 443 So.2d at 1274. "[A] material variance will exist if the indictment charges an offense committed by one means and the trial court's jury charge addresses a separate and contradictory means." Hamilton v. State, 455 So.2d 170, 173 (Ala.Cr.App.1984). See also Thomas v. State, 452 So.2d 899, 903 (Ala.Cr.App.1984) ("An oral instruction on subsection (3) felony-murder constitutes a fatal variance from an indictment charging subsection (1) intentional murder.").

....

The trial court is without power to add to or take away from any material averment in the indictment. Neither may the trial judge charge the jury upon any issue not properly involved in the trial of the case." Coleman v. State, 443 So.2d 1355, 1358 (Ala.Cr.App.1983) (charging that a burglary conviction could be based upon breaking and entering with an intent to commit either sexual abuse or sodomy was not reversible error, even though the indictment only charged an intent to commit sexual abuse, because the defendant was not harmed since the charge required proof of an intent to perform a more specific act of sexual gratification than that required for a finding of sexual abuse). See also Clements v. State, 370 So.2d 723 (Ala.1979) (although indictment properly charged robbery during the course of which the defendant intentionally killed the victim, the trial court erroneously charged on a different offense, murder in the first degree under circumstances of aggravation, and the jury erroneously rendered a verdict on a different offense (first degree murder with aggravated circumstances) following the judge's instructions), overruled, Beck v. State, 396 So.2d 645, 662, n. 8 (Ala...1980)." [Emphasis added].

Gibson v. State, 488 So.2d 38, 40-41 (Ala.Cr.App. 1986).

Hamilton v. State, 455 So.2d 170 (Ala.Cr.App. 1984), held that:

"The fatal variance rule was established to assure that the accused had sufficient notice to enable him to defend himself at trial. House v. State, 380 So.2d 940 (Ala.1979). In order to reverse a conviction because of a variance in the indictment and the court's charge to the jury, the variance must be material. Ex parte Collins, 385 So.2d 1005 (Ala.1980). The United States Supreme Court, citing Washington & Georgetown R. Co. v. Hickey, 166 U.S. 521, 531, 17 S.Ct. 661, 665, 41 L.Ed. 1101 (1897), held that " 'no variance ought ever to be regarded as material where the allegation and proof substantially correspond, or where the variance was not of a character which could have misled the defendant at the trial.' This was said in a civil case, it is true, but it applies equally to a criminal case if there be added the further requisite that the variance be not such as to deprive the

accused of his right to be protected against another prosecution for the same offense." Berger v. United States, 295 U.S. 78, 83, 55 S.Ct. 629, 631, 79 L.Ed. 1314, 1318 (1935)."

Quite simply, the trial court incorrectly charged the jury on the law of conspiracy, when conspiracy was neither an alleged crime nor a theory of liability. It is reasonable that the jury determined the defendant's guilt on the theory of conspiracy rather than the offenses charged. The court erred to reversal in so charging the jury.

CONCLUSION

The trial court erred in refusing to allow the statement of Mr. Moore into evidence as exculpatory evidence for the defendant. He also incorrectly charged the jury on the law applicable to the case. Both errors deprived the defendant of due process. His conviction is due to be reversed.

CERTIFICATE OF SERVICE

I certify that I have this date served a copy of the foregoing brief and argument on Attorney General for the State of Alabama, Alabama State House, 11 South Union St., Montgomery, Al 36130, by placing a copy of the same in the United States mail, properly addressed and postage prepaid.

DATED this 21st day of February, 1996.

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