IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JAMES VARDAMAN		APPELLANT
VERSUS		NO. 2006-KA-00734-COA
STATE OF MISSISSIPPI		APPELLEE

APPEAL FROM THE CIRCUIT COURT OF RANKIN COUNTY, MISSISSIPPI

APPELLANT'S BRIEF
ORAL ARGUMENT NOT REQUESTED

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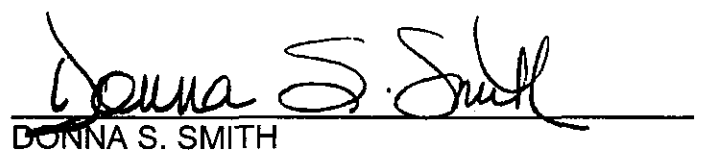
CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made so that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

James Vardaman -- Appellant
Donna S. Smith -- Appeal Counsel for Appellant
David Clark -- District Attorney
Mark Ray -- Assistant District Attorney
Jim Hood -- Attorney General for the State of Mississippi
Hon. Samac S. Richardson -- Trial Judge

Respectfully submitted,



DONNA S. SMITH
COUNSEL FOR JAMES VARDAMAN

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STATEMENT OF THE CASE

On July 4, 2004, James Vardaman, Julie Mason and Jerry Mullins left Crystal Springs, Mississippi, to go to Brandon to renew Vardaman's car license tag. After placing the renewal sticker on his car tag, Vardaman walked across the street to the Dollar General Store. While inside, he purchased pills which contained pseudoephedrine, a substance necessary to the manufacture of methamphetamine. [Tr. 183 – 186.]

The manager of Dollar General, Kathy Davis, was disturbed by the fact that Vardaman was purchasing more than 2 boxes of pills containing psuedoephedrine at the same time and called 911 to report this suspicious activity.[1] Her call was transferred

[1] Davis testified that she had worked with Brandon narcotics office Martin Mann on several occasions and she always called 911 when a customer attempted to purchase more than 2 boxes of pills containing psuedoephedrine. She knew that it is illegal to purchase more than 2 boxes of these pills at the same time.

to narcotics agent Sergeant Martin Mann and she gave him information regarding the model and color of the automobile Vardaman was riding in and the direction in which it was traveling. In fact, Davis followed the car on foot for a short time. [Tr. 141 – 146.] Sergeant Mann immediately collected his partner, Matt Thornton, and together they drove to the area where the Dollar General store was located. [Tr. 59]

Mann and Thornton observed the gold Nissan at the Family Dollar Store and saw Vardaman leave the store. He was met by another passenger in the car (later identified as Jerry Mullins) and the officers saw what they believed to be a disagreement between the two. Vardaman and Mullins got into the car and it was driven off by a female later identified as Julie Mason. The officers kept the car under surveillance as it proceeded down Highway 80 toward Cross Gates Boulevard. [Tr. 59 – 61.]

The vehicle stopped at a BP gas station on Highway 80 at Cross Gates Boulevard and Mann observed Vardaman leave the car and throw a yellow bag into the trash can at the gas island closest to the highway.[2] At this point, the officers decided to have the car stopped for a traffic violation[3] and called for backup units to respond to the area. The car with Vardaman, Mason and Mullins inside was stopped at the Exxon gas station across Highway 80 from the BP station. Mann and Thornton followed them, with Mann driving, and assisted in the traffic stop. [Tr. 60 – 61.]

Mann and Thornton placed all three occupants of the vehicle in custody and searched the car, having first obtained permission from Mason for that search. [Tr. 62.] As they were searching the car, Mason told one of the officers that there were pills

[2] Thornton testified that he saw Vardaman deposit several individual items in the trashcan. He did not see him place a yellow plastic bag in the trash.
[3] There is no indication in the record why a traffic stop was conducted and no testimony was elicited to support that any traffic violation was committed.

secreted behind the ashtray in the dash of the car. [Tr. 62, 191 – 192.] Because Mann had observed Mason and Vardaman "hunched and leaned over" toward the dash, they concentrated their search there, eventually finding a small yellow bag which contained numerous pills Mann recognized as pseudoephedrine pills from his experience as a narcotics officer. [Tr. 62, 86 - 88, 131.]

Mann testified he watched the trash can the whole time, only looking away for five percent of the time, even though he drove to the suspects' location and assisted in the search and maintaining control of one of them. [Tr. 102, 128 – 130.] Once the suspects were placed in a transport vehicle, Mann then dashed back across the street and pulled a yellow plastic bag containing several empty pseudoephedrine blister packs from the nearly full trashcan, which was positioned between two gas pumps. He and Thornton then proceeded to the Brandon jail to assist in processing the suspects. [Tr. 102 – 103.]

When Mann and Thornton arrived at the police station, they got the suspects situated and Mann took the plastic bag containing the pills to the fingerprint table and counted them, finding that the bag contained 288 pseudoephedrine pills, although they had recovered only seven empty blister packs which held 24 pills each, or a total of 168 pills. [Tr. 77 - 78, 87 – 88] Mann told his partner how many pills they had confiscated, but never recorded the number of pills on any official police document. He then placed the bag containing the pills near the computer while he interviewed Mullins. [Tr. 79.]

Vardaman somehow obtained control over the bag with the pseudoephedrine pills in it. He asked to be allowed to go to the restroom and transport Officer Mark Miller escorted him to the restroom and left the door open so that he could observe him.

Miller observed small white pills spilling from a yellow plastic bag in Vardaman's crotch area into the toilet and commanded him to stop his actions. Another officer, Dan Carter, heard his fellow officer's command and responded to the restroom, where he also observed pills falling into the toilet from Vardaman's crotch area. Carter and Miller struggled with Vardaman as he attempted to flush the toilet, eventually handcuffing him. Carter observed "a pile of white sitting at the bottom of the toilet; and, it was just – it was full." [Tr. 1 50 - 161.] One intact pill was recovered from Vardaman's person.

Subsequently Mason and Mullins gave statements to Mann and Thornton, who recorded their statements on video tape. Several days later, the officers interviewed Vardaman in jail. They thought they were recording the interview on tape, so they did not follow Brandon police department's standard operating procedure of obtaining a document signed by the defendant which acknowledged he had been advised of his Miranda rights and that he waived those rights. Vardaman wrote, in longhand, a statement in which he admitted that he had purchased two boxes of pseudoephedrine pills." However, his statement did not contain any admissions that he was going to use the pills to cook methamphetamine, although Mann testified that Vardaman told him that he and Mullins were going to "make a cook" in the next day or so and they had purchased the pseudoephedrine pills in order to cook methamphetamine. [Tr. 82 – 84.] During trial, both Mason and Mann testified that they had already been convicted on various charges related to their arrests on July 4, 2004 and that their reason for testifying was simply to get the truth out into the open. [Tr. 181, 194.] Mason testified that he had served time with Vardaman before and, after objection, the Court instructed the jury to ignore Mullins' testimony regarding serving time with Vardaman. [Tr. 164 –

165.] Mullins went on to testify that he had taught Vardaman how to cook methamphetamine and that Vardaman had recently told him that he wanted to do it again and needed his (Mullins') help. [Tr. 165 – 166.]

Mullins said that he and Vardaman each bought two boxes of pseudoephedrine pills at the Dollar General store. In response to the State's question whether Vardaman had instructed him specifically what to purchase in the Dollar General, Mullins stated that he "kinda knew what to get when he told me to get cold and allergy pills....Well, I knew what – what he wanted....Because of the prior – prior thing, me teaching him how to cook." [Tr. 171 – 172.] Mullins gave the two boxes he had purchased to Vardaman, and then Vardaman went into the Family Dollar store to get more pills. When Vardaman got back in the car he told them that he recognized some cops around them and instructed Mason to pull into a gas station so that he could get rid of the pills. Mason then pulled into a BP station on Highway 80 and Vardaman threw something into the trashcan there. [Tr. 173.]

Mason testified that she drove the car they were all riding in to the Dollar General and Family Dollar stores and that she realized the men were buying pseudoephedrine pills to cook into methamphetamine only after she saw Vardaman with some of the pill boxes. [Tr. 185 – 188.] As she drove away from Family Dollar, Vardaman told her that he saw an unmarked car he knew to be used by the police and started popping pills out of the blister packs into a yellow plastic bag. Mason demanded he get rid of the pills and pulled into a BP station to allow Vardaman to get rid of the pills. She thought he did. Shortly after this, they were stopped by the police and she offered information to them that Vardaman had been fooling with the radio prior to the car being stopped. [Tr.

190 – 192, 195.] On cross examination, Mason admitted perjuring herself either when she entered her guilty plea or during this trial. [Tr. 201 -202.]

Vardaman was convicted of unlawful possession of more than 250 dosage units of pseudoephedrine pills and conspiracy to unlawfully manufacture methamphetamine.

SUMMARY OF THE ARGUMENT

Vardaman was wrongfully convicted of possession of more than 250 dosage units of pseudoephedrine and conspiracy to unlawfully manufacture methamephetamine. The evidence was insufficient to prove beyond a reasonable doubt that Vardaman was guilty of those crimes and the verdicts were against the overwhelming weight of the evidence. The Court failed to timely instruct the jury as to the parameters of note-taking, thereby prejudicing Vardaman. There was insufficient evidence before the court to warrant sentencing Vardaman as an habitual offender and his sentence should be vacated and the case remanded for sentencing of the defendant as a non-habitual offender. Vardaman was represented by ineffective counsel.

ARGUMENT

I. THE COURT ERRED IN NOT GRANTING VARDAMAN'S MOTION FOR DIRECTED VERDICT AS TO THE CHARGES AGAINST HIM

Vardaman appropriately and timely moved the Court for a directed verdict and requested a preemptory instruction at the close of the state's case. [Tr. 205 – 206, R. 98.], thereby preserving this issue for appeal.

Miss.Code Ann. § 97-1-1 (Supp. 1993) provides that conspiracy is committed when two or more persons conspire to commit a crime or to accomplish any unlawful purpose. Each of the alleged conspirators *must* recognize that he is joining the other in a common plan and "[e]ach must intend to further a common and unlawful purpose." *Taylor v. State, 536 So.2d 1326, 1328 (Miss. 1988). See, also, Watson v. State, 521 So.2d 1290, 1293 (Miss.1988).* A formal or express agreement is not required to prove a conspiracy; a conspiracy may be proven by the acts and conduct of the alleged conspirators. *Thomas v. State, 591 So.2d 837, 839 (Miss. 1991), citing Clayton v. State, 582 So.2d 1019, 1022 (Miss.1991); Nixon v. State, 533 So.2d 1078, 1092 (Miss.1987), cert denied, 490 U.S. 1102, 109 S.Ct. 2458, 104 L.Ed.2d 1012 (1989).*

Here, the testimony of Mason and Mullins, the two alleged co-conspirators is unequivocal. There was no common plan formed by Vardaman in conjunction with either Mullins or Mason. Mullins testified that he was asleep in the back seat of the car when Vardaman went into Dollar General and got back into the car. At that time, Vardaman asked Mullins if he would go into the store and get "some." The colloquy between Mullins and the state regarding what Vardaman had requested him to purchase is as follows:

Q. What happened, then, when he got back in the car?

A. Then he asked me would I go in and get some in there; and, I went in and got some.

Q. Some what?

A. Two boxes, at Dollar General, cold and allergy pills.

Q. You say he asked you to go in. Did he specifically to tell [sic] you what to get when you went inside?

A. Well, I kinda knew what to get when he told me to get cold and allergy pills.

Q. But was he the one to tell you. Did he specifically tell you exactly what he wanted?

A. Well, I knew what – what he wanted.

Q. Why did you know what he wanted? How did you know what he wanted?

A. Because of the prior – prior thing, me teaching him how to cook.

Q. So before you ever got out of the car to go inside the Dollar General Store, you knew what you were going to get and why you were going to get it.

A. Right.

Q. What did you go inside and do?

A. To get two boxes of cold and allergy pills.

Only after Mullins came out of Dollar General did he learn that Vardaman had purchased pseudopehedrine pills at Family Dollar. [Tr. 168 – 172, R. Ex. 0021-0025]

Likewise, Mason testified that Mullins was in the restroom when Vardaman walked across the street from the Tax Assessor's office to Dollar General. Mason drove across the street, then Mullins got out and went into Dollar General. There was no conversation between him and Vardaman regarding why Mullins was going in at any time before he went into the store. After Mullins returned to the car with "Sudafed" pills, Vardaman then went into Family Dollar and Mullins and Mason commenced to argue.

Q. Okay. And what were you and Jerry doing or Joey doing – Jerry Joe doing while James Vardaman was in the car – I mean, in the store.

A. I was arguing with Joey; because I knew then what what was going on and I didn't like it....

Q. Now, Julie - -

A. Yes, sir.

Q. -- if I go over to the Dollar General Store or to the Family Dollar Store and pick up a box of Sudafed, no big deal. Nobody's going to argue about it. Why are you harping on Jerry Joe about him picking up Sudafed.

A. Because I knew what the pills were really for.

Q. How did you know that?

A. Because I'd known for a while that the pills were going to be used for manufacturing crystal meth.

Q. How did you know that?

A. Ever since I was fifteen years old, I was around cooks and stuff.....

Q . So when, on July the 6th you're at the Shell station –

A. Yes, sir.

Q. -- and James had gotten out of the car and walked down to the Dollar General Store –

A. Yes, sir.

Q. -- did you know why he walked down there?

A. Not at the time. But when he came out with the pills, I knew.

[Tr 185 – 190, R. Ex. 0026-0031.]

It is apparent from the testimony of both Mullins and Mason that neither of them knew that Vardaman was purchasing pseudoephedrine pills. It is also apparent that they had not discussed cooking methamphetamine that day. *A fortiori,* neither of them could have known that Vardaman intended to cook crystal methamphetamine with those pills. At best, both Vardaman and Mullins independently purchased a legal quality of pseudoephedrine pills and there was no common plan or agreement to manufacture methamphetamine with or from those pills. Given that no plan existed to cook methamphetamine, none of the three of them could have intended to further a common unlawful act. The only evidence of a conspiracy in this case is that Mullins, Mason and

Vardaman, all of whom had cooked methamphetamine before or been around cooks, rode together to Brandon and two of them purchased cold and allergy pills. Mullins did not even know that Vardaman had purchased pills until he had himself purchased pills. [Tr. 171.] Mullins and Vardaman never had a meeting of the minds that they were going to manufacture methamphetamine and therefore there can be no conspiracy. See, *Johnson v. State, 642 So.2d 924 (Miss.1994) and Franklin v. State, 676 So.2d 287 (1996).* Under the unique facts of this case, Vardaman submits that the Court must reverse his conviction for conspiracy to manufacture methamphetamine and discharge him on that count.

Likewise there is no proof that Vardaman purchased more than 250 dosage units of pseudoephedrine pills. The unequivocal testimony in this case is that Vardaman was nervous when he went into the Dollar General store. Kathy Davis thought he had purchased three boxes of pills, but she was not the cashier who sold the pills to him. [Tr. 146.] Each box of pills marked with the Dollar General logo or trademark contained 24 pills. [Tr. 69 – 70, 131.] If Vardaman purchased three boxes of pill containing 24 pills each then the math is quite convincing. He purchased 72 pills at the Dollar General. Then Vardaman allegedly purchased more pills from Family Dollar but the record is silent as to how many dosage units he personally purchased there. Mullins also purchased two boxes of cold and allergy medicine – or 48 pills - from Dollar General, but his purchase was made without Vardaman's knowledge. [Tr. 171 - 172, 185.] Assuming that Detective Mann's unsupported figures for the number of pills confiscated – 288 pills – was correct, then Vardaman only purchased 240 dosage units

which is a legal amount of pseudoephedrine pills to purchase. *Miss. Code Ann. §41-29-313(2)(c).*

II. THE COURT ERRED IN FAILING TO INSTRUCT THE JURY ON NOTE-TAKING IN A TIMELY FASHION

Mississippi has authorized the use of notes by jurors under strictly limited circumstances in the discretion of the trial judge. *U.R.C.C.C.P. 3.14.* Where the trial judge allows the jury to take notes he must give both a preliminary instruction and an instruction at the close of the evidence on the appropriate use of those notes during deliberations. The language of the rule is mandatory:

> Instructions. The court shall instruct the jury as to whether note taking will be permitted. If the court permits jurors to take written notes, the trial judge shall give both a preliminary instruction and an instruction at the close of all the evidence on the appropriate use of juror notes. U.R.C.C.C.P. 3.14(2)

In the case before the court, the learned trial judge failed to give the preliminary instruction mandated by the rule in a timely fashion. Immediately following *voir dire*, Judge Richardson inquired of the duly selected jury whether any of them wished to take notes. Finding that six (6) of them did, he told them that he would give instructions on the appropriate use of juror notes when they returned from the noon recess. [Tr. 55 – 56.] The jury returned after lunch and the trial began with the testimony of Martin Mann. No instruction was provided to the jury before testimony was elicited by the prosecution. After several minutes of direct examination by the state, Judge Richardson apparently realized his oversight and made the following statement and then instructed the jury as provided by *U.R. C.C.C.P. (2)(b)*

> Ladies and Gentlemen of the jury, while they're having their conference, this would be a good time for me to do this; because I neglected to give you instructions on note-taking before the examination began. No one's left the courtroom; witness is on the witness stand and there's been no break in the testimony. I'm putting that in for the benefit of the record....And I apologize for neglecting that earlier. [Tr. 66 – 67.]

"Preliminary' is defined as "something that precedes, prepares for or introduces the main matter, action or business" *American Heritage Dictionary of the English Language, Fourth Edition (2000).* Webster defines preliminary as "that which precedes the main discourse, work, design, or business; something introductory or preparatory; as the preliminaries to a negotiation or duel. *Webster's Revised Unabridged Dictionary (1913).*

This appears to be a case of the first impression in Mississippi. There have been several cases decided wherein the court approved the use of notes by the jury but none where the trial court, having decided to allow note-taking, failed to timely instruct the jury on the use of notes. *See, e.g., Martin v. State, 872 So.2d 713 (Miss.2004) and Wharton v. State, 734 So.2d 985 (Miss. 1988.)*

Had Judge Richardson given the mandated instruction in a timely manner – *i.e.,* before testimony began – more jurors may have elected to take notes as they would have known *ab initio* that they could not rely upon nor look at their fellow jurors' notes. The failure of the trial judge to give the mandated preliminary instruction in a timely fashion deprived the jurors of the opportunity to make informed decisions as to whether or not each of them desired to take notes.

III. THE COURT ERRED IN SENTENCING VARDAMAN AS AN HABITUAL OFFENDER

James Vardaman was sentenced to life in prison without parole as an habitual offender pursuant to *Miss. Code Ann.§99-19-83 (1972).* That statute provides that:

> Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal *crime upon charges separately brought and arising out of separate incidents at different times* and who shall have been sentenced to and served separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere, and where any one (1) of such felonies shall have been a crime of violence shall be sentenced to life imprisonment, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation. [Emphasis added.]

The State presented the testimony of Michelle Taylor, am MDOC employee, with respect to Vardaman's prior convictions and sentences. Taylor testified that Vardaman served about a year in prison on each of two forgery convictions from Lincoln County, Mississippi, although MDOC did not have the date of his initial incarceration "in the computer." Regardless of this oversight, she was sure that he had served a year, although "with the Department of Corrections, he did not serve that full year...he did it in jail, he did not come to us." [Tr. 251 – 254.] No testimony was adduced to prove that those crimes arose from separate incidents or that they were separately brought.

In fact, the records admitted into evidence as State's Exhibit B contain the Lincoln County indictment. That indictment charges Vardaman with two counts of forgery, each of which occurred on "the 16th day of November, 1994." (Indictment, Lincoln County Cause No. 11,537). No testimony was elicited to show that Vardaman committed these crimes at different times or in separate incidents. Therefore, his

convictions for forgery did not rise to the level required by statute to use against him in establishing habitual offender status.

Vardaman also had prior convictions from Copiah County for simple assault on a police officer, for which he was sentenced to two years, and possession of methamphetamine, for which he had been sentenced to three years running consecutively to the simple assault sentence. [Tr. 255.] However, MDOC did not separately calculate the time Vardaman served under each sentence, respectively. [Tr. 256.] All Officer Taylor could testify to was that Vardaman served from December 6, 1999 through April 7, 2004, in *toto*. She had no means of telling the court that Vardaman served at least one year on each of those sentences. In fact, she did not know how much time was attributable to each of the respective sentences.

Once again, the State failed to prove that Vardaman committed these crimes as separate incidents at different times. The Copiah County indictment is also in the records admitted as States' Exhibit B. (See, Indictment, Copiah County Cause No. 2000-0082-CR). In that document it is alleged, in Count 1, that Vardaman on the "6th day of December, 1999" committed the crime of simple assault on a police officer, as well as possessing methamphetamine in Count 3. No explanation of the events that transpired on December 6, 1999, was offered into evidence by the state. However, it is logical to believe that Vardaman, upon being apprehended for possession of a controlled substance, tried to flee and caused injury to a police officer in that attempt. This obviously means that the two crimes of which he was convicted in Copiah County, Mississippi arose out of the same incident and at the same time. In order to treat each

of these convictions as the predicates for imposition of habitual offender status, the state was bound to prove that the crimes arose out of "separate incidents at separate times". The State wholly and totally failed to prove this essential element for the imposition of habitual offender status and, therefore, Vardaman was improperly sentenced as an habitual offender to life without parole. The Court should vacate the trial court's finding that Vardaman is a habitual offender under *Miss. Code Ann. §99-19-83 (1972)* and remand this case for sentencing without enhancement. The State has already had its one bite at the enhancement apple and should be foreclosed from trying to prove now what it failed to prove at the sentencing hearing.

IV. VARDMAN WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL

Vardaman asserts that he was denied effective assistance of counsel vis-à-vis his attorney's actions or lack thereof in (1) failing to bring to the Court's attention that the petit jury was never sworn in as required by statute; (2) failing to submit a cautionary jury instruction to the court for consideration on accomplice testimony; (3) failing to submit to the Court for consideration a cautionary jury instruction advising the jury that they should not use Jerry Mullins' testimony as to any prior conviction against Vardaman and (4) failing to object to the admission of MDOC records, which were neither certified nor attested, during the sentencing hearing. Those failures of counsel adversely prejudiced Vardaman.

The record does not show that the petit jury was never sworn as required by *Miss. Code Ann. §13-5-71(1972).* Frascogna, Vardaman's trial attorney, never brought

this failure to the judge's attention, thereby waiving this issue for appeal. *See, e.g., Booker v. State, ____ So.2d _____ (2004-KA-02143-COA)(Miss, Ct. App. 2006.), and Stewart v. State, 881 So.2d 919 (Miss. Ct. App. 2004).* Vardaman was entitled to be tried by a panel of jurors sworn on their oaths to return a true verdict.

Frascogna elicted testimony from both Jerry Mullins and Julie Mason, each of whom were originally charged with the same crimes as Vardaman. Each of them testified that he/she had already pleaded guilty to some crime or another in order to resolve the cases against them. [Tr. 163, 193.] It is well known that co-defendants have many reasons to testify at their co-defendant's trial and that their testimony is looked upon with suspicion. This instruction should be given by the court as Mullins' *and Mason's statements regarding the existence vel non of a conspiracy* were otherwise uncorroborated by the evidence. Frascogna should have submitted a cautionary instruction to advise the jury of the suspicion with which they should have weighed both Mullins and Mason's testimony. *See, e.g., Dear v. State, _____ So.2d _____ (2005–KA-02281-COA) (Miss. Ct. App. 2006), Walker v. State, _____ So.2d _____ (2005 –KP-00611-COA) (Miss. Ct. App. 2006).*

Frascogna filed three Motions in Limine to prevent the State from eliciting testimony concerning Vardaman's prior convictions at the guilt/innocence trial. [R. 21 - 29.] Apparently the Court ruled that the Motions in Limine were well-taken and granted. [R. 114 – 115.] Despite the Court's ruling, State's witness Mullins testified that he had served time previously with Vardaman. The Court, upon timely objection, immediately issued a curative instruction to the jury. [Tr. 164 – 165.] It was then incumbent upon trial counsel to submit a cautionary instruction to the jury regarding the strictly limited

use of that testimony. No such instruction was requested or granted, thereby failing to provide the jury proper instruction. *See, e.g., Bone v. State,* _____ *So.2d* _____, *(2003-KA-00981-COA) (Miss. Ct. App. 2005).*

Finally, Frascogna failed to object at all to the introduction into evidence of MDOC records which were neither certified nor attested. See State's Exhibit B. In order to be self-authenticating under *Miss. R. Evid. 902(1) and (4),* the records maintained by MDOC must be provided under seal or attested under the Acts of Congress. The MDOC records admitted without objection do not contain the seal of office of any official of MDOC or a notary public nor do they purport to have been attested. Because these documents were not self-authenticating under Rule 902, they should not have been admitted. Had these documents not been admitted into evidence there was sufficient doubt as to whether Vardaman had served sufficient time for two or more crimes arising from separate incidents at different times to prevent him from being found an habitual offender and, therefore, he could not have been sentenced to life without parole. The very fact that Frascogna failed to object, allowing these documents into, evidence is severely prejudicial to Vardaman as he could not have been sentenced to life imprisonment without them.

Taken as a whole, Frascogna's omissions and commissions are egregious and so prejudicial to Vardaman that his convictions must be reversed.

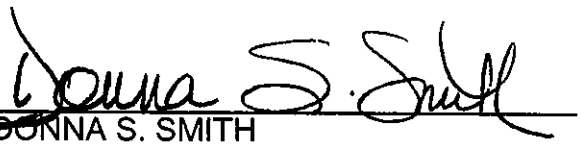
CONCLUSION

For the above and foregoing reasons, the Court should reverse James Vardaman's convictions for possession of more that 250 dosage units of

pseudoephedrine and conspiracy to manufacture methamphetamine and discharge him. Alternatively, this Honorable Court should reverse his convictions and remand for re-sentencing as a non-habitual offender or for new trial.

Respectfully Submitted,

JAMES VARDAMAN

BY: 

DONNA S. SMITH
Attorney for Appellant

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that I, Donna S. Smith, attorney for appellant, James Vardaman, have this day filed this Appellant's Brief with the Clerk of this Court, docketing fee and other appellate expenses having been paid, and have served a copy of this Appellant's Brief by United States Mail, postage prepaid, on the following persons:

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Honorable Samac S. Richardson
Circuit Judge
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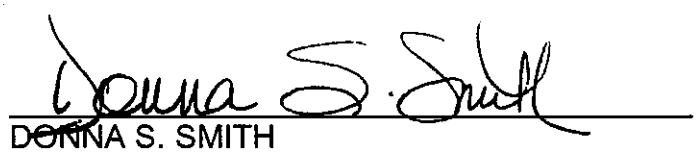
Jim Hood, Esquire
Attorney General
P. O. Box 220
Jackson, Mississippi 39205-0220; and

James Vardaman, #53918
MSP Unit 29-E
Parchman, Mississippi 38738.

SO CERTIFIED, this the 2nd day of February, A.D., 2007.



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