IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI

NO. 2006-KA-01260-COA

LORENZO TARVER — APPELLANT

VS.

STATE OF MISSISSIPPI — APPELLEE

APPELLANT'S BRIEF

APPEAL FROM THE CIRCUIT COURT OF LEFLORE COUNTY
CAUSE NO. 2005-0044

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

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

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This the 14th day of December, 2007.

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SUMMARY OF THE CASE

This case comes before the Court on appeal from a jury verdict of guilty and a judgment and sentence of sixty (60) years in the Mississippi Department of Corrections and a fine of $100,000.00 dollars, in the Circuit Court of Leflore, County, Mississippi, Judge Ashley Hines, on June 15, 2006, for possession of more than one kilogram of marijuana, a schedule I controlled substance, with intent to sell, transfer of distribute.[1]

The State of Mississippi charged Lorenzo Tarver in count one of a two count indictment with possession of marijuana, more than a kilogram, with intent to sell, transfer or distribute in violation of M.C.A. § 41-29-139 (a)(1) and in count two with being a felon in possession of a deadly weapon in violation of M.C.A. § 97-37-5. Additionally, count one was enhanced as to location in violation of M.C.A. §41-29-142.[2] On June 14, 2006 the charges against Tarver came on for trial. The Assistant District Attorney announced ready and Tarver announced ready. The jurors who were summoned were selected, specially sworn, impaneled and accepted by both the State and Tarver to try this cause. The next day, June 15, 2006, after testimony from witnesses, the jury found Tarver guilty of count one only. The court sentenced Tarver to serve sixty (60) years in the Mississippi Department of Corrections. He was further ordered to pay a fine in the amount of $100,000.00, court cost in the amount of $385.50, and a bond fee in the amount of

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[1] R.E. 315. In this Brief, R.E. refers to the Record Excerpts Page. The record page is cited as Volume:Page:Line(s).

[2] R.E. 001 - 002.

$20.00.[3] On June 28, 2006 Tarver filed his Motion for New Trial.[4] On June 30, 2006 the trial court filed its Order denying Tarver's Motion for New Trial.[5] A Notice of Appeal was filed on July 20, 2006.[6]

STATEMENT OF THE FACTS

On June 18, 2004 elements of the Greenwood Police Department executed a search warrant at 506 Cypress Avenue in the City of Greenwood, Mississippi. Tarver's mother (Delores Griffin), step father (Walter Griffinr) and niece (Dzondria Tarver) live at the residence. Other family members and friends visit the house. Tarver was the only person present during the execution of the search warrant.

During the search, allegedly over a kilogram of marijuana, more than $18,000 in U.S. Currency, a 40-caliber firearm along with other firearms were retrieved from the house. At the time of trial, according to the State, the marijuana had disappeared from the Greenwood Police Department evidence vault.

SUMMARY OF THE ARGUMENT

Tarver's right to a fundamental fair and impartial trial was denied as a result of the cumulative effect of a multitude of trial errors. The prosecutor's closing argument insinuated criminal conduct by his Jackson lawyers in stealing the missing marijuana evidence. He then appealed to jury prejudice by arguing that Tarver's trial counsel thinks

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[3] R.E. 315.

[4] R.E. 290-313.

[5] R.E. 314.

[6] R.E. 320-21.

people from Greenwood, Mississippi are ignorant. The statements were unsupported by any evidence, inflammatory, prejudicial and calculated to deny Tarver a fundamental and fair trial. Jurors who expressed concern about missing evidence were erroneously excluded for cause. The trial court, after sustaining an objection to the prosecutor's prejudicial statements during voir dire, permitted the prosecutor to talk about two trials: Tarver's and whoever stole the missing marijuana. The trial court then struck an empaneled juror without first instructing jurors they were to avoid contact with spectators. The trial court denied Tarver's motion to sever the gun count of the indictment. The counts weren't interwoven and evidence to prove one count was not admissible to prove the other count. The trial court then abused its discretion in denying Tarver's motion for continuance. At the time of trial Tarver's retained counsel was suspended from the practice of law in Mississippi. His trial counsel rendered ineffective assistance of counsel when he had only two (2) days to prepare for trial. He had previously appeared only to argue pre-trial motion and had never viewed the evidence against Tarver. Counsel exercised peremptory challenges from the wrong jury list and waived error for appeal by failing to make contemporaneous objections to inadmissable evidence.

The cascade of trial errors continued when the prejudicial effect of the admission of Tarver's prior federal drug possession conviction outweighed it probative value. The state was permitted to amend the indictment as to substance to allege the crime was committed within 1500 feet of a day care center instead of a park. Tarver's right to a speedy trial were violated. The trial was commenced more than eight (8) months after his arrest and fourteenth (14) months after his arraignment. The motion to recuse trial judge should have been granted. The trial court's rulings and imposition of the maximum

sentence is supports the motion. The evidence should have been suppressed because the "confidential informant" recanted his statements used to obtain the search warrant. As a result of the multitude of trial errors, this Court must reverse Tarver's conviction and dismiss the cause. In the alternative, this case must be remanded for a new trial.

ARGUMENT

I. PROSECUTOR'S CLOSING ARGUMENT INSINUATING CRIMINAL CONDUCT BY TARVER'S JACKSON LAWYERS IN THE MISSING EVIDENCE AND THEN APPEALING TO JURY PREJUDICE THAT COUNSEL THINKS THEY'RE IGNORANT CONSTITUTES MISCONDUCT THAT DEPRIVED TARVER OF A FUNDAMENTAL RIGHT TO A FAIR AND IMPARTIAL TRIAL?

The standard of review that appellate courts must apply to lawyer misconduct during opening statements or closing arguments is whether the natural and probable effect of the improper argument is to create unjust prejudice against the accused so as to result in a decision influenced by the prejudice so created.[7] In deciding the propriety of allegedly improper comments, they are considered in the context of the case.[8] A series of otherwise harmless errors in a closing argument may be grounds for reversal where, in the aggregate, those errors violate a defendant's rights to a fair and impartial trial.[9] The judge is provided considerable discretion to determine whether the remark is so prejudicial that a mistrial should be declared and if no serious and irreparable damage has resulted, the trial judge

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[7] *Caston v. State*, 823 So. 2d 473, 495 (Miss. 2002). (quoting *Sheppard v. State*, 777 So. 2d 659, 661 (Miss. 2001).

[8] *Ahmad v. State*, 603 So. 2d 843, 846 (Miss. 1992).

[9] *Howell v. State*, 411 So. 2d 772, 776 (Miss. 1982).

should admonish the jury at the time to disregard the impropriety.[10]

Attorneys are afforded wide latitude in arguing their cases to the jury, but they are not allowed to employ tactics which are inflammatory, highly prejudicial, or reasonably calculated to unduly influence the jury.[11] A prosecutor is prohibited from insinuating criminal conduct which is unsupported by any proof.[12] The prosecutor may comment upon any facts introduced into evidence, and he may draw whatever deductions and inferences that seem proper to him from the facts.[13] Counsel cannot, however, state facts which are not in evidence, and which the court does not judicially know, in aid of his evidence. Neither can he appeal to the prejudices of men by injecting prejudices not contained in some source of the evidence.[14] It has been held that a prosecutor may not use his personal beliefs and the prestige attendant to his office to bolster his argument or the witnesses or evidence which he deems most damaging to a defendant.[15]

Here, during closing argument, the prosecutor made the following inflammatory and

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[10] *Carpenter v. State,* 910 So. 2d 528, 534 (¶ 23) (Miss. 2005) (citing *Roundtree v. State,* 568 So. 2d 1173, 1177 (Miss. 1990)).

[11] *Flowers v. State,* 842 So. 2d 531, (¶ 13) (Miss. 2003) (citing *Sheppard v. State,* 777 So. 2d 659, 661 (Miss. 2001) and *Hiter v. State,* 660 So. 2d 961, 966 (Miss. 1995).

[12] *Smith v. State,* 457 So. 2d 327, 334 (Miss1984). (citing *Stewart v. State,* 263 So. 2d 754 (Miss. 1972).

[13] *Bell v. State,* 725 So. 2d 836, 851 (Miss. 1998).

[14] *Sheppard,* 777 So. 2d at 661.

[15] *United States v. Young,* 470 U.S. 1, 5, 105 S.Ct. 1038, 84 L.Ed. 2d 1 (1985); *Dunaway v. State,* 551 So. 2d 162, 164 (Miss. 1989); *Tubb v. State,* 217 Miss. 741, 745, 64 So. 2d 911 (1953).

highly prejudicial statement insinuating criminal conduct by Tarver's Jackson lawyers calculated to unduly influence the jury:

> But you got a guy who admits to that kind of marijuana, has this kind of money, 18,000 dollars, knowing - - we know that he's going to have a 40 - caliber Baretta is his house. And defense lawyer talking about the missing evidence when they know good and well that that evidence was seen at a hearing where his co-attorneys were, and his investigator was, and his client was. Then all the sudden the first time it's set for trial, it's gone. They wanted to see the evidence vault. Show where the vault is. Now I don't know who showed them, but it was shown to them. The evidence vault. Now, you think this kind of stuff only happens on T.V. No. That's for real. That's why the FBI is investigating, and when we find out who did it - - and you heard Lawrence Williams. Lawrence Williams said, may have been a police officer involved. And if it was - - if it was, that police officer is going to be sitting right where that guy is sitting. And if we find out ShamsidDeen and his cohorts down in Jackson were involved, they are going to be sitting right there.
>
> MR. SHAMSIDDEEN: Objection. Objection.
>
> THE COURT: The objection is sustained.

When ShamsidDeen failed to request the court to instruct the jury to disregard the prosecutor's misconduct insinuating criminal conduct unsupported by any proof or evidence nor ask for a mistrial, or the court, on his own initiate, admonish the jury to disregard the misconduct, the prosecutor continued his inflammatory and prejudicial appeal to the jury's prejudice:

MR. MCCULLOUCH CONTINUING:

> Ladies and gentlemen of the jury, the people come up here from Jackson, big shot lawyers, I guess, I guess[16] thinking Greenwood Mississippi, bunch of ignoramuses. We don't have

[16] 6:755:5-29.

> any sense up here. You can just talk about - - I mean, how long you going to talk about the prints? They said, we didn't do the prints. How many hours of question did you hear about it? Talking about the constitution is made for the people, the people of the United States. That's you. That's all of us. It's not just for Lorenzo Tarver, a drug dealer. It's for all the people. And when we let somebody like this sell this kind of marijuana or possess with the intent to sell, have in their possession - - and if you read the instruction, doesn't have to be actual - - doesn't have to be holding it, possession. When we find that, I hope that we convict, because this is a big fish, and there is a duty that all of us have as Americans, if he wants to talk about America.

It is the duty of trial counsel to promptly make objections if he deems that opposing counsel is overstepping the wide range of authorized argument and then insist upon a ruling by the court.[17] The trial judge will first determine if the objection should be sustained or overruled.[18] If he decides that serious and irreparable damage has been done, he can grant a mistrial.[19] If the argument does not warrant a mistrial he can just admonish the jury to disregard the improper comment.[20] The court has held it is reversible error to make unwarranted personal comments on defense counsel in closing argument as to his veracity and believability.[21]

Here, there was no evidence or proof Tarver's counsels stole the missing marijuana evidence, the evidence clearly shows they never saw the vault. As a point of fact, there

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[17] *Evans v. State,* 725 So. 2d 613, 670 (Miss. 1997).

[18] Id.

[19] Id.

[20] Id.

[21] *Edwards v. State,* 737 So. 2d 275, 300-01 (¶ 56) (Miss. 1999).

wasn't any evidence the marijuana was stolen. The FBI and the Bureau of Alcohol, Tobacco and Firearms were still investigating the disappearance.[22] The evidence could have simply been misplaced. Moreover, during voir dire, when the trial court sustain the objection to the prosecutor's statement about the missing evidence the prosecutor deliberately and egregiously ignored the ruling and further talked about two trials: Tarver's and whoever was responsible for the missing evidence.[23] Then during the State's case in chief the prosecutor insinuates Tarver's lawyers were responsible for the missing marijuana evidence.[24] Even the undersigned could not escape the prosecutor's insinuation of stealing the missing marijuana evidence.[25]

Despite the State's inflammatory and prejudicial statements, the natural and probable effect of the prosecutor inflammatory and highly prejudicial arguments insinuates criminal conduct by Tarver's Jackson lawyers in stealing the missing marijuana evidence. The prosecutor's statement that ShamsidDeen thinks people from Greenwood, Mississippi are ignorant is an appeal to the jury's prejudice. No one wants to be viewed as ignorant. This court must therefore vacate Tarver's conviction because of prosecutorial misconduct and enter a order of dismissal. In the alternative, this cause must be remanded for a new trial.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN (1) EXCLUDING FOR CAUSE JURORS WHO EXPRESSED CONCERN ABOUT MISSING EVIDENCE (2) PERMITTING THE PROSECUTOR TO TALK ABOUT TWO TRIALS: TARVER'S AND WHOEVER STOLE THE EVIDENCE AND (3) STRIKING AN IMPANELED

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[22] 3:325:26-29.

[23] 3:324:27-29; 3:325:1-29; 3:326:1-23.

[24] 4:472:9-29; 4:473:1-7.

[25] 4:586:29; 4:587:1-23.

JUROR.

The standard of review of the decision to grant or deny a challenge for cause is abuse of discretion.[26] This Court will not disturb the decision of the trial court unless it is clearly erroneous.[27] Furthermore, one must demonstrated an obvious prejudice resulting from undue lack of constraint on the prosecution or on the defense.[28]

Mississippi law guarantees the right of either party in a case to probe the prejudices of prospective jurors and investigate their thoughts on matter directly related to the issues to be tried.[29] Such questions enable parties to conscientiously challenge prospective jurors for cause and provide valuable clues for the exercise of peremptory challenges.[30] However, judicial rules prohibit a party from asking venire members hypothetical questions or attempting to elicit a pledge to vote a certain way if a certain set of circumstances are shown.[31] Questions seeking a commitment from jurors are never necessary to accomplish the basic purpose of securing fair and impartial jurors.[32]

Any person, otherwise competent, who will make oath that he is impartial in the case, shall be competent as a juror in any criminal case, notwithstanding the fact that he has an impression or an opinion as to the guilt or innocence of the accused, if it appears to the

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[26] *Sewell v. State,* 721 So. 2d 129 (¶ 29) (Miss. 1998).

[27] *Langston v. State,* 791 So. 2d 273, 282 (25) (Miss. Ct. App. 2001).

[28] *Davis v. State,* 684 So. 2d 643, 652 (Miss. 1996).

[29] *West v. State,* 553 So. 2d 8, 22 (Miss. 1989).

[30] *Harris v. State,* 532 So. 2d 602, 606 (Miss. 1988).

[31] Id.

[32] Id. at 607.

satisfaction of the court that he has no bias or feeling or prejudice in the case, and no desire to reach any result in it, except that to which the evidence may justify.[33] Absent clear showing that prospective juror would be unable to follow court's instruction and obey juror's oath, juror's feelings do not constitute grounds for challenge, and granting of such challenge is reversible error.[34]

Here, juror 12 raised his hand when asked who would say that they're automatically going to vote not guilty because the State won't be able to present the marijuana.[35] Juror 16 indicted that it might be tough to be fair under the circumstances.[36] Jurors 53 and 60 expressed similar concerns.[37] Jurors 65[38], 59, 14 and 45 also expressed concerns.[39] Juror 14 later clarified her position and wanted to listen to all the evidence.[40] It is clear from the prosecutor's question he was attempting to elicit a pledge to vote a certain way if a certain set of circumstances are shown. Such a question is prohibitive, unnecessary and the trial court abused it discretion and reversible error resulted when the responses were permitted

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[33] Miss. Code Ann. § 13-5-79 (Rev. 2002); see also *Simmons v. State,* 241 Miss. 481, 489, 130 So. 2d 860, 863 (1961)) (that a juror has formed an impression about the case does not disqualify him where he states that his opinion is not fixed and that he will decide the case on the evidence).

[34] *Fuselier v. State,* 468 So. 2d 45 (Miss. 1985).

[35] 3:326:24-29; 3:327:1-4.

[36] 3:329:2-4.

[37] 3:329:9-13.

[38] 3:330:17-22.

[39] 3:331:8-12; 3:331:26. 3:332:1-3.

[40] 3:332:3-8.

to be grounds for a challenge for cause.

Based on the answers given to this prohibitive question, the State struck for cause jurors 7[41],12[42], 16[43], 53[44], 59[45], 60[46]. Though juror 14 clarified her position and wanted to listen to all the evidence she was still struck for cause.[47] The fact Tarver's counsel failed to object to the impermissible State's challenges for cause and agreed to the challenges for jurors 53 and 60 did not relieve the trial court from denying same where they are judicially prohibitive. Neither did the jurors say they were unable to follow the court's instruction or obey their oath. This was not harmless error because the jurors expressed concern about the missing evidence.

Additionally, during voir dire, the trial court abused its discretion by permitting the prosecutor to talk about two trials: Tarver's and those responsible for stealing the missing marijuana evidence.[48] The prosecutor actions were deliberate and egregious as they were made after the court sustained an objection to the statement.[49] Tarver was prejudice by the introduction of another crime into his trial.

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[41] 3:362:11-27.

[42] 3:362:28-29; 3:363:1-6.

[43] 3:364:8-18.

[44] 3:366:21-29; 3:367:1-4.

[45] 3:367:5-12.

[46] 3:367:13-20.

[47] 3:363:26-29; 3:364:1-7.

[48] 3:326:6-23.

[49] 3:324:27-29; 3:325:1-29; 3:326:1-1-5.

The court then struck impaneled juror 11 for allegedly having contact with a spectator in violation of U.C.C.C. R. 3.06.[50] The testimony shows the spectator denied talking to the juror.[51] and the court failed to inquire of the juror if the allegation were true. Per the rule, the trial court failed to instruct jurors that they are to avoid all contacts with the attorneys, parties, witnesses or spectators.[52] This ruling is further evidence of the court's bias against Tarver. As a result, he was deprived of the right to a fundamental fair and impartial trial.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING TARVER'S MOTION TO SEVER THE GUN COUNT OF THE INDICTMENT.

A trial court's denial of a motion to sever multiple counts in a single indictment is reviewed for abuse of discretion.[53] Mississippi Code Annotated Section 99-7-2 (Rev. 2007), which sets forth the requirements for trying two offenses together, states: (1) Two (2) or more offenses which are triable in the same court may be charged in the same indictment with a separate count for each offense if: (a) the offenses are based on the same act or transaction, or (b) the offenses are based on two (2) or more acts or transactions connected together or constituting parts of a common scheme or plan. (2) Where two (2) or more offenses are properly charged in separate counts of a single indictment, all such charges may be tried in a single proceeding. In overruling a motion to sever, the trial court must make a detail finding of its ruling.[54]

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[50] 5:727:20-28.

[51] 5:724:13-29.

[52] 3:384:26-29; 3:385:1-29; 3:386:1-29; 3:387:1-29; 3:388:1-28.

[53] *Rushing v. State,* 911 So. 2d 526, 532 (¶ 12) (Miss. 2005).

[54] *Corley v. State,* 584 So. 2d 769 (Miss. 1991).

The supreme court established the following three factors for lower court to consider when determining whether a multi-count indictment is proper: (1) whether the time period between the occurrences is insignificant, (2) whether the evidence proving each count would be admissible to prove each of the other counts and (3) whether the crimes are interwoven.[55]

The Mississippi Uniform Rules of Circuit and County Court Practice (URCCC) likewise address multi-count indictment. The provision of URCCC 7.07(A.) (B.) are identical to the above statutory language. The only difference is in the order and numbering of the provisions and the references to the trial judge and jury.

When a defendant raises the issue of severance, prior case law recommends that a trial court hold a hearing on the issue. The State, then has the burden of making a prima facie case showing that the offense charged falls within the language of the statute allowing multi-count indictment. If the State meets its burden, a defendant may rebut by showing that the offense were separate and distinct acts or transaction. In making its determination regarding severance, the trial court should pay particular attention to whether the time period between the occurrence is insignificant, whether the evidence proving each count would be admissible to prove each of the other counts, and whether the crimes are interwoven.[56]

In determining whether a defendant's acts constitute a common plan or scheme, this Court considers whether the victim is the same, the act is the same, and the same evidence

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[55] *Rushing,* 911 So. 2d at 533 (¶ 14) (citing *Corley* 584 So. 2d at 772).

[56] See *Allman v. State,* 571 So. 2d 244, 248 (Miss. 1990); *McCarty v. State,* 554 So. 2d 909, 914-16 (Miss. 1989).

can be used if the State brought charges in separate trials.[57]

The Mississippi high court have been, and remains, unwilling to allow separate and distinct offenses to be tried in the same criminal proceeding. The Mississippi court's policy is designed to avoid potential problems of a jury finding a defendant guilty on one unproven count due to proof of guilt on another, or convicting a defendant based upon the weight of the charged offense, or upon the cumulative effect of the evidence.[58]

Herein, the offenses are not based on the same act or transaction. Nor are they connected by a common scheme or plan. There is absolutely no evidence that Tarver while possessing marijuana also possessed the weapon found in the back room of his parent's house. Moreover, there is absolutely no evidence of common scheme or plan tying the marijuana and the gun together. The only possible connections require absolute and pure speculation.

The commission of the offense charged in count one of the indictment does not involve or require the commission of any of the elements of the crime charged in count two. Evidence proving the marijuana count would not be admissible to prove the gun charge.

The crimes are not interwoven. The weapon seized during the execution of the warrant was found in the back room of the house, covered with a rug. The room in question is at a distance from the room the police identifies as Tarver's room. Tarver's mother, step father and niece live at the residence. The two counts are merely joined gratuitously together in the indictment to prejudice the jury against Tarver by introducing his prior

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[57] *Ott v. State,* 722 So. 2d 756 (Miss. 1998).

[58] *McCarty v. State,* 554 So. 2d at 915.

conviction into evidence. Though Tarver was found not guilty of the gun charge, the marijuana conviction is the fait accompli.

IV. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING TARVER'S MOTION FOR CONTINUANCE.

The decision to grant or deny a motion for continuance is within the sound discretion of the trial court and will not be grounds for reversal unless shown to have resulted in a manifest injustice.[59] To succeed in this claim on appeal, the defendant must show an abuse of the court's discretion and that the abuse actually worked an injustice in his case.[60]

At the pre-trial hearing on Monday, June 12, 2006 Attorney Ali ShamsiDeen informed the court he was retained only to argue pre-trial motions.[61] He stated that he had done so on at least two other occasions.[62] The trial court denied the motion for continuance because it was not filed seven days before trial.[63] ShamsidDeen was ordered to be in court two days later, June 14, 2006, for the start of trial.[64] After the jury was fortuitously selected (ShamsidDeen used the wrong jury list to exercise peremptory challenges) he again expressed his concerns that he was not prepared for trial and would render ineffective assistance of counsel.[65] Tarver also expressed concerns ShamsidDeen was not prepared

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[59] *Bailey v. State,* 956 So. 2d 1016 Miss. App. 2007).

[60] *Nelson v. State,* 850 So. 2d 201, 204 (¶ 7) (Miss. Ct. App. 2003).

[61] 2:297:1-8.

[62] 3:301:24-29; 3:302:1-2.

[63] 3:301:16-23.

[64] 3:302:3-7.

[65] 3:382:2-11; 3:382:26-29; 3:383:1-5 3:383:21-29.

for trial.[66]

The fact ShamsidDeen was not prepared for trial quickly became evident when he became aware he had not seen the evidence the State intended to introduce against Tarver.[67] A manifest injustice resulted when Tarver's counsel had only two (2) days to prepare for trial. He had not viewed evidence the state intended to introduce against Tarver. Furthermore, he used the wrong jury list to exercise peremptory challenges. He also failed to make contemporaneous objections to inadmissible evidence on more than one occasion.

V. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING TARVER'S MOTION TO SUPPRESS HIS CRIMINAL RECORD.

The standard of review for a trial judge's ruling on a motion to suppress evidence is well established. This court must decide whether there was substantial, credible evidence to support the trial judge's ruling.[68] This ruling must not be disturbed unless such substantial, credible evidence is absent.[69] Furthermore, admission of evidence is within the discretion of the trial court, and can only be reversed upon abuse of its discretion.[70]

The supreme court has acknowledged the highly prejudicial effect on a jury in the context of admitting prior convictions of similar offenses for impeachment purposes.[71] Furthermore, M.R.E. 609(a), Impeachment by Evidence of Conviction of Crime, requires the

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[66] 3:382:19-25.

[67] 5:709:18-29.

[68] *Culp v. State,* 933 So. 2d 264, 274 (¶ 26) (Miss. 2005).

[69] *Ray v. State,* 503 So. 2d 222, 223-24 (Miss. 1986).

[70] *Crawford v. State,* 754 So. 2d 1211, 1215 (¶ 7) (Miss. 2000).

[71] *Peterson v. State,* 518 So. 2d 632, 637 (Miss. 1987).

trial court to determine if the probative value of the conviction outweighs its prejudicial effect. M.R.E. 404(b), Character Evidence not Admissible to Prove Conduct: Exception Other Crimes, provides that evidence of other crimes may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Additionally, M.R.E. 403, Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion or Waste of Time, provides that although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.

Tarver's prior federal drug conviction was in 1998 and he had not been convicted of any crime since then. This factor weights against admission of the conviction. Both charged offenses are possession of drugs with intent to sale or distribute which also weight against their admission. Their admission tends to cause the jury to make the impermissible inference that Tarver acted in conformity with his prior crime.

Here, Tarver filed a motion to suppress and exclude his criminal record.[72] He also filed a Brief in support of same.[73] He argued that his prior conviction for possession with intent to sale cocaine was similar to his count one charge of possession of marijuana with intent to sell, transfer or distribute and should be excluded from evidence.

On November 17, 2005 , the trial court filed its Order denying Tarver's motion to

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[72] R.E. 038-040.

[73] R.E. 100-197.

suppress.[74] Citing case law, the court found that the probative value of the evidence in showing intent is not substantially outweighed by the prejudice to Tarver and that the prejudice to Tarver can be sufficiently limited by the Court properly instructing the jury as to the limited purpose for which they may consider the evidence.[75] The trial court abused its discretion in admitting Tarver's prior federal drug conviction. The trial court overlooks the fact that admission of Tarver's prior conviction in this case was clearly more prejudicial than probative. In the present case the amount of marijuana that was allegedly involved is itself evidence of an intent to distribute. Thus a prior conviction was not needed to prove Tarver's intent if the jury accepted the prosecutor's proof on the question of possession. On the other hand, admission of Tarver's prior conviction for possession with intent to distribute cocaine was extremely prejudicial. The admission of this prior conviction impermissibly inferred Tarver was guilty in this case because of his prior conviction. Finally, it should be noted that Tarver did not testify. Thus the admission of this evidence had no impeachment value.

VI. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT PERMITTED THE STATE TO AMEND THE INDICTMENT TO ALLEGE THE CRIME WAS COMMITTED WITHIN 1500 FEET OF A DAY CARE CENTER INSTEAD OF A PARK.

Amendment to an indictment may be made only if the amendment is immaterial to the merits of the case and the defense will not be prejudiced by the amendment. Amendments as to the substance of the charge must be made by a grand jury. The test for whether an amendment to the indictment will prejudice the defense is whether the defense

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[74] R.E. 200-201.

[75] *White v. State,* 842 So. 2d 565 (Miss. 2003).

as it originally stood would be equally available after the amendment is made.[76]

Herein, the State filed its Motion to Amend the Indictment on September 15, 2005.[77] On November 28, the trial court filed its Order granting the motion.[78] Citing U.R.C.C.C. 7.09, the court reasoned that the amendment went to the form of the indictment to correct the transcription error in the enhanced portion of the indictment, changing the word "park" to the word "daycare,"rather than to substance.

The amendment to the indictment was to substance not form and should not have been permitted. Tarver was prejudice in that before the amendment of the indictment the State could not prove beyond a reasonable doubt that a park was within 1500 feet from the house. After the amendment, his defense that the location was not a park was no longer available.

VII. TARVER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

To succeed on a claim of ineffectiveness of counsel, it must be shown that counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.[79] The time-honored test for claim of ineffective assistance of counsel was set forth in *Strickland v. Washington.*[80]

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[76] *Crawford v. State,* 754 So. 2d 1211, 1219 (¶ 17) (Miss. 2000) (citing *Eakes v. State,* 665 So. 2d 852, 860 (Miss. 1995)).

[77] R.E. 061-062.

[78] R.E. 206.

[79] *Ross v. State,* 954 So. 2d 968, 1003 (¶ 77) (Miss. 2007) (citation omitted).

[80] 466 U.S. 668 (1984).

Evidence ShamsidDeen was not prepared for trial quickly became evident when he realized he had not seen photographic evidence the State intended to introduce against Tarver.[90] As the court well knew, ShamsiDeen was not the attorney at the suppression hearing. His retained counsel, Chokwe Lumumba, appeared for Tarver at that time.

This inauspicious beginning continued when ShamsidDeen admitted to using the wrong jury list to exercise peremptory challenges as expressed in the following declaration:

> MR. SHAMSIDDEEN: Okay. If I may then, Your Honor, my understanding of this list was totally erroneous, and I'll say that it was my fault. And the way I was selecting people was based on the names that I had here, and I was trying to go from this list. But, Your Honor, I - - this is in vein, too, really of the motion I have concerning the help that I need in this case, and I was hoping we would hear those motions before we went into this aspect of the trial, because it's really relevant to that. One, in regards to that motion the prosecutor has been investigating this case, Mr. Bradley, as a witness, which is preventing him from being help to me. Mr. Bradley who had been working this case even before I even knew about this case, and he's worked this case all along and I certainly intended for him to be here to[91] be help to me in this is one instance where he could have at least taken notes that I couldn't take trying to listen to the Court. I'm asking Mr. McCullouch why is Mr. Bradley a witness for them. He's stating that he's a rebuttal to Chris Davis. If that's the case, then - - then we could solve - - resolve that now because we won't be calling Chris Davis. I don't know of any other reason why - - you know, how he would be helpful to the State in regards - - in terms of testimony.[92]
>
> MR. SHAMSIDDEEN: I must apologize, Your Honor., because I was looking at this list in view of who I thought really eligible as jurors, and I was trying to make my selections from that,

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[90] 5:710:1-28.

[91] 3:375:12-29.

[92] 3:376:1-11.

and I thought I have followed along in order.

THE COURT: But I told you the jurors that I was tendering to the parties, and you wrote the numbers down.

MR. SHANSIDDEEN: Yes.

THE COURT: And I'm not understanding what the problem with that is. Are you telling me that if you had observed that I dismissed Johnny Lee Moore on the record during the voir dire that you would have - - if you knew that he wasn't on the jury, you're telling me you would have used one of the strikes that you used on somebody else differently?

MR. SHAMSIDDEEN: Yes, sir.[93]
THE COURT: Well, I feel like we've selected this jury according to the practices that we always engage in, and I explained the practices before we started. And I called out the numbers of the jurors that were under consideration tendered to the parties. So at this time I'm not going to go back and redo the jury after we've already done the jury selection.

MR. SHAMSIDDEEN: Well, I'm just saying, Your Honor, for the record, too, it was quite confusing to me to have names on here that were already eliminated. I mean, if they were already eliminated, why did I even have to consider them is my point.

THE COURT: You weren't considering them, because I - - you were only considering the ones that I called out, because I called out - - when we started, I called out all the jurors who were tendered to the parties. I tendered the first group to Mr. - - to the State. And then we added to that after he exercised his challenges. Then I gave the ones that were[94] tendered to the defendant. I gave those numbers to you. But now we're on the alternates, and you have one challenge to the two alternates which are 52 and 54.[95]

Considering his confusion, as the following excerpt shows, ShamsidDeen wanted

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[93] 3:377:2-23.

[94] 3:378:7-29.

[95] 3:379:1-4.

to know who actually were selected as jurors as he really didn't understand the jury selection system:

> MR. SHAMSIDDEEN: Yes, let me be clear who we have as jurors at this point, Your Honor, if I can do that. So what we're saying Juror 19 is selected.[96]
>
> THE COURT: That's Juror No. 1.
>
> MR. SHAMSIDDEEN: And Juror 26 is selected.
>
> THE COURT: That's No. 2.
>
> MR. SHAMSIDDEEN: And Juror 32?
>
> THE COURT: 32.
>
> MR. SHAMSIDDEEN: 36.
>
> THE COURT: Juror 4.
>
> MR. SHAMSIDDEEN: And 37.
>
> THE COURT: 37, 40, 41, 42, 44, 46, 47, 50[97] - - 50 is No. 12, and then we have 54 and 55 as Alternate 1 and Alternate 2.
>
> MR. SHAMSIDDEEN: Your Honor, I - - again, I have to protest that. I really didn't understand this process. I haven't gone through the process like this before. But, you know, I thought the list itself was tendered to me.[98]

Counsel's deficient performance continued in the following prejudicial exchange initiated by the State on direct examination that went without objection to speculation:

> Q. But let me ask you this. Do you think the man knew that that was the law that over one kilogram is the

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[96] 3:379:16-29.

[97] 3:379:16-29.

[98] 3:380:1-8.

same as having forty-something kilograms? Do you think he actually knew that was the law?

A. Yes, he's been through the system before.

Q. But I'm saying do you think that he knew the law was if you had over one kilogram, it would be worse for you if you had forty-something kilograms or just a couple of kilograms?[99]

A. It'd all be the same.

Q. Okay. Well, I disagree with you on that. I don't think he know it, but that's alright. We can have disagreements.[100]

The deficient representation continued during the following prejudicial questions and answers initiated by the State that implies bad acts of Tarver that were not admissible but went largely unchallenged:

Q. Would you agree with me or disagree that there are records at the P.D., police department, showing 506 Cypress as his address for years?

A. Yes, he's given that address for his residence in the past. Yes.[101]

Continuing, counsel failed to make the proper objection to the prosecutor's following questions which violated Tarver's constitutional right to remain silent:

Q. Now, did he say, "that ain't my bedroom?"

A. No, he didn't.

Q. "This ain't my house?"

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[99] 4:471:21-29.

[100] 4:472:1-4.

[101] 4:474:2-6.

A. No, he didn't say that.

Q. Did he say, "this isn't my gaming machine"- - "gambling machine," whatever room you want to call it?

A. He claimed the gambling machine.

MR. SHAMSIDDEEN: Objection, Your Honor.

THE COURT: State your objection.

MR. SHAMSIDDEEN: Hearsay. He's asking him to state the truth for a statement out of court.
THE COURT: It's overruled.[102]

Counsel's deficient performance continued when Greenwood Police Department Sargent Demetrice Bedell, not recognized as a fingerprint expert, was permitted, without objection, to give the following expert testimony:

Q. Well, then how couldn't they have gotten a fingerprint on it?

A. Like I explained earlier, the secretions and the plastic won't allow you to get an accurate fingerprint off of things of that nat nature.

Q. And anybody could feel that.

MR. MCCULLOUCH: No more questions. Your honor.[103]

Furthermore, the following prejudicial hearsay testimony during the State's case in chief proceeded without objection:

Q. And then what did you do?

A. I told Agent Bedell what I observed from smelling

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[102] 4:474:10-22.

[103] 4:476:3-10.

> through the shed, and he in turn smelled the same thing. He said, "let me go inside the house and get the key. See if he has the key." so he went inside and then he come back out and he had some keys. He said, "I got these from Lorenzo." and he stuck a key in it and turned it and it opened up.[104]

Counsel performed deficiently by failing to make contemporaneous objections to evidence which precipitated the following next day, June 15, 2006, motion for a mistrial:

> MR. SHAMSIDDEEN: Yes sir. The issue that - - and this is directly in vein of what Mr. McCullouch is stating right now. We made an agreement that we would not get into the search warrant itself where yesterday he elicited it - - testimony was given - - testimony that the search warrant was ordered or obtained from information. Information Sergeant Bedell from the stand yesterday said it was because of[105] information that he received about that specific gun and what was going to be on the gun and that the gun belonged to Lorenzo Tarver. Now, we had agreed yesterday that we would not get into that. And now he's put that information in the jury's mind that there was information that they got that caused him to get the search warrant. And based on that, I'm asking the court for a mistrial.[106]

Actually, the following exchange details the agreement between the parties:

> MR. SHAMSIDDEEN: The motion that none of the issues concerning the charges that were dismissed against Mr. Tarver is mentioned in the course of this trial.
>
> THE COURT; Do you have any response to that?
> MR. MCCULLOUCH: None, Your Honor.
>
> THE COURT: That motion is granted.
>
> MR. MCCULLOUCH: And, Your Honor, I would make a motion

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[104] 4:481:7-13.

[105] 4:495:21-29.

[106] 4:496:1-9.

in limine to limit the defense from going into all of the issues therefor that the numerous hearing that we went over concerning those, because that's - - was exactly what the issues were, such as, the - -[107] all the various charges that the Greenwood Police Department had at some time. I would also make a motion in limine to request the court to limit or - - if not completely disallow questioning on the issue of the search warrant. We spent I think over three hours in a motion to suppress hearing, at least, on that issue. The Court ruled on the issue, and this could turn into a two-week trial if we tried to re-litigate all of those issues.
THE COURT: What response does the defendant make to that?

MR. SHAMSIDEEN: I think in response to the search warrant, we don't intend to get into that. What was the other motion?

MR. MCCULOUCH: Well, I mean, that was it. It was the search warrant and that we did not want to get into any of the previous charges concerning Tarver or Chris Davis or Edwin Brewer, and I know those are on your witness list. I would like to note for the record today is the first day I've been tendered a witness list - -[108]

The testimony in reference to the search warrant Tarver's counsel was now objecting to was the following:

Q. Okay. Go ahead.

A. And we also had a conspiracy to commit - - we also had another warrant also.

Q. All right. So June the 18, 2004, you have a[109] court ordered search warrant and you go over to 506 Cypress.

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[107] 3:380:16-29.

[108] 3:381:1-23.

[109] 3:399:26-29.

A. We do.[110]

Q. Now when you say you had information about a 4–caliber Baretta with Shelby County stamp on it, are you saying you had this information at what point?

A. Prior to getting the court ordered search[111] warrant, we had information that the weapon would be at the residence, along with Lorenzo Tarver.[112]

Counsel's performance was deficient in that failure to make a contemporaneous objection and allow the trial court an opportunity to cure the defect is a procedural bar and constitutes a waiver of the argument on appeal.[113] Furthermore, an objection on one or more specific grounds constitutes a waiver of all other grounds.[114] Counsel's deficient performance fell below an objective form of reasonableness and Tarver is therefore barred from raising the issue of their admissibility on appeal.[115]

Additionally, there was no foundation or objection to competency to the following exchange by the State on redirect examination:

Q. When you're a federal probationee - - I guess that's the word - - and they ask you for an address and you put down 506 Cypress, what does that mean?

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[110] 3:400:1-3.

[111] 3:408:26-29.

[112] 3:409:1-2.

[113] *Baker v. State,* 930 So. 2d399, 412-13 (¶ 30) (Miss. Ct App. 2005) (quoting *Mitchell v. Glimm,* 819 So. 2d 548, 552 (¶ 11) (Miss. Ct. App. 2002)).

[114] *Burns v. State,* 729 So. 2d 203, 219 (¶ 67) (Miss. 1998)..

[115] *Bennett v. State,* 933 So. 2d 930 (Miss. 2006).

A. That means that's where you stay.[116]

The witness was a Greenwood Police Department Officer, not a federal employee let alone a federal probationer officer. Furthermore, this witness, who was not qualified as an expert, was permitted to testify, without objection, to the result of a crime lab report, that was not in evidence, during the following dialogue:

Q. Now, out of all of these - - I want to show you this Crime Lab report. How many bags total were sent to the Mississippi Crime Lab?

A. Approximately five.

Q. Okay. Now, out of all those bags how many prints of value - - not necessarily his - - of anybody was lifted from that bag?

A. It says, "no latent prints of value" --

Q. Okay.

A. - - "for comparison."

Q. Wait a second. All right, what about there?

A. "Latent impressions of value marked L1 was developed and photographed on one of the trash bags in Submission 008.

Q. And there were none on submission nine.

A. Correct.

Q. And submission nine was how many bags?

A. Two.

Q. So out of five bags, big old garbage size bags, there was only one fingerprint that the Mississippi Crime

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[116] 4:473:18-21.

Laboratory could lift off of any of those.

A. Correct.

Q. And that could have been your fingerprint?

A. Yes.

Q. So just because they didn't lift Tarver's fingerprints means it wasn't his? I mean, somebody had[117] to hold it, right?

A. Correct.

Q. Well, then how couldn't they have gotten a fingerprint on it?

A. Like I explained earlier, the secretions and the plastic won't allow you to get an accurate fingerprint off of things of that nature.

Q. And anybody could feel that.[118]

The deficient performance by counsel continued in the following prejudicial bad acts testimony elicited in the State's case in chief without objection:

Q. How did you know 506 was where Lorenzo Tarver[119] stayed?

A. I been at the police department since 1998 and on several occasions I've had dealings with Lorenzo, and I've always known that to be his address especially with other police reports where he's been arrested and listed that address.

Q. And those would be on drug related issues. Right?

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[117] 4:475:8-29.

[118] 4:476:1-8.

[119] 4:567:29.

A. There were a couple of drug related issues, yes, sir.

Q. How else did you know it's his address?

A. Well, at the time that we were going there we had gotten information that Lorenzo lived there, and the information on the - -

MR. SHAMSIDDEEN: Objection again, Your Honor.

THE COURT: It's overruled.[120]

Finally, during the state's closing argument, counsel failed to ask for a jury instruction to not consider and disregard the following inflammatory and prejudicial statement:

> But you got a guy who admits to that kind of marijuana, has this kind of money, 18,000 dollars, knowing - - we know that he's going to have a 40 - caliber Baretta is his house. And defense lawyer talking about the missing evidence when they know good and well that that evidence was seen at a hearing where his co-attorneys were, and his investigator was, and his client was. Then all the sudden the first time it's set for trial, it's gone. They wanted to see the evidence vault. Show where the vault is. Now I don't know who showed them, but it was shown to them. The evidence vault. Now, you think this kind of stuff only happens on T.V. No. That's for real. That's why the FBI is investigating, and when we find out who did it - - and you heard Lawrence Williams. Lawrence Williams said, may have been a police officer involved. And if it was - - if it was, that police officer is going to be sitting right where that guy is sitting. And if we find out ShamsidDeen and his cohorts down in Jackson were involved, they are going to be sitting right there.
>
> MR. SHAMSIDDEEN: Objection. Objection.
>
> THE COURT: The objection is sustained.

When ShamsidDeen failed to request the court to instruct the jury to disregard the argument or ask for a mistrial, the prosecutor continued his inflammatory and prejudicial

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[120] 4:568:1-17.

appeal:

MR. MCCULLOUCH CONTINUING:

> Ladies and gentlemen of the jury, the people come up here from Jackson, big shot lawyers, I guess, I guess[121] thinking Greenwood Mississippi, bunch of ignoramuses. We don't have any sense up here. You can just talk about - - I mean, how long you going to talk about the prints? They said, we didn't do the prints. How many hours of question did you hear about it? Talking about the constitution is made for the people, the people of the United States. That's you. That's all of us. It's not just for Lorenzo Tarver, a drug dealer. It's for all the people. And when we let somebody like this sell this kind of marijuana or possess with the intent to sell, have in their possession - - and if you read the instruction, doesn't have to be actual - - doesn't have to be holding it, possession. When we find that, I hope that we convict, because this is a big fish, and there is a duty that all of us have as Americans, if he wants to talk about America.[122]

The prosecutor's statement that ShamsidDeen think people from Greenwood, Mississippi are ignorant was an appeal to the jurors prejudice. No one wants to be called ignorant. In stead of making a contemporaneous objection to the statement, counsel waited until after the argument, some 2 hours, to lodge objections regarding three (3) trial incidents and to request a mistrial.[123]

If counsel had made contemporaneous objections to the numerous errors listed about and requested a mistrial the court would have granted the motion and the outcome of this cause would have been different.

VIII. WHETHER TARVER IS ENTITLED TO A NEW TRIAL BECAUSE OF LOST

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[121] 6:755:5-29.

[122] 6:756:1-16.

[123] 6:757:25-29; 6:758:1-29; 6:759:1-29; 6:760:1-4.

OR DESTROYED EVIDENCE?

In order to find a due process violation by the state in a preservation-of-evidence case: (1) th evidence in question must possess an exculpatory value that was apparent before the evidence was destroyed, (2) the evidence must be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means, and (3) the prosecutor's destruction of the evidence must have been in bad faith.[124]

The drug evidence allegedly seized from the residence where Tarver was arrested was not introduced into evidence as testimony on direct examination of the state's case in chief confirms:

> Q. Okay. And as far as that evidence being in - -presented at any other hearing, it's not here today, right?
>
> A. The drug evidence is not here today, no sir.[125]
>
> Q. But today you bring in some plastic bags, and you say the evidence that was in those bags is gone.
>
> A. That is correct.[126]

Herein, ShamsidDeen did not represent Tarver at the forfeiture proceedings or suppression hearing and did not see the marijuana evidence. To Tarver's detriment, therefore, he was unable to have it independently tested to determine its exculpatory value. The marijuana is of such a nature that Tarver would be unable to obtain comparable evidence by other reasonably available means. Finally, the marijuana was missing because

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[124] *State v. McGrone,* 98 So. 2d 519 (¶ 11) (Miss. 2001).

[125] 4:596:2-5.

[126] 4:596:22-24.

of State action not Tarver's. He was denied the opportunity to test whether it was exculpatory or not.

IX. TARVER'S RIGHT TO A SPEEDY TRIAL WAS DENIED.

Review of a speedy trial claim involves a question of fact: whether the trial delay arose from good cause.[127] Both federal and state laws protect a criminal defendant's right to a speedy trial when an appellant asserts a violation of his rights under the United States constitution and under the laws of Mississippi, two separate analyses of review are employed. The right to a speedy trial is guaranteed under federal law by the Sixth Amendment to the United States Constitution and is applicable to the state via the Fourteenth Amendment. Mississippi constitutionally protects the right to a speedy trial and statutorily limits the time in which a defendant must be tried. While the right to a speedy trial is protected both constitutionally and statutorily, any inquiry into a violation of the right to a speedy trial must necessarily begin with an analysis of state statutory right, as the State has the right to craft laws so long as they are not in violation of the minimum standard set by the federal constitution.[128]

Our state constitution requires that an accused be granted in all prosecution by indictment or information, a speedy and public trial.[129] Mississippi Code Annotated Section 99-17-1 (Rev. 2000) states unless good cause be shown, and a continuance duly granted by the court, all offenses for which indictment are presented to the court shall be tried no

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[127] *Flora v. State,* 925 So. 2d 797, 814 (Miss. 2006) (citing *DeLoach v. State,* 722 So. 2d 512, 516 (¶ 12) (Miss. 1998).

[128] *Mitchell v. State,* 792 So. 2d 192, 213 (¶ 80) (Miss. 2001).

[129] Miss. Const. of 1890, art 3, § 26.

trial.[137] Under this test, which has been adopted by the Mississippi Supreme court, the trial judge is to balance: (I) length of delay, (ii) the reason for the delay, (iii) the defendant;'s assertion of his right, and (iv) prejudice to the defendant.[138]

A discussion of whether Tarver incurred a prejudicial pre-trial delay begins with addressing the first factor of the *Barker* analysis: the length of the delay. This factor has been described as somewhat of a triggering mechanism. Until it is established that there has been some delay which is presumptively prejudicial, there is no need for further analysis of the remaining balancing factors.[139] The supreme court has established that a delay of eight (8) months or more [between arrest and trial] is presumptively prejudicial.[140]

The second *Barker* factor is whether the delay is justified. Once there is a finding that the delay is presumptively prejudicial, the burden shifts to the prosecution to produce evidence justifying the delay and to persuade the trier of fact of the legitimacy of these reasons.[141] Thus the reason for the delay must be determined and ethe unique circumstances of each case examined.[142] The *Barker* court said that on this factor different weights should be given to different reasons for delay.[143]

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[137] *Barker v. Wingo,* 407 U.S. 514 (1972).

[138] *Price,* 898 So. 2d at 648 (¶ 10).

[139] *Barker,* 407 U.S. at 530, 92 S. Ct. 2182; *Perry v. State,* 637 So. 2d 871, 874 (Miss. 1994).

[140] *Reynolds v. State,* 784 So. 2d 929, 933 (¶ 10) (Miss. 2001).

[141] *DeLoach v. State,* 722 So. 2d 512, 517 (¶ 17) (Miss. 1998).

[142] *Stark v. State,* 911 So. 2d 447, 450 (¶ 11) (Miss. 2005).

[143] *Barker,* 407 U.S. at 531, 92 S. Ct. 2182.

The accused's assertion of or failure to assert the right to a speedy trial is the third of the *Barker* factors to be considered in an inquiry on whether the speedy trial right was denied. Although a defendant does not have an obligation to bring himself to trial, he will earn points on his side of the ledger when he has made a demand for a speedy trial.[144] The fourth *Barker* factor is prejudice to the defendant. The *Barker* court instructed that prejudice to the defendant should be assessed in light of the following interest: (1) to prevent oppressive pretrial incarceration, (2) to minimize anxiety and concern by the accused due to an unresolved criminal charge, and (3) to limit the possibility that the defense will be impaired.[145] The court said prejudice should be examined in light of these interest of a defendant with the last interest, possible prejudice to the defendant, being the most important.[146]

Tarver was arrested on June 18, 2004.[147] He was arraigned on April 1, 2005.[148] Fourteen months elapsed from his arraignment to when his trial commenced on June 14, 2006. He asserted his right to a speedy trial in his Motion to Dismiss for Violation of Defendant's Speedy Trial Rights filed on May 31, 2005.[149] At the motion hearing on June

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[144] *Stevens v. State,* 808 So. 2d 908, 917 (¶ 22) (Miss. 2002).

[145] *United States v. Loud Hawk,* 474 U.S. 302, 312, 106 S. Ct. 648, 88 L.Ed.2d 640 (1986) (quoting *United States v. Ewell,* 383 U.S. 116, 86 S. Ct. 773, 15 L.E. 2d 627 (1966).

[146] *Barker,* 407 U.S. at 552, 92 S. Ct. 2182.

[147] 2:229:10-21.

[148] 2:229:25-29; 2:230:1-2.

[149] R. E. 019-020.

23, 2005 he testified to the prejudicial effect to his prolonged incarceration. [150] He testified that he was on lock down 11 months for 23 hours a day.[151] While incarcerated he has not been able to contact his witness Henry Delaney, his step-father's nephew, who stayed at the house where the marijuana was discovered.[152] Likewise, he could not locate Willie White, a witness who could establish his residence at the time of his arrest.[153]

The State's witness testified that the drug were sent to the Mississippi Crime Laboratory for analysis on June 23, 2004 as reason for the delay .[154] The next scheduled grand jury after Tarver's arrest was in September 2004.[155] The Greenwood Police Department was unable to present the case to the grand jury at that time. The next grand jury met in February 2005.[156] The case was presented at that scheduled grand jury and Tarver was indicted. The indictment was filed May 7, 2005.[157] The analytical drug report was returned on June 25, 2005.[158] At the close of the hearing, the court took the motion under advisement.[159] On July 5, 2005 the court issued its order denying the motion to dismiss for

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[150] 2:234:11-29; 2:235:1-29; 2:236:1-10.

[151] 2:264:12-25.

[152] 2:265:7-17.

[153] 2:235:6-10.

[154] 2:239:16-22.

[155] 2:237:2-11.

[156] 2:238:7-13.

[157] 2:238:14-22.

[158] 2:239:25-29.

[159] 2:277:3-15.

speedy trial violation.[160]

At the time of the motion hearing Tarver was also being held in cause number 2004-0004 styled State of Mississippi v. Lorenzo Tarver. He was charged with capital murder, conspiracy to commit capital murder and multiple counts of aggravated assault. He also filed a speedy trial motion in this cause on February 24, 2005.[161] The trial court granted Tarver's motion to dismiss these charges on the basis of violation of Tarver's speedy trial right. However, the trial court denied his motion to dismiss the marijuana charges although he was held for precisely the same amount of time on these charges as he was for the charges the trial court dismissed.

X. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING TARVER'S MOTION FOR RECUSAL.

This Court applies an objective standard in deciding whether a judge should have disqualified himself. The decision to recuse or not to recuse is one left to the sound discretion of the trial judge, so long as he applies the correct legal standards and is consistent in the application. On appeal, a trial judge is presume to be qualified and unbiased and this presumption may only be overcome by evidence which produces a reasonable doubt about the validity of the presumption.[162] In determining whether a judge should have recused himself, the reviewing court must consider the trial as a whole and examine every ruling to determine if those rulings were prejudicial to the complaining

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[160] R.E. 050-053.

[161] 2:250:3-15.

[162] *Green v. State,* 631 So. 2d 167, 177 (Miss. 1994).

party.[163]

The Code of Judicial Conduct is also applicable to judicial disqualification. Canon 3(B)(1) of the Code of Judicial Conduct states: "A judge shall hear and decide all assigned matters, except those in which disqualification is required. " According to Canon 3(E): (1) Judges should disqualify themselves in proceedings in which their impartiality might be questioned by a reasonable person knowing all the circumstances or for other grounds provided in the code of judicial conduct or otherwise as provided by law, including but not limited to instances where: (a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.[164]

At a pre-trial hearing on June 22, 2005 Tarver made a motion for the trial court to recuse itself from the case in part because it had developed some biases against Tarver's counsel Chokwe Lumumba.[165] Concerns that the trial court's bias had spilled over to Tarver was the main reason for the motion. Tarver's retained counsel was apparently late for a sentencing hearing earlier in the week on a case styled State of Mississippi v. Arthur Woods. The prosecuting attorney and Lumumba had a verbal confrontation and the court administrator became upset with Lumumba. Subsequent to the prosecutor leaving the court toward the judge's chambers, the court bailiff asked Lumumba to leave the courtroom. Tarver sensed the animosity toward him when he arrived in court. A motion to recuse trial

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[163] *Jones v. State,* 841 So. 2d 115, 135 (¶ 60) (Miss. 2003).

[164] See Miss. Const. of 1890 art. 6 § 165; see also M.C.A. § 9-1-11.

[165] 1:7:15-29; 1:8:1-29; 1:9:1-29; 1:10:1-29; 1:11:1-29; 1:12:1-29; 1:13:1-29; 1:14:1-22; 1:16:9-24; 1:16:29; 1:17:1-22.

judge was filed.[166]

The trial court subsequently issued its order denying Tarver's motion to sever the gun count of the indictment.[167] It also denied his motion for recusal.[168] The court administrator later filed a bar complaint against Lumumba. Added to these facts, Tarver conveyed his impassioned disbelief that the trial court would order ShamsidDeen to trial with only two (2) days to prepare.

At trial, during the selection of the jury the court granted the State's peremptory challenges that were judicially prohibited. During the closing argument the court failed to instruct the jury to not consider and disregard the prosecutor's inflammatory and prejudicial statement. It later indicated that it would not have granted a mistrial even if the request had been timely.[169] Finally the imposition of the maximum sentence of sixty (60) years and a fine of $100,000.00 is proof enough of the court's bias toward Tarver. Considering the trial as a whole and examining every ruling to determine if these rulings were prejudicial to Tarver, the trial court should have granted the motion for recusal. The trial court's bias necessitates this Court vacating the conviction and remanding this cause for a new trial.

XI. TARVER'S SENTENCE WAS EXCESSIVE AND CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE UNITED STATES AND MISSISSIPPI CONSTITUTIONS.

The 8th amendment to the United States Constitution prohibits the infliction of cruel

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[166] R.E. 55-57.

[167] R.E. 202-204.

[168] R.E. 198.

[169] 6:760:5-20.

and unusual punishment. Article 3 § 28 of the Mississippi Constitution adds to this prohibition the imposition of excessive fines. As a general rule, a sentence that does not exceed the maximum period allowed by statute will not be disturbed on appeal.[170] Generally, the imposition of a sentence is within the discretion of the trial court, and appellate courts will not review the sentence, if it is within the limits prescribed by statute.[171]

A court's proportionality analysis [of a sentence] should be guided by objective criteria, including (I) the gravity of the offense and the harshness of the penalty; (ii) the sentence imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.[172]

Though Tarver's sentence does not exceed the maximum period allowed by statute, this court has remanded other cases for review of sentence even where the sentence did not exceed the maximum allowed by statute.[173] Herein, Tarver was not charge with making a sale of the marijuana. The charge was possession of more than one kilogram of marijuana with intent to sell, transfer or distribute. The maximum sentence is thirty (30) years. Because the possession was within 1500 of a day care center the court was permitted to double the fine and sentence. Tarver was also ordered to pay a fine in the amount of $100,000.00 and received the maximum sentence of sixty (60) years in the Mississippi Department of Corrections. As a result of the observed bias of the trial court,

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[170] *Wallace v. State,* 607 So. 2d 1184, 1188 (Miss. 1992).

[171] *Reynolds v. State,* 585 So. 2d 753, 756 (Miss. 1991).

[172] *Solem v. Helm,* 463 U.S. 277, 291, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983) (writ of habeas corpus).

[173] *Tower v. State,* 837 So. 2d 221 (Miss. Ct. App. 2003).

Tarver filed a motion for recusal due to alleged trial court biased against Tarver's retained counsel Chokwe Lumumba which was transferred to Tarver. Additionally, Tarver's fervent expression of disbelief that the court would order ShamsidDeen to represent him with only two (2) days to prepare, and because of the imposition of the maximum sentence, this court should remand this sentence for a proportionality analysis.

XII. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING TARVER'S MOTION TO SUPPRESS EVIDENCE.

The standard of review for a trial judge's ruling on a motion to suppress evidence is well established. This Court must decide whether there was substantial, credible evidence to support the trial judge's ruling.[174] This ruling must not be disturbed by our Court unless such substantial, credible evidence is absent.[175] Further, admission of evidence is within the discretion of the trial court, and can only be reversed upon abuse of its discretion.[176]

Herein, Chris Davis was the "confidential informant" who supplied information that became the basis for the affidavit for the search warrant to search the residence at 506 Cypress Street.[177] At the suppression hearing, Davis testified that he had never been a confidential informant for Sargent Williams. Furthermore, what he told officers about Tarver was not true and was what officers told him to say.[178] There was no substantial evidence to support the judge's ruling and the motion to suppress evidence should have been

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[174] *Culp v. State,* 933 So. 2d 264, 274 (¶ 26) (Miss. 2005).

[175] *Ray v. State,* 503 So. 2d 222, 223-24 (Miss. 1986).

[176] *Crawford* at ¶ 7.

[177] 2:190:1-14.

[178] 1:142:23-29; 1:143:1-29; 1:144:1.

granted.

The police affidavit did not advise the magistrate that issued the search warrant that the informant only supplied them with information that the affifant (police) had given to Davis (the informant). Thus the affidavit contained false information. Moreover, the trial court erroneously refused to allow the defense to ascertain whether Davis was the informant who the police relied on to file the affidavit for the warrant. The identity of the informer should have been disclosed in order to allow the trial court to determine whether the police had misrepresented facts to the judicial officer who issued the warrant.

XIII. THE CUMULATIVE EFFECT OF ERRORS DEPRIVED TARVER OF THE RIGHT TO A FUNDAMENTAL FAIR AND IMPARTIAL TRIAL.

Error that do not require reversal themselves may require reversal if, when taken cumulatively, they deny the defendant the right to a fundamentally fair and impartial trial.[179] In any case in which a court finds harmless error or an error not sufficient in itself to warrant dismissal, the court may, on a case-by-case basis, determine whether the errors taken cumulatively warrant dismissal based on their cumulative prejudicial effect.[180] This Court may reverse a sentence based upon the cumulative effect of errors that, by themselves, do not independently require a reversal.[181] Herein, there was a cascade of trial errors that deprived Tarver of the right to a fundamental fair and impartial trial.

• The errors commenced when the trial court denied Tarver's motion to sever the weapon count of the indictment. The two counts are not based on the same act or

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[179] *Byrom v. State,* 863 So. 2d 836, 847 (¶ 12) (Miss. 2003).

[180] Id. at 846 (¶ 13).

[181] *Jenkins v. State,* 607 So. 2d 1171, 1183 (Miss. 1992).

transaction. Nor are they connected by a common scheme or plan. There is absolutely no evidence that Tarver while possessing marijuana also possessed the weapon found in the back room of his parent's house. Moreover, there is absolutely no evidence of common scheme or plan tying the marijuana and the gun together. Additionally, the commission of the offense charged in count one of the indictment do not involve or require the commission of any of the elements of the crime charged in count two. Evidence proving the marijuana count would not be admissible to prove the gun charge. The crimes are not interwoven. The only connections possible require absolute and pure speculation. The two counts are merely joined gratuitously together in the indictment to prejudice the jury against Tarver by permitting the introduction of his prior federal drug conviction into evidence.

• The trial court then denied Tarver's motion for continuance after his retained counsel, Chokwe Lumumba, was suspended from the practice of law in Mississippi. As a result, his trial counsel, Ali ShamsidDeen, who had solely been retained to argue pre-trial motions, was ordered to be ready for trial in only two (2) days.

On Monday, June 12, 2006, after Tarver's retained counsel could not represent him, ShamsidDeen appeared on his behalf to argue the motion for continuance. He informed the court he was only retained to argue pre-trial motions.[182] He had done so on at least two other occasions.[183] The trial court denied the motion because it was not filed seven days before trial.[184] ShamsidDeen was ordered to be in court two days later, June 14, 2006, for

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[182] 2:297:1-8.

[183] 3:301:24-29; 3:302:1-2.

[184] 3:301:16-23.

the start of trial.[185] After the jury was fortuitously selected (ShamsidDeen used the wrong jury list to exercise peremptory challenges) he again expressed his concern that he was not prepared for trial and would render ineffective assistance of counsel.[186] Tarver also expressed concern that ShamsidDeen was not prepared for trial.[187]

• The trial court abused its discretion in excluding for cause jurors who expressed concern about missing evidence. Judicial rules prohibit a party from asking venire members hypothetical questions or attempting to elicit a pledge to vote a certain way if a certain set of circumstances are shown.[188] Questions seeking a commitment from jurors are never necessary to accomplish the basic purpose of securing fair and impartial jurors.[189] Here, juror 12 raised his hand when asked who would say that they're automatically going to vote not guilty because the State won't be able to present the marijuana.[190] Juror 16 indicted that it might be tough to be fair under the circumstances.[191] Jurors 53 and 60 expressed similar concerns.[192] Jurors 65.[193] 59, 14 and 45 also expressed concerns.[194] Juror 14 later clarified

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[185] 3:302:3-7.

[186] 3:382:2-11; 3:382:26-29; 3:383:1-5 3:383:21-29.

[187] 3:382:19-25.

[188] *Harris* at 602.

[189] Id. at 607.

[190] 3:326:24-29; 3:327:1-4.

[191] 3:329:2-4.

[192] 3:329:9-13.

[193] 3:330:17-22.

[194] 3:331:8-12; 3:331:26. 3:332:1-3.

her position and wanted to listen to all the evidence.[195]

It is clear from the prosecutor's question he was attempting to elicit a pledge to vote a certain way if a certain set of circumstances are shown. Such a question is prohibitive, unnecessary and the trial court abused it discretion when it permitted the responses to be grounds for a challenge for cause. Based on the answers given to this prohibitive question, the trial court permitted the State to strike for cause jurors 12, 14, 16, 53, 59, 60. Though juror 14 clarified her position and wanted to listen to all the evidence she was still struck for cause. Though Tarver's counsel failed to object to the State's impermissible challenges for cause the waiver does not relieve the trial court from denying same where they are judicially prohibitive.

• Evidence of Tarver's criminal record should have been suppressed. The supreme court has acknowledged the highly prejudicial effect on a jury in the context of admitting prior convictions of similar offenses for impeachment purposes.[196] Tarver's prior federal drug conviction was in 1998 and he had not been convicted of any crime since then. This factor weights against its admission. More so, both charged offenses are possession of drugs with intent to sale or distribute which weight against their admission as they tend to cause the jury to make the impermissible inference that Tarver acted in conformity with his prior crime. Moreover, the prosecutor was allowed to introduce Tarver's record in the prosecutor's case in chief. Tarver never testified. Thus the introduction of his prior conviction was not for impeachment purposes and totally violated the rules of evidence.

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[195] 3:332:3-8.

[196] *Peterson v. State,* 518 So. 2d 632, 637 (Miss. 1987).

• The State should not have been permitted to amend the indictment to allege the house was within 1500 feet of a day care instead of a park. The amendment was to substance not form. Tarver was prejudice in that before the amendment the State could not prove beyond a reasonable doubt that the house was within 1500 feet of a part a park. After the amendment, this defense was no longer available.

• Tarver received ineffective assistance of counsel when his trial counsel had only two (2) days to prepare for trial. Counsel was not prepared for trial and had not seen the evidence against Tarver. He used the wrong jury list to exercise peremptory challenges. Furthermore, he waived error for appeal by failing to make contemporaneous objections throughout the trial. Moreover, counsel failed to request a jury instruction to disregard and move for a mistrial after the prosecutor's inflammatory and prejudicial closing argument implying Tarver's Jackson lawyers stole the missing marijuana evidence. He then failed to object to another inflammatory and prejudicial argument that he thinks people in Greenwood, Mississippi are ignorant.

• Tarver's right to a speedy trial were violated. He was not tried withing 270 days of his arraignment nor within eight (8) months of his arrest. He was prejudiced by the delay in that he could not locate a witness who knew of his residence status at the time of his arrest and another witness who stayed at the home where the drugs were allegedly discovered.

• The trial court should have granted the motion for recusal. The court administrator complained about Tarver's retained counsel's attitude. After his retained counsel was suspended from the practice of law the trial court denied his motion for continuance and gave his new trial counsel only two (2) days to prepare for trial. The court permitted qualified jurors to be struck for cause. The court also failed to admonish the jury to disregard

inflammatory and prejudicial closing arguments by the prosecutor. The court then sentenced Tarver to the maximum punishment allowed by law for a marijuana crime.

• Tarver motion to suppress evidence should have been granted. The "confidential informant", upon which the affidavit for search warrant was based, recanted his testimony and testified police officers told him what to say.

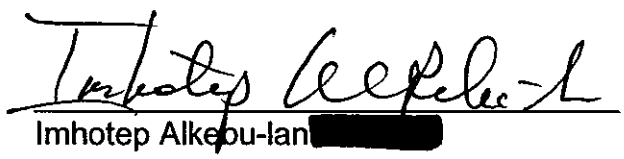
• Finally, the prosecutor's closing arguments, first insinuating criminal conduct by Tarver's Jackson lawyers in stealing the missing marijuana evidence and then appealing to the jury's prejudice by stating that Tarver's counsel think people from Greenwood are ignorant, was inflammatory, prejudicial and calculated to deny Tarver a fundamental fair and impartial trial.

CONCLUSION

For the foregoing multitude of reasons and authorities, manifest justice mandates this Court vacating Tarver's conviction and entering a order of dismissal. In the alternative, this cause should be remanded for a new trial.

Respectfully submitted,

LORENZO TARVER

By: 

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CERTIFICATE OF SERVICE

This is to certify that on the below date a true and correct copy of the foregoing was mailed first class, postage prepaid, to the following individuals:

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This the 14th day of December, 2007.

Imhotep Alkebu-lan