IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

KEITH BASKIN — APPELLANT/DEFENDANT

VS. — CASE NO: 2006-KA-01355

STATE OF MISSISSIPPI — APPELLEE/PLAINTIFF

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# APPELLANT'S REPLY BRIEF

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Appeal from the Circuit Court of Madison County, Mississippi

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ORAL ARGUMENT 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 in order that the Justices of the Court of Appeals and the Supreme Court may evaluate possible disqualification or recusal:

1. Tom Kessler, Madison County Assistant District Attorney, Post Office Box 121, Canton, Mississippi 39046.

2. Armstrong Walters, Madison County Assistant District Attorney, Post Office Box 121, Canton, Mississippi 39046.

3. Honorable Samac Richardson, Madison County Circuit Court Judge, Post Office Box 1885, Brandon, Mississippi 39043.

4. Walter Wood, 356 Highway 51 Suite G, Ridgeland, Mississippi 39157.

5. Mérrida Coxwell, Coxwell & Associates, PLLC, 500 N. State Street, Jackson, Mississippi 39201.

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6. Keith Baskin, Appellant.

Josh Turner
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## ARGUMENT

### I. The State Has Wholly Failed To Prove "*Intent To Sell*" At Trial And Now On Appeal

Through three extensions of time and five miniscule pages of "Argument" in 14 point type, the State has utterly failed to support its positions that evidence of any intent to sell was presented to the jury. The State allocated one and a half (1 ½) pages in its response to Mr. Baskin's principal brief, in a feeble attempt to bolster why the evidence was sufficient. Clearly, the State said little because little can be truly said to support Mr. Baskin's current conviction. In the response, the State never mentions *Hollingsworth v. State,* 392 So.2d 515 (Miss. 1981).

As stated in Mr. Baskin's principal brief to this Court, the facts of *Hollingsworth* are "on all fours" with Mr. Baskin's case. In *Hollingsworth,* our Supreme Court held that the evidence submitted to the jury was *insufficient* to convict the defendant of the intent to deliver the marijuana. Moreover, in *Hollingsworth* there were certain *indicia* found along with the marijuana such as scales for weighing the marijuana and a box of plastic bags. *Id.* at 517. None of which were found in Mr. Baskin's possession or that of the driver of the vehicle, Dacorious Clark.

According to the State's brief it relies on the language of *Edwards v. State,* 795 So.2d 554 (Miss. Ct. App. 2001). *Edwards* is plainly dissimilar. In *Edwards* the defendant was convicted of possession with the intent to distribute methamphetamines. *Id.* There are two strong factors that were presented to the jury in *Edwards* that were <u>not</u> presented to the jury in Mr. Baskin's case. First and foremost there was testimony from Mr. Edwards indicating how much personal use was. Law enforcement found thirty-three grams of

methamphetamine in an outside compartment of Mr. Edwards' truck and then found six more grams on Mr. Edwards's person. Mr. Edwards testified that ½ gram to 2 grams was an amount for personal use. *Id.* at. 565. Quite frankly, Mr. Edwards convicted himself with his own testimony when it was determined that he possessed more than twenty times that for his personal use. Second, there were scales found along with the drugs and the court found the scales combined with the quantity of drugs along with the defendant's own admissions were sufficient for the jury to convict him.

Mr. Baskin was arrested along with one Dacorious Clark, who was driving. Mr. Clark entered into a plea agreement with the State and served a whopping one day in jail. The evidence in this case could easily infer that the two were going to split the 450.6 grams (which converts to 15.894 ounces) and use it themselves. The division of this amount would be less than eight (8) ounces each. An amount held insufficient to prove "intent to sell" in *Girley infra.* No doubt that this is a circumstantial case and the evidence produced by the State had to be to "*the exclusion of every other reasonable hypothesis consistent with his innocence.*" *Tubbs v. State,* 402 So.2d 830, 834 (Miss. 1981) (emphasis supplied). That said, there is absolutely no testimony that was elicited about personal use of marijuana or amounts that are "sale amounts" during Mr. Baskin's trial. There were no scales, plastic bags or admissions made by the defendant about personal use of marijuana. Clearly the State lacked the evidence found in the *Edwards* case where Mr. Edwards admitted that an amount for his personal use was twenty times less than the amount found in his possession.

Our appellate courts have consistently held that the State has not met its burden when it fails to prove the intent factor beyond a reasonable doubt. See: *Girley v. State,* 602 So.2d 804) (Miss. 1992) (reversing and remanding for *failure to prove intent to sell* when the

defendant was found with 11 ½ ounces of marijuana found in four sandwich bags, $861.69 in cash in assorted denominations and an unknown amount of cocaine); *Bryant v. State,* 427 So.2d 131 (Miss. 1983); and *Hollingsworth, supra.*[1] This burden is all the more heightened by the fact that this is a circumstantial case and the State has to put on proof to surpass any and all other hypothesizes consistent with innocence. See *Tubbs, supra.* No proof of "intent to sell" was presented to the jury.

The mere assertions that the possession of 450.6 grams in this case is sufficient to obtain a conviction for intent to sell based purely on quantity is specious. The Courts have held quantity is enough when it is 5100 pounds of marijuana, see *Guilbeau v. State,* 502 So.2d 639, 642 (Miss. 1987) or 348 pounds of marijuana in *Boches v. State*, 506 So.2d 254, 260 (Miss. 1987). All are amounts that weigh more than the average human being.

In an attempt to convince this Court that the current amount alone is sufficient the State cites to *Carlisle v. State,* 936 So.2d 415 (Miss. Ct. App. 2006). *Nowhere in Carlisle does this Court address an argument raised on the sufficiency of the evidence!* It was not an issue raised on appeal and therefore not addressed by this Court. Reliance on this case would run afoul of sound logic and legal principles.

The State claims that:

> *Sub judice* we have well over twice that amount with defendant having 450.6 grams (A smidgen shy of a pound!) Which according to expert testimony adduced at trial for the jury was enough to roll between 450 & 900 joints. Coupled with the testimony of defendant's behavior exhibited by his throwing the contraband out the door...well, the jury got it correct.

(See Brief for the Appellee at p. 5).

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[1] Both *Bryant* and *Hollingsworth* were briefed extensively in the Appellant's principle brief to this Court.

The testimony by the expert referenced above only stated how many "joints" could be rolled. The testimony in no way stated how many joints were for personal use or whether the amount, if divided between Mr. Baskin and Mr. Clark, would exceed the amount for personal use. Nor did Mr. Nichols testify, because he could not according to his knowledge, how many joints an average person smoked in a day. Indeed, all Mr. Nichols offered was speculation about how much the average joint weighed. He offered nothing to bolster the State's position that the marijuana in question was possessed with the "intent to sell."

The evidence in this case was insufficient to convict Mr. Baskin of any sale or intent to sell of the marijuana that was found at the scene. This Court must find that the cases of *Hollingsworth, Bryant,* and *Girley* support that the evidence is insufficient and that the jury got the verdict wrong. Therefore, this court must reverse Mr. Baskin's sentence of sixty (60) years and send this case back to the Circuit Court of Madison for re-sentencing and/or a new trial.

## II. The Trial Court's Sentence Violates Mr. Baskin's Fundamental Eighth Amendment Rights Because The Sentence Is Grossly Disproportionate

The State offers that the argument by Mr. Baskin in his principle brief is procedurally barred. This assertion by the State is misplaced. It is a fundamental right that an accused not receive excessive, cruel or unusual punishments. See U.S. CONST. amend. VIII. Additionally, since a grossly disproportionate sentence unconstitutionally deprives a person of his liberty it invokes the Fourteenth and Fifth Amendments simultaneously, obviously resulting in an illegal sentence. *"The right to a legal sentence is a fundamental right, the violation of which excepts the petitioner's claim from the procedural bars." Adams v. State,* 954 So.2d 1051, 1055 (Miss. Ct. App. 2007) (emphasis supplied) citing *Ivy v. State,* 731 So.2d 601, 603 (Miss.1999).

Mr. Baskin's Eighth Amendment rights were violated by his sentence of sixty (60) years. The Mississippi Supreme Court has clearly held that when the issue of a grossly disproportionate sentence is raised then the Court looks to the three factors set forth in *Solem v. Helm,* 463 U.S. 277 (1983). See *White v. State,* 742 So.2d 1126, 1135 (Miss. 1999). *The State never addressed these factors at all in its brief!* Our state Supreme Court has held where the issues are not addressed in a parties' brief then failure to address the factors is tantamount to confession of the issues.

> The state did not respond to this argument in its brief. Its failure to respond is tantamount to confession of error and will be accepted as such. The reason for the rule is that an answer to appellant's brief cannot be safely made by this Court, without our doing what appellee should have done, namely, brief the appellee's side of the case. This we are not called on to do. Stampley v. State, 284 So.2d 305 (Miss.1973); Lawler v. Moran, 245 Miss. 301, 148 So.2d 198 (1963); Gulf, M. & O. R. Co. v. Webster County, 194 Miss. 660, 13 So.2d 644 (1943). See also, other cases cited in Stampley. Although these cases dealt with the failure of an appellee to file any brief, the rule applies where appellee fails to respond to a part of appellant's brief.

*Turner v. State*, 383 So.2d 489, 491 (Miss. 1980).

*Turner* dealt with an issue of prejudice in a speedy trial case that was not addressed by the State. When the issue was not addressed the Court held that the State confessed the issue. *Id.* Such is the case here, where the State did not mention one single word about: "(1) The gravity of the offense and the harshness of the penalty; (2) Comparison of the sentence with sentences imposed on other criminals in the same jurisdiction; and (3) Comparison of sentences imposed in other jurisdictions for commission of the same crime with the sentence imposed in this case." See *White,* 742 So.2d at 1135. These are the three factors set forth in *White* and *Solemn* that the State just outright failed to address. These factors were covered

extensively in Mr. Baskin's principle brief to this Court, yet the State did not counter the three factors in any way.

The State's only case used to support that the sentence was not grossly disproportionate is *Fulks v. State*, 944 So.2d 79 (Miss. Ct. App. 2006). But clearly *Fulks* says that "the sentence will be *generally* upheld" if the sentence is within the statutory guidelines. It certainly does not say "always" and Mr. Baskin's case is an extraordinary case that falls outside of the generalities mentioned in *Fulks*. Mr. Baskin's case is not proportionate when reviewed in light of the three factors that went unaddressed by the State in its brief.

Mr. Baskin asks this court to reverse his sentence and remand this case for re-sentencing as the State has confessed this issue. In the event the Court finds that the State did not confess the issues, Mr. Baskin has showed this Court that the sentence was grossly disproportionate when addressing all three factors.

## III. The State Moving To Enhance Mr. Baskin's Conviction After Sentencing Was A Clear Act Of Vindictive Prosecution

Before the trial began the state offered Mr. Baskin four years if he entered a plea of guilty. Instead of taking this plea deal, Mr. Baskin exercised his constitutional rights to have the State prove its case to a jury. After the jury returned a guilty verdict the State asked the Court for the ability to drive one last nail in the coffin and essentially give Mr. Baskin a life sentence by asking for enhancement under the habitual offender statute.

> To punish a person because he has done what the law plainly allows him to do is a due process violation "of the most basic sort." *Bordenkircher v. Hayes*, 434 U.S. 357, 363, 98 S.Ct. 663, 668, 54 L.Ed.2d 604. In a series of cases beginning with *North Carolina v. Pearce* and culminating in *Bordenkircher v. Hayes*, the Court has recognized this basic-and itself uncontroversial-principle. *For while an individual certainly may be penalized for violating the law, he just as*

> *certainly may not be punished for exercising a protected statutory or constitutional right.*

*United States v. Goodwin,* 457 U.S. 368, 372 (U.S.1982) (emphasis supplied) (footnote omitted).

Only after the trial was over and the jury returned a guilty verdict, did the prosecution moved to amend the indictment. This was a classic example of vindictive prosecution. The State already knew about Mr. Baskin's prior convictions, indeed he was charged before the trial began as a subsequent offender. An accused is entitled to a reversal of his conviction if it is proved that prosecutorial vindictiveness occurred. *Id.*

Once Mr. Baskin made the State perform its job and put on proof, the prosecution moved to enhance the sentence to insure that Mr. Baskin would receive the maximum sentence of thirty years (which was later doubled by Judge Richardson). These acts by the Madison County District Attorney's Office were done out of nothing short of vindictiveness and this Court must reverse this case for a new trial as these acts are unconstitutional.

## IV. The State's Brief Fails To Address The Arguments Regarding Sixth Amendment Violations Due To The Trial Court's Habitual Enhancement Allowed Subsequent To The Jury Verdict

Mr. Baskin clearly raises a Sixth Amendment challenge to allowing amendment of the indictment post jury verdict. The only thing that the State offers is *Dora v. State*, 2007 WL 1413053 (Miss. Ct. App.) which does not mention the Sixth Amendment anywhere in the entire opinion.

*Torrey v. State,* 891 So.2d 188 (Miss. 2004), was the first case to allow the amendment of the indictment post jury verdict. *Dora* like *Torrey* involved a *pro se* defendant who clearly did not understand the Sixth Amendment applications of being fully apprised of the charges against them. None of these cases, or any others in Mississippi, addresses the

Sixth Amendment dilemma allowing amendment of an indictment post jury verdict. It is constitutionally wrong and it absolutely violates the rights of an accused to know what he/she is charged with. The State offers nothing to refute this except to state:

> The State would ask this reviewing Court to decline the invitation to apply a sixth amendment analysis to an issues [sic] that does not implicate that provision.

(See Brief of Appellee at p. 8-9).

Essentially the State is asking this Court to whimsically toss aside Mr. Baskin's Sixth Amendment rights in order to maintain an unconstitutional sentence. In sum, the trial court erred by granting the State's motion to amend the complaint to charge Mr. Baskin as a habitual offender after the jury verdict was entered.

## V. Conclusion

Mr. Baskin respectfully requests that this Court grant him a new trial based on the cumulative errors set forth in this brief and in his principle brief. In the event this Court should not find he is entitled to a new trial then it is imperative that this case be remanded for re-sentencing as the evidence was insufficient to convict Mr. Baskin of "intent to sell" and the trial court erred by allowing the State to amend its indictment after the jury verdict.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I, Joshua A. Turner, have this mailed by United States Mail, postage prepaid, a true and correct copy of the above and foregoing *Reply Brief* to the following:

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This the 11th day of June, 2007.

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