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 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 and Joshua A. Turner, Coxwell & Associates, PLLC, 500 N. State Street, Jackson, Mississippi 39201.

6. Keith Baskin, Appellant.

JOSHUA A. TURNER

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Appellant
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STATEMENT REGARDING ORAL ARGUMENT

Mr. Baskin requests that this Court allow oral argument to help resolve the issues of his case. Oral Argument is permitted pursuant to M.R.A.P. 34 and needed to help the understanding of Mr. Baskin's appeal.

STATEMENT OF ISSUES

This appeal has three issues that are set forth below. First, the State did not put forth any evidence that Mr. Baskin possessed a controlled substance with the intent to sell it. Second, Mr. Baskin's sentence violates the Eighth Amendment of the United States Constitution because it is disproportionate to the offense. Lastly, allowing the State to amend its indictment after the jury verdict but prior to sentencing violated Mr. Baskin's Sixth Amendment rights set forth in the United States Constitution. This cause must be remanded to the lower court for re-sentencing or a new trial if this Court should find cumulative error.

SUMMARY OF THE ARGUMENT

Mr. Baskin's case requires reversal for a new trial or at the very least a re-sentencing on possession of a controlled substances. The evidence introduced by the prosecution was not sufficient to convict him of a sale or intent to sell. Additionally, this Court should reverse this case for re-sentencing as the sentence given to Mr. Baskin is constitutionally disproportionate to the crime. Also, the State moved to amend Mr. Baskin's indictment after the jury verdict but before sentencing, resulting in a vindictive prosecution in violation of the Sixth Amendment to the United States Constitution.

For all of these reasons Mr. Baskin is entitled to reversal of his conviction and a new trial. Alternatively, if the Court finds that Mr. Baskin possessed the marijuana but that the State did not prove intent to sell, he requests that the Court reverse his conviction for re-sentencing.

STATEMENT OF THE CASE AND FACTUAL BACKGROUND

On January 2, 2005 Mr. Baskin was traveling north on Highway 49 as a passenger in an automobile owned and operated by Dacorious Clark. As Mr. Clark approached the top of a hill he was directed to stop by law enforcement officials of the Mississippi Highway Patrol and the Flora Police Department who were conducting a road block just outside of Flora.

When Mr. Clark approached the road block he slowed the car he was driving and as he did Officer Brantley and Officer Shows with the Mississippi Highway Patrol approached him. As they approached the car Mr. Clark sped away hitting Officer Brantley's arm in the process.

At trial, Officer Shows and Officer Brantley testified that they witnessed someone in the car throwing bags of what appeared to be marijuana out of the passenger side window. The officers did not have to drive very far to get the vehicle stopped and it did not travel at a high rate of speed. Once they got the car stopped Mr. Clark got out and struggled with Officer Brantley. According to Officer Show's testimony, Mr. Baskin was obedient and compliant with his requests as he was placed under arrest. (Trial Tr. p. 63).

ARGUMENT

I. THE STATE DID NOT PUT FORTH ANY EVIDENCE TO PROVE THAT MR. BASKIN INTENDED TO *SELL* A CONTROLLED SUBSTANCE, THEREFORE THE TRIAL COURT ERRED BY REFUSING TO GRANT A MOTION FOR A DIRECTED VERDICT AT THE CLOSE OF THE STATE'S CASE AND ERRED BY REFUSING TO SET ASIDE THE GUILTY VERDICT OR GRANT A NEW TRIAL BASED ON THE FACT THAT THERE WAS INSUFFICIENT EVIDENCE TO PROVE ANY INTENT TO SELL

The term "sale" is found in *Miss. Code Ann.* § 41-29-105(a) (1972) and reads:

> **"Sale," "sell" or "selling" means the actual, constructive or attempted transfer or delivery of a controlled substance for remuneration, whether in money or other consideration.**

Id. (emphasis supplied)

In the present case Mr. Baskin was convicted of possession of marijuana with the intent to sell it. However, the State put forth no evidence to support the "sale" or intent to sell element of this crime.

This Court cannot under any interpretation of the word "sale" uphold the jury verdict or the trial court's sentence of Keith Baskin. The insufficiency of the evidence in this case requires this Court to reverse and remand this case for re-sentencing. Our Supreme Court has held:

> Should the facts and inferences considered in a challenge to the sufficiency of the evidence "*point in favor of the defendant on any element of the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty,*" *the proper remedy is for the appellate court to reverse and render.* *Edwards v. State,* 469 So.2d 68, 70 (Miss.1985) (citing *May v. State,* 460 So.2d 778, 781 (Miss.1984)); see also *Dycus v. State,* 875 So.2d 140, 164 (Miss.2004).

Duncan v. State, 939 So.2d 772, 783 (Miss. 2006) (emphasis supplied) (quotations original).

"Proof of the offense of 'sale' under the definition before us requires a showing that a transfer or delivery for remuneration occurred." *Jenkins v. State,* 308 So.2d 95 (Miss. 1975) (emphasis supplied). No such proof exists in this record to support the sentence.

The indictment charging Mr. Baskin prior to amendments read as follows:

> The Grand Jurors for the State of Mississippi, taken from the body of good and lawful citizens of said county, elected, summoned, empanelled, sworn and charged to inquire in and for the body of the county aforesaid, at the term aforesaid of the Court aforesaid, in the name and by the authority of the State of Mississippi, upon their oath present that,
>
> KEITH BASKIN
>
> Late of the county aforesaid, on or about the 2nd day of January, 2004, in the county aforesaid and within the jurisdiction of this Court, did unlawfully, willfully, knowingly and feloniously, **with the intent to sell,** possess more than five-hundred (500) grams but less than one (1) Kilogram of marijuana, a Schedule I controlled substance, in Madison County, Mississippi, in violation of Mississippi Code Annotated § 41-29-139 (1972), as amended,
> Against the peace and dignity of the State of Mississippi.
>
> Endorsed: A True Bill

(Rec. Exc. p. 1) (emphasis supplied).

The following testimony from the chemical analyst, Archie Nichols, at the Mississippi Crime Lab was the sole effort and proof by the State to support the "intent to sell" element:

Mr. Kessler:	And I'm handing you, now, what's been marked as State's Exhibit Number 1, in evidence, and I'll ask you this: what is the weight of the contents of that packaging, excluding the packaging itself?
Mr. Nichols:	It weighed four hundred and fifty point six grams.
Mr. Kessler:	So with respect to the marijuana that's in there, the marijuana, itself, weighs how much?
Mr. Nichols:	The marijuana, itself, weighs four hundred and fifty point six grams.
Mr. Kessler:	How routine is it for you to make examinations of marijuana at the Mississippi Crime Lab?
Mr. Nichols:	It's part of my daily job duties. I analyze it, pretty much, on a daily basis.
Mr. Kessler:	And do you ever have occasion to actually have marijuana cigarettes submitted to you for examination?

Mr. Nichols: Yes, I do.

Mr. Kessler: And do you know, based on your experience and observations, how much, weight wise, of marijuana is required to make an average marijuana cigarette?

Mr. Wood: *To which I would object, Your Honor. That question is far outside this witness's area of expertise.*

The Court: Overruled.

Mr. Nichols: The ones that I generally receive into the laboratory?

Mr. Kessler: Yes.

Mr. Nichols: The ones that I have analyzed in the past would weigh - - the plant material in them would weigh anywhere from half a gram to a gram each, approximately.

Mr. Kessler: Based on those observations, how many average size marijuana cigarettes could be rolled with the contents of Exhibit 1 there?

Mr. Wood: *I would renew my objection, Your Honor. They're reaching an area that this witness could offer an opinion that's outside his area of expertise.*

The Court: Overruled.

Mr. Wood: *I'd like a continuing objection to this line of questions.*

The Court: *You may have one.*

Mr. Kessler: How many averaged sized marijuana cigarettes could be rolled with the contents of that - - of that exhibit?

Mr. Nichols: Based on the ones that I've seen in the past, from half a gram to a gram each, it would be anywhere from four hundred and fifty to nine hundred.

Mr. Kessler: And, just for the record, would you look at that package? And, if you can, give the dimensions of what size package, that's right there before you, in Exhibit 1, is.

Mr. Nichols: The package that the actual marijuana's in?

Mr. Kessler: Well, yeah, just - - yeah.

Mr. Nichols: I mean it's a gallon size ziploc bag.

Mr. Kessler: And that ziploc bag, with the contents that are in it, would it - - would it be easily placed in a pocket of clothing, such as you're wearing now?

Mr. Nichols: No.

(Trial Tr. pp. 85-87).

Plainly absent from the State's proof is any mention of *sale* of the marijuana. There was no evidence offered by the State of any **transfer** or **delivery** that occurred to prove a sale, nor did the State introduce any evidence that Mr. Baskin intended to sell the marijuana introduced into evidence. There was no money or proof of consideration introduced by the State. Mr. Baskin did not possess any scales, multiple small bags of marijuana, notes indicating sales, small denominations of money or any other indicia whatsoever indicating that the amount found was going to be split up into smaller increments for sale. Nor did the state introduce evidence that Mr. Baskin possessed any quantity of money to demonstrate a transaction, payment or remuneration of any sort had taken place in the past. No information of any kind was proven, offered or elicited from the witness stand that Keith Baskin ever committed a sale or that he intended to sell the marijuana. The amount of marijuana possessed was entirely consistent with the purchase of marijuana for personal consumption.

As in every commodity purchase, the bigger the purchase the better the purchase price, so it is entirely consistent with innocence that this purchase was a purchase for personal consumption. The State did not introduce any evidence at all that the marijuana was for anything other than personal use. All that was introduced were the speculations of the State's witness from the Crime Lab, Mr. Nichols, who testified that he received a bag which contained marijuana. This testimony was elicited over the objections of Mr. Baskin's trial counsel. How that marijuana was to be used was only speculation on Mr. Nichol's part, which only raises a

suspicion of intent and the Supreme Court has clearly held that "mere suspicion of intent" is not enough to overcome reasonable doubt. *Sample v. State*, 643 So.2d 524, 529 (Miss. 1994). Mr. Nichols did not testify that he had ever been involved in controlled buys with law enforcement or worked on the street to know the quantities of personal use. Perhaps most important, yet lacking from the State's proof, is that Mr. Nichols did not testify that the marijuana was more than used for an individual's personal use.

It was stipulated that Mr. Nichols could testify as to the contents of the plastic bag due to his experience, training and education. However, he was not qualified to testify as to any other scenario. The proper predicate was not laid and defense counsel objected throughout Mr. Nichols' testimony regarding his speculation of how many marijuana cigarettes could be made with the quantity in question.

Even in the light taken most favorable to the State, it only proved that the vehicle Mr. Baskin was a passenger in had marijuana thrown out of it. The marijuana could easily have been for personal use by Mr. Clark and/or Mr. Baskin.

Mr. Baskin's case is on "all fours" with *Hollingsworth v. State,* 392 So.2d 515 (Miss. 1981). In *Hollingsworth*, the Noxubee County Sheriff's Department set up a roadblock in Brooksville where it was stopping all cars going toward Macon on Highway 45. *Id.* at 516. The officers were at the roadblock for approximately 30 to 45 minutes when a car approached one of the Sheriff's Deputies and slowed down. *Id.* Instead of stopping the car accelerated and went through the road block. *Id.* The Deputies gave chase and as they were following the car they noticed that the occupants were throwing what appeared to be "hay or chopped grass" out of the car. *Id.* After the officers got the vehicle stopped, they picked up two bags that were later found to be marijuana. *Id.* Also found and introduced into evidence were a leather bag, scales and a

box of plastic bags. *Id.* at 517. At trial the Toxicologist testified that the content of the plastic bag was marijuana. *Id.*

The Court found that the evidence presented was not sufficient to show any intent or attempt to deliver the marijuana. The Court ultimately held:

> *However, the inference in the present case flowing from possession of the articles mentioned could just as well infer possession for personal use as intent to deliver the contraband to another person. We are of the opinion that the evidence here, direct and circumstantial, fails to show intent, or attempt, to deliver the marijuana. Consequently, we hold that the appellant should have been sentenced for possession of more than one (1) ounce of marijuana under Mississippi Code Annotated Section 41-29-139(d)(2) (Supp. 1980) and the case is remanded for resentencing under that statute.*

Id. at 518 (emphasis supplied).

In Mr. Baskin's case he was a passenger in the car with Dacorious Clark. (Trial Tr. pp. 56-57). Mr. Clark slowed down to go through the roadblock and then sped through it. (Trial Tr. p. 56). As law enforcement chased the vehicle north on Highway 49 Officer Shows stated he saw Mr. Baskin throw out the plastic bag of marijuana. (Trial Tr. p. 56). At trial the only thing introduced into evidence was one plastic bag which the Toxicologist testified contained marijuana. (Trial Tr. p. 85).

In the present case there were no scales, baggies, small denominations of money or other indicia that one might use to bag and sell marijuana. The State did not introduce any small plastic bags into evidence to show intent for the marijuana to be divided up into smaller increments. All the State relied on at trial was a plastic bag of marijuana that was thrown from the car of Dacorious Clark along with speculation from the crime lab analyst who does not work on the streets.

Another case that supports Mr. Baskin's argument is *Bryant v. State,* 427 So.2d 131 (Miss. 1983). Mr. Bryant was drinking beer at The Watering Hole Lounge in Lee County Mississippi when approached by law enforcement. *Id.* at 132. The Sheriff (Robert Herring) and two of his deputies entered the establishment and as they did Bryant said "Hey Robert." *Id.* The Sheriff instructed Bryant to walk over to him and Bryant refused. *Id.* The Sheriff then went over to Bryant whereupon he arrested him for public drunk. *Id.* A search of Bryant's person led the officers to find 55 ¾ methaqualone tablets and 85 ½ diazepam tablets. *Id.* The Court reversed the conviction and held:

> Applying the reasoning of *Hollingsworth,* supra, we must conclude that the state failed to prove the possession was with intent to deliver, as charged, and the conviction as to "intent to deliver" cannot stand. *In reversing the conviction as to intent to deliver, we point out that the proof was totally lacking as to any sale, attempted sale, or anything suggestive of any intent to deliver. Upon the record one may ask: Had the defendant purchased the substances just prior to his arrest for his own personal use? Was he addicted to the extent that the quantity he possessed did not exceed that which he himself would consume within reasonable time limits? No proof was offered by the state with regard to any of the foregoing questions or to any fact sufficient to establish beyond a reasonable doubt that the defendant had intent to deliver. At most the proof established no more than a mere suspicion of such intent. Therefore the trial court erred in letting the "intent" issue go to the jury after the defendant requested a directed verdict and peremptory instruction. As in Hollingsworth, any inference flowing from defendant Bryant's possession could infer possession for personal use just as strongly as it could infer intent to deliver.*

Bryant, at 132-33 (emphasis supplied).

In cases involving a "sale," the overwhelming majority of cases affirming convictions occur when a police officer or confidential informant testifies that some type of transaction occurred. See *Walker v. State,* 2006 WL 2865634 (Miss. Ct. App. 2006) where the Defendant took money from a confidential informant and gave the confidential informant some cocaine in return; *Williams v. State,* 2006 WL 69515 (Miss. Ct App. 2006) where the Defendant sold

cocaine to a confidential informant; *Latiker v. State*, 918 So.2d 68 (Miss. 2005) where an under cover officer identified the Defendant as the man he bought crack from; *Bindon v. State,* 926 So.2d 222 (Miss. Ct. App. 2005) where the confidential informant testified about an exchange of drugs after receiving $300.00; *Kelly v. State,* 910 So.2d 535 (Miss. 2005) where a confidential informant testified he made a drug buy; *Burgess v. State*, 911 So.2d 982 (Miss. Ct. App. 2005) where informant testified that the Defendant sold $60.00 of marijuana and tablets; *Wilson v. State*, 893 So.2d 1064 (Miss. Ct. App. 2004) where an undercover officer testified that the Defendant sold him $100.00 worth of cocaine; *Johnson v. State*, 904 So.2d 162 (Miss. 2005) where a police officer testified he witnessed a control drug buy at a school; *Jackson v. State*, 887 So.2d 183 (Miss. Ct. App. 2004) where witness testified that Defendant was one of two men who sold him cocaine; *Carter v. State,* 869 So.2d 1083 (Miss. Ct. App. 2004) where officer and confidential informant testified that Defendant sold crack cocaine.

In this case two officers from the Mississippi Highway Patrol testified and one chemical analyst from the Mississippi State Crime Laboratory. Not one of these witnesses testified that he witnessed a transaction, delivery or exchange that resembled a sale. Nor did any of them testify to any set of facts that suggested any intent to sell. Furthermore, neither the two officers from the Highway Patrol nor the crime lab analyst testified as to any opinion regarding the amount of the substance for use or their respective experience with marijuana.

The Supreme Court has held in certain unusual circumstances that large quantities of drugs can be used to infer intent to distribute. See *Guilbeau v. State,* 502 So.2d 639, 642 (Miss. 1987) where *5,100* pounds of marijuana was seized and *Boches v. State*, 506 So.2d 254, 260 (Miss. 1987) where *348* pounds of marijuana was seized. These are extraordinary amounts. In the present case Mr. Nichols testified that the amount of marijuana introduced into evidence was

only 450.3 grams. This amount is substantially less than the other cases where an inference was drawn and it is an amount totally consistent with personal use.

A case from another jurisdiction is also directly on point with Mr. Baskin's facts and it is applicable here. In *State v. Smith*, 603 P.2d 638 (Kan. Ct. App. 1979), the Kansas appellate court addressed the same issue with the same amount of marijuana as Mr. Baskin is charged with now. In *Smith*, the Kansas court held:

> The state's evidence in this case showed that defendant was arrested after officers observed him place a brown paper bag in his car. When approached by the officers as he walked away from the car, defendant first attempted to swallow and then threw away a clear plastic bag containing white powder. That bag was never found, but one of the officers opined from his brief view of it that it contained either heroin or cocaine.
> The brown bag in the car proved to contain approximately one pound of marijuana. It was in brick form, and was one-half of the customary two-pound or one kilogram brick. *The primary testimony relied on to show that defendant intended to sell the marijuana was given by Detective Jack Henderson, a Wichita detective who had been assigned to narcotics for 31/2 years, part of that time as an undercover agent. His testimony was: (1) When he was making an undercover buy of a one-pound brick his cover story would be that he needed it to sell, not that it was for personal use. (2) The one-pound brick of marijuana was worth $90 to $150, depending on quality. (3) One pound could be broken down into 18 to 20 "one ounce" packages or bags which could be resold for $10 to $15 each. (4) The largest supply he had ever observed being held for personal use was two ounces; he had never seen anyone with a one-pound brick for personal use.*
> As to the kind of proof which might demonstrate an intent to sell narcotics, in *State v. Faulkner*, 220 Kan. at 160-1, 551 P.2d at 1254, the Court quoted approvingly from 28 C.J.S. Drugs and Narcotics Supplement s 211:
> "In order to sustain a conviction for possession of narcotics or dangerous drugs for purpose of sale, there must be sufficient proof of possession of such drugs, and proof that the possession was for the purpose of sale. Such proof may be circumstantial and may consist of evidence as to quantity of the narcotic, equipment found with it, place it was found, manner of packaging, and opinion of experts that the narcotic was packaged for sale."
> As may be seen, the state's evidence upon which it must rely here is essentially limited to the quantity of marijuana and its packaging in brick

> form. Of the other three elements referred to in Faulkner there is no evidence: there was no narcotics equipment found with the marijuana; the car in which it was found does not suggest a selling operation; and there was no expert opinion that it was packaged for sale. We do not believe a rational fact finder could, from the two elements present here, conclude beyond a reasonable doubt that defendant intended to sell the marijuana.
> *As to the quantity, there was no evidence as to the amount reasonably necessary to satisfy the personal desires of a consumer. We are not prepared to say that one pound is a little or a lot for defendant's personal use, and cannot believe the jury was any better equipped to make this determination than are we.* See *People v. Steed,* 189 Colo. 212, 216, 540 P.2d 323 (1975) (7.9 ounces in 14 bags); *State v. Larko,* 6 Conn.Cir. 564, 571, 280 A.2d 153 (1971) (one pound in brick form); *Redden v. State,* 281 A.2d 490, 491 (Del.1971) (12 ounces in three envelopes; 29 small bags; 2 cigarettes). And Cf. *State v. Boyd,* 224 N.W.2d 609, 612-13 (Iowa 1974) (33 pounds in 2-pound bricks insufficient standing alone, but sufficient when coupled with two sets of scales and expert testimony that 2-pound bricks are customary packages for sale).

Id. at 640-41.

As in Mr. Baskin's case, an employee of the State testified as to how many marijuana cigarettes could be made from the marijuana. He did not testify at all if the amount could have been for personal use or sale. There is no way to determine beyond a reasonable doubt that the amount was such that it was going to be sold. In the present case, one of the officers testified he charged both men with possession of the marijuana. (Trial Tr. p.61). It is certainly possible that Mr. Baskin and Mr. Clark were going to split the marijuana for personal usage. The state's case attempts to rely on circumstantial evidence. *"[I]t is well established that in circumstantial evidence cases, it is necessary for the State to prove the guilt of the defendant not only beyond a reasonable doubt, but also to the exclusion of every other reasonable hypothesis consistent with his innocence."* *Tubbs v. State,* 402 So.2d 830, 834 (Miss. 1981) (emphasis supplied). This the state did not do. To be sure, there was no proof of any sale or intent to sell and Mr. Baskin's

conviction should be reversed and his cases remanded for re-sentencing on the charge of possession.

The state introduced four hundred fifty point three (450.3) grams of marijuana. According to *Miss. Code Ann.* 41-29-139(c)(2)(D), Mr. Baskin's sentence for possession of a controlled substance between 250 grams and 500 grams should have been two (2) to eight (8) years without the enhancement:

> (D) Two hundred fifty (250) grams but less than five hundred (500) grams, by imprisonment for not less than two (2) years nor more than eight (8) years and by a fine of not more than Fifty Thousand Dollars ($50,000.00);

With the enhancements that the State received upon amending the indictment pursuant to *Miss. Code Ann.* § 41-29-147 (subsequent offender) and pursuant to *Miss. Code Ann.* § 99-19-81 (habitual offender), then the maximum sentence Mr. Baskin could receive would be sixteen (16) years.[1]

The State simply did not prove beyond a reasonable doubt that Mr. Baskin intended to sell the marijuana in question. The case should be remanded for re-sentencing.

II. THE TRIAL COURT VIOLATED MR. BASKIN'S EIGHTH AMENDMENT RIGHTS BY SENTENCING HIM TO A GROSSLY DISPROPORTIONATE SENTENCE IN COMPARISON TO THE OFFENSE

Mr. Baskin received a sentence of sixty (60) years and a fine of two million dollar ($2,000,000.00) as a habitual offender for the possession of four hundred fifty point three (450.3) grams of marijuana. This sentence is grossly disproportionate and violates the Eighth Amendment of the United States Constitution. U. S. CONST. amend. VIII. When a

[1] Mr. Baskin does not agree that the State should be allowed to amend the indictment after his sentence to charge him as a habitual offender under *Miss. Code Ann. Section* 99-19-81 as it violates his Sixth Amendment rights. However, he wishes the Court to accept this sentence of sixteen years as alternative argument.

disproportionate sentence is raised by an appellant, this Court looks to the United States Supreme Court decision of *Solem v. Helm,* 463 U.S. 277 (1983).[2]

> The elements for evaluating proportionality are:
>
> (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.
>
> *Solem v. Helm,* 463 U.S. 277, 292, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983). This Court has adopted the test in numerous instances. *See Stromas,* 618 So.2d at 122-23 (Miss.1993); *Wallace,* 607 So.2d at 1188; *Fleming v. State,* 604 So.2d 280, 302-03 (Miss.1992); *Jones v. State,* 523 So.2d 957, 961 (Miss.1988); *Clowers v. State,* 522 So.2d 762, 764 (Miss.1988); *Presley v. State,* 474 So.2d 612, 618-19 (Miss.1985).

White v. State, 742 So.2d 1126, 1135 (Miss.1999).

A. THE GRAVITY OF THE OFFENSE AND THE HARSHNESS OF THE PENALTY

The State of Mississippi has an obvious need to control the amount of drugs that are used by its citizens and the ramifications that come with such drug use. However, in the present case Mr. Baskin did not have an amount of marijuana that suggested anything more that personal use.[3] He did not have any scales with him or small baggies to divide up the marijuana. Most applicable to this analysis is that Mr. Baskin did not have a weapon and he did not resist his arrest in any way. (Trial Tr. p. 63). In fact testimony from the officers emphasized that he was compliant and did exactly what he was told. (Trial Tr. p. 63).

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[2] Mr. Baskin is aware that the Supreme Court has ruled that there is no proportionality guarantee given in the Constitution. *Harmelin v. Michigan,* 501 U.S. 957 (1991). However, a sentence such as this one can still violate the Eighth Amendment. *White v. State*, 742 So.2d 1126, 1135 (Miss. 1999).

[3] While there are several references throughout Part II to the "sale of controlled substances", Mr. Baskin in no way concedes that a sale occurred in his case. The references are only for the purpose of analysis and illustration of sentencing in other cases as they relate to his case.

As for the penalty in this case, it could not have been harsher. Mr. Baskin was charged with the intent to sell a controlled substance pursuant to *Miss. Code Ann.* § 41-29-139. Before trial, the State then moved the Court to amend the indictment to charge Mr. Baskin as a subsequent offender so that his sentence would be doubled. See *Miss. Code. Ann.* § 41-29-147. And once the jury returned a guilty verdict on his charge of possession with intent to sell, the State prior to sentencing moved the Court to amend the indictment again to charge Mr. Baskin as an habitual offender pursuant to *Miss. Code Ann.* § 99-19-81.

This amendment was clearly done out of vindictiveness by the prosecution. Mr. Baskin was already looking at a sentence from zero (0) to thirty (30) years. Since Mr. Baskin exercised his constitutional rights to a jury trial by making the State prove its case and the State retaliated in vindictive fashion by making sure he received the maximum by amending the indictment to habitual status. "*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.'*" *United States v. Goodwin*, 457 U.S. 368, 372 (1982); quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978).

The action by the Madison County District Attorney's office clearly shows that the enhancement was sought only for the purpose of punishing the valid exercise of a Constitutional right. If not, then why not seek enhancement as a habitual at the time it sought amendment to charge Mr. Baskin as a subsequent offender?

The only possible answer to this question is that the prosecutors did this out of spite. This is analogous to cases where an accused receives harsher sentences upon gaining a new trial after appeal. See, *Blackledge v. Perry* 417 U.S. 21, 28 (1974) holding, *"[a] person convicted of an offense is entitled to pursue his statutory right to a trial de novo, without apprehension that*

the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration." (emphasis supplied).

In the present case the gravity of the offense did not weigh in favor of the prosecution. Mr. Baskin possessed an amount of marijuana that could obviously be consumed by one or two people over a short duration of time. Mr. Baskin posed no physical threat to the officers or anyone around him.

B. A COMPARISON OF THE SENTENCE WITH SENTENCES IMPOSED ON OTHER CRIMINALS WITHIN THE SAME JURISDICTION REVEALS THAT MR. BASKIN'S SENTENCE IS DISPROPORTIONATE

Madison County is within the Twentieth Circuit Court District. Also within that District is Rankin County and the two share Circuit Court Judges, Samac Richardson and William Chapman. The unconstitutional sentence in the present case was levied by Samac Richardson. When Mr. Baskin's sentence of sixty (60) years and $2,000,000.00 fine is compared with other sentences within this district, it plainly shows the sentence's extremity and disproportionality. See the following cases within the Twentieth District with substantially less time sentenced to the accused:

1) *Singleton v. State,* 2007 WL 331070 (Miss. Ct. App. 2007), Trial Court Judge Samac Richardson, Madison County, Mississippi, where defendant was convicted of the sale of a controlled substance within 1500 feet of a church; he received 60 years with 35 years suspended.
2) *Brown v. State,* 935 So.2d 1122 (Miss. Ct. App. 2006), Trial Court Judge William Chapman, Madison County, Mississippi, where the defendant was convicted of two counts of possession of marijuana with the intent to sell; he received 20 years on each count to run concurrently with 10 years suspended on each.

3) *Gill v. State,* 924 So.2d 554 (Miss. Ct. App. 2005), Trial Court Judge Samac Richardson, Madison County, Mississippi, where the defendant was convicted of the sale of cocaine; he received a sentence of 30 years with 10 years suspended.

4) *Denson v. State,* 858 So.2d 209 (Miss. Ct. App. 2003), Trial Court Judge Samac Richardson, Madison County, Mississippi, where the defendant was convicted of sale of cocaine; he received 30 years with 10 years suspended, 5 years supervised probation and restitution of $5,000.00 which was suspended.

5) *Jones v. State,* 912 So.2d 973 (Miss. 2005), Trial Court Judge Samac Richardson, Rankin County, Mississippi, where the defendant was convicted of transferring cocaine; he was sentenced to 30 years with 10 suspended and 5 years probation upon release.

6) *Mooneyham v. State,* 842 So.2d 579 (Miss. Ct. App. 2002) Trial Court Judge John Kitchens, Rankin County, Mississippi, where the defendant was convicted of 30 grams of methamphetamine and sale of methamphetamine; he was sentenced to 10 years for the possession of methamphetamine and 15 years for sale of methamphetamine, with these charges to run consecutively.

7) *Hurlburt v. State,* 803 So.2d 1277 (Miss. Ct. App. 2002) Trial Court Judge Samac Richardson, Rankin County, Mississippi, where the two defendants were tried together and respectively convicted of possession of marijuana with the intent to distribute and possession of methamphetamine; each received 25 years for the marijuana charge and each received 3 years for the methamphetamine charge, to run consecutively, along with a $5,000.00 fine conditioned upon good behavior.

8) *Maldonado v. State,* 796 So.2d 247 (Miss. Ct. App. 2001) Trial Court Judge Samac Richardson, Rankin County, Mississippi, where the defendant was found guilty of possessing 716 pounds of cocaine, she received 30 years.

All of the above cited cases involved a sentence involving a sale of a controlled substance or the intent to sell or distribute a controlled substance. Every single one of the above sentences equates to less than sixty (60) years as given to Mr. Baskin. Even in *Maldonado* the defendant had 716 pounds of cocaine and she only received 30 years. When Mr. Baskin's case is compared to other sentences within the Twentieth District his case is unconstitutionally disproportionate.

The aforementioned Dacorious Clark is probably the best example of this District's skewed sentencing. Mr. Baskin's trial was held on March 17, 2006. He was then sentenced on April 13, 2006 to sixty years. Eleven days later on Cause No. 20004-0656 Mr. Dacorious Clark was sentenced for his actions set forth in the facts above to a paltry **eight (8) years, with only one (1) day to serve, seven (7) years three hundred sixty-four (364) days suspended and five (5) years supervised probation.** (See *Judgment of Conviction and Sentence Instanter* for Dacorious Clark in Cause No. 2004-0656 signed by Judge Samac Richardson, attached as Exhibit "A" to Mr. Baskin's *Motion to Supplement Record*). Dacorious Clark only served one day! According to Mr. Clark's sworn plea agreement he too had a prior felony for burglary in Bolivar County Mississippi in 1996.

Instead of sentencing Mr. Baskin in accord with Mr. Clark the District Attorney's Office moved to have Mr. Baskin sentenced as a subsequent offender and then later to a habitual offender. This made sure he received 30 years and gave the court the discretion to double that 30 years, which it harshly obliged. There is no explanation for this action except vindictiveness.

C. A COMPARISON OF SENTENCES IMPOSED IN OTHER JURISDICTIONS FOR COMISSION OF THE SAME CRIME WITH THE SENTENCE IMPOSED IN THIS CASE FURTHER REVEALS THAT MR BASKIN'S SENTENCE IS DISPROPORTIONATE.

Other Districts within Mississippi have given substantially less amounts of time for sales of controlled substances in situations just like Mr. Baskin's. See the decisions in the following cases:

1) *McMinn v. State*, 867 So.2d 268 (Miss. Ct. App. 2004) Trial Court Judge Breland Hilburn, Hinds County, Mississippi, on petition for post conviction relief, denied, defendant received 10 years for sale of crystal methamphetamine and 10 years for conspiracy to sell methamphetamines to run consecutive.
2) *White v. State,* 842 So.2d 565 (Miss. 2003) Trial Court Judge Bobby DeLaughter, Hinds County, Mississippi, where defendant was convicted of possession of more than one ounce of marijuana with intent to distribute; he received 9 years with 6 years suspended and 9 years to serve.
3) *Jones v. State,* 724 So.2d 427 (Miss. Ct. App. 1998) Trial Court Judge Janie Lewis, Yazoo County, Mississippi, where defendant was convicted of manufacturing marijuana ; he received 15 years with 5 suspended and $1,000 fine.
4) *Elliot v. State,* 939 So.2d 824 (Miss. Ct. App. 2006) Trial Court Judge Lee Howard, Oktibbeha County, Mississippi, where defendant was convicted of sale of more that one ounce but less than one kilogram of marijuana; he received a 5 year sentence, $1,000 fine and 5 years post release supervision.
5) *McGee v. State,* 928 So.2d 250 (Miss. Ct. App. 2006) Trial Court Judge Al Smith, Bolivar County, Mississippi, where defendant was convicted of sale of marijuana and conspiracy to sell marijuana; he received a 10 year sentence, fine of $300 and 10 years

post release supervision for the sale of marijuana and he received a 10 year sentence, $5000.00 fine and 10 years post release supervision for the conspiracy charge, all to run concurrent.

6) *Ales v. State,* 921 So.2d 1284 (Miss. Ct. App. 2006) Trial Court Judge Sharion Adcock, Pontotoc County, Mississippi, where defendant pled guilty to sale of marijuana; he received a sentence of 20 years with 12 years suspended.

All of these decisions reflect that Mr. Baskin's sentence for a sale of marijuana was too harsh. He was essentially given a life sentence, as he will be ninety-one (91) years old when he is finally released on this relatively minor, non-violent charge! We do not challenge the Legislature's right to fix punishment, but the unnecessary severity of this sentence after solely due to the invocation of the defendant's constitutional rights, if left uncorrected by this Court, will result in a level of justice "bearing a countenance to sanguine and cruel."

D. THE SENTENCE WHEN ASSESSED WITH THE *SOLEM* TEST CLEARLY SHOWS A VIOLATION UNDER THE EIGHTH AMENDMENT.

Mr. Baskin is aware that the burden for proving a disproportionate sentence is heavy. See, *White, supra* at 1135. However, the cases cited above where a sale occurred clearly show that lesser sentences are given and that the sentence given to him was doubled then doubled again. This vindictive action by the prosecution should not be tolerated by this Court and the practice of seeking a sentence in this fashion should be condemned starting with this opinion. Mr. Baskin's sentence when looked at with the above sentences, especially Mr. Clark's, is far too severe and it violates the Eighth Amendment of the United States Constitution.

III. ALLOWING THE STATE TO AMEND ITS INDICTMENT AFTER THE JURY VERDICT AND BEFORE SENTENCING VIOLATED MR. BASKIN'S FUNDAMENTAL SIXTH AND FOURTEENTH AMENDMENT RIGHTS.

Mississippi's Supreme Court has held "[i]t is fundamental that courts may amend Indictments only to correct defects of form, however, defects of substance must be corrected by the grand jury." *Evans v. State,* 813 So.2d 724, 728 (Miss. 2002). In Mr. Baskin's case, the State only moved to charge Mr. Baskin under habitual status after the jury verdict out of vindictiveness. Courts have allowed this amendment in the past. See *Torrey v. State*, 891 So.2d 188 (Miss. 2004) and *Wilson v. State,* 935 So.2d 945 (Miss. 2006). Noticeably absent from the discussion and consideration in this line of cases is the affect that this amendment has on an accused's Sixth and Fourteenth Amendment rights.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, ***and to be informed of the nature and cause of the accusation;*** to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI. (emphasis supplied).

Allowing the State to amend the indictment in situations such as this allows them the discretion to adjust the substance of the charging document. A job clearly reserved for the grand jury. Yet, our state courts have not addressed this issue with Sixth Amendment scrutiny. U.S. CONST. amend. VI.

The cases thus far, *Torrey* and *Wilson,* have only addressed an amendment to the indictment as it relates to U.R.C.C.C. 7.09. An accused has a fundamental right to know what he has been charged with so that he may prepare his defense or decide if it is better for him to enter

a plea. *Torrey* appears to be the first case where a post jury verdict amendment was allowed for the purpose of enhancing a sentence.

Torrey relied on the case of *Adams v. State,* 772 So.2d 1010 (Miss. 2000), for the proposition that amending the indictment after the jury verdict but before sentencing was permissible. However, Adams gives no such authority. In *Adams,* the State moved for enhancement a week before trial, not after the jury verdict. There is no law that exists that allows 7.09 to supersede the protections given by the Sixth Amendment. It appears that as Mr. Torrey pursued his appeal *pro se,* he may have confused the Court on this issue by not addressing his Sixth Amendment protections.

"*The Sixth Amendment of the United States Constitution entitles an accused person to be informed of the nature and cause of the accusations against him.*" *Johnson v. State*, 879 So.2d 1057, 1060 (Miss. Ct. App. 2004).

To rule otherwise runs afoul of an accused's due process rights under the Fourteenth Amendment as it is clearly a lack of notice. Undersigned is mindful that prior convictions used to enhance an indictment do not require approval of a jury. See, *Adams v. State,* 410 So.2d 1332, 1334 (Miss.1982) and *Wildee v. State,* 930 So.2d 478, 481 (Miss.Ct.App.2006). However, after a jury verdict has been entered by the Court the State should not then be allowed to enhance without any notice.

This issue was briefly addressed by this Court in *Meadows v. State* where it held:

> As stated in *Graves,* "for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is patently unconstitutional." *Graves,* 492 So.2d at 567; *Chaffin v. Stynchcombe* 412 U.S. 17, 32-33, n. 20, 93 S.Ct. 1977, 36 L.Ed.2d 714 (1973). "***But in the 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer.***" *Graves,* 492 So.2d at 567

(quoting *Bordenkircher,* 434 U.S. at 363, 98 S.Ct. 663). *See also Heatherly v. State,* 773 So.2d 405(¶ 9) (Miss.Ct.App.2000).

Meadows v. State, 828 So.2d 858, 860 (Miss. Ct. App. 2002).

The above emphasized portion is crucial to the understanding of what the State did in Mr. Baskin's case because after the jury verdict was returned there is no "give-and-take," there is simply a verdict and a sentence that follows. There is nothing at that point that is bargained for, as a convicted person has no ability to accept or reject the amendment. Moreover, there is nothing in the record that shows the State informed the accused that it would seek further enhancement beyond subsequent offender status if the case went through a trial. Surely, if the prosecution were to notify an accused of its intentions prior to trial it would facilitate plea agreements. Allowing the State to continue to enhance a sentence just because an accused exercises his constitutional right to a trial is fundamentally wrong.

The current law that exists is akin to convicting a person for possession for simple possession of marijuana and then showing up after the trial with a motion and an attached affidavit from the crime lab technician showing the amount to be more than a kilogram.

The State used the amendment card in a vindictive manner when it moved to amend after the jury verdict and before sentencing. The trial court erred in allowing this amendment as it violates Mr. Baskin's Sixth Amendment rights to be confronted with all charges he is facing prior to trial. Since his conviction relies upon an unconstitutional amendment to his indictment he is entitled to a reversal of his conviction as to the habitual offender status.

IV. CONCLUSION

Mr. Baskin requests that this Court reverse his conviction and provide him with a new trial in light of the individual errors set forth in this brief. Alternatively, Mr. Baskin requests that the Court reverse this decision and remand for re-sentencing.

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 *Appellant's Brief* to the following:

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This the 23rd day of February, 2007.

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