IN THE MISSISSIPPI COURT OF APPEALS

No. 2006-KA-01787 -COA

FERLANDO ESCO — APPELLANT

vs.

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

Appeal from the Circuit Court of Madison County, Mississippi

Julie Ann Epps (MS Bar [redacted]
504 East Peace Street
Canton, MS 39046
(601) 407-1410
facsimile (601) 407-1435

A. Randall Harris
P.O. Box 2332
Madison, MS 2332
(601) 454-7242

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 this Court may evaluate possible disqualifications or recusal.

Ferlando Esco
Appellant/Defendant

Ross R. Barnett
A. Randall Harris
Trial attorneys for Ferlando Esco

Julie Ann Epps
Appellate Attorney for Ferlando Esco

Scott E. Rogillio
Thomas L. Kesler
Armstrong Walters
Assistant District Attorneys

Jim Hood
Attorney General

The State of Mississippi
Appellee

Honorable William E. Chapman, III
Circuit Court Judge, Madison County, Mississippi.

SO CERTIFIED, this the 22d day of October, 2007.

Julie Ann Epps

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STATEMENT OF THE CASE

In an indictment filed September 8, 2005, Ferlando Esco was charged with the following: 1) aggravated assault in violation of M.C.A. § 97-3-7(2), 2) armed robbery (M.C.A. § 97-1-1), 3) conspiracy to commit aggravated assault (M.C.A. § 97-1-1), 4) conspiracy to commit armed robbery (M.C.A. § 97-3-79); 5) possession of a firearm by a convicted felon (M.C.A. § 97-37-5) and 6) felony evasion (M.C.A. § 97-9-72). CP. 5; RE. 18. The charges arose from the shooting of William Curtis James, Jr. on June 14, 2005. Esco was alleged to have planned, along with Michael Johnson and Isaiah Sanders, to rob James who owned a landscaping business and was thought to carry large sums of money on him.

The trial took place in August, 2006. The prosecution's first witness was emergency room doctor James Kolb who testified that he treated Curtis James at University Medical Center for a gunshot wound on June 14, 2005. T. 198.

The victim, William Curtis James testified that he has owned a landscaping and house washing business for eight years. T. 204. Ferlando Esco, he stated, "is supposed to be a cousin." T. 205. On June 13, 2005, James' mother told him that a real estate agent had called for him. The next day James got a call from someone who said he was a real estate agent and that he and his wife had a couple of houses for him to work on. T. 206. James told them that he was having lunch

at McDonalds in Madison the next day and that they should meet him there. TR. 207.

The next day, the real estate people called and said they were in Madison now and James got into his SUV and drove to McDonalds. T. 208. James walked into the McDonalds. He saw a black man with dreadlocks sitting in the corner. This man spoke to James. T. 209. Another "bright skinned" man was on the phone and nodded his head at James as though to speak. Then the man on the phone and the dreadlocked man walked out of the McDonalds separately. T. 209. A girl that James knew approached him and asked for some money so that she could buy lunch. James gave her three dollars. T. 210. He was talking to the girl and her friend when the phone rang and the caller (purporting to be one of the couple he was to meet about the houses) asked if he could meet them at Walgreens. T. 210. James said "no" because he was planning on eating lunch. A little later, they called again and told James that an emergency had come up and that they wouldn't be able to meet him. T. 211.

James testified that he left the McDonalds to return to work. T. 211. As he was getting into his SUV, he saw that the man with the dreadlocks was sitting in the backseat of James' SUV. T. 2123. He had a pistol. The man told James to crank the truck up slowly. As James did so, the bright skinned man ran around the front of the SUV. The man was trying to push James and James was holding him off. T. 212. The man said "shoot the m___ f___." T. 213. The subsequent shot knocked James out of the SUV and he staggered into the McDonalds. T. 213.

James was in the hospital for about five days. T. 215. He had to almost immediately return to the hospital for another week. The bullet broke all of his ribs. T. 215.

James testified that before he was shot, he had discussed buying some rims for his SUV with a friend, Daniel Ford. T. 216. Ford offered to sell him some rims. James looked at the rims and agreed they were nice but when Ford told him the rims belonged to Ferlando Esco, James told Ford he wasn't interested. T. 219. James testified that he doesn't have a checking account, only a savings account and that he operates on a cash basis. T. 220.

On cross-examination, James identified the bright skinned man as Michael Johnson. T. 228. He testified that he never saw Ferlando Esco either inside or outside the McDonalds. T. 229.

Some months later, James got a call from one of the two women he'd been talking to at the McDonalds the day he got shot. Her name was Joann Rogers. T. 230. Joann said that when she and her friends pulled into the parking lot at McDonalds, she saw Ferlando Esco in a car on the phone. T. 232. This was the first time that James knew that Esco was at the McDonalds so, on December 9, 2005, he took Joanne to investigator Mike Brown to make a statement. T. 231-32. James admitted that he could not identify the voice on the phone calls setting up the McDonalds' meeting as Ferlando's. T. 236.

Co-defendant Michael Johnson, in exchange for a deal with the prosecution, testified that Isaiah Sanders is his cousin. T. 246. Johnson met Esco

when Johnson was serving time for carjacking in a federal correctional facility in Beaumont, Texas. T. 247. Johnson was released from prison in June, 2002. He met up with Ferlando again when he was returning to Jackson from New Orleans. He and his girlfriend had gotten into an argument. Johnson got out of the car and was walking down the highway. Ferlando was driving by and stopped and gave him a ride. T. 246.

On June 14, 2005, Esco, driving a Cadillac Escalade, picked Johnson up from Target. T. 248. They then they picked up Isaiah. T. 250. Isaiah had a nine millimeter weapon with him. T. 250. The purpose of their getting together was to rob someone. T. 250. Johnson identified State's Exhibit no. 3 as the gun that Isaiah was carrying. T. 251, 253. It was decided that they needed another gun so they drove to Isaiah's house to pick up a revolver. T. 253-54.

They then proceeded to Ferlando's apartment at the Parc on County Line Road. T. 254-55. There, they borrowed a white Mustang from a friend of Ferlando's. T. 257. Ferlando was driving with Johnson in the passenger seat and Isaiah in the back. T. 257. They drove around and ended up in the parking lot of Winn Dixie/McDonalds. T. 258. They purchased some cheeseburgers, a soft drink and some water at the McDonalds drive-thru. T. 261. According to Johnson, Ferlando was saying that Curt wasn't going to just lay down and let himself be robbed and that they had to be rough with him. T. 259. Ferlando wasn't going to participate in the robbery. He planned to wait in the car. T. 260.

When they saw James pull up in a black Suburban and walk into the McDonalds (T. 260), Ferlando pulled the Mustang over to the Bank Plus parking lot and Johnson and Isaiah got out and entered the McDonalds. T. 262. Johnson sat down and Isaiah went into the bathroom. T. 262. During this time, Ferlando and Johnson talked via phone. Isaiah then left the McDonalds. When James exited the McDonalds, Johnson followed him. T. 263. When Johnson got to James' SUV, Isaiah was in the back seat and James was saying "y'all just going to have to do what ya'll got to do." T. 264. Johnson was leaning against the door and Isaiah shot him. T. 264. Johnson and Isaiah then took off running to the Mustang (T. 265-66) and Ferlando drove the Mustang away from the McDonalds. T. 267.

A police car with blue lights flashing drove up behind them. Ferlando stopped the car. T. 269. When the police car stopped behind them, Ferlando sped off in the Mustang and drove back to the apartment complex (T. 270-71) but while they were driving, Johnson threw the nine millimeter out the window. T. 272. When Ferlando parked the car, they all got out and ran. T. 275.

Johnson testified that he pleaded guilty to the charges arising from the shooting of Curtis James. In return, the prosecution has recommended a sentence of twelve years but Johnson had not been sentenced at the time of Esco's trial. T. 279. The state is also supposed to recommend that his sentence run concurrent with any time that may remain on his federal sentence. T. 295.

Isaiah pleaded guilty and got a sentence of forty years. T. 293.

Sergeant Edwin Lawrence of the Madison County Police Department testified that he was dispatched along with other officers to the scene of the June 14, 2005, shooting at McDonalds. T. 309. Lawrence documented the scene by taking photographs which were entered into evidence. T. 310. A handgun was recovered in some shrubbery close to the McDonalds. T. 316. Law enforcement retrieved at least one sales receipt and money from the cash register inside the McDonalds. T. 321. The plan was to submit this evidence to the crime lab to look for fingerprints. T. 324. Lawrence testified that he does not know what the crime lab found with regard to the receipts and money or the gun that was found in the shrubbery. T. 326. Lawrence later returned to the witness stand to identify a cell phone recovered from the McDonalds' parking lot. T. 463.

Darwin Freeman was employed by the City of Madison in the Public Works Department. T. 331. On June 14, 2005, he was stopped in his vehicle at the red light at Highway 51 and Main Street. T. 332. He noticed a car parked in the westbound lane pointing east. Two men came running across the parking lot in front of the Jitney and jumped in the car. T. 332. Freeman tried to get a tag number but the car sped off. Freeman followed the car until it turned south on Old Canton Road. T. 332. About that time, Freeman got a page on his city radio that there had been a shooting at the McDonalds. T. 333. Freeman realized that what he had seen must be connected to the shooting and radioed the police department dispatcher about the car turning south on Old Canton Road. T. 333.

Freeman was shown a photograph of a white Mustang with a brown convertible top. He identified it as a photo of the car he had seen that day. T. 334. Freeman testified that one of the men running to the car had either dread locks or a do rag hanging down. T. 336. Freeman didn't notice anything about the other man running across the parking lot or the driver of the car except to say that the driver was a black male. T. 337. After Freeman wrote out a statement for the police, he was taken to an apartment complex in Ridgeland and shown a person who Freeman identified as one of the men running across the parking lot. T. 338. That was the man with the dreadlocks. T. 344.

Madison Police Officer John Redstone testified that he responded to the McDonalds' shooting on June 14, 2005. T. 349. Police radio reported that three black men had left the scene in a white Ford Mustang. T. 350. Redstone and his partner, Sergeant Davenport, had just seen a white Mustang on Madison Avenue. T. 351. The eventually spotted the Mustang on Rice Road. T. 352. Sergeant Davenport initiated a traffic stop. The Mustang stopped but as Redstone and Davenport were getting out of their vehicle, the car sped off. T. 353. They pursued the vehicle and at some point they were joined by a Ridgeland police car. T. 355. Another Madison law enforcement officer, Officer Brooks, was behind them on a motorcycle. T. 355. Eventually, Ridgeland p.d. spotted the Mustang at the Parc Apartments. T. 359.

Officers Dennis Davenport, and motorcycle officer Jamie Brooks followed Redstone on the stand. Both testified similarly about the pursuit of the white Mustang. T. 369-374; 380-85.

Ridgeland Police Officer Scott Young also testified about the chase. T. 387. He stated that when they spotted the Mustang in the parking lot of the Parc Apartments, there were several people standing a few feet from the car. T. 396. One of those people was Ferlando Esco. T. 396. Young noticed Esco standing in a group with two other black males. T. 396. Young asked Esco about the car and he said that it was his girl's car and that he was driving her car because she had his truck. T. 397. Young did not arrest Ferlando. T. 404.

Toni Pope worked at the Parc Apartments. She was asked to determine whether Esco lived at the complex. T. 405. She testified that Esco lived in apartment number 10-E. T. 406.

McDonalds' employee Fidelis Malembeka testified that all McDonalds' cups look the same and that there is no way to distinguish a cup sold by one McDonalds from a cup sold by another McDonalds. T. 409.

Derrick Thomas was working as a flag man for Hemphill Construction on June 14th. He heard sirens, saw a white Mustang drive by and as the Mustang made a left turn, saw a pistol thrown out of the car. T. 411. Another construction worker, Louis James, testified that he was almost run over by the Mustang. T. 415.

Sergeant Mark Penn with the Ridgeland Police Department drove to the Parc Apartments after having received information that a white Mustang involved in the McDonalds shooting was spotted there. T. 419. Penn saw only one person near the vehicle – Ferlando Esco. T. 421. Esco was bouncing a basketball in front of an apartment. T. 421. Penn asked him about the Mustang. At first, Esco told him that two black males had run from the vehicle. Then he said that the Mustang belonged to a friend but that a similar vehicle had come through and that two people in the car had pulled up to the dumpster, thrown something in the dumpster, and drove off. T. 422.

Penn testified that he spotted another possible suspect laying in the breezeway in the next apartment building down. He was wearing all black clothing, talking on a cell phone and sweating heavily. T. 423. This person turned out to be Sanders. T. 426. A person standing in an upper apartment pointed toward Sanders and then put her finger over her lips as though she didn't want to be identified. T. 424. She did not similarly point out Esco. T. 427.

Ridgeland police officer Brian Myers testified that two McDonalds' cups were found in the Mustang. T. 431.

Ridgeland police officer Marcus Edwards was the first patrol car to report to the Parc Apartments. When he got there, there was a black male – Esco – walking away from the car. T. 440. After backup arrived, Edwards approached Esco who told him that one or two black males left their vehicle and ran toward the dumpster. T. 442.

Joseph Wisnoski was a narcotics investigator with the Madison Police Department. In June of 2005, Wisnoski reported to the Parc Apartments in response to a shooting at McDonalds. T. 449. There were already a couple of officers there and Ferlando Esco. T. 449. Wisnoski asked Esco what he had been doing. Esco stated that he had been at the apartments most of the day. He said that the Mustang was his girlfriend's and that he had loaned it to a couple of friends and that he had just gotten back to the apartments. T. 450.

Wisnoski testified that dispatch had advised that a possible suspect was a black male with dreadlocks wearing all black. T. 450. A person of that description was sitting on nearby steps. Wisnoski asked the man his name and what he was doing there. He replied "Isaiah Sanders" but his story about what he was doing changed several times. T. 451. Sanders was taken into custody. A cell phone was taken from Sanders' pocket. T. 351.

Wisnoski then drove to the Chevron at the corner of Old Canton Road to recover a Ruger semiautomatic handgun that had been found beside the road along with a baseball cap. T. 453.

Mike Brown is an investigator for the city of Madison. On the day of the shooting, he went to UMC to see if the victim could provide a statement. T. 470. When it became clear that the victim was not in any condition to make a statement, he drove to the Parc Apartments. Brown identified two McDonalds' cups taken from the Mustang. T. 480. (State's Exs. 36 and 37). Brown was shown a document which he identified as a list of the incoming and outgoing

phone numbers that were found on the cell phone taken from Ferlando Esco. (State's Ex. 26) on June 14, 2005. There was an outgoing call at 11:12 p.m. to the victim's phone number. T. 485. There was an incoming call from Michael Johnson at 2:58 p.m. and an outgoing call to Johnson at 3:49 p.m. T. 485. But on Curtis James' phone, there was no corresponding phone call from Ferlando Esco's phone at 11:12 a.m. T. 496. During Brown's testimony, the prosecution entered into evidence another McDonalds' cup retrieved from the Mustang's console. T. 487.

Fingerprint analyst Paul Wilkinson, Jr., compared a print found on a McDonalds' cup (State's ex. 20) to fingerprint cards taken from Michael Johnson, Isaiah Sanders and Ferlando Esco and identified the print on the cup as belonging to Esco. T. 505. On cross-examination, Wilkinson admitted that he did not locate Esco's fingerprints on the nine millimeter (State's Ex. 3) (T. 607) or the firearm in state's ex. 4. T. 508. Nor was he able to lift prints off of three McDonalds' receipts and three twenty dollar bills (State's Ex. 5) (T. 509) or a package of cigarettes. T. 609. (State's Ex. 13).

Probation Officer James Fentress testified that he began supervising Esco on September 19, 2002. Esco had been released from custody on September 16, 2002. T. 520. Esco had been convicted of possession of counterfeit currency. T. 521. He also had convictions for robbery, and possession by a felon of a firearm. T. 522. As part of his probation, Esco had to have permission if he wanted to leave the Southern District of Mississippi. T. 524. At some point after June 14,

2005, Fentress was made aware that Esco had left the jurisdiction without getting permission. T. 524.

The prosecution's last witness was United States Deputy Marshall Kevin Koback who was based in Nashville in June, 2005. T. 526. Koback was given information that there was a warrant out for Ferlando Esco and that Esco was thought to be in Clarksville, Tennessee. T. 526. Esco was arrested as he exited a Wal-Mart in Clarksville. T. 527. Esco was found to have $5000.00 cash on his person at his arrest. T. 528.

The defense called five witnesses. The first was the police officer who testified about recovering the McDonalds' cup.

Twenty-three-year-old Shereka Elder testified that she was at the McDonalds the day of the shooting. She accompanied her cousin, Tiffany Miller, who was filling out an application for employment. T. 564. They were at the McDonalds for about 45 minutes (T. 565) sitting at the table right in front of the cashier. T. 564. Shereka testified that she has known Ferlando since she was about thirteen years old. T. 565. She did not see Esco either inside the McDonalds or outside the McDonalds that day. T. 565. She did see Curtis James whom she has known for five or six years. He was at the McDonalds sitting at a table eating when she and Tiffany walked in. T. 566. She also saw two black males there ordering food. One of them was tall, about six-feet-two-inches, and had dreadlocks in a ponytail. The other was about five -eleven and a shade brighter than herself. T. 566. They got their food and then went and stood by the

restroom which she thought was unusual. T. 567. As Shareka and Tiffany were driving away, they saw a police car heading toward McDonalds. T. 568.

Nikike ("Niki") Shavers testified that she was thirty-one years old and had known Ferlando Esco most of her life. T. 576. They are friends and they like to gamble. On June 14, 2005, she was with Esco at the Parc Apartments. They were planning to go to Vicksburg to gamble. T. 577. Niki got to the apartments about 10:30. Two black males drove up to the apartments in another vehicle. She knew one of them as "Dread." T. 578. She and Ferlando were inside an apartment. The two men came to the door and asked Ferlando if they could borrow his SUV. T. 579-80. Ferlando explained that the engine light was on in his SUV and he couldn't let them use it. Dread then asked if they could borrow Niki's car to get something to eat. T. 580. Niki told them they couldn't use her car but they kept insisting. T. 581. Finally, Ferlando gave them the keys to another car, a white Mustang. T. 581. The Mustang wasn't Ferlando's car but he had the keys to it. T. 582. Niki and Ferlando waited on the two guys to come back. When two hours had passed, Niki left. While she was in her car, her friend Tomika Austin called and said that Ferlando was in the news. "I was like, no, it ain't Fred [Ferlando] because I just left him." T. 582.

Defendant's next witness was Madison Police Department Patrol Commander Thomas Mikula. On June 14, 2005, he was called to the McDonalds about a shooting. T. 596. Curtis James was there laying on the floor. Mikuli

asked James what had happened and James told him that three guys tried to get in his black Suburban. T. 597.

The last witness to testify on Esco's behalf was Esco himself. T. 599. Esco testified that he was thirty-two years old. He has twin boys and a little girl. T. 600. In June, 2005, he was living at the Parc Apartments. T. 600. On the morning of June 14, 2005, he had eaten breakfast at the McDonalds on County Line Road. T. 600. He drove there in a Mustang owned by his friend Katina. T. 601. He had borrowed Katina's car because the engine light was on in his SUV. T. 601. At that time, Esco was working at Grant and Son's Fashions in Canton. T. 601.

The morning of June 14, Nikike Shavers came by around 10:00. T. 602. They planned to go to the casino in Vicksburg. T. 602. After Niki got there, two guys showed up. One of them was Dread (Isaiah Sanders) and the other was named John. T. 602. They came over to ask for the phone number of Ferlando's cousin, Curt James. T. 603. They said that Curt owed John $2400. T. 603. When Ferlando went upstairs to get the number, Dread had Ferlando's phone. Ferlando called the number and Dread put the number in the phone and Ferlando took his phone back. T. 604. Dread asked Ferlando to tell Niki to let him borrow her car so they could get something to eat. Finally, Ferlando told them they could use the Mustang. T. 604. He gave them his phone and asked them to put it in the charger in the Mustang. He and Niki waited for a while for Dread and John to return. Finally, after a few hours, Niki left. T. 606.

Shortly after Niki left, the Mustang pulled into the parking lot at a high speed. T. 606-07. Ferlando walked around the apartments and saw Ladarius Stewart and asked him if he had seen anyone get out of the Mustang. T. 608. Stewart said no. Ferlando then approached the Mustang and opened the door and started searching for his cell phone. T. 608. A few minutes later, a police car drove by. Several minutes later, other police officers showed up. T. 609. One of the officers started asking Ferlando questions. Ferlando told the officer that the car belonged to a friend of his. T. 611. Then another officer came from another building with Dread. Ferlando testified that he didn't want to tell on Dread. The officer kept asking Ferlando who he had given the Mustang to and Ferlando told him to call his lawyer, Ross Barnett, Jr. T. 611. The officer called the lawyer and Ferlando's lawyer told Ferlando to cooperate so Ferlando told the officer that he had given the car to Dread and John. T. 611. Ferlando was handcuffed but then released. T. 613. Dread, however, was taken into custody. T. 613.

Ferlando testified that he met Michael Johnson while serving time in Beaumont Texas. T. 614. He did not see Michael Johnson that day. T. 615. Ferlando stated that his first conviction was at the age of 16 for strong arm robbery. T. 616. In about 1998, he was convicted of being a felon in possession of a firearm. T. 616. His next conviction was for possession of counterfeit money in 2000. T. 616.

Ferlando testified that he loaned the car to Dread and John. He thought John was Dread's brother but he doesn't know that for sure. T. 617. While

Michael Johnson had testified that Ferlando called him and that Michael was calling Ferlando on the morning of June 14, Ferlando testified that there were no such calls. In fact, the list of calls prepared by the police of calls purportedly on Ferlando's cell phone do not show any ingoing or outgoing calls to or from Michael Johnson until 2:58 when there is an incoming call from Johnson. At that point, though, Ferlando testified that his cell phone was in the Mustang with Dread and John. T. 618.

Ferlando testified that he went to Tennessee to stay with his sister in order to avoid being picked up until his federal probation was over in three months. T. 627.

The prosecution called four police officers in rebuttal. Three of them were asked whether they had testified truthfully when they testified during the prosecution's case-in-chief. T. 657, 660, 661.

The jury found Ferlando Esco guilty on all counts. T. 738, RE. 24. The trial court sentenced Esco to life without parole on all counts with the sentences in counts one through five to run concurrently but count six to run consecutively to the other counts. T. 752-53; CP. 92; RE. 39.

SUMMARY OF THE ARGUMENT

There were a multitude of errors in this case that individually and collectively deprived Ferlando Esco of due process and a fair trial. First of all, the "star" witness against Esco was his co-defendant Michael Johnson. Johnson had entered a plea in exchange for the prosecution recommending a sentence of twelve years. At his plea colloquy, Johnson testified as to what happened the day James was shot. On cross-examination, the defense asked Johnson about a couple of statements he made during the colloquy that did not fit exactly with his testimony during Esco's trial. On redirect, the prosecution entered the entire colloquy into evidence as a prior consistent statement. But to the extent that Johnson's testimony was challenged, it was on two statements made during the plea colloquy. The plea colloquy certainly did not back up Johnson's trial testimony on these two points and, thus, was not admissible as a prior consistent statement. And certainly, the entire plea colloquy was not admissible.

This error was compounded by the trial court's failure to instruct the jury that the prior statement could not be used as substantive evidence of Esco's guilt.

One of the charges against Esco was felon in possession of a firearm. Since Esco was on probation at the time of the instant case, and had previously been convicted of several felonies, this element, that Esco was a felon, was not a real issue at trial. The defense moved prior to trial to prohibit the state from introducing a fourteen-year-old conviction for strong arm robbery since 1) it was

ancient and 2) similar to the armed robbery with which Esco was currently charged. The trial court allowed the prosecution to use this conviction in an effort at prosecutorial overkill that denied Esco his right to due process and a fair trial.

Again, the jury was not given an instruction that it could not use the fourteen-year-old conviction as substantive evidence of guilt.

In cross-examining Esco, the prosecution asked him, several times, whether police officers had been lying when they testified. Credibility issues are solely for the jury and the prosecution's questioning was improper. The prosecution's asking the police officers to vouch for their own credibility was error for the same reason. Credibility is for the jury to determine.

The prosecution was allowed to introduce a list prepared by a police officer that was ostensibly a list of phone numbers on one of the cell phones in evidence. The prosecution argued that it was admissible as a summary. But for the list to be admissible as a summary, the prosecution had to make available the original. But since the cell phone's electronic components could no longer be accessed, there was no way that the defense could authenticate the accuracy of the list.

Finally, it was error for the trial court to talk to the jury before pronouncing sentence. To the extent that any information was exchanged during this private meeting about Esco, Esco was entitled to be privy to such information.

Finally, the errors taken together deprived Ferlando Esco of a fair trial.

LAW AND ARGUMENT

1. The trial court erred in allowing the prosecution to introduce Michael Johnson's prior statement.

Michael Johnson testified for the prosecution in exchange for the prosecution's promising to recommend a sentence of twelve years. His testimony on direct is outlined in the Statement of the Case, *supra*. On cross-examination, the defense pointed out that Johnson testified that the robbery involved a 9 millimeter but during his plea colloquy, he stated that he did not know what kind of gun was used, only that it was a revolver. T. 296. Defense counsel read from the plea transcript and Johnson admitted that he had not identified the gun as any specific type when he pled guilty. T. 297. The defense also pointed out that Johnson had not mentioned that Esco had picked him up at Target. T. 297. During the plea, he stated only that they had all met at Ferlando's apartment. T. 297. Johnson answered, "No. I wasn't just – they was questioning me. The questions that they asked me, I was answering them. I didn't just say specifically about anything." T. 297. This was the entirety of the defense's attempt to impeach Johnson with his plea colloquy.

On redirect, the prosecution asked Johnson whether the testimony he was giving at Esco's trial was consistent with that he had given at the plea colloquy. T. 301. Johnson stated that it was.

Q. You have provided some more detail today than you did then; is that correct?

A. Yes.

Q. But what you said on the 31st, insofar as what you were asked, is the same answers you gave today; is that correct?

A. Yes.

T. 301-302.

At that point, the prosecution moved to introduce the entire plea colloquy – all thirty-two pages - as an exhibit to Johnson's testimony based on the fact that it was a prior consistent statement. T. 302. The defense objected on various grounds. For one, introduction of the statement would amount to improper bolstering. T. 302. Secondly, it was cumulative. And finally, introduction of the entire statement would incorporate topics about which Johnson was not challenged during cross-examination. T. 302. "I think the answer to it," defense counsel stated, "is if I asked him did he not say something, and they find out that he did say it, they can ask him that and point it out." T. 302.

The prosecution countered that, based on the rule of completeness, it would be improper to "cherry-pick" Johnson's statement. T. 303. Again, the defense objected that introduction of Johnson's entire prior statement would be improper - that, to the extent any of it was admissible, only those statements that had been impeached could come in. T. 303. The trial court ruled that the entire statement could come in (T. 304) and it was admitted as State's Exhibit 6. T. 305.

Generally, a witness may be questioned about a prior consistent statement if the statement "is consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." Mississippi Rules of Evidence, 801(d)(1)(B). In most cases, the defense questions the witness about a prior inconsistent statement and the prosecution then redirects using a different statement - a statement consistent with the witness's testimony. *See, e.g., Jackson v. State,* 766 So.2d 795, 808 (Miss.Ct.App. 2000). This case, though, involves a single statement – the plea colloquy. Apparently everyone agreed that Johnson's colloquy lacked the specificity of Johnson's testimony. To the extent that the colloquy was inconsistent, it was in the instance where Johnson testified, during the plea hearing, that he did not know what type of gun was used in the crime. This, of course, was inconsistent with Johnson's ability to testify at trial that the gun was a nine millimeter.

The colloquy cannot be both an inconsistent statement and a consistent statement. On the points about which Johnson was cross-examined, the plea colloquy was **not** consistent with Johnson's trial testimony. So the plea colloquy was not admissible to the extent that it buttressed Johnson's testimony ofn these two points. The rest of the plea colloquy was consistent with Johnson's testimony and, thus, was not used by the defense to impeach Johnson. Clearly, the prosecution in this case wanted Johnson's plea colloquy in evidence to bolster Johnson's testimony. In fact, when the defense first started to cross-examine

Johnson about the two statements in the colloquy, the prosecution, at that point, stated that it had no objection to admitting the entire colloquy. T. 296.

A prior consistent statement, even when offered to rebut a challenge to the witness's veracity, is never to be used as substantive evidence of the defendant's guilt. *Smith v. State*, 792 So.2d 343, 347 (Miss.App. 2001). Moreover, it is admissible to rebut a charge of fabrication **only** if the statement was made prior to the time that the declarant's reason or reasons to fabricate arose. *Tome v. United States*, 513 U.S. 150, 160, 115 S.Ct. 696, 705, 130 L.Ed.2d 574 (1995).

"[A]dmission of a prior consistent statement of a witness where the veracity of the witness has been attacked is proper but should be received by the court with great caution and only for the purpose of rebuttal so as to enable the jury to make a correct appraisal of the credibility of the witness. " *White v. State,* 616 So.2d 304, 308 (Miss.1993).

In *Caston v. State*, 823 So.2d 473, 488-489 (Miss. 2002), the trial court allowed the prosecution to question their witnesses about statements that they had made some 30 years previously – statements that corroborated their testimony at trial. The trial court did not, however, allow the prosecution to show the statements to the jury. On appeal, the Mississippi Supreme Court held that the trial court's ruling was error. "[E]liciting prior consistent statements in the absence of a challenge to the witness's veracity should be given only for the purpose of rebuttal." *Caston*, 823 So.2d at 489.

The Mississippi Supreme Court in *Owens v. State*, 666 So.2d 814, 816 (Miss. 1995) adopted the rationale of *Tome* and likewise concluded that to be admissible under the Mississippi rules the prior consistent statements must have been made prior to the time any reason to fabricate arose. For example, in *Owens,* the Court held that a statement made by a child-fondling victim to the sheriff was not admissible as a prior consistent statement pursuant to M.R.E. Rule 801(d)(1)(B).

In this case, Johnson's guilty plea was premised on his testifying against Esco. Therefore, his reason to fabricate arose before the statement he gave during his guilty plea and, thus, his allegedly consistent statement during the plea colloquy was no more reliable than his trial testimony and should not have been placed before the jury. *Id. Accord, United States v. Mareno,* 94 F.3d 1453, 1455 (10th Cir. 1996) (statement of accomplice made to authorities was inadmissible because he had a pre-trial motive to exculpate himself and curry favor with authorities); *United States v. Forrester*, 60 F.3d 52 (2nd Cir.1995) (motive to fabricate arose prior to statement to authorities and was inadmissible hearsay); *United States v. Awon,* 135 F.3d 96, 100 (1st Cir. 1998) (motive to falsify precluded admission of statement).

To the extent that it was proper to use **any** of the prior statement, only those parts addressing the issues about which Johnson was questioned on cross-examination, i.e. the revolver and Target, should have been elicited. It was categorically improper and prejudicial, though, to introduce the entire statement

as though it were substantive evidence of Esco's guilt. Once a part of a document can be said to have been introduced, Rule 106 does not automatically make the entire document admissible. *United States v. Pendas-Martinez,* 845 F.2d 938, 944 (11th Cir. 1988). "[I]t is consistently held that the rule permits introduction only of additional material that is relevant and is necessary to qualify, explain, or place into context the portion already introduced." *Id.*[1]

Because Johnson's statement made during his plea was inadmissible hearsay and unreliable, Esco's due process rights to a fair trial and his Sixth Amendment rights to cross-examination and confrontation were violated. Unreliable statements do not satisfy the constitutional demands for admissibility so both the due process and confrontation clauses require exclusion. *E.g., Idaho v. Wright,* 497 U.S. 805, 821 (1990). Furthermore, to the extent that Johnson could be asked about the consistent statements he made during his plea, the entire statement should never been admitted into evidence. *Smith,* 792 So.2d at 347.

2. The trial court erred in failing to instruct the jury that Johnson's statement could not be considered as substantive evidence.

Even if it was appropriate for the prosecution, on re-direct, to query Johnson about his guilty plea as a prior consistent statement, the trial court should have instructed the jury that the statement could not be used as substantive

[1] As one court has phrased it, the test is whether introduction of the entire statement is necessary to prevent a "misleading advantage from an incomplete presentation of the statement." *State v. McSheehan*, 624 A.2d 560, 561 (N.H. 1993).

evidence of guilt. "[C]ounsel may not use prior inconsistent statements as a 'guise of impeachment for the primary purpose of placing before the jury substantive evidence which is not otherwise admissible.' " *Flowers v. State,* 773 So.2d 309, 326 (Miss.2000) quoting *Harrison v. State,* 534 So.2d 175, 178 (Miss.1988). In *Moore v. State*, 755 So.2d 1276 (Miss.App. 2000), the Mississippi Court of Appeals held that it was plain error for the trial court to allow admission of the codefendants' prior inconsistent out-of-court statements without instructing the jury to use the statements for impeachment purposes only.

> Allowing the jury to consider [the codefendants'] prior inconsistent, out-of-court statements as substantive evidence of [the defendant's] participation in the subject crime spree impacted [the defendant's] fundamental right to a fair trial. To avoid this impact, the trial court could have instructed the jury regarding the limited application of the evidence, but the defense never requested such an instruction. The trial judge may instruct the jury upon applicable principles of law (1) at the request of a party, as provided by Miss.Code Ann. § 99-17-35 (Rev.1994), or (2) on the court's own motion as specified in URCCC 3.07.

Moore, 755 So.2d at 1279-80.

Michael Johnson's plea colloquy was given to the jury as a prior consistent statement but the jury was never given the important information not to consider the plea colloquy as substantive evidence of guilt. Because this statement was transcribed, unlike any of the other testimony elicited at trial, this statement was available to the jury during its deliberations and, thus, was emphasized over and above any and all other testimony at trial. This was highly prejudicial to Esco and

violated his rights to a fair trial and his Sixth Amendment rights to cross-examination and confrontation. This Court has no choice but to reverse Esco's convictions and remand for a new trial.

3. The trial court erred in allowing the prosecution to introduce a 1991 conviction of strong arm robbery when Esco was 16 without first determining whether this evidence was more prejudicial than probative.

One of the crimes for which Esco was charged was felon in possession of a firearm. Before trial, the defense asked the court to prohibit the prosecution from introducing evidence of a strong arm robbery for which Esco was convicted in 1991 when he was 16 years old. T. 33, 522; RE 30. The crime was more than ten years old and would be more prejudicial than probative given its similarity to the current case. T. 33; RE. 30. The defense argued that since Esco had previously been convicted of other felonies, the prosecution did not need the 1991 conviction in order to prove that Esco, in June 2005, was a convicted felon.[2] T. 34; RE. 31. Moreover, the defense contended, introduction of the 1991 robbery conviction would "chill his ability to get up on the stand and testify." T. 34; RE. 31.

The court held that the prior robbery conviction was admissible (T.522) and because the prosecution was using it to prove that Esco was a felon in possession and not just for impeachment, the court refused to do a *Peterson*

[2] Defense counsel argued "let them talk about the currency violation, the counterfeit currency, or let them talk about something else but not talk about this strong-armed robbery conviction because it's not necessary for one thing." T. 33-34.

analysis and decide whether the prior conviction was more prejudicial than probative before ruling that the prior conviction was admissible. T. 35; RE 32. The fact that the prosecution could have used Esco's other priors to prove its case was of no moment, the court ruled, since the prosecution was entitled to prove its case the way it wants to. T. 35; RE. 32.

Mississippi Rule 609 governs the use of prior convictions used for impeachment evidence. The Rule does not allow convictions to be admitted if a period of more than ten years has elapsed since the date of the conviction. M.R.E. 609(b) states in pertinent part: "Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction ... unless the court determines, in the interests of justice, that the probative value of the conviction supported by the specific facts and circumstances substantially outweighs its prejudicial effect." The Mississippi Supreme Court has held that in determining admissibility under Rule 609, the trial court should consider the following five factors: (1) the impeachment value of the prior crime, (2) the point in time of the conviction and the witness's subsequent history, (3) the similarity between the past crime and the charged crime, (4) the importance of the defendant's testimony, and (5) the centrality of the credibility issue. *Peterson v. State,* 518 So.2d 632, 637 (Miss.1987).

Since the prior convictions in this case were admitted as proof of an element of the crime of felon in possession (and not just for impeachment) the trial court declined to conduct a Rule 609 balancing test. The court's refusal, though,

was error. Even if the evidence was admitted for a purpose other than impeachment, the trial court was still required to determine whether it was more prejudicial than probative.

The United States Supreme Court addressed this very issue in *Old Chief v. United States*, 519 U.S. 172, 117 S.Ct. 644 (1997). In *Old Chief*, the Court held that the trial court abused its discretion under Federal Rule of Evidence 403 in rejecting an offer to concede the fact of a prior conviction and instead admitting the full record of the prior judgment solely to prove the prior conviction, when "the name or nature of the prior offense raise[d] the risk of a verdict tainted by improper considerations." *Old Chief*, 519 U.S. at 174, 180. The principal issue in *Old Chief* involved the danger of unfair prejudice, which means "the capacity of some concededly relevant evidence to lure the fact finder into declaring guilt on a ground different from proof specific to the offense charged." *Id.* at 180.

Old Chief was charged with violating 18 U.S.C. § 922(g)(1), which prohibited any person with prior convictions from possessing a firearm. Old Chief sought to stipulate that he had a prior conviction because the introduction of his prior assault crime by the prosecution would unfairly prejudice the jury. The prosecution rejected the stipulation, believing that it had the right and duty to present evidence of the prior conviction; the district court agreed. The United States Supreme Court reversed, basing its decision on Federal Rule of Evidence 403. In terms of evidentiary significance, the Court said that there was no difference between a defendant stipulating to an element of a crime and the

government proving an element of the crime. In felon-in-possession-of-firearms cases in which the government must prove the element of felony conviction, the only important difference between stipulation and government proof is that one risks prejudicing the jury (government introducing evidence), whereas the other has no risk (stipulation). *Old Chief*, 519 U.S. at 191. Because the federal statute applies to nearly any offense requiring imprisonment for more than one year (*i.e.*, a "generic" felony requirement), the government has no great need to inform a federal jury of the nature of the previous conviction. *Old Chief,* 519 U.S. at 174, 117 S.Ct. at 655. Thus, such information bears slight probative value in light of the danger of unfair prejudice. *Id.*

In this case, Esco testified that he had been convicted of several prior felonies.[3] An admission is the equivalent of a stipulation. *Langley ex rel. Langley v. Miles*, 956 So.2d 970, 973 (Miss.App. 2006). And, indeed, the prosecution noted that Esco had admitted to having been convicted of three different felonies during the state's closing argument. T. 705-06. The prosecution, then, had no need to adduce evidence of Esco's fourteen-year-old strong arm robbery (committed when Esco was sixteen years old) to prove the felon element of the felon-in-possession charge.

The trial court's refusal to conduct a 403 analysis was error. Indeed, had it conducted a Rule 403 balancing test, it would have concluded that the fourteen-

[3] Esco also testified about the strong-arm robbery but this was only because the trial court's ruling that it was admissible gave him little choice.

year-old robbery conviction was more prejudicial than probative given that 1) the crime was committed fourteen years ago (and crimes committed over ten years previously are presumed to be less probative than those committed more recently), b) the crime was committed when Esco was sixteen and a juvenile, and 3) the crime was similar to the one for which Esco was currently being tried and, thus, carried with it the danger of the jury's using it as evidence that Esco had a propensity to commit strong arm or armed robbery.

Any time the jury is allowed to learn that a defendant has been convicted of a crime similar to that for which he is currently on trial, there is a danger that the jury may rely on this evidence to determine that the defendant should be convicted because he/she has a character trait or propensity to commit that crime. "The admission of prior convictions of the same nature as the charges being brought against a defendant will have so significant an impact as to render it almost impossible to have a fair and impartial jury." *Rigby v. State*, 826 So.2d 694, 708 (Miss., 002) (Graves, J. dissenting).

The admission of the strong-arm robbery for which Esco was convicted in 1991 was highly prejudicial. The trial court erred when it failed to conduct a Rule 403 analysis of this prior and in failing to hold evidence of the prior inadmissible. No such instruction was given here making admission of the 14-year-old conviction all the more prejudicial.

4. The trial court erred in not giving a limiting instruction regarding the proper use of evidence of Esco's prior convictions.

When evidence is introduced that the defendant has a prior conviction for an offense similar to the one for which he is on trial, the court has a duty to minimize the risk that the jury would infer guilt on the charges from the fact of previous convictions on similar charges through a curative instruction. *United States v. Diaz,* 585 F.2d 116, 118 (5th Cir. 1978). The Mississippi Supreme Court has noted that "the better practice is that a limiting instruction be granted by the trial judge *sua sponte* when proper request is not made by defense counsel." *Peterson v. State,* 518 So.2d 632, 638 (Miss.1987). *See also, Robinson v. State,* 735 So.2d 208 (Miss.1999) (holding that the trial judge has a responsibility to give *sua sponte* a limiting instruction when prior convictions are sought to be admitted under M.R.E. 609(a)(2)).

5. The trial court erred in overruling Esco's objection to being cross-examined by asking him whether the law enforcement witnesses were lying.

On cross-examination, the prosecution asked Esco whether the law enforcement witnesses were lying when they testified. For instance, the prosecution asked Esco whether Officer Scott Young lied when he testified that Esco told him that he was driving some girl's car because she was driving Esco's truck. T. 629-30. The defense objected to the prosecution's asking Esco to compare testimony. T. 630. The trial court overruled the objection. T. 630. The

prosecution then asked Esco whether Officer Penn was lying when he testified about another statement Esco gave. T. 631. This was followed by the prosecution's questioning Esco as to whether Officer Wisnoski lied when he testified. T. 631-32. This questioning was highly improper and the court should have sustained the objection.

In is improper for a prosecutor to ask the defendant on cross-examination to opine regarding the veracity of a law enforcement officer's testimony. *United States v. Sanchez,* 176 F.3d 1214, 1219-20 (9th Cir.1999) (holding that a prosecutor's questions were in error because they "compelled [the defendant] to give his opinion regarding the credibility of a deputy marshal"). As one court has stated, "the predominate, if not sole purpose of such questioning is simply to make the defendant look bad." *State v. Graves*, 668 N.W.2d 860, 872 (Iowa 2003). For this reason, a majority of courts to have addressed this issue have determined that such questioning is categorically improper. Payne, Rebecca, *Admissibility of Testimony Concerning the Truthfulness or Untruthfulness of a Witness*, 35 The Colorado Lawyer 37 (December 2006).

> The general concern about "were they lying" questions is that asking one witness to express an opinion as to the veracity of another witness calls for improper comment on another witness' testimony, and that it is the province of the jury to determine the credibility of witnesses. *See State v. Casteneda-Perez,* 61 Wash.App. 354, 810 P.2d 74, 78-79 (1991). Further, it is perceived as unfairly giving the jury the impressions that in order to acquit, they must determine that witnesses whose testimony is at odds with the testimony of the defendant are lying. *See id.*

State v. Pilot, 595 N.W.2d 511, 516 (Minn. 1999). *See also*, *United States v. Geston*, 299 F.3d 1130, 1135-37 (9th Cir. 2002) (reversing on "due process" grounds defendant's convictions for assault and use of force under color of law, because trial judge allowed prosecutor to cross-examine law enforcement officers about veracity of other witnesses' testimony); *United States v. Jae Shik Cha*, 97 F.3d 1462 (9th Cir. 1996); *United States v. Richter*, 826 F.2d 206, 208-09 (2d Cir. 1987) (finding, in prosecution for conspiracy to distribute methamphetamine and money laundering, trial judge erred by allowing government counsel to cross-examine defendant about whether other witnesses were lying when they testified inconsistently with his testimony); *State v. Casteneda-Perez,* 810 P.2d 74, 79 (Wash. App. 1991) (holding prosecutor's questions asking witnesses whether other witnesses were lying was "contrary to the duty of prosecutors, which is to seek convictions based only on probative evidence and sound reason"); *State v. Flanagan,* 801 P.2d 675, 679 (N.M. 1990) ("Whether the defendant believes the other witnesses were truthful or lying is simply irrelevant."); *People v. Berrios,* 298 A.D.2d 597, 750 N.Y.S.2d 302, 302 (2002) ("Whether the defendant believed that the other witnesses were lying is irrelevant.)

Mississippi law also prohibits the questioning of a witness about the credibility of another witness's testimony. With the proper foundation, a witness can be asked for an opinion as to the other witness's **character** for truthfulness or untruthfulness under M.R.E. 608, but the witness cannot be asked to give an

opinion as to the truthfulness of the witness's statements. Such questions are irrelevant to the extent they invade the province of the jury. *Hart v. State*, 637 So.2d 1329 (Miss. 1994). It is the jury's role to evaluate credibility of witnesses and decide the relative reliability of the facts. A witness's opinion of the credibility of another witness's testimony is therefore irrelevant.

It is clear that the prosecution in this case asked Esco whether the officers were lying solely for the purpose of making Esco look bad. The trial court should have sustained Esco's objection to the questioning. Because the court did not, Esco's right to a fair trial and due process were impaired.

6. Esco was denied a fair trial when the prosecution was allowed, on redirect, to ask the law enforcement witnesses to vouch for their own credibility.

In its rebuttal case, the prosecution called four police officers. Three of them were asked only whether they had testified truthfully when they testified during the prosecution's case-in-chief. T. 657, 660, 661. This was improper redirect. Just as it was improper for the prosecution to ask Esco whether the officers were lying, it was improper to ask the officers to vouch for their own credibility.

As stated above, the credibility of witnesses is for the jury. *Sturdivant v. State,* 745 So.2d 240, 248 (Miss.1999). The prosecution cannot ask the witness to vouch for his own credibility. Allowing the officers to do so in this case violated Esco's right to a fair trial and due process.

7. **The trial court erred in allowing the prosecution to introduce a document prepared by the police purporting to be a list of the incoming and outgoing phone calls present on State's Ex. 26, a cell phone, on June 14, 2005.**

During the testimony of Mike Brown, the prosecution introduced a list purporting to be a list of the outgoing and incoming phone calls found on June 14, 2006, on the cell phone, State's Exhibit 26. T. 481. The list, State's Exhibit 38, was prepared by Brown by writing down the numbers that purported to be listed on the cell phone as incoming and outgoing calls. The defense objected. "If they're telling me that I can take that phone right now and hook it up and it would show those and show that it was on June 14th, I wouldn't have a problem with it. But how do I know . . . ." T. 482-83. The prosecution responded that the list was admissible as a summary. T. 483. The trial court overruled the defense's objection and the list was admitted. T. 483.

The list was an out of court statement, i.e. hearsay, which was not admissible under any of the exceptions. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." M.R.E. 801(c). *Davison v. Mississippi Dept. of Human Services,* 938 So.2d 912, 916 (Miss.App. 2006). The list at issue here was prepared by Brown but prepared outside of court. It was hearsay.

To have been admissible as a summary, "the originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a

reasonable time and place. The court may order that they be produced in court." M.R.E. 1006. While the cell phone was introduced into evidence, it was not in a condition that the defendant, the court, or the jury could determine whether the list was a true and complete list of what it purported to be.

In most cases where there is testimony regarding cell phone usage or even cell phone location, the proponent of the evidence procures a list of incoming and outgoing calls from the service provider and offers proper authentication testimony. *See, e.g., Washington v. State*, 794 So.2d 253, 256 (Miss.App. 2001). No such effort was made in this case. The list was hearsay. It's admission violated Esco's right to cross-examination and confrontation.

8. The trial court erred in consulting with the jury prior to pronouncing sentence.

After the verdict was returned (T. 738), but before sentencing, the trial court recessed in order to "visit" with the jury. T. 740. Then, after sentencing Esco, the trial court stated that Esco was a danger to the community. "I mean I have been at this for a while. I was somewhat surprised at the amount of anxiety I saw on some of the potential jurors' faces and heard, even up here at the bench, on some others. They just simply are scared of you." T. 754.

This visit with the jury, outside the presence of the defendant, carried with it the danger that the sentencing judge would be exposed to information or sentiments that the defendant had no opportunity to rebut. As such, it was error.

The "use of undisclosed evidence against a criminal defendant ... is the type of error that may undermine the fairness of a proceeding and that certainly tarnished the public reputation of judicial proceedings." *United States v. Hayes,* 171 F.3d 389, 395 (6th Cir. 1999).

It is certainly true that a sentencing hearing is not a criminal trial, and many of the constitutional requirements of a criminal trial do not apply at sentencing. *See Williams v. New York,* 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949). But when the court in *Williams v. New York* determined that the Constitution does not give a criminal defendant the right to cross-examine witnesses against him at sentencing, it was careful to point out that this did not mean that "sentencing procedure[s][are] immune from scrutiny under the due-process clause." *Williams,* 337 U.S. at 252 n. 18, 69 S.Ct. 1079. Other cases prove the point. *See, e.g., Mempa v. Rhay,* 389 U.S. 128, 137, 88 S.Ct. 254 (1967) (due process right to counsel at sentencing); (due process right to obtain evidence favorable to the accused, held by the government and "material either to guilt or to punishment") (emphasis added); *Townsend v. Burke,* 334 U.S. 736, 741, 68 S.Ct. 1252 (1948) (due process right to ensure that sentence was not based upon "assumptions concerning [defendant's] criminal record which were materially untrue"); *cf. Gardner v. Florida,* 430 U.S. 349, 362, 97 S.Ct. 1197 (1977) (plurality) (qualifying *Williams v. New York* in the context of capital cases and holding that defendant had a due process right not to receive a death sentence based on information that he "had no opportunity to deny or explain").

Mississippi recognizes that a defendant has the right to review information used in determining his sentence. *Edwards v. State,* 615 So.2d 590, 598 (Miss.1993) (holding that defendant has no right to a presentencing report but does have a right to review it if one is used). Once the trial court talked to the jurors in this case off the record and prior to sentencing Ferlando Esco, Esco was entitled to know what was said and to respond accordingly. Because Esco was denied this opportunity, the sentences imposed must be vacated and remanded.

9. The errors taken together are cause for a new trial.

The Mississippi Supreme Court has recognized that several errors not individually sufficient to warrant a new trial may, when taken together, require reversal. *Stringer v. State*, 500 So.2d 928, 946 (Miss. 1986); *Hickson v. State*, 472 So.2d 379, 385-86 (Miss. 1985). In this case, the court made several errors in its rulings that, cumulatively, had the effect of denying Ferlando Esco a fair trial. *Chambers v. Mississippi*, 410 U.S. 284, 298, 93 S.Ct. 1038, 1047 (1973) (reversing based on various evidentiary errors resulting in a denial of due process). If this Court finds that no single error in this case calls out for reversal of the convictions and /or sentences, it should nonetheless consider a new trial based on the plethora of errors that prevented Ferlando Esco from obtaining due process.

Conclusion

For the above and foregoing reasons, Ferlando Esco's conviction and sentence must be vacated or reversed and remanded for a new trial.

Respectfully submitted,

FERLANDO ESCO

By: _____

Julie Ann Epps (MS Bar No. [redacted])
504 East Peace Street
Canton, MS 39046
(601) 407-1410
facsimile (601) 407-1435

A. Randall Harris
P.O. Box 2332
Madison, MS 2332
(601) 454-7242
facsimile (601) 6283

CERTIFICATE OF SERVICE

I, Julie Ann Epps, hereby certify that I have this day mailed by first-class mail, postage prepaid, a true and correct copy of the foregoing Brief of Appellant to the following:

Hon. William E. Chapman, III
Madison County Circuit Court Judge
P.O. Box 1626
Canton, MS 39046

David Clark
Madison County District Attorney
P.O. Box 121
Canton, MS 39046

Hon. Jim Hood
Mississippi Attorney General
P.O. Box 220
Jackson, MS 39205

This, the 22d day of October, 2007.

Julie Ann Epps