IN THE SUPREME COURT OF MISSISSIPPI
NO. 2007-CA-02018 SCT

CHARLES LAMAR JOHNSON — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
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IN THE SUPREME COURT OF MISSISSIPPI
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CHARLES LAMAR JOHNSON — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

CERTIFICATE OF INTERESTED PERSONS

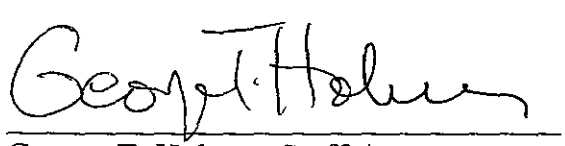
The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Charles Lamar Johnson

THIS 5th day of March, 2008.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Charles Lamar Johnson

By: 

George T. Holmes, Staff Attorney

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	I
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF ISSUES	1
STATEMENT OF THE CASE	1
FACTS	1
SUMMARY OF THE ARGUMENT	4
ARGUMENT	4
ISSUE # 1	4
ISSUE # 2	12
CONCLUSION	14
CERTIFICATE OF SERVICE	15

TABLE OF AUTHORITIES

CASES:

Ballenger v. State, 667 So.2d 1242 (Miss.1995) 12

Bradley v. State, 934 So.2d 1018 (Miss. Ct. App. 2005) 5

California v. Acevedo, 500 U.S. 565, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991) 5

Comby v. State, 901 So.2d 1282 (Miss. Ct .App. 2004) 9

Couldery v. State, 890 So.2d 959 (Miss. Ct. App. 2004) 7-9

Ferrell v. State, 649 So.2d 831 (Miss. 1995) 5-7, 11

Givens v. State, 618 So.2d 1313 (Miss.1993) 12

Graves v. State, 708 So.2d 858 (Miss.1997) 5

Gray v. State, 487 So.2d 1304 (Miss.1986) 12

Gray v. State, 549 So.2d 1316 (Miss.1989) 12, 13

Green v. State, 884 So. 2d 733 (Miss. 2004) 13

Grubb v. State, 584 So.2d 786 (Miss.1991) 13

Harris v. State 908 So.2d 868 (Miss. Ct. App. 2005) 12

Jones v. State, 797 So.2d 922 (Miss. 2001) 12

Katz v. United States, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed.2d 576 (1967) 5

Kennedy v. State, 909 So.2d 1128 (Miss. Ct. App. 2005) 4

Leatherwood v. State, 473 So. 2d 964 (Miss. 1985) 13

Madison v. State, 932 So. 2d 252 (Miss. Ct. App. 2006) 13

McNeal v. State, 551 So.2d 151(Miss.1989) 12

McQuarter v. State, 574 So. 2d 685 (Miss. 1990) 13

Nix v. Williams, 467 U.S. 431, 104 S. Ct. 2501, 81 L. Ed.2d 377 (1984) 11

Parker v. State, 606 So.2d 1132 (Miss.1992) 12

Poole v. State, 231 Miss. 1, 94 So.2d 239, 240 (1957). 12

Price v. State, 752 So.2d 1070 (Miss. Ct. App. 1999) 4

Samuels v. State, 371 So.2d 394 (Miss.1979) 12

Sanders v. State, 757 So.2d 1022 (Miss. Ct. App.2000) 4

Strickland v. Washington, 466 U.S. 668 (1984) 13

Triplett v. State 814 So.2d 158 (Miss. Ct. App. 2002) 9-10

White v. State, 735 So.2d 221 (Miss. 1999) 10, 11

STATUTES

none

OTHER AUTHORITIES

Article 3, §23 of the Mississippi Constitution of 1890

Fourth Amendment to the United States Constitution

STATEMENT OF THE ISSUES

ISSUE NO. 1: WHETHER THE TRIAL COURT SHOULD HAVE SUPPRESSED EVIDENCE SEIZED DURING A SEARCH OF THE APPELLANT'S VEHICLE?

ISSUE NO. 2: WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST CIRCUMSTANTIAL EVIDENCE INSTRUCTIONS?

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Simpson County, Mississippi, where Charles Lamar Johnson was convicted of possession of a firearm by a convicted felon and two counts of armed robbery in a jury trial conducted June 21, 2006, with Honorable Robert G. Evans, Circuit Judge of the Thirteenth District, presiding. Johnson, an habitual offender, was sentenced to five (5) years on the gun charge in count I concurrent to two consecutive life sentences, without parole, in counts II and III, and is presently incarcerated with the Mississippi Department of Corrections.

FACTS

Wendy's restaurant on U. S. Highway 49 in Magee was robbed Monday, February 21, 2005, around 11:50 p. m., after the dining room was closed and while the employees were shutting down the drive-up window. [T. 146-52,160-64, 171-75]. The robber was described as "a black man wearing a tan shirt, blue mask and brown gloves" displaying a

revolver. *Id.* The restaurant workers said the robber snuck in the back door while another employee was coming in. *Id.*

The gunman made the manager get money out of a safe and the cash register and also stole some of the worker's cell phones and one of their wallets. *Id.* The money was allegedly put into a black duffel bag. *Id.* The robber drove off in the manager's black Chevrolet Blazer, after, commandeering her keys. *Id.*

Magee is in Simpson County. Soon after the robbery, in nearby Taylorsville, in Smith County, Smith County Sheriff's Deputy James Grimes, heard a radio transmission about the robbery which included information that the robber had a black duffel bag along with other details and was possibly driving a black Chevrolet Blazer. [T. 4-9, 125-35]. Deputy Grimes headed to the intersection of Mississippi Highways 37 and 28 in case the robber drove in that direction. *Id.*

Shortly thereafter, a red or burgundy Ford Crown Victoria was seen by Deputy Grimes approaching the intersection heading East on Mississippi Highway 28. *Id.* Before reaching the intersection, the Crown Victory turned and went through the parking lot of Jr. Foodmart and made a U-turn. *Id.* According to Grimes, the Crown Victoria exited the parking lot and ran the stop sign at the aforesaid intersection. *Id.* Grimes turned on his blue lights and pulled the Crown Victoria over which was driven and owned by none other than the appellant Charles Lamar Johnson. [T. 10-21, *Id.*].

It was dark, so Grimes had to use a flash light. *Id.* Grimes said as he approached

the Crown Victoria, the light from the flash light illuminated the inside of the car and the officer could see what looked like a black duffle bag on the front floor board with money and rolled coins coming out of it. *Id.* Grimes also said the driver tendered a suspended licence and acted "nervous". *Id.*

Grimes called for backup and also called to have the Magee police came to check Johnson. *Id.* Investigator Wesley Garner responded from Magee, and he and Grimes searched the car and the black bag. *Id.* They found clothes, money, a mask, Wendy receipts and shoes which the witnesses said looked like those used by the robber. [*Id.*, T. 29-35, 105-22, 179-80; Exs. 2-16]. They also searched the immediate grassy area near the car and found a revolver, which was described as being similar to the one used the robbery. [T. 133, 164, 176; Ex. 17]. Back at Wendy's, a foot print left on a piece of cardboard next to the cash register was inconclusively similar to the tread on Johnson's shoes. [T. 32, 103-04, 113-14, 136-44; Ex. 1].

No eyewitness identified Johnson as the perpetrator of the armed robbery and there was no confession. The state's case against Johnson, was, therefore, entirely circumstantial. Johnson was issued two misdemeanor tickets for running the stop sign and one for not having a valid drivers license, but those charges were dismissed. [T.15-16].

SUMMARY OF THE ARGUMENT

The trial court should have sustained the appellant's motion to suppress evidence and the appellant's trial counsel was ineffective for failing to ask for circumstantial evidence instructions.

ARGUMENT

ISSUE NO. 1: WHETHER THE TRIAL COURT SHOULD HAVE SUPPRESSED EVIDENCE SEIZED DURING A SEARCH OF THE APPELLANT'S VEHICLE?

Johnson's argument here is that neither Deputy Grimes nor Officer Garner had legal authority to search Johnson's car and luggage without a warrant, so Johnson's motion to suppress should have been sustained. [R. 8]. Evidence which has been gathered in conjunction with an "illegal arrest or detention is inadmissible at trial." *Kennedy v. State,* 909 So.2d 1128, 1130 (Miss. Ct. App. 2005).

The standard of review for a trial court's overruling a motion to suppress is whether the trial court's findings are supported by "substantial credible evidence" under "the totality of the circumstances". *Price v. State*, 752 So.2d 1070, 1073(¶ 9) (Miss. Ct. App. 1999). The standard is one of "abuse of discretion" when the appellate court is reviewing the propriety of admission of evidence. *Sanders v. State*, 757 So.2d 1022, 1023(¶ 5) (Miss. Ct. App. 2000).

Individuals in Mississippi are protected from warrantless searches and seizures at the hands government officials by the Fourth Amendment to the United States

Constitution and Article 3, §23 of the Mississippi Constitution of 1890. *Graves v. State*, 708 So.2d 858, 862-63 (Miss.1997), *Bradley v. State*, 934 So.2d 1018, 1022-23(Miss. Ct. App. 2005). Generally warrantless searches are "per se unreasonable" and warrants are required for a search unless the search is a "consensual" search, a search which is "incident to arrest", or is an "inventory search" of an arrested person, or is a search done under "exigent circumstances if probable cause exists", or a search of a motor vehicle when making a "lawful contemporaneous arrest". *Id.*, and *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

Under the search of a motor vehicle exception, officers may conduct a warrantless search of a vehicle and any containers therein if probable cause exists to believe that the containers hold contraband or evidence of crime. *California v. Acevedo*, 500 U.S. 565, 576, 111 S. Ct. 1982, 114 L. Ed.2d 619 (1991).

It is Johnson's position that the search of his automobile and duffel bag were not incident to arrest, nor inventory searches nor excepted from the warrant requirement by the "plain view" or "inevitable discovery" doctrines.

Incident to Arrest and Plain View

In *Ferrell v. State*, 649 So.2d 831, 832-34 (Miss. 1995) Ferrell was arrested for speeding and driving with a suspended license. He was handcuffed and placed into a patrol car. When the arresting officer went back to Ferrell's car to get keys, he saw a matchbox on the passenger's seat and looked under the matchbook and found a yellow

pill. The officer then noticed a matchbox between the front seats and opened the matchbox where he found crack cocaine. *Id.* Ferrell was prosecuted and convicted of possession of cocaine. *Id.*

On appeal, the Court determined that the search of Ferrell's car was not a valid search incident to arrest nor was it a valid plain view search explaining that, "[i]n the case of a search incident to arrest, the exception to the warrant requirement is founded upon the reasonable concern that the arrestee might have a weapon on his person or within reach, and that he may attempt to destroy evidence which is within his grasp." The Court concluded that since Ferrell was cuffed in the back seat of the patrol car, he was no threat to destroy evidence or access a weapon. Hence, the officer exceeded his authority because "the scope of a warrantless search must be commensurate with the rationale that excepts the search from the warrant requirement." *Id.*

The plain view exception, as explained in *Ferrell*, exists to allow the seizure of contraband discovered in the course of officers' "legitimate activities", not as justification for "warrantless, exploratory searches of containers that purport to contain innocuous materials." *Id.* The plain view doctrine, requires that "the object in question must itself be in plain view" or if there is a container, the contents must be in plain view of can be "inferred from the containers outward appearance."

Since the cocaine in Ferrell was not in plain view and since the content of the containers could not be inferred from the "container's outward appearance", the search

did not fall within the plain view exception.

At the suppression hearing in the present case, Deputy Grimes clearly testified that after patting Johnson down for weapons, he "placed [Johnson] in handcuffs,[and] advised him he was under arrest for running the stop sign." [T. 12]. When Grimes called Officer Garner in Magee, Garner asked Grimes to "hold on to the subject" referring to Johnson, and Grimes explained, "he is already custody already". [T. 13] When asked when the search of Johnson's car take place, Grimes answered, "[s]earch of the vehicle took place after [Johnson] was in custody." [T. 17].

So Johnson like Ferrell, was cuffed in the back of the patrol car, he "neither posed a danger nor had the ability to destroy evidence". It follows, as a matter of law, under *Ferrell*, that the search of Jones' vehicle was not incident to arrest.

In regards to plain view, the contents of the black duffel bag in Johnson's case were not readily viewable, nor was there anything that could be inferred from the outward appearance of the bag as in *Ferrell*. Accordingly, as is *Ferrell*, the search and seizure of the black duffel bag was not excepted from the warrant requirement under the plain view doctrine. The *Ferrell* court reversed and rendered, which is the same relief Johnson respectfully requests.

There is more authority to support the suppression of the the search of black duffel bag. In *Couldery v. State,* 890 So.2d 959, 965-66 (Miss. Ct. App. 2004), Couldery was driving a rental car through Rankin County traveling east on I-20 between Brandon

and Pelahatchie. Couldery saw a Mississippi Highway Patrol car parked on the right shoulder and changed from the right lane to the left lane. The trooper on the shoulder followed Couldery for about thirty seconds and pulled him over for "driving in the left-hand lane". *Id.*

The officer questioned Couldery, a muscular person, who told the officer that he owned a gym and was driving home to New York from vacation. The officer said Couldery's eyes were blood-shot and ultimately asked Couldery for consent to search the car which Couldery denied. *Id.* The officer detained Couldery and called for a K-9 unit which came and alerted on Couldery's car. The trooper entered the vehicle and discovered a small bag on the back seat that contained syringes and two small bottles of what appeared to be steroids." *Id.* The trooper and another officer opened the trunk of Couldery's car and found two suitcases and pried the suitcase open by force. The officers found "a large variety of medications" described as "steroids". *Id.*

For the present case, it is important to note that the *Couldery* court did not think, under the totality of the circumstances, that the trooper had probable cause to search the vehicle because of Couldery's bloodshot eyes, nor his "physical size, [or] profession as owner of a gym." Nor was the "trip destination and trip transportation . . . indicative of illegal activity." *Id.* Likewise, in the present case, having a black duffel bag is not indicative of any wrongdoing.

In *Couldery*, the Court found that under the totality of the circumstances, even if

the stop was proper, the trooper "should have ticketed Couldery and left him to journey home"; because the trooper did not have authority to hold Couldery "beyond the ordinary scope of a brief traffic stop." 890 So.2d 965-66.

In the present case, there is nothing about Johnson having a black bag which under the totality of the circumstances would give rise to the conclusion that Johnson had committed a criminal offense and that the bag contained contraband, and as in *Couldery*, the officer should have given Johnson a ticket for running the stop sign and for not having a licence and sent him on his way.

Even if the trooper in *Couldery* had probable cause to stop, the Court said the trooper's "subsequent actions" were not "reasonably related to the stop" based on the principle that the trooper "exceeded his parameters in dealing with the defendant". *Id.* In determining whether probable cause existed for a particular search, it must be information reasonably leading an officer to believe that then and there contraband or evidence material to a criminal investigation would be found", and in Couldery's case, there was not. The same rationale applies in Johnson's case. Couldery's, like Ferrell's, conviction was reversed and rendered. There is no reason Johnson's should not be. See also, *Comby v. State,* 901 So.2d 1282 (Miss. Ct. App. 2004).

Inventory Search

Not only does the plain view exception not apply here, neither does the "inventory" exception. In *Triplett v. State* 814 So.2d 158, 160-62 (Miss. Ct. App. 2002)

the defendant was arrested in an apartment where drugs were found. After that, the police searched a car that Triplett had driven to the apartment and found cocaine "under a washcloth lying between the driver's seat and the console area on the carpet." *Id.* The issue on appeal was whether the search of the car was a proper warrantless inventory search.

Triplett was not near the automobile when it was searched as he had been placed under arrest and handcuffed prior thereto. *Id.* The car Triplett drove was not impounded at the time of the search nor was it being abandoned by the officers, so there was no need to do an inventory search. Therefore, the evidence regarding the cocaine should have been suppressed at the trial. *Id.*

In the present case, Johnson's car was not impounded and there is no indication that it was being abandoned or left indefinitely on the side of the road. It follows that the search of Johnson's automobile was not a valid inventory search and the evidence seized from the car and duffel bag should have been suppressed. The *Triplett* court reversed and rendered.

Inevitable Discovery Doctrine

In *White v. State*, 735 So.2d 221, 223-4 (Miss. 1999) a Crystal Springs police officer saw Elwood and William White by "a pick-up truck improperly stopped in a lane of traffic in a public road." The officer stopped and arrested William on an open container violation and handcuffed him.

Another officer arrived and addressed Elwood who was in the driver's seat of the pickup. Elwood was patted down and no weapon was discovered. The officer did find some bullets in Elwood's shirt pocket. Next the officer searched the interior of the truck and located a pistol "the handle of which was in plain view". Elwood was then also placed in handcuffs, then the officer "returned to the truck to conduct a more thorough search" and found a "medicine bottle ... concealed under a jacket on the passenger side ... which he opened" and found crack cocaine. *Id.*

The Court of Appeals ruled that "the search was improper and unlawful, but then determined that the search was subject to the exception to the exclusionary rule known as the 'inevitable discovery' doctrine established in *Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984)" and affirmed. *Id.* The Supreme Court granted *certiorari* and reversed the Court of Appeals. The *White* court found that *Ferrell v. State, supra*, controlled, and after stating "[o]nce the Whites had been handcuffed and secured, the search incident to arrest of either party ended" said, "the 'inevitable discovery' doctrine simply has no application as there was no valid underlying reason for the officers to return to the truck after the Whites had been secured ...". *Id.* Finding that the drug evidence against Elwood White was "fruit of the poisonous tree", the *White* court reversed and rendered. *Id.*

It follows, therefore, that the evidence seized from Johnson's car and the black duffel bag should have been suppressed. The Court is requested to reverse and render.

ISSUE NO. 2: WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST CIRCUMSTANTIAL EVIDENCE INSTRUCTIONS?

The record in this case is devoid of any direct evidence that Johnson committed the subject armed robbery and there is no confession. Circumstantial evidence instructions are required where all evidence of the crime is entirely circumstantial, that is, when the prosecution cannot produce an eyewitness or a confession. *Jones v. State*, 797 So.2d 922, 929 (Miss. 2001), *Givens v. State*, 618 So.2d 1313, 1320 (Miss.1993), *McNeal v. State*, 551 So.2d 151, 157 (Miss. 1989), *Harris v. State* 908 So.2d 868 (Miss. Ct. App. 2005). Here no circumstantial evidence instructions were requested nor given at Johnson's trial.

In circumstantial evidence cases it is mandatory for the trial court to grant two jury instructions addressing the increased burden of proof to beyond a reasonable doubt and to the exclusion of every reasonable hypothesis consistent with innocence and the second "two-theory" when properly requested and supported by the evidence. See *Parker v. State*, 606 So.2d 1132, 1140 (Miss. 1992). Failure to grant constitutes reversible error. *Id.*

However, even though appropriate, the instructions must be requested by the defense. *Poole v. State*, 231 Miss. 1, 94 So.2d 239, 240 (1957). It is not a trial court's duty to prepare instructions for either party. *Samuels v. State*, 371 So.2d 394, 396 (Miss. 1979), and *Ballenger v. State*, 667 So.2d 1242, 1252 (Miss. 1995).

This issue should probably be reviewed on a plain error standard which requires an

error that results in "a manifest miscarriage of justice" or an adversely affected fundamental or substantive right.. *Gray v. State*, 487 So.2d 1304, 1312 (Miss.1986) *Gray v. State*, 549 So.2d 1316, 1321 (Miss.1989), *Grubb v. State*, 584 So.2d 786, 789 (Miss. 1991).

Failure to seek proper jury instructions deprives a criminal defendant of the fundamental constitutional right to a fair trial; because, a defendant is entitled to have the jury fully and properly instructed on theories of defense for which there is a factual basis in evidence. *Green v. State*, 884 So. 2d 733, 735-38 (Miss. 2004).

In *Madison v. State* , 932 So. 2d 252, 255 (Miss. Ct. App. 2006), the court reiterated:

> [the Supreme] Court applies the two-part test from *Strickland v. Washington*, 466 U.S. 668 (1984), to claims of ineffective assistance of counsel. *McQuarter v. State*, 574 So. 2d 685, 687 (Miss. 1990). Under *Strickland,* the defendant bears the burden of proof to show that (1) counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense. *Id.* There is a strong but rebuttable presumption that counsel's performance fell within the wide range of reasonable professional assistance. *Id.* This presumption may be rebutted with a showing that, but for counsel's deficient performance, a different result would have occurred. *Leatherwood v. State*, 473 So. 2d 964, 968 (Miss. 1985). This Court examines the totality of the circumstances in determining whether counsel was effective. *Id.*

If the issue of ineffective assistance of counsel is raised, as it is here, on direct appeal the court will look to whether:

> (a) . . . the record affirmatively shows ineffectiveness of constitutional dimensions, or (b) the parties stipulate that the record is adequate and the Court determines that

findings of fact by a trial judge able to consider the demeanor of witnesses, etc. are not needed. *Id.*

The appellant hereby stipulates through present counsel that the record is adequate for this court to determine this issue and that a finding of fact by the trial judge is not needed.

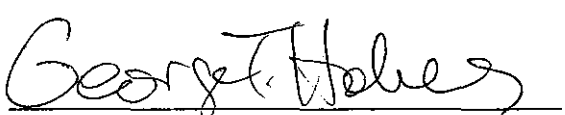
The prejudice to Johnson under the *Strickland* test was that the jury the jury deliberated the case with a reduced burden of proof. There is no conceivable trial strategy for a criminal defendant to seek to reduce the state's burden of proof, thus increasing the chance of conviction. The jury in the case at bar was not fully and fairly instructed, and Johnson's conviction must be reversed and this case remanded for a new trial for failure to give the two requisite circumstantial evidence instructions to correct a miscarriage of justice.

CONCLUSION

Johnson is entitled to have his convictions reversed and rendered or remanded for a new trial.

Respectfully submitted,

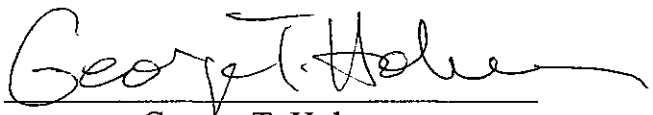
MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Charles Lamar Johnson, Appellant

By: 

George T. Holmes, Staff Attorney

CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 5th day of March , 2008, mailed a true and correct copy of the above and foregoing Brief Of Appellant to Robert G. Evans, Circuit Judge, P. O. Box 545, Raleigh MS 39153 , and to Hon. Eddie Bowen , Dist. Atty. , 100 Court St., Ste. 4, Mendenhall MS 39114, and to Hon. Charles Maris, Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid.



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