IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JAEL FRAISE — APPELLANT

VS. — NO. 2007-KA-1626-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

I. NO COMMENTS OR IMPEACHMENT EFFORTS MADE BY THE PROSECUTOR DURING TRIAL CONSTITUTED PROSECUTORIAL MISCONDUCT

II. THE STATE PROPERLY PRODUCED THE TWO WITNESSES UNDER UNIFORM CIRCUIT AND COUNTY RULE 9.04

III. THE TRIAL COURT DID NOT ERR IN ALLOWING THE PHOTO LINEUP AND TESTIMONY FROM JEANETTE QUINTANA AND DETECTIVE CLARK

IV. THE COURT DID NOT ERR IN ALLOWING THE TESTIMONY OF HOLLY KRANTZ

V. THE TRIAL COURT DID NOT ERR IN ADMITTING INTO EVIDENCE THE PHOTOGRAPH OF THE APPELLANT

VI. THE DEFENDANT WAS NOT ENTITLED TO A CIRCUMSTANTIAL EVIDENCE INSTRUCTION

VII. DEFENSE COUNSEL'S LEGAL REPRESENTATION WAS SUFFICIENT

STATEMENT OF THE FACTS

On September 25, 2006, at the Pit Stop convenience store in Picayune, Mississippi, Jeanette Quintana was taking a break at the rear of the store and letting Grant Stevens learn to work behind the counter as a cashier. The two employees were talking to a customer, Stephanie Childs, when Jael Fraise, the Defendant, entered the store with a do rag covering his face. He grabbed Ms. Childs by the arm, told Ms. Quintana not to move, and then turned the gun on to Mr. Stevens telling him to fill the bag with cash. Mr. Stevens emptied the cash from the drawer in the amount of $425, and he placed the money in the bag. As the Defendant was fleeing the scene, Mr. Stevens ran after him. He was outside in time to see the Defendant get into a red Oldsmobile driven by an unidentified 3rd party. The car went forward, reversed, and then finally left the parking lot down a gravel drive. **T. 201-213, T. 246-252**

The Picayune police department arrived and asked for descriptions of the robber. Mr. Stevens said that he didn't get a good look at his face, but described the rear of the red Oldsmobile. **T.254-257**. A BOLO (Be on the Lookout) was issued for the vehicle which was subsequently found in the Arborgate apartments by Officer Poche. **T. 89.** Upon arriving, the officers found the hood warm to the touch and observed wet mud and gravel stuck to the underside of the car. **T.82.** Ms. Quintana was able to identify the robber as a regular customer, and she subsequently picked Jael Fraise out of a photo lineup. **T. 161.**

Mr. Fraise's parole officer and two Picayune detectives went to the same Arborgate apartment to talk to Mr. Fraise. The Defendant had left, but they found money still organized by denomination, a black do rag, black gloves, and a picture of Jael Fraise with a pistol almost identical to the way it was described by Mr. Stevens. **T.145-149.**

Mr. Fraise was later picked up in California and returned to Picayune for trial. At trial he claimed an alibi defense that was supported only by his fiancé. **T. 311.**

STATEMENT OF THE CASE

The Appellant, Jael Fraise, was indicted on March 15, 2007 in the Pearl River County Circuit Court for armed robbery and possession of a weapon by a convicted felon. **R. 3.** Miss. Code. Ann. 97-3-79, 97-37-5. The Appellant acknowledged his right to be arraigned and waived this right on both charges. **R. 7.** He entered pleas of not guilty for both offenses.

Prior to trial, the State of Mississippi was granted its motion to amend the indictment to reflect the Appellant's status as a Habitual Offender. **R. 18** On July 13, 2007, a bifurcated trial was held and the jury found the Appellant guilty of armed robbery and possession of a firearm by a convicted felon. Pursuant to Mississippi Code Annotated 99-19-83 appellant was sentenced as a habitual offender to two life sentences without the possibility of parole. **R. 39.**

The Appellant's motion for Judgment Notwithstanding the Verdict was denied, and subsequently this appeal was filed in the Mississippi Supreme Court. **R. 47.** The appeal has been assigned to the Mississippi Court of Appeals and the State now responds.

SUMMARY OF THE ARGUMENT

The number of arguments raised on appeal by the Defendant do not justify a reversal of his sentence. For many of the assertions he made, no objections were ever made at trial, and none of the assertions without an objection constitute a manifest miscarriage of justice. Nor is there any conduct so prejudicial to constitute prosecutorial misconduct.

There was no denial of a fair trial under Rule 9.04 because the substance of all testimony was provided, and all testimony presented was correctly allowed. No evidence was improperly admitted because there is no showing that any of the evidence was improperly seized or so prejudicial that it outweighed its probative value. Also, with the eyewitness account and direct evidence there was no need for a circumstantial evidence instruction. Finally, all the decisions made by the defense counsel, when viewed in the totality of the circumstances, should be considered trial strategy and not ineffective assistance of counsel.

ARGUMENT

I. NO COMMENTS OR IMPEACHMENT EFFORTS MADE BY THE PROSECUTOR DURING TRIAL CONSTITUTED PROSECUTORIAL MISCONDUCT

This Court has held that the failure of defense counsel to contemporaneously object to a prosecutor's remarks at trial bars consideration of prosecutorial misconduct allegations on appeal. *Simmons v. State*, 805 So.2d 452 (Miss.2001). "It is elementary, for preservation of error for review, there must be a contemporaneous objection." *King v. State*, 615 So.2d 1202, 1205 (Miss.1993). The comments that the prosecutor made during trial were not objected to contemporaneously, and none of the comments were so prejudicial as to require further consideration. Therefore, the Defendant is procedurally barred from asserting the comments as grounds for appeal. However, if not procedurally barred, the comments that the Defendant cites do not rise to the level of prosecutorial misconduct.

The first comment that the Defendant claims is prosecutorial misconduct was made during voir dire when the prosecutor said "[Defendant] is presumed innocent until proven guilty." "But I want to remind you that everybody at Parchman, Mississippi is presumed innocent." **T. 29.** This statement was not prosecutorial misconduct.

The Defendant cites similar comments concerning the presumption of innocence made in *Taylor v. Kentucky,*436 U.S. 478 (1978). The Defendant incorrectly states the holding. The court held in *Talyor* that the comments made by the prosecutor **and** the "skeletal" jury instructions gave rise to reversible error. *Id* at 487. While the comment may have been similar, in this case there was a jury instruction regarding the presumption of innocence. (Jury Instruction 2, D-1). Without an additional showing that the jury instructions were deficient, no reversible error occurred.

The Defendant alleges the second instance of prosecutorial misconduct was the questioning

of Mr. Blank as to whether he had visited or spoken to the Defendant "in the Jail." **T. 305.** While the defense counsel called for a bench conference, no objection was ever raised **T. 305.** Therefore, the Defendant should be barred from asserting this claim on appeal.

However, even if not barred this statement was not reversible error. In support of his position, Mr. Fraise incorrectly cites to *Estelle v. Williams*, 425 U.S. 501, 518 (1976). The quote the Defendant cites is found in the **dissent** regarding possible jury's speculation as to why a defendant is dressed in prison garb. The court in the opinion ruled that without an objection, the prisoner was barred from bringing the issue up on appeal. However, even if the Court were to find direction in the dissent, the question of prison garb is completely different. The question asked in this case referencing the Defendant's current location was far less prejudicial than cases dealing with shackels and prison garb, which can be a constant reminder of the defendant's incarceration. Instead, the Court should look to *Davenport v. State*, 662 So.2d 629 (Miss. 1995). In that case, the defendant was allegedly seen by a group of jurors while he was still wearing shackles. The court found that it was **not** reversible error. See Also *Rush v. State*, 301 So.2d 297 (Miss.1974) (Short violation of prohibition against shackles not reversible error); *Wiley v. State*, 582 So.2d 1008 (Miss.1991) (Defendant shackled in hallway seen by jurors not reversible). Therefore, if having a defendant in court with hand cuffs and shackles on is usually not error, then the mention of the word "jail"is surely not so prejudicial as to ruin the defendant's presumed innocence. The Defendant's argument that the "goal of the prosecution" was to establish that Mr. Fraise was in jail is an assumption and unfounded. In fact, from the transcript, it is more probable to that the questioning was attempting to establish bias and that Mr. Fraise and Mr. Blanks had spoken about the upcoming trial. Additionally, the Defendant cites to *Wood v. State*, 257 So.2d 193 (Miss. 1972). However, that case regards improper impeachment of a witness and therefore does not apply to the questions posed by

the prosecutor regarding the Defendant's time in California.

Third, Mr. Fraise contends that any evidence of his flight was prosecutorial misconduct. Again, the Defendant should be procedurally barred from asserting this claim on appeal as no objection was offered. The Defendant's counsel only objected to the introduction of evidence regarding when and where the Defendant was finally served. The following statements are the relevant portions of the transcript:

MS. CREEL:	Yes, sir. And where he was served, we'd also like to be able to say that.
THE COURT:	All right.
MR. BREWER:	Your Honor, I don't see the relevance of where he was served, but
	...
THE COURT:	...So that will be allowed, just because it's fact.
MR. BREWER:	Yes, Your Honor. For the record, note just an objection.
THE COURT:	Sure, sure...

T. 50. The evidence that the Defendant now cites as misconduct only includes questions addressing whether Mr. Fraise ever came back to work and if he was gone from the apartment the next day after the robbery. **T. 301, 354, 365, 367.**

Evidence of flight is generally admissible to show consciousness of guilt. *Fuselier v. State*, 702 So.2d 388 (Miss. 1997). Flight is inadmissible when there is an independent reason for the flight that cannot be explained to the jury because of its prejudicial effect. *Id.* In *Fuselier* the discussion of flight was inadmissible because the defendant was an escapee. Whether he had committed the murder he was accused of or not, he had reason to flee when the officer's attempted to capture him. A more appropriate cite would be *Mariche v. State*, 495 So.2d 507 (Miss.1986). In that case a suspect wanted on a rape charge lead police on a car chase that resulted in his capture. At court, evidence of the car chase was admissible and affirmed on appeal because he had no independent reason to flee. Therefore, his choice of flight was evidence of consciousness of guilt.

Id. In this case the same is true of Mr. Fraise. While not mentioned in court or in the objection, his Motion in Limine states that he was on parole, and this couldn't be disclosed to the jury because of prejudice. However, there is subsequently no information that he was in violation of his parole. Without any parole violation he had no other reason to flee. Therefore, if not barred, the evidence was admissible as consciousness of guilt.

Finally, during the cross examination of defense witness Astrid Hernandez, the prosecutor asked, "Because you were hiding him out down there, weren't you?" And "You were keeping him from coming up here, you were hiding him, because you didn't want him to get arrested." **T. 320.** Mr. Fraise asserts that this was prosecutorial misconduct because there was no basis of fact for the continued assertion that Ms. Hernandez was hiding the Defendant.

Again, there was never any objection to the questioning and this issue should not be raised on appeal. However, even if the Court does examine this line of questioning, there was sufficient factual basis to support the question that the prosecutor asked Ms. Hernandez. She had just said that she had seen the Defendant in New Orleans with her and that she intentionally didn't call the police. She also acknowledged that she was aware that "they were looking for him." **T. 320.** Therefore it is a logical conclusion that he was hiding down there with her, and the question was proper given the context.

Not only were there no objections to these statements, none of the instances cited rise to the level of prosecutorial misconduct.

II. THE STATE PROPERLY PRODUCED THE TWO WITNESSES UNDER UNIFORM CIRCUIT AND COUNTY RULE 9.04

The testimonies of witnesses Grant Stevens and Rhonda Poche were properly admitted, and there is no reversible error in their production. To begin, there was no objection to the testimony of either Rhonda Poche or Grant Stevens. Therefore, with no evidence of any objection or even a motion related to either testimony, the assertion of error may not be raised on appeal. *King v. State*, 615 So.2d 1202, 1205 (Miss.1993). However, even if reviewed, there is no reversible error.

Grant Stevens was on the witness list and everything he testified to was in the police reports and in discovery to the Defense. **R.E. 13-18.** There should be no argument as to whether he was a surprise witness and that the Defense was unable to prepare for his testimony. Under the rule all that is required is "a copy of the contents of any statement, written, recorded or otherwise preserved of each such witness and the substance of any oral statement made by any such witness." U.R.C.C.C. 9.04. The statements that Mr. Stevens made to the police officers included everything to which he later testified to at trial.

Rhonda Poche was on the witness list, but she was never mentioned in any of the police reports. Regardless, there was no unfair surprise as the Defense had plenty of opportunity to learn of her eventual testimony, and no objection was ever raised. In *Agnew v. State*, 783 So.2d 699 (Miss. 2001), the defendant was convicted of murder and a key testimony was that of a witness who could identify the murder weapon. The defense moved for a mistrial claiming that under rule U.R.C.C.C. 9.04, they were not provided with the substance of the witness' testimony. However, the court ruled that there was no surprise since the substance of the testimony had been mentioned during the trial and no objection was ever raised. The witness' testimony was mentioned in a motion in limine discussion, during the opening statement, and during a direct examination of another witness. *Id* at

706.

If the Defendant in this case claims surprise, then he wasn't listening to the first half of the trial. Ms. Poche was mentioned in the opening statement, and the entirety of her testimony was clearly stated.

> MS. CREEL: Deputy Rhonda Poche was on duty. And she was on duty that night patrolling, she was looking for the red Oldsmobile. She heard it was at Arbor Gate. She went to Arbor Gate. Rhonda Poche is a member of the security department at Arbor Gate Apartments. She, also, lives in Arbor Gate Apartments. And she lived right across the parking lot from where the red Oldsmobile was found. Now, Ms. Poche, Deputy Poche, she had seen Jael use that car at his house.

T. 58-59. Had the Defendant objected under U.R.C.C.C. 9.04, he could have been given time to interview the witness or, if the surprise constituted unfair prejudice, then granted a mistrial. However, there was no objection and therefore no way to know that the Defendant had any problems with Ms. Poche testifying.

III. THE TRIAL COURT DID NOT ERR IN ALLOWING THE PHOTO LINEUP AND TESTIMONY FROM JEANETTE QUINTANA AND DETECTIVE CLARK

The Appellant argues that the testimonies of Jeanette Quintana and Detective Clark were inadmissable because of the likelihood of misidentification. However, Mr. Fraise admits that there was no objection at trial regarding the lineup nor were any motions filed in this regard. Again, without an objection, this issue is not preserved for review. *King v. State*, 615 So.2d 1202, 1205 (Miss.1993). The Appellant claims that this issue should be reviewed under the Plain Error Rule, but there was no serious error or infringement of substantial rights. The case cited by the Defendant is *Porter v. State,* 732 So.2d 899 (Miss. 1999) which was reversed when a defendant's Sixth Amendment rights were completely ignored. There is nothing as egregious in this case.

The standard of review for trial court decisions regarding pretrial identification is "whether or not substantial credible evidence supports the trial court's findings that, considering the totality of the circumstances, in-court identification testimony was not impermissibly tainted." *Ellis v. State,* 667 So.2d 599, 605 (Miss.1995). Even if the identification is impermissibly suggestive, the identification can be admissible when "considering the totality of the circumstances surrounding the identification procedure, the identification did not give rise to a very substantial likelihood of misidentification." *York v. State*, 413 So.2d 1372, 1383 (Miss.1982). The court has adopted the five factor *Biggers* test found in *Neil v. Biggers*, 409 U.S. 188 (1972). The five factors are "(1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty exhibited by the witness at the confrontation; and (5) the time between the crime and the confrontation. *Id* at 199.

In this case, the factors are satisfied despite the defects in identification that the Defendant

raised. A similar lineup was affirmed on appeal in *Isom v. State,* 928 So.2d 840 (Miss.2006). In that case the witness saw a burglar for a few seconds in her backyard before he ran. There was a spotlight on the burglar when he triggered the motion lights, but he had a black toboggan cap that covered part of his head from view. *Id* at 848. In comparison, the lineup and identification in this case is just as sufficient, if not more than the one in *Isom.*

First, Ms. Quintana, though further away than Mr. Stevens, had an unobstructed view of the Defendant and did not have a gun pointed at her. **T. 203.** She had the entirety of the robbery to observe the Defendant. She was able to observe his movements and she heard him speak. In *Isom,* the witness observed the burglar for a few seconds before he ran away. Both defendants wore some sort of mask or hat partially covering their face, though in this case Ms. Quintana says that she could still see through the type of mask the Defendant was wearing.

Second, both Ms. Quintana and the witness in *Isom* did nothing else than watch the robbery take place. No evidence of other actions or distraction was presented in either case. **T. 206.**

Third, though the Defendant argues that Ms. Quintana's descriptions are inconsistent, it seems fairly consistent throughout the reports that she was unsure whether he was a light skinned black man or a dark skinned white man. The only confusion Ms. Quintana had was which race the man was, but she had no doubt as to the color of his skin. In *Isom*, the witness said that the man was black, was wearing a hat, and that she had a brief look at his face. **R.E. 13-18.**

Fourth, at the confrontation, both Ms. Quintana and the witness in *Isom* claim to have seen the defendant's faces. **T. 207.**

Finally, the identification took place somewhere between immediately after the crime to four days later. In *Isom,* the identification took place in court two years later. In *Magee v. State*, 542 So.2d 228 (Miss. 1989), the identification took place two days later, which is similar to Ms.

Quintana's identification one to four days later in this case. Regardless of any discrepancy in when the search of the Defendant was performed and when the photo lineup was done, the jury was presented all of the evidence from both parties, and they were capable of making a judgment based on the facts.. Other similar identifications have been upheld under the *Biggers* test and the Court should find that the identification and the testimony regarding the identification by Ms. Quintana and Detective Clark does not constitute reversible error.

IV. THE COURT DID NOT ERR IN ALLOWING THE TESTIMONY OF HOLLY KRANTZ

Surrebuttal is not an entitlement, and it is discretionary by the trial judge. *Wilcher v. State*, 863 So.2d 776 (Miss. 2003). The Defendant cites the Mississippi Rule of Evidence requiring that a witness is given an opportunity to explain or deny a prior inconsistent statement. M.R.E. 613(b). However, the comment to the rule points out that "the traditional insistence that the attention of the witness be directed to the statement on cross-examination *is relaxed in favor of simply providing the witness an opportunity to explain and the opposite party an opportunity to examine the statement, with no specification of any particular time or sequence.* M.R.E. 613(b) cmt. (Emphasis added). Here, Ms. Hernandez had already been asked on direct examination about any comments she made to the detective. **T. 314.** The only inconsistencies were what she said to the detectives and whether a man or a woman called her. Ms. Hernandez said she told the detectives she was with the Defendant on the night of the robbery, but Ms. Krantz testified that Ms. Hernandez said she was not with Mr. Fraise. **T. 340**. There is no additional evidence to offer as to what each party thinks was said. As to whether a male or female detective called, Ms. Hernandez claims a male called her, but she refers to the officers plurally during her direct examination. T.314. Ms. Krantz testified that she could not remember if both of the officers spoke to Ms. Hernandez. Here, there is no inconsistency since both seem to acknowledge that two officers called Ms. Hernandez. The Court should rule that any inconsistency had been fully addressed on Ms. Hernandez's direct examination and there was no need for a surrebuttal.

The second issue is whether Ms. Hernandez was properly called as a witness since her phone number was found in the Defendant's phone records without a search warrant. This is not an issue because the Defendant has stated that he was on parole. The Defendant's appeal raises the question

of "fruit of the poisonous tree." *Silverthorne Lumber Co. v. U.S.*, 251 U.S. 385 (U.S. 1920). The contention is that the eventual discovery of Ms. Hernandez was the result of an illegal search of the Defendant's phone records. However, the exception to the rule allows for the introduction of indirect evidence if it were shown that such evidence inevitably would have been discovered from an independent source. *Hill v. State*, 432 So.2d 427 (Miss. 1983). While some of the other numbers dialed by the detectives may never have been discovered, surely it may be assumed that the detectives would have discovered the Defendant's girlfriend and eventual key alibi witness. Additionally, at trial Ms. Krantz did not testify to any information found in the phone records nor did she make any reference to them until questioned by the Defense on how she obtained Ms. Hernandez's telephone number.

V. THE TRIAL COURT DID NOT ERR IN ADMITTING INTO EVIDENCE THE PHOTOGRAPH OF THE APPELLANT

Relevancy and admissibility of evidence are largely within the discretion of the trial court, and reversal may be had only where that discretion has been abused. *Grant v. State*, 762 So.2d 800, 805 (Miss.App. 2000). In this case, a photograph of the Defendant holding a pistol was admitted into evidence at trial. **R.E. 11.** The pistol in the photo was similar in appearance to the one described by the store clerk on the night of the robbery. The court did not abuse its discretion admitting the photo as it was highly probative to show that the Defendant had a similar weapon. Of the cases cited by the Appellant, both refer to gruesome images that were shown to the jury. In *Hickson v. State,* 472 So.2d 379 (Miss. 1985) the jury was shown the victim's disembodied hands in a jar. In the case that *Hickson* cites for its reasoning, the jury was shown the skull of the deceased. And even in *Hickson* the court states that there may be a need in another case for a body part to be shown. *Id* at 385. However, even with that instruction, the case at hand doesn't deal with a gruesome body part nor a murder weapon. This picture was of a gun; not a murder weapon, not a bloody gun, not even a gun next to a body. Just a gun.

A more appropriate case would have been *Grant v. State,* 762 So.2d 800 (Miss.App. 2000). In that case a photo of the defendant posing with a gun was found during a search. The other people in the picture were cut out, and only the defendant and the gun he was holding were left. The court, in determining admissibility found that the photograph was prejudicial, but highly probative. The defendant didn't have the gun when apprehended and the weapon found had no fingerprints. The photo then was the clear connection to a weapon that appears to be identical to the one used in the robbery. *Id* at 805.

Grant is clearly on point to this case. Without a weapon or other connection to the weapon,

the photograph is one of the States' most probative pieces of evidence. The trial court did not abuse its discretion in admitting the evidence.

VI. THE DEFENDANT WAS NOT ENTITLED TO A CIRCUMSTANTIAL EVIDENCE INSTRUCTION

To necessitate a circumstantial evidence instruction, the evidence presented must be wholly circumstantial. *Keys v. State*, 478 So.2d 266, 267 (Miss.1985). Here, while there is circumstantial evidence, there is also direct evidence in the form of two eyewitnesses. While the Defendant may find fault or not believe the testimony and identification by the store clerk, it makes it no less direct.

In *Price v. State*, 749 So.2d 1188 (Miss.App. 1999), the defendant was convicted on a charge of sexual battery. The only evidence against him was his admission that he had been in the relevant areas within hours of the crime and that his fingerprints were found there. Though somewhat circumstantial, the verdict was affirmed by the court. In discussing the standard for judging evidence, the court clearly states, "Direct evidence is eyewitness accounts." *Id* at 1194. Eyewitness accounts must not simply be direct evidence of a crime, but must also link the defendant to the crime. Circumstantial evidence is that a person heard a gunshot and then saw the defendant, direct evidence is that the person witnessed the defendant firing the gun. *Id* at 1193.

While the Defendant here may not like the outcome of the direct evidence, it is nevertheless an eyewitness account of the Defendant committing the crime. The jury is the ultimate trier of fact, and they have the ability to determine the credibility of the witness. *Id* at 1193 citing *Winston v. State*, 726 So.2d 197, 201 (Miss.App. 1998). Here the jury obviously found that Ms. Quintana was credible. Any problems or deficiencies that the Defendant asserts against Quintanta's testimony or identification do not destroy the fact that she was an eyewitness. Since the case is not wholly circumstantial, no circumstantial jury instruction was necessary.

VII. DEFENSE COUNSEL'S LEGAL REPRESENTATION WAS SUFFICIENT

The Sixth Amendment provides a right to effective assistance of counsel, not errorless counsel. *Hall v. State*, 735 So.2d 1124, 1127 (Miss.Ct.App.1999). There is a presumption that a trial attorney's performance is competent, that their decisions were strategic, and that their performance within the wide range of reasonable professional assistance . *Waldon v. State*, 749 So.2d 262 (Miss.App. 1999) and also *Watts v. State*, 981 So.2d 1034 (Miss.App. 2008). To succeed on an ineffective assistance of counsel claim, the Defendant must prove that counsel's overall performance in the totality of the circumstances was deficient and that his defense was prejudiced as a result. *Id* at 268 citing *Strickland v. Washington*, 466 U.S. 668 (1984). Finally, the Defendant must show that **but for** his attorney's errors, there was a reasonable probability that a different result would have occurred. *Watts v. State,* 981 So.2d 1034 (Miss.App. 2008). In this case, Defense counsel's decisions were sufficient.

The Defendant's first argument is that his counsel failed to challenge Ms. Quintana's out-of-court identification and failed to object to her in-court identification. The defendant must prove that counsel had an obligation to object to the admittance of the evidence. *Williams v. State*, 819 So.2d 532, 537 (Miss.App. 2001). In that case, the police performed a "show-up" identification, a procedure that has been widely condemned, and counsel failed to object. However, when looking at the *Biggers* factors discussed earlier, the court said that the factors weighed in favor of the State. Thus, there was no obligation to object *Id.* Here, a failure to file a motion to suppress was trial strategy. There are many, many reasons why the Defendant's counsel may have chosen not to file a motion to suppress. For the sake of example, defense counsel may have wanted to use the lineup to bolster his case. In a case that hinged on Ms. Quintana's identification, defense counsel may have

felt that it was crucial to point out discrepancies between the Defendant and the other pictures in the lineup.

Secondly, the Defendant claims that his attorney was deficient because counsel stipulated to some of the State's evidence. In *Yarbrough v. State*, 529 So.2d 659 (Miss. 1988), the defense attorney's conduct was extremely ineffective. While he admitted into evidence a police report that was only helpful to the State, he also issued no subpoenas until the day of the trial, only issued subpoena's to State's witnesses, only called one witness, conducted no pre-trial investigation or discovery, he didn't move to suppress the "show-up" identification, filed no jury instructions, made argumentative objections, complained to the judge about representing his client, and made absurd demands on the State to produce evidence that was available during discovery. *Id* at 662. Despite all of this, the court was still willing to consider whether it effected the outcome and if the attorney had sincerely tried to assist his client. Only then did the court find that the defense was ineffective. *Id* at 663.

In this case, the facts do not show a complete breakdown of the adversarial system. It seems that for the most part the Defendant's counsel had a well presented argument, that he called witnesses, and properly cross examined the state's witnesses. If cases like *Yarbrough* have to discuss a laundry list of incompetence to find counsel deficient, then surely one or two mistakes will not render a defense completely insufficient. None of the cases presented by the defendant are closely analogous. In *Scott v. State,* 446 So.2d 580, 585 (Miss. 1984), the jury was given a police officer's notes and thoughts, not an official police report. In *Waldrop v. State,* 506 So.2d 273 (Miss. 2003), the defense counsel introduced into evidence a National Crime Information Center report in addition to other conduct that was clearly ineffective. "Examples include numerous frivolous motions, repeated refusals to follow rulings and instructions from the bench, and even a request for

elementary information, ("How do I introduce [an exhibit], Your Honor?")." *Id* at 274. *Rose v. State,* 556 So.2d 728 (Miss. 1990) is not a case of ineffective counsel, rather the case focused on several instances of improper testimony, one of which involved the opinion of the sheriff as to the guilt of the accused. Finally, the Appellant incorrectly applied a case from the 8th Circuit *Freeman v. Class,* 95 F.3d 639 (8th Cir. 1996). The appellant claims that the court found the introduction of a police report damaging. That is incorrect. The court found that the introduction of a written statement from an accomplice, laden with hearsay, was prejudicial. *Id* at 408, 409. The introduction of the police report was not prejudicial. *Id* at 408. When looking at the other decisions regarding police reports, every case finding ineffective assistance of counsel also have numerous other deficiencies. Here there may have been grounds for an objection, but, standing alone, the stipulation by the defense alone was not reversible error.

The Defendant's third argument that he had ineffective counsel was that his attorney did not contact certain witnesses that would have offered testimony to contradict the State's witnesses. The Defendant raised an alibi defense and two witnesses were called that supported his alibi. The cases relied upon by the Appellant do not support a reversal for ineffective counsel. In *Bryant v. Scott*, 28 F.3d 1411 (5th Circuit 1994), the court did find ineffective counsel, but the defense counsel failed to call any alibi witnesses. The other two cases *Hersick v. State,* 904 So.2d 116 (Miss. 2004) and *Hodges v. State* 912 So.2d 730 (Miss. 2005) both require an adequate investigation. However, in both of those cases the defendants lose because their claim fails on the second prong of the *Strickland* test (but for the errors the defendant had a reasonable probability of a different outcome). The Defendant in this case asserts that his attorney failed to interview his father, the apartment manager, and other officers that took reports. However, sufficient evidence was presented at trial that Ms. Quintana's description varied in her statements to the police, and the other officers would

not have offered anything new to the jury. There seems to be no evidence that any of these witnesses would have greatly effected the verdict. Therefore there was no error.

The Defendant also claims that the search of his apartment was illegal regardless of the fact that he was under probation. His claim is that, using the Ninth Circuit's analysis, the probation officer was used as a "stalking horse." The Ninth Circuit's test has not been applied in Mississippi and other jurisdictions have declined to follow it as well. See *State v. Hajicek*, 620 N.W.2d 781 (Wis. 2001), *U.S. v. Emmett*, 321 F.3d 669, 671 (7th Cir. 2003), *In re Tyrell J.*, 32 Cal.Rptr.2d 33, 40 (Cal. 1994) (*In Re Tyrell* later overruled where officer had no reasonable suspicion or knowledge of the probation condition). The courts in Mississippi have only recognized that a parolee is not afforded the same Fourth Amendment protection as a regular citizen. *Robinson v. State*, 312 So.2d 15, 18 (Miss.1975). Parole is not equivalent to a full release from prison. Mr. Fraise was still subject to search by Ms. Varnado, his parole officer. Additionally, even if the Court was to examine the case under the test used in Ninth Circuit, Ms. Varnado was not used as a "stalking horse." She may not have initially had any suspicion, but once she was told of the robbery, she willingly went to his house. Ms. Varnado was actively involved in the search and not just a method for the officers to avoid obtaining a search warrant. In fact, Ms. Varnado was the one who found the photos of Mr. Fraise printing on the computer. (R.E. 20). The Ninth Circuit's test has not been adopted in this jurisdiction, and absent an extreme situation, the rule should not be adopted by this Court. It may be plausible to adopt a "stalking horse" rule in situations where the parole officer only granted permission to search or had stayed in the car. However, this is not that situation. Here Ms. Varnado agreed to question the Defendant and subsequently began a search in which she was actively engaged. (R.E. 20).

Next, the Defendant finds error with a number of objections and jury instructions that he feels

were improper. No situation presented was so extreme or so deficient to be outside of the reasonable presumption that the attorney acted within his discretion and in the best strategic interests of his client.

Finally, the Defendant asserts that the defense counsel failed to obtain a copy of the 911 tape. There is no showing that the 911 tape would have been of any assistance at trial. There is a slim chance that there may have been some discussion of identification on the tape, but otherwise this fails the *Strickland* test by not showing whether or not the Defendant was prejudiced or whether there would have been a different outcome at trial.

CONCLUSION

None of the arguments raised by the Defendant merit reversal. In fact, a majority of the issues raised were not even objected to at trial, and no issues constitute plain error. There was no prosecutorial misconduct and the Court properly admitted all evidence and witnesses during trial. Therefore, the decision of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lisa L. Blount, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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