

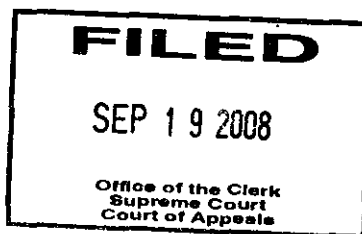
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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

HOWARD CATER, II

APPELLANT

VS.



NO. 2007-IA-01669-SCT

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR APPELLEE

THE STATE DOES NOT REQUEST ORAL ARGUMENT.

Respectfully submitted,

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ATTORNEY GENERAL
STATE OF MISSISSIPPI**

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STATEMENT OF THE CASE

Procedural History

Howard Cater, II ["Cater"], was indicted by the Grand Jury of Adams County for the crime of false pretenses, in an indictment filed on September 12, 2006. (C.P. 1) On October 20, 2006, he filed a motion to quash the indictment (C.P. 23), and then on August 28, 2007, an amended motion to quash the indictment. (C.P. 4) The Circuit Court, Honorable Lillie Blackmon Sanders, Circuit Court Judge, presiding, denied the relief requested on September 13, 2007. (C.P. 12) On September 27, 2007, Cater asked this Court's permission for an appeal for this Court to review the lower court's interlocutory order. At this Court's direction, on December 12, 2007, the State filed a response to the request for interlocutory appeal. In said response, the State agreed that the issue sought to be presented to this Court was a matter which this Court should resolve by way of interlocutory

appeal because the granting of such an appeal would “[r]esolve an issue of general importance in the administration of justice,” citing M.R.A.P. 5(a)(3). This Court, on December 12, 2007, granted permission for the appeal.

Cater raises one issue on appeal, viz.,

Is a Limited Liability Company a person under Section 97-19-39 of the Mississippi Code of 1972, such that a crime could have been committed in this case?

SUMMARY OF THE ARGUMENT

The lower court did not commit error in overruling Cater’s motions to quash indictment. First, the cases of ***Champluvier v. State***, 942 So.2d 145 (Miss.2006), and ***Coleman v. State***, 947 So.2d 878 (Miss.2006) should be overruled. Second, in any event, the cases are distinguishable from the case at bar.

ARGUMENT

PROPOSITION

**THE LOWER COURT DID NOT COMMIT ERROR IN
DENYING CATER'S MOTIONS TO QUASH
INDICTMENT.**

The crime for which the grand jury indicted Cater is defined in Miss. Code Ann. §97-19-39(2) (1972), as amended, as follows:

Every person, who with intent to cheat or defraud another, shall designedly, by color of any false token or writing, or by another false pretense, obtain the signature of any person to any written instrument, or obtain from any person any money, personal property, or valuable thing, with a value of Five Hundred Dollars (\$500.00) or more, upon conviction thereof shall be guilty of a felony and punished by imprisonment in the State Penitentiary not exceeding ten (10) years, and by a fine not exceeding Ten Thousand Dollars (\$10,000.00).

Pertinent parts of Cater's indictment state that Cater

late of the County aforesaid, in said County, on or about the 18th day of September, 2003, did wilfully, unlawfully, feloniously and with intent to cheat and defraud Cane Callon, d/b/a Camco Investments, LLC, designedly and falsely with knowledge of such falseness did obtain an amount of money in excess of \$500.00 from Cane Callon d/b/a Camco Investments, LLC, for the purchase and resale of automobiles pursuant to a written agreement to do so; said Howard Cater, II, having failed to complete said purchases and instead converting the money to his own use shortly after receiving it. . . .

(C.P. 1)

The facts would apparently show that Cane Callon, doing business as Camco Investments, LLC ["Camco"], entered into an agreement with Cater whereby Cane Callon, doing business as Camco, would finance the purchase of wrecked

automobiles by Cater, who would then repair and resell the automobiles at a profit. Immediately upon the wire transfer deposit of \$110,000.00 from Cane Callon, doing business as Camco, into Cater's bank account, Cater began writing checks unrelated to the deal, and of course the deal was never completed.

The essence of Cater's argument is that the crime of false pretenses requires the victim thereof to be a "person," and that this Court's opinion in the case of ***Champluvier v. State***, 942 So.2d 145 (Miss.2006), specifically excludes limited liability companies from the definition of "person."

The State first contends that the ***Champluvier*** case as well the case of ***Coleman v. State***, 947 So.2d 878 (Miss.2006), also cited by Cater, was wrongly decided and should be revisited and overruled for the reasons stated in the dissenting opinions of those two cases.

Furthermore, both ***Champluvier*** and ***Coleman*** were cases in which the defendants were convicted of embezzlement under former Miss. Code Ann. §97-23-19 (Supp.2005).¹ In pertinent part, that statute stated as follows:

If any director, agent, clerk, servant, or officer of any incorporated company, or if any trustee or factor, carrier or bailee, or any clerk, agent or servant of any private person, shall embezzle or fraudulently secrete, conceal, or convert to his own use, any goods, rights in action, money, or other valuable security, effects, or property of any kind or description which shall have come or been intrusted to his care or possession by virtue of his office, place, or employment, either in mass or otherwise, with a value of Five Hundred Dollars (\$500.00) or more, he shall be guilty of felony embezzlement. ...

¹This section was amended effective July 1, 2007, to cure the problem identified by this Court in the ***Champluvier*** and ***Coleman*** cases.

In the ***Champluvier*** case, the victim of the crime was a limited liability company ["LLC"]. A majority of this Court found that the State's evidence was lacking in that it did not prove that the victim of the crime was either an "incorporated company" or a "private person." Cater, on the other hand, was not charged under the embezzlement statute. Rather, as stated, he was charged with the felony crime of false pretenses pursuant to Miss.Code Ann. §97-19-39(2) (1972), as amended. That statute states as follows:

Every person, who with intent to cheat or defraud another, shall designedly, by color of any false token or writing, or by another false pretense, obtain the signature of any person to any written instrument, or obtain from any person any money, personal property, or valuable thing, with a value of Five Hundred Dollars (\$500.00) or more, upon conviction thereof shall be guilty of a felony and punished by imprisonment in the State Penitentiary not exceeding ten (10) years, and by a fine not exceeding Ten Thousand Dollars (\$10,000.00).

The State contends that the ***Champluvier*** case is distinguishable. First, as stated, the statute involved in the ***Champluvier*** case was an embezzlement statute, not the false pretenses statute. Said embezzlement statute listed as potential victims only one type of business entity, viz., incorporated companies, to the exclusion of any others, along with "private persons." The false pretenses statute specifically lists no type of business entity. Instead, it merely describes the victim as "another" and "any person." One of the reasons this Court gave in the case of ***Coleman v. State***, 947 So.2d 878 (Miss.2006), for refusing to consider artificial persons to be within the definition of the word "person" in the embezzlement statute was that the embezzlement statute at issue there restricted the victims of said crime

to “any incorporated company” or “any private person,” and if the “person” included artificial persons, then it would necessarily include incorporated companies as well, making the statute redundant. 947 So.2d at 882, ¶14. Such an interpretation of the false pretenses statute would not result in such redundancy, since in said statute, as stated, there is only one class of victim, viz., a “person” – which, the State claims, can be a natural person, or an artificial person, e.g., a corporation, LLC, partnership, or association.

This Court has examined the indictments in many false pretenses cases in which the victim was an artificial person, and has never ruled an indictment improper for that reason. In the case of ***State v. Hoffman***, 508 So.2d 669 (Miss.1987), this Court upheld a trial court’s quashal of indictment because it failed to give the defendant notice of his crime. This Court found no flaw, however, with the fact that the victim in that false pretenses case was a corporation. *See also*: ***Neece v. State***, 210 So.2d 657 (Miss.1968) (Corporation defrauded.); ***Pippin v. State***, 126 Miss. 146, 88 So. 502 (1921) (Fatal variance found because indictment failed to name partnership as victim in false pretenses case.).

Accordingly, the State submits that the word “person” found in Miss.Code Ann. §97-19-39 should be interpreted to mean both natural and artificial persons, which would include an LLC. ***Champluvier*** and ***Coleman*** should be confined to their facts.

Finally, the State submits that, unlike in the ***Champluvier*** case, in the case at bar, as shown *supra*, the indictment names a natural person, Cane Callon, albeit one doing business as an LLC.

The trial court's order denying Cater's motion to quash his indictment should be affirmed.

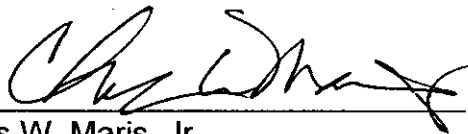
CONCLUSION

The lower court did not commit error in denying Cater's motions to quash indictment and this Court should affirm that ruling.

Respectfully submitted,

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CERTIFICATE OF SERVICE


I, Charles W. Maris, Jr., 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 APPELLEE to the following:

Honorable Lillie Blackmon Sanders
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This the 19th day of September, 2008.



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