


SUPREME COURT OF MISSISSIPPI

HERMAN LEE WILLIAMS

APPELLANT

VS.

NO. 2007--00270

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF APPELLANT

OF COUNSEL:

LEE D. THAMES, JR. 

VARNER, PARKER & SESSUMS, P.A.

Post Office Box 1237

1110 Jackson Street

Vicksburg, Mississippi 39181-1237

Telephone: 601/638-8741

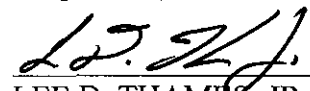
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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. District Attorney, G. Gilmore Martin
P.O. Box 648
Vicksburg, MS 39181
2. Assistant District Attorney, Mike Bonner
P.O. Box 880
Jackson, MS 39205-0220
3. Jim Hood, State Attorney General
P.O. Box 880
Jackson, MS 39205-0220
4. Herman Williams, Defendant
Parchman, MS
5. Lee D. Thames, Jr., Attorney for Defendant
1110 Jackson Street
Vicksburg, MS 39181
6. Judge Frank G. Vollor
Warren County Courthouse
Vicksburg, MS 39181

Respectfully Submitted,



LEE D. THAMES, JR., ATTORNEY FOR
HERMAN LEE WILLIAMS

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STATEMENT OF THE CASE

A. FACTS

On July 10, 2005, Herman Williams went to the Navy Circle overlook in Vicksburg, Mississippi. (Tr. 270) Renae White accompanied Herman Williams. (Tr. 252) It was after midnight. (Tr. 187) The night was dark and the overlook has no lights. At least two other vehicles were present. (Tr. 179) Herman Williams, Renae White and Lance Rogers testified at trial that there were at least five or six other vehicles at the overlook. (Tr. 255, 261, 270-71)

Officer Brassard, a rookie recently graduated from the Academy less than two months previously, drove his patrol car to the overlook. (Tr. 187) Officer Brassard pulled behind Herman Williams' vehicle. Officer Brassard got out and questioned Herman Williams and asked for Herman Williams' drivers license. (Tr. 253) Herman Williams had a drivers permit, tags and insurance but did not have a drivers license. (Tr. 271) Herman Williams was asked to step out of the car. Herman Williams gave the police permission to search the car. (Tr. 271) The police searched the car and found no drugs. (Tr. 194, 272) The police advised that they were going to arrest Herman Williams.

Officer Brassard claims he saw Herman Williams throw something. However, no one else saw Herman Williams throw anything. Herman Williams denied having drugs or throwing drugs. (Tr. 272-3) Lance Rogers and Renae White, both present at the overlook, testified that Herman Williams did not throw any drugs on the ground. (Tr. 254, 257, 262) Nobody else could substantiate Officer Brassard's claim.

A bag of drugs was found at the overlook which is open to the public throughout the day. However, no fingerprints were found on the bag to connect the bag with Herman Williams. The

police never gave Herman Williams a drug test. (Tr. 273) The area where Herman Williams allegedly threw the drugs was dark. (Tr. 188) The overlook does not have lights. (Tr. 188)

Officer Brassard arrested Herman Williams for possession of cocaine. Herman Williams was incarcerated on July 15, 2005. Herman Williams posted bond on March 1, 2006. (Tr. 9) On June 15, 2006, Herman Williams was arrested on different charges and bail was denied. (Cp. 13, Tr. 8) Herman Williams remained in jail until his trial began on September 5, 2006. So, approximately thirteen months, twenty-five days passed between the arrest and trial. Of that time, Herman Williams was incarcerated approximately ten months, ten days.

Interestingly, while in the custody of the State of Mississippi, Herman Williams was indicted by the Warren County Grand Jury on October 19, 2005. (Cp. 4) However, Herman Williams was not notified of the indictment until sometime in late June, 2006.

B. LEGAL PROCEEDINGS

Herman Williams was arrested on July 15, 2005. Herman Williams was indicted by the October 2005, grand jury on October 19, 2005. (Cp. 4) Even though Herman Williams had remained in the custody of the State of Mississippi, Herman Williams was not served a copy of the indictment until June 14, 2006. (Cp. 8) On July 21, 2006, Herman Williams was appointed counsel. (Cp. 10) Herman Williams was arraigned on July 27, 2006. (Tr. 1) On September 5, 2006, the trial court denied Herman Williams' Motion to Dismiss because his right to a speedy trial was violated. (Tr. 41) The trial court also overruled Herman Williams' objection to jurisdiction. (Tr. 40) Herman Williams had argued that the United States of America had exclusive jurisdiction of the property in question and that the State of Mississippi had not reserved concurrent jurisdiction.

Trial proceeded on September 5 and 6, 2006. (Tr. 64-314) The jury found Herman Williams guilty of possession of cocaine of approximately 10.7 grams.

On September 20, 2006, the trial court sentenced Herman Williams to 24 years, day for day, with no right to probation or parole. (Tr. 344) Herman Williams timely filed his Motion for New Trial and/or Motion for Reconsideration and/or Dismiss. (Cp. 111) On November 30, 2006, the trial court denied Herman Williams' motion. (Cp. 149) Aggrieved, Herman Williams filed his Notice of Appeal. (Cp. 151)

SUMMARY OF THE ARGUMENT

Herman Williams was denied his constitutional right to a speedy trial. Herman Williams was arrested for possession of a controlled substance on July 10, 2005. However, Herman Williams was not tried until September 5, 2006, approximately 13 months, 25 days after the arrest. Of that time, Herman Williams was incarcerated approximately 10 months, 10 days. Furthermore, Herman Williams lost contact of two of his witnesses because the State did not notify Herman Williams of his indictment until June 14, 2006, eleven months after the arrest. Herman Williams had been indicted as early as October 2005, and had been incarcerated and in the custody of the State but not notified of said indictment. Herman Williams was severely prejudiced and therefore denied his constitutional right to a speedy trial and therefore the charges should be dismissed.

The State of Mississippi did not have jurisdiction of the property where the alleged incident occurred. The property was conveyed to the United States of America in 1899 from private individuals. The State of Mississippi never reserved their right to concurrent jurisdiction nor did the United States of America grant the State concurrent jurisdiction. The laws argued by

the State of Mississippi as to jurisdiction were enacted in 1906 which would not affect the conveyance since the conveyance predated said law argued by the State. Therefore, the Court lacked jurisdiction to prosecute and convict Herman Williams.

Herman Williams was convicted for possession of cocaine of approximately 10.8 grams and sentenced a non-violent habitual offender receiving 24 years imprisonment day for day not eligible for probation or parole. Clearly the subject sentence is unconstitutional and cruel and inhuman punishment as well as disproportionate to similar sentences in Warren County. The gravity of the offense does not rise to the level of the harshness of the penalty. Furthermore, other drug possession and drug with intent to sell crimes received lighter sentences than Herman Williams' sentence of 24 years. Please note that this was not even a drug sale conviction but rather simple possession. Herman Williams had no guns. Clearly this sentence is a disproportionate to other sentences and to the crime. The only victim would be the taxpayers of Mississippi who will have to pay for Herman Williams to remain in jail for 24 years, day for day. Herman Williams is a victim on the failed war on drugs declared over twenty seven years ago.

The trial court improperly allowed testimony of prior convictions of Herman Williams. The trial court erroneously held that Herman Williams had opened the door on his prior convictions by stating that he had never "smoked drugs". However, Herman Williams did not testify that he never had done drugs which is a significant difference. Herman Williams was convicted of possession of cocaine, a drug that is normally snorted, not smoked. The prior felony convictions clearly are prejudicial and outweigh the probative value in this matter. Therefore, the Court should remand for a new trial.

Herman Williams was denied advice of counsel and due process. After Herman Williams

testified on direct, the State claimed that Herman Williams had opened the door as to the prior convictions. The Court granted the State's motion to ask Herman Williams questions about the convictions. At that time, counsel for Herman Williams asked if he could speak with his client for a few minutes based on the Court's improper ruling. The Court denied Herman Williams' counsel the right to advise Herman Williams of what the Court has ruled. As such, Herman Williams was denied his right to counsel and therefore a new trial is necessary.

The finding of the guilt was against the overwhelming weight of the credible evidence and is contrary to the law and the weight of the evidence. The only direct evidence that Herman Williams was allegedly in possession of drugs was Officer Brassard. Officer Brassard said he saw Herman Williams throw something at the overlook. Officer Brassard conceded that it was dark that night. There were no fingerprints found on the drugs. Herman Williams, Renee Wright and Lash Rogers all testified they were present at the overlook at that time and that Herman Williams did not throw any drugs. Particularly in light of the fact that Herman Williams has been sentenced to 24 years in prison, day for day without eligibility or parole, the testimony of one officer against three other ones clearly goes against the weight of the credibility of the evidence and therefore the conviction should be dismissed or given a new trial.

The trial court erred by redacting the single juror language from D-2. The trial erred by redacting language from Jury Instruction D-3 regarding reasonable doubt. The trial court erred in striking the presumption of innocence in Jury Instruction D-4. Most importantly, the trial court erred by not requiring the element of "knowingly or intentionally" by granting Jury Instruction S-1 and refusing D-6. Therefore, the Court should reverse and remand for a new trial.

LEGAL ARGUMENTS

I. HERMAN WILLIAMS WAS DENIED HIS RIGHT TO A SPEEDY TRIAL

On July 10, 2005, Herman Williams was arrested for possession of a controlled substance which is the charge before the Court.

Herman Williams remained in the custody of the State until March 1, 2006, when he posted bond. While incarcerated from July 10, 2005 until March 1, 2006, Herman Williams was indicted for possession of a controlled substance which is the charge before the Court. However, the State never served Herman Williams with the indictment though under the State's custody.

On June 15, 2006, while out on bond, Herman Williams was arrested on new charges. The State filed a Motion to Hold Defendant Without Bond. The trial Court later upheld denial of bond. Herman Williams was incarcerated from June 15, 2006, until the trial on September 5, 2006. Herman Williams was arraigned on July 27, 2006, more than one year after his arrest.

The time of the arrest until trial on September 5, 2006, is approximately 13 months, 25 days. Herman Williams was incarcerated approximately 10 months, 10 days of the 13 month, 25 day period. Herman Williams was indicted by the Grand Jury on October 19, 2005. Herman Williams was tried more than 10 months, 17 days after he was indicted.

Herman Williams first became aware of the indictment on June 14, 2006. At arraignment, Herman Williams objected on the record noting he had already been denied a right to speedy trial.

The Sixth Amendment to the United States Constitution states in part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...." The Mississippi Constitution, Article 3, §26, also affords the right to a speedy trial.

The date of the Defendant's arrest is the date the right to a speedy trial attaches. Thorson v. State, 653 So. 2d 876, 889 (Miss 1994); Johnson v. State, 666 So. 2d 784, 792 (Miss 1995).

In determining whether a defendant's right to a speedy trial is violated, the Court must weigh the four factors set out in Barker v. Wingo, 407 U.S. 514 (1972). The factors are: (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant has asserted his right to a speedy trial; and (4) whether the defendant has been prejudiced by the delay. No one of these factors is, in itself, dispositive. Rather, they must be considered together, in light of all the circumstances. Barker, 407 U.S. at 533, 92 S.Ct. At 2193. Smith v. State, 550 So. 2d 406, 408 (Miss 1989). The Mississippi Supreme adopted the Barker test in Wells v. State, 288 So. 2d 860 (Miss 1974).

1. Length of Delay

The date of the defendant's arrest is the date the right to a speedy trial attaches. Thorson v. State, 653 So. 2d 876, 889; Johnson v. State, 666 So. 2d 784, 792 (Miss 1995). The Mississippi Supreme Court has held "that any delay of eight (8) months or longer is presumptively prejudicial." Smith v. State, 550 So. 2d at 408. Herman Williams was arrested on July 10, 2005, and his trial began on September 6, 2006, approximately thirteen (13) months, twenty-five (25) days later. This factor weighs heavily against the State.

2. Reason for the Delay

The record is devoid of any legitimate reason for the delay. The State never argued the case was delayed because of an overworked docket or unavailability of the prosecutor or the count. The case was not delayed because of police investigation. During most of the delay, Herman Williams was actually in the custody of the State and therefore available for prosecution. Herman Williams never asked for a continuance. Therefore, the factor weighs heavily against the

State.

The trial Court improperly found that the delay was caused by Herman Williams by virtue of being in the custody of the State on a different charge. The trial court did not count the time Herman Williams was incarcerated with the State on other charges. The trial court refused to count some of the time against the State, “because defendant was incarcerated in the Department of Corrections on another charge.” (Tr. 57) Furthermore, the trial court held that the fact Herman Williams was incarcerated on other charges “weighs against him and not against the State of Mississippi on the computation of time.” (Tr. 368)

However, the trial court’s holding is contrary to the Mississippi Supreme Court’s ruling in Fisher v. State, 532 So. 2d 992 (Miss 1988). In Fisher, the defendant was serving time on another conviction. The Mississippi Supreme Court held, “The mere fact that the defendant is in custody for another crime is generally not a sufficient reason for delaying a trial. E.g. Frankel v. Woodrough, 7 F. 2d 796, 799 (8th Cir. 1925); U.S. v. Alagia, 17 FRD 15, 17 (D. Dal. 1955); Beavers v. State, 498 So. 2d 788, 790; Burgess v. State, 473 So. 2d 432, 433-34 (Miss 1985).” Fisher, 532 So. 2d at 995.

In Beavers v. State, 498 So. 2d 788, 790 (Miss 1986), the Mississippi Supreme Court held that revocation of parole leading to incarceration is not a legitimate reason for delay. Just like the case *sub judice*, Beaver’s parole was revoked after being arrested. Beaver, 498 So. 2d at 790. The Mississippi Supreme Court held, “Incarceration via parole revocation, however, is not a legitimate reason for the prosecutor’s failure to bring an accusation to trial. Burgess v. State, 473 So. 2d at 433-34; Bailey v. State, 463 So. 2d 1059 (Miss 1985).” Beaver, at 790-91. The Mississippi Supreme Court held:

Here the risk of non-persuasion rests with the prosecution. Because there is nothing in the record attributable to Beavers (except the 38 day delay due to the motion for continuance) or to any other source not chargeable to the prosecution, explaining why Beavers could not have been brought to trial substantially earlier, we consider this a factor weighing in Beavers' favor.

Beavers, at 791.

The State has the burden of persuasion. The State was silent on this factor other than the fact Herman Williams was incarcerated with MDOC. However, Herman William's incarceration on other charges are not a legitimate cause for delay. Therefore, this factor weighs heavily against the State.

3. Defendant's assertion of right to a speedy trial.

It is not the duty of the accused to bring himself to trial. Simmons v. State, 678 So. 2d 683, 687 (Miss 1996); McGhee v. State, 657 So. 2d 799, 804 (Miss 1995); Kinzey v. State, 498 So. 2d 814, 823 (Miss 1986). The State bears the burden of bringing a defendant to trial in a speedy and timely manner. Simmons, 678 So. 2d at 687; McGhee, 657 So. 2d at 804. "As has been repeated throughout this opinion, a defendant may have some responsibility to assert his speedy trial claim, but the primary burden os on the courts and the prosecutors to assure that cases are brought to trial." Flores v. State, 574 So. 2d 1314, 1325 (Miss. 1990) (*citing* Trotter v. State, 554 So. 2d 313, 317 (Miss 1989)).

In the case *sub judice*, Herman Williams asserted his right to a speedy trial. (Tr. 2). He was arraigned over a year after his arrest.

This factor weighs heavily against the State.

4. Whether the defendant has been prejudiced

The current trend in denying a defendant is right to a speedy trial usually hinges on the defendant's failure to prove he was prejudiced. However, Herman Williams was prejudiced in at

least two reasons. First, he was imprisoned over ten months of the thirteen month delay.

Therefore, prejudice is presumed because the defendant is incarcerated. Secondly, Herman Williams lost contact with two of his witnesses. Because the two witnesses were unable to testify, Herman Williams was prejudiced.

“When the delay has been presumptively prejudicial, the burden falls upon the prosecutors.” State v. Ferguson, 576 So. 2d 1252, 1255 (Miss 1991). An affirmative showing of prejudice by the defendant is not necessary to prove denial of the constitutional right to a speedy trial. Moore v. Arizona, 414 U.S. 25, 26 (1973); Flores v. State, 574 So. 2d 1314, 1323 (Miss 1990); Trotter v. State, 554 So. 2d 313, 318 (Miss 1989) Furthermore, “this Court has stated that the State actually has to show lack of prejudice in order to prevail in this factor.” Jasso v. State, 655 So. 2d 30, 35 (Miss 1995) (citations omitted).

The United States Supreme Court has identified three interests speedy trial is designed to protect: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concerns of the accused; and (iii) to limit the possibility that the defense will be impaired. Barker v. Wingo, 407 U.S. 514, 532 (1972). Of the three, “the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.” Barker, 407 U.S. at 532.

Herman Williams was incarcerated over ten months of the thirteen month period between the arrest and trial. Part of Herman Williams’ defense required the testimony of Johnathon White and Gregory Holmes, two witnesses present at the overlook. What is interesting and what hampers Herman Williams’ ability to communicate with these witnesses was the fact that the indictment was not served on Herman Williams for more than one year after the arrest. Based on such a long delay, Herman Williams had just assumed simply that the case had been dismissed.

Furthermore, one of his witnesses, Johnathon White, joined the armed services and therefore was unable to come to trial. The process server John Tompkins, was unable to find the two witnesses, Johnathon White and Gregory Holmes, as evidenced as Defendant Exhibit 3 in the Court record. (Cp. 37-42) Mr. Williams's ability to monitor and keep up with these witnesses was greatly hampered by his incarceration.

Thus, Herman Williams is able to show prejudice based on the fact that he was incarcerated for most of the time between the arrest and trial. Furthermore, two of his key witnesses were not available for trial. The case against Herman Williams was what is called a dope throwing case. The only evidence against Herman Williams was the police officer who testified that he saw Herman Williams throw dope. However, there were questions as to the officer's testimony because there was no lighting, the officer did not see exactly where the drugs were thrown and landed, and the scene where the drugs allegedly laid were not secure for over fifteen, twenty minutes. The crime scene was an overlook where at the time of the incident the police officer testified there was at least one other vehicle while Herman Williams testified there were at least five or six other vehicles. These two witnesses would have testified at trial that they were there and that they did not see Herman Williams throw any drugs. Therefore, Herman Williams' defense was greatly prejudiced and this factor weighs heavily against the State.

All four factors weigh heavily against the State. Therefore, Herman Williams' right to a speedy trial was denied. The trial court improperly denied Herman Williams' motion to dismiss because his right to a speedy trial was violated. This Court should over-rule the trial court and hold that Herman Williams' right to a speedy trial was violated, and dismiss the indictment and conviction.

II. THE STATE COURT DID NOT HAVE JURISDICTION

The charge and arrest of Herman Williams occurred on property owned by the United States. The property is part of the National Military Park and the overlook area is called the Navy circle. The property was acquired by the United States in 1899 from private individuals. (Tr. 340-41, Ex D-1, CP 83-92) Namely, on October 20, 1899, David Mosby, Carrie Mosby, Sally Mosby and Mrs. J.C. Thomas, conveyed property to the United States of America, said deed found in the Warren County Land Records in deed book 92, page 177. On October 26, 1899, Henry L. Mayer conveyed property to the United States of America, said deed found in the Warren County Land Records in deed book 92, page 188. On December 23, 1899, Martha Pinkston conveyed property to the United States of America, said deed found in the Warren County Land Records in deed book 92, page 248.

The trial Court lacked territorial jurisdiction to prosecute the charge against Herman Williams. The United States of America possesses exclusive jurisdiction of the Navy Circle land which it obtained in 1899. The United States did not convey concurrent jurisdiction to Mississippi. Mississippi never retained concurrent jurisdiction in 1899. The State never provided any material supporting the contention that Mississippi had concurrent jurisdiction. The only argument made by the State was law found in 1906. However, the United States obtained ownership prior to 1906 and the law is not retroactive unless an additional affirmative step by the United States and/or State was made to reserve concurrent jurisdiction, which was not shown. Therefore, only the United States has territorial jurisdiction of the property where the alleged criminal act occurred. Therefore, the Circuit Court of Warren County, Mississippi does not have jurisdiction over the property and the indictment and conviction should be dismissed.

In State v. Ritchie, S.W. 3d 364 (Tenn. 2000), the Tennessee Supreme Court recognized territorial jurisdiction of federal land located within a state's boundaries. Ritchie ultimately denied the petition for writ of habeas corpus, but did so on habeas corpus procedural grounds and not the merits.

In Ritchie, the defendant committed crimes on property owned by the Tennessee Valley Authority. The property was conveyed to the United States in fee simple. Ritchie, 20 S.W. 3d at 627. The Court of Criminal Appeals reversed the conviction based on federal exclusive jurisdiction of the TVA property. The Tennessee Supreme Court reversed because jurisdiction had never been challenged through direct appeal or the post-relief statutes and habeas corpus was not the proper avenue. Ritchie, at 633-34.

In State v. Graham, 267 S.E. 2d 56, 58 (N.C. App. Ct. 1980), a crime was committed on federally owned property. While holding the State had concurrent jurisdiction, the Court held that the United States may have exclusive jurisdiction in some instances. "The United States may accept exclusive or partial jurisdiction....." Graham, 267 S.E. 2d at 58. Graham noted that 40 USC § 3112 provided the proper procedure for the United States to acquire exclusive jurisdiction by filing a notice of acceptance with the Governor of the State. Since the United States had not reserved exclusive jurisdiction, the Court denied Graham's relief.

However, 40 U.S.C. § 3112 does not apply to lands acquired by the United States prior to 1940. State v. Allard, 313 A. 2d 439 (ME. 1973); Markham v. United States, 215 F. 2d 56 (4th Cir. 1954).

In U.S. v. Raffield, 82 F. 3d 611 (4th Cir. 1996), the defendant was convicted in federal court of drunk driving in violation of state law on lands owned by the United States. Raffield acknowledges that the United States can acquire land in a state and have either exclusive

jurisdiction or partial/concurrent jurisdiction. Raffield, 82 F. 3d at 612. However, North Carolina and the United States had agreed to concurrent jurisdiction in North Carolina's national forests thereby denying Raffield relief. Raffield, at 613.

In State v. Boyd, 34 P. 3d 912 (Wash. 2001), the Court of Appeals of the State of Washington addressed a jurisdictional challenge by defendant who had attacked campers on the Coleville Indian Reservation. The Court explained the burden of proof as follows:

1. The State always has the burden of establishing jurisdiction beyond a reasonable doubt. But merely by alleging that the crime took place in Washington, the State met this burden. (RCW 9A.04.030(1); L.J.M., 129 Wash. 2d at 392, 918 P. 2d 898.
2. To overcome this presumption, the defendant need only point to evidence of facts which, if proved, would defeat jurisdiction. L.J.M., 129 Wash. 2d at 394.95, 918 P. 2d 898.
3. The State must then come forward with a prima facie showing of additional jurisdictional facts sufficient to refute the defense's theory and satisfy the court that it has jurisdiction. Id. At 395, 937 P. 2d 1069.
4. If the defense fails to convince the court that jurisdiction is questionable, the State can rest on its initial showing that the crimes occurred within the states. Id. at 388, 396, 937 P. 2d 1069.
5. If, however, the court remains in doubt as to its jurisdiction, then the jurisdictional facts become an element of the crime to be decided by the finder of fact in the event of a trial. The State must prove the jurisdictional facts by the usual standard of beyond reasonable doubt. Id. at 393, 937 P. 2d 1069.

Boyd, 34 P. 3d at 915, This procedure was not followed in the case *sub judice*.

The State does not dispute that the alleged crime occurred at the Navy Overlook, property owned by the United States. The State simply argues that pursuant to Miss. Code Ann. § 55-5-17 and Miss Code of 1906, § 2 395, the state has concurrent jurisdiction. However, the deeds produced to the trial court show the property was conveyed by individual citizens, not the State

or City, to the United States in 1899. The conveyances pre-date the statutes argued by the State. Therefore the statutes argued by the State are not applicable. The State failed to produce any documents wherein the United States gave the State concurrent jurisdiction. Quite to the contrary, Herman Williams proved that the property conveyed pre-dates the statutes relied on by the State and trial court. Therefore, the conviction should be dismissed because the State does not have nor could prove that it had concurrent jurisdiction.

III. THE SENTENCE IS UNCONSTITUTIONAL AND DISPROPORTIONATE

Herman Williams was convicted of possession of cocaine having a weight of more than 10 grams, but less than 30 grams, to wit: 10.8 grams. The trial court found that Herman Williams had been convicted of two prior felonies and thereby sentenced Herman Williams pursuant to the non-violent habitual offender statute. Based on the habitual offender statute, Herman Williams was sentenced to twenty-four years imprisonment, day for day, not eligible for probation or parole.

Herman Williams objected to the sentence as unconstitutional and disproportionate to similar sentences in Warren County. Defendant, Herman Williams presented to the court Warren County drug sentences of 2005 and 2006. (Ex 2) Clearly, 24 years day for day for possession of cocaine is cruel and inhumane punishment. Herman Williams is simply another casualty on the losing war on drugs.

Miss. Code Ann § 99-19-81 mandates the maximum sentence with no eligibility of parole or probation. However, the United States and Mississippi Supreme Court require that a criminal sentence must not be disproportionate to the crime for which the defendant is being sentenced. Solem v. Helm, 463 U.S. 277, 290 (1983); Clowers v. State, 522 So. 2d 762, 764 (Miss. 1988). Addressing the nonviolent habitual offender statute, the Mississippi Supreme Court stated,

“Notwithstanding § 99-19-81, the trial court has authority to review a particular sentence in light of constitutional principles of proportionality as addressed in Solem v. Helm.” Clowers, 522 So. 2d at 765. The trial court must utilize three factors in its proportionality analysis in each case:

- (1) The gravity of the offense and the harshness of the penalty;
- (2) Comparison of the sentence with sentences imposed on other criminals;
- (3) Comparison of sentences imposed in other jurisdictions for commission of the same crime with the sentence imposed in this case.

Solem, 463 U.S. at 290-91; Clowers, at 764.

The war on drugs is all but lost. Ronald Reagan declared a war on drugs over 27 years ago and yet our prisons are overflowing with people who have violated drug laws. As a society, we need to begin trying to treat this illness rather than locking people up, ruining their lives, making it where they will remain in criminal activities, and be a liability on tax payer's dollars by being locked in jails.

Herman Williams was convicted of possession of cocaine. He was not convicted for the sale of cocaine or with the intent to sell. He did not have a gun with him. He did not attack anyone. He did not hurt anyone. There was no victim other than society who will be stuck with a price tag of paying for Herman Williams to spend 24 years, day for day, in prison. The 24 year sentence is clearly disproportionate to the crime of possession of cocaine.

I entered into evidence an affidavit of my paralegal with all of the drug possession sentences for the years 2005 and 2006, in Warren County, Mississippi. Herman Williams' sentence of 24 years is disproportionate to other drug defendants of Warren County. After review of the sentences I am sure that you will agree that Herman Williams' sentence of 24 years day for day is disproportionate to other sentences in Warren County concerning drug possession. For

instance, and ironically, on the day of Herman Williams' sentence, Robert Mitch Keller, Warren County Circuit Court, Cause No. 060238 on September 20, 2006, was charged with possession of cocaine of less than ten grams, and he also had a prior felony. However, Robert Mitch Keller only received three years and was eligible for probation and/or parole. Mr. Keller's sentencing is included in the Defendant's Exhibit 2.

Another person charged with possession of cocaine and receiving a disproportionate sentence is Franklin Ray Brooks, Cause No. 05, 0077. Mr. Brooks was in possession of cocaine more than 2 grams, less than 10 grams. He was sentenced to five years.

Reginald Tiffith was charged with sale of cocaine which is a more serious crime than possession of cocaine. Reginald Tiffith was originally indicted as habitual offender having two prior drug charges in Cause No. 05, 0063-CR-P. Reginald Tiffith was originally sentenced to twelve years but was given four years to serve and five years probation.

Charles Miles was charged with the sale of cocaine, Cause No. 05, 0060-CR-P. Again, sale of cocaine is a more serious offense than possession of cocaine. Mr. Miles also had prior felony convictions and was originally indicted as an habitual offender. He was originally sentenced to twelve years but received four years to serve and five years probation.

Tracy Tedeton was charged with possession of amphetamines under two grams in 05, 0249. While originally sentenced to two years in prison, she was sentenced to drug court.

Jeffery Deon Hunter, 06, 0163-CR-P, was charged with possession of cocaine of more than .1 grams but less than 2 grams and was originally sentenced to six years but actually served in jail two years, six months and probation for the remainder.

Charles Edward Mitchell, Cause No. 05-0160-CR-V, was charged with possession of marijuana for more than thirty grams but less than 250 grams. While originally sentenced to three

years, he received in-house arrest.

Demarcus Hamilton, in Cause No. 05, 0331-CR-V, was charged with possession of cocaine more than ten grams but less than thirty grams, which is exactly the charge of Herman Williams. Hamilton was found guilty and received five years probation and received the RID program. Clearly, Hamilton's sentence is greatly disproportional to twenty four years day for day.

Candace Buck, in Cause No. 05, 0329-CR-V, was charged with possession of cocaine more than ten grams but less than thirty grams, again the same charge as Herman Williams. She received twelve years suspended for five years.

Michael McDuff, in Cause No. 06, 0256-CR-V, was charged with possession of cocaine of more than .1 gram but less than 2 grams. McDuff received five years suspended and drug court.

Tommy Huntley, a convicted felon in possession of a weapon was also charged with possession of cocaine for more than .1 grams but less than 2 grams. Tommy Huntley had a prior felony and two felony charges in Cause No. 06, 0240-CR-V. He received a six year sentence suspended for five years. He also ultimately received drug court because the court dropped the weapons charge. Huntley is a guy who not only is in possession of drugs but also has a weapon which could cause harm to individuals. Yet Hamilton simply got drug court wherein Herman Williams received twenty four years day for day without eligibility of probation or parole.

Based on the foregoing sentences, none of them even amount to half of the sentence that Herman Williams received. The closest was the charge of Candace Buck who received twelve years but five of those years were suspended leaving her only seven years in prison and she would be eligible for probation and/or parole.

The trial court erred in not finding that the sentence was disproportionate to the crime. As such, this Court should reverse the twenty four year day for day sentence and either issue a lighter sentence or remand for further proceedings before the trial court.

IV. THE TRIAL COURT IMPROPERLY FOUND THAT HERMAN WILLIAMS HAD OPENED THE DOOR ON HIS PRIOR CONVICTIONS

Prior to trial, Herman Williams made an *ore tenus* motion to prevent the State from bringing up in front of the jury Herman Williams' prior criminal record during the trial. (Tr. 59) The State confessed the motion and agreed not to use his prior record in their case in chief. The Court granted the motion with the caveat that if Herman Williams testifies and, "opens the door to the introduction of his prior crimes by something he says, such as, 'I would never commit a crime like this' or something like that, then or somehow brings that to issue, then you can approach the bench at that time and get a ruling from me." (Tr. 59) In other words, the Court ruled that if Herman Williams opens the door in his own testimony as to his prior crimes, then the Court would consider allowing the State to bring up Herman Williams' prior crimes at trial.

During trial, the trial court improperly held that Herman Williams had opened up the door to his prior convictions and allowing the State to question Mr. Williams on his prior felony convictions. Apparently, the State and trial court held that Herman Williams' testimony that he does not smoke drugs was equivalent to he doesn't use drugs. It is believed that the trial court used the following response of Herman Williams to allow prior convictions which states as follows, "No, sir, I didn't. I have been working on a job for fifteen years. I don't smoke drugs." That may very well be the truth and would not open up the door to prior drug convictions. My understanding is he was convicted of possession of cocaine. My limited understanding of possession of cocaine would mean that cocaine use is snorted, not smoked. Crack cocaine is

smoked. Therefore, Herman Williams' statement could very well have been exactly true. Therefore, the Court mischaracterized the answer as an answer of not ever using drugs and improperly allowed the State to question Herman Williams about his prior convictions. Based on the error, the Court should reverse the conviction and remand for a new trial.

The law disfavors introduction of prior criminal acts. MRE 404(b) states prior convictions are not admissible except in limited instances. MRE 404(b) reads:

Evidence of other crimes, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The trial court failed to weigh the prejudice caused by admitting the prior convictions. In the case *sub judice*, the trial court failed to weigh the prejudicial effect of the admissions against the probative value of the evidence. If the court had performed such analysis, the trial court would have still held the conviction overly prejudicial and refused to admit the convictions. Therefore, the trial court manifestly erred and the case should be remanded for a new trial.

V. HERMAN WILLIAMS WAS DENIED ADVICE OF COUNSEL AND DUE PROCESS

The trial court improperly held that Herman Williams opened the door by testifying that he did not smoke drugs. In the event that this Court denies my prior argument, then the Court must find that Herman Williams was denied a right to counsel and due process pursuant to the United States Constitution, Amendments 5 and 6 as well as Mississippi's Constitution. After the Court determined that Herman Williams opened the door, Herman Williams was denied access to his attorney to advise him what the Court had ruled, the ramifications and preparation of questions which Herman Williams believed he was not going to be questioned about. (Tr. 278)

Therefore, Herman Williams was denied his right to due process and counsel and therefore the case must be remanded for a new trial.

This Defendant has been unable to find a criminal case on point where a court has ruled that Defendant has a right to confer with counsel while on cross examination on an issue that was allegedly waived. However, in Geders v. United States, 425 U.S. 80 (1976), the United States Supreme Court held that a defendant in a federal prosecution was denied his right to counsel when not allowed to consult with his attorney during a regular overnight recess prior to being cross examined. The Court held that “ a defendant in a criminal case must often consult with his attorney during the trial.” Geders, 425 U.S. at 88. “The rule” does not prevent a criminal defendant from conferring with an attorney throughout trial unlike a non-party witness. Furthermore, the United States Supreme Court stated, “our cases recognize that the role of counsel is important precisely because ordinarily a defendant is ill-equipped to understand and deal with the trial process without a lawyer’s guidance.” Geders, at 88.

Admittedly, Geders involves preventing a defendant from consulting with his counsel on an overnight recess which is not the case in this matter. However, the significant occurrence of the Court ruling that Herman Williams had opened the door to testimony regarding prior convictions was such an important event that he should have at least been allowed the right to confer with counsel for five minutes. Herman Williams is not a lawyer and is not a very educated person. He needed assistance throughout the whole process and clearly did not understand what the Court was ruling. At the very least, the Court should have allowed counsel to confer with Herman Williams before he was cross examined. The Court had already sent the jury back upstairs for a restroom break as both counsel argued whether or not he had opened the door. (Tr. 274) Therefore, the flow of the trial would not have been affected in any form or fashion.

Counsel for Herman Williams only needed five minutes to explain the process of what was going on and the severity of what the Court had ruled. All of this was denied.

In a civil matter, Potashnick v. Port City Construction Co., 609 F. 2d 1101 (5th Cir. 1980), the fifth circuit recognized a civil litigant has a constitutional right to have counsel. The Court held that a ruling “prohibiting a litigant from consulting with his attorney during break and recesses in the litigant’s testimony impinge upon” the client’s right to counsel. Potashnick, 609 F. 2d at 1118. Therefore, the trial court manifestly erred and the case should be remanded for a new trial.

**VI. THE FINDING OF GUILT WAS AGAINST THE OVERWHELMING
WEIGHT OF THE CREDIBLE EVIDENCE AND/OR IS CONTRARY
TO THE LAW OR THE WEIGHT OF THE EVIDENCE**

The State failed to prove beyond a reasonable doubt that Herman Williams was guilty of the crime of possession of cocaine, more than 10 grams but less than 30 grams. The finding of guilt of Herman Williams was against the overwhelming weight of the credible evidence and/or is contrary to law or the weight of the evidence in this matter and the conviction and sentence should be dismissed or Herman Williams given a new trial. The trial court erred in refusing to grant D-1. (Cp. 55)

The only direct evidence against Herman Williams was Officer Brassard. Officer Brassard had been on the job as a police officer for Vicksburg for two to three months. He had been working since 3:00 p.m. the date of the incident. He made his arrest of Herman Williams nearly nine hours later in the dark at the Navy Circle overlook. Officer Brassard’s testimony was somewhat contradictory. Officer Brassard admitted that he did see at least one other car. Other witnesses testified there were at least five other cars.

Officer Brassard admitted that it was dark and he had a hard time seeing. Officer Brassard testified that he kept his eyes on Herman Williams the entire time. However, he would not have been able to know where the drugs were thrown if he kept his eyes on Herman Williams. Therefore, Officer Brassard's testimony was inconsistent.

Herman Williams and the passenger with Herman Williams both testified that Herman Williams did not have any cocaine and did not throw the drugs. The drugs found at the scene could have been placed there by any person at any time. There were no fingerprints indicating that the drugs had been in the possession of Herman Williams. The drugs were found on public property and not on Herman Williams' possession or in Herman Williams' vehicle. The State had no direct evidence of fingerprints connecting Herman Williams with the drugs. Furthermore, the State did not have a video of Herman Williams throwing the drugs. In other words, the State had no direct evidence that the drugs they found at the Navy Circle overlook were the possession of Herman Williams. As such, the conviction needs to be reversed and either rendered or a new trial given particularly in light of the severity of the sentence.

VII. THE TRIAL COURT ERRED IN MODIFYING JURY INSTRUCTION D-2

The Court modified proposed Instruction D-2. (CP Pg 51, 57) The Court redacted the language "even though it may cause a mistrial of this case." This was language sometimes known as the "sinker" language, which was taken from Mississippi Model Jury Instruction for criminal, 1:19. See also Barry v. State, 859 So. 2d 399 (Miss. Ct. App. 2003); Edland v. State, 523 So. 2d 42 (Miss. 1988).

In Edland v. State, 523 So. 2d 42, 49 (Miss. 1988), the Mississippi Supreme Court held that where the jurors are not given the single jury instruction, then it is reversible error.

Therefore, the modification of D-2 was reversible error by the trial court.

VIII. THE COURT MANIFESTEDLY ERRED WHEN REDACTING LANGUAGE FROM JURY INSTRUCTION D-3

The trial court manifestly erred when the trial court redacted part of Instruction D-3. Specifically, the Court redacted “there is always a reasonable doubt of the Defendant’s guilt when the evidence simply makes it probable that the Defendant is guilty. Mere probability of guilt will never warrant you to convict the Defendant.” The trial court ruled that it was proper to strike the language because there was an attempt to define reasonable doubt. (Tr. 290)

The Jury Instruction No. D-3 was taken straight out of the Mississippi Model of Jury Instructions for Criminal, Section 1:10. (Cp. 52, 59) The importance of the stricken language is significant because of the lack of the State’s direct evidence to convict Herman Williams. The only evidence at trial was the testimony of Officer Brassard, whose testimony is contradictory. Officer Brassard admitted being on the shift for more than ten hours, and that it was dark. However, based solely on Officer Brassard’s testimony, the Court was able to convict Herman Williams for possession of drugs he allegedly threw in a public place. As such, the Court manifestly erred in redacting the above quoted language and therefore should be remanded for a new trial.

IX. THE TRIAL COURT MANIFESTLY ERRED IN STRIKING PART OF JURY INSTRUCTION D-4

The trial court manifestly erred in striking or redacting language from Jury Instruction D-4. Jury Instruction D-4 is a presumption of innocence which is taken verbatim from the Mississippi Model Jury Instructions Criminal, Section 1:9. (Cp. 53, 61) The trial court struck the following language, “the presumption of the innocence attends Herman Williams throughout the trial and prevails at its close unless overcome by evidence which satisfied the jury of Herman

Williams guilty beyond a reaasonable doubt.” This clearly is the law of the United States and Mississippi Constitution. The presumption of innocence stays throughout the trial and it is the duty of the State to prove beyond reasonable doubt that Herman Williams is in fact guilty. As such, the trial court manifestly erred in redacting the above stated language. Therefore, the Court should reverse the jury verdict and order a new trial.

X. THE TRIAL COURT IMPROPERLY GRANTED JURY INSTRUCTION S-1 AND REFUSED JURY INSTRUCTION D-6

The trial court manifestly erred by granting Jury Instruction S-1 and refusing Jury Instruction D-6. (Cp 48, Cp 65). By granting S-1 and refusing D-6, the trial court essentially allowed the jury to find Herman Lee Williams guilty of possession of marijuana without the State proving the element “knowingly or intentionally”. As intention is one of the most important criteria in finding someone guilty, the Court clearly manifestly erred.

The Jury Instruction S-1 as given by the trial court reads as follows: If you find from the evidence in the case beyond a reasonable doubt that:

1. Herman Lee Williams on July 10, 2005, Warren County, Mississippi;
2. Did willfully and feloniously possess, which is a controlled substance, having a weight of more than ten grams but less than thirty grams to wit: 10.8 grams. (Cp 48)

Noticeably, the element of intent is not included in the Jury Instruction. The Defendant’s proposed Jury Instruction D-6, which was refused includes: If you find from the evidence in this case beyond a reasonable doubt that (1) Herman Williams on or about July 10, 2006, Warren County; (2) knowingly or intentionally had in his possession; (3) cocaine, and (4) Herman Williams knew that it was cocaine; (Cp. 65) This Jury Instruction was at least partially taken

from at Mississippi Model of Jury Instructions Section 4:6. Noticeably, Jury Instruction D-6 requires that the State prove knowledge or intent, a significant element for any crime.

Mississippi Code annotated Section 41-29-139(c) is the statute Herman Williams was charged with and ultimately found guilty of violating. The statute specifically notes “knowingly or intentionally” in the language. Specifically, the statute reads, “it is unlawful for any person **knowingly or intentionally** to possess any controlled substance....” Mississippi Code Annotated § 41-29-139(c). The statute specifically requires knowingly or intentionally which is not included in S-1 and is included in D-6. Therefore, the trial court manifestedly erred and Herman Williams should be granted a new trial.

CONCLUSION

In conclusion, the case should be dismissed based on the violation of Herman Williams’ constitutional right to a speedy trial and/or the Court’s lack of proper jurisdiction over this matter. Alternatively, the Court should remand the matter for a new trial or new sentencing based on the above stated arguments.

Respectfully Submitted,

HERMAN LEE WILLIAMS

BY:


LEE D. THAMES, JR.

OF COUNSEL:
VARNER, PARKER & SESSUMS
1110 JACKSON STREET
POST OFFICE BOX 1237
VICKSBURG, MS 39181
(601) 638-8741

CERTIFICATE OF SERVICE


I have this day personally delivered a copy of the foregoing Brief to the following:

District Attorney G. Gilmore Martin
P.O. Box 648
Vicksburg, MS 39181

Jim Hood, State Attorney General
P.O. Box 880
Jackson, MS 39205-0220

Judge Frank G. Vollar
Warren County Courthouse
Vicksburg, MS 39181

Dated this the 13th day of November, 2007.



LEE D. THAMES, JR.