IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DECARLOS JENKINS — APPELLANT

V. — NO.2007-KA-00399-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

ORAL ARGUMENT NOT REQUESTED

MISSISSIPPI OFFICE OF INDIGENT APPEALS
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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 this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Decarlos Jenkins
3. Honorable Laurence Y. Mellen and the Coahoma County District Attorney's Office
4. Honorable Charles E. Webster

THIS 3rd day of December 2007.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Decarlos Jenkins, Appellant

By: _____
Leslie S. Lee, Counsel for Appellant

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STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Coahoma County, Mississippi, and a judgment of conviction for the crimes of Count I, Possession of Cocaine, in the amount of one-tenth (0.1) gram but less than (2) grams, and Count II, Possession of Marijuana, Less than 30 Grams, a misdemeanor, against the appellant, Decarlos Jenkins. C.P. 9-10, R.E. 13-14. According to the sentencing order, the trial judge found that Jenkins escaped prior to his sentencing hearing. The trial judge proceeded with sentencing in absentia. The court found Jenkins to be an habitual offender under Miss. Code Ann. §99-19-83 (1972), and sentenced him to life imprisonment without the possibility of parole or probation in Count I. C.P.

Supplemental C.P. Volume 1, 1-3, R.E. 19-21. In Count II, Appellant was sentenced to a fine of two hundred fifty dollars ($250.00). Supplemental C.P. Volume 1, 4-5, R.E. 22-23. An Amended Notice of Appeal was subsequently filed on October 23, 2007, to include the sentencing judgment[1]. R.E. 24. These convictions followed a jury trial on February 2, 2007, with sentencing on October 11, 2007, Honorable Charles E. Webster, Circuit Judge, presiding. Jenkins is presently incarcerated with the Mississippi Department of Corrections.

FACTS

According to the trial testimony, a search warrant was executed at a residence located at 451 Garfield Street in Clarksdale, Mississippi on October 11, 2006. Tr. 25. The search was conducted by the Clarksdale Police Department and the Mississippi Bureau of Narcotics (MBN). Tr. 60. Jenkins, along with Marcus McCollough and a small infant were present in the residence when it was searched. Tr. 45.

Officer Joseph Wide was on the entry team. Tr. 98. He saw Jenkins running toward the kitchen. Wide patted Jenkins down to make sure he did not have a weapon. Tr. 99-100. However, Wide testified he did not pat down Jenkins's shirt pocket. Tr. 109. Wide did remember that Jenkins was wearing a grayish-white dress shirt with a pocket on the front. He was shown Ex. S-11 and testified that was the shirt Jenkins was wearing. Tr. 102. He admitted there were no identifying markings on the shirt. Tr. 103.

[1] This pleading is located in the Court's files, as it was filed after the Clerk's Papers were prepared by the circuit court clerk.

MBN Agent James Jones testified that he entered the residence after it was secured. While searching Jenkins, he located two rock-like substances in his pocket and some leafy-substance. Tr. 60-62. Agent Jones notified Corporal Ricky Bridges, who took a pictures of the contents of the pocket. Tr. 62, 46, Ex. S-1(a). Jones described the shirt Jenkins was wearing as a short-sleeve grayish type shirt with a front pocket. Tr. 64. He testified Ex. S-11 was the shirt Jenkins was wearing when he was arrested. Tr. 65. He was unaware of any picture being taken which included Jenkins's face with the shirt. Tr. 67.

The items taken from the shirt pocket were collected to be sent to the Crime Lab. Tr. 47, Ex. S-3. Corporal Bridges also testified that Ex. S-11 was the shirt Jenkins was wearing when arrested. Tr. 50. Bridges testified, however, that the shirt was not seized at the time of Jenkins's arrest. Tr. 51. Bridges also confirmed that no picture existed which showed Jenkins wearing the shirt. Tr. 52. After his arrest, Jenkins was taken to the Clarksdale Police Department and then on to the Coahoma County Detention Center. Tr. 65.

Sergeant Leroy Austin testified as to the procedure of booking a prisoner into the Coahoma County Jail. All of an arrestee's clothes are taken, except for his underwear, and placed in a property bin. Tr. 121. Austin testified that the Jenkins's Inmate Movement Sheet indicated Jenkins's clothes were put into bin number 95. Tr. 122, Ex. S-13. Austin admitted that Officer Hite is the one who actually booked Jenkins into the jail. Austin was not present at the time. Tr. 123. Austin also testified he had no idea who may have accessed the bin while Officer Hite was on duty. Tr. 126-27. A total of four sergeants have access to the

room where the bins are kept. He also stated that an inventory is not taken of what property is placed in the bins. Tr. 127.

Bridges later went to the jail and retrieved the clothing alleged to have been in Jenkins's bin. Sergeant Austin put it a clear garbage bag and handed it to him. Tr. 167-68. Bridges kept track of the shirt until it was time for court. Tr. 168, Ex. S-11.

Decarlos Jenkins testified in his own defense. He did not live at 451 Garfield. The house belonged to his mother[2]. He was there that evening visiting his girlfriend and babysitting his girlfriend's child. Tr. 143, 151. Jenkins testified he was wearing a tank top with no pockets when police arrived. He denied having any illegal contraband on him. Tr. 148.

The Crime Lab examined the items in Ex. S-3, and determined there was 0.18 grams of cocaine, and 0.84 grams of marijuana[3]. Tr. 114.

SUMMARY OF THE ARGUMENT

The State failed to establish the chain of custody of the shirt appellant was alleged to have been wearing at the time of his arrest. This shirt contained a front pocket where officers claimed a small amount of cocaine and marijuana were found. Appellant testified that he was wearing a tank top and the shirt produced in court was not the shirt he had on when

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[2]His mother, Maxine Mullins, also testified and confirmed 451 Garfield was her house and that Jenkins did not live there. Tr. 132-33.

[3]For the sake of judicial economy, only the facts relating to Jenkins's conviction will be discussed. Since Jenkins was not convicted of possessing the larger amounts of the drugs found in the house, those facts have been omitted.

arrested. The officer who removed appellant's clothes at the jail was never called to testify by the State. The State was required to establish the chain of custody once the allegation of substitution was made by the defendant. Based on the testimony presented, the evidence was clearly insufficient to show possession of the contraband alleged to have been in appellant's pocket.

It was also alleged that the appellant escaped from custody after he was convicted by the jury, but prior to his sentencing hearing. No evidence or testimony was taken on whether or not Jenkins was presently in custody or whether he had, in fact, fled. Nevertheless, the trial judge sentenced appellant in absentia to life without parole as an habitual offender. This was error. The sentence of life without parole as an habitual offender was also disproportionate for possession of .18 grams of cocaine and constitutes cruel and unusual punishment.

Finally, the trial court committed reversible error by granting an abstract instruction on the differences by direct and circumstantial evidence. This jury was misled by the confusion related to this instruction given that the burden of proof was different for the original charges in the indictment and the lesser-included charges submitted to the jury.

ARGUMENT

ISSUE NO. 1 THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICTS ON EACH COUNT.

In trial counsel's Motion for Judgment Notwithstanding the Verdict or in the Alternative, a New Trial, counsel specifically argued that the evidence was insufficient to

support the verdicts on each count. C.P. 12-13, R.E.15. The trial judge denied this motion. C.P. 14, R.E. 17. The trial judge also denied Jenkins's motion for a directed verdict at the close of the State's case, as well has his renewed motion for a directed verdict at the close of the defense case. Tr. 128-29, 172-73. This was error.

Review of a motion for a directed verdict tests the sufficiency of the evidence. *Bush v. State*, 895 So. 2d 836, 843 (¶15) (Miss. 2005). The court must determine whether the evidence shows "beyond a reasonable doubt that the accused committed the act charged and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction." *Id.* at 843 (¶16) (quoting *Carr v. State*, 208 So. 2d 886, 889 (Miss. 1968)). Taking the evidence in the light most favorable to the verdict, the question is not whether the court believes the evidence established guilt beyond a reasonable doubt but whether a rational trier of fact could have found all the elements beyond a reasonable doubt. *Bush*, 895 So. 2d at 844 (¶16) (quoting *Jackson v. Virginia*, 443 U.S. 307, 315 (1979)).

As set forth by the facts cited above, none of the officers who were present at the search testified as to what, if anything, was found on Marcus McCollough, the only other adult in the house at the time of the search. The prosecution failed to call Officer Hite to complete the chain of custody on Ex. S-11. No fingerprints were taken of anything at the scene. Tr. 54. Officer Wide first patted down Jenkins for weapons, but claimed he never patted down Jenkins's front pocket. Tr. 109. Although the actual shirt is not included in the

appeal record, all indications are it was an ordinary shirt with no distinguishing marking[4]. Tr. 64, 102-03, 169-70. Agent Jones testified "a couple" of other Clarksdale police officers were present during the search, including an Officer Bobo. Tr. 66. Yet these officers were also never called. A photograph of Jenkins wearing Ex. S-11 was never produced. Tr. 67.

The trial judge commented after all the evidence was presented that the State's evidence as to constructive possession of the larger amounts of cocaine and marijuana found in house was not strongest case he had ever seen, but nonetheless allowed the case to go to the jury. Tr. 174. It should be remembered that Jenkins was originally indicted on only one count of possession of cocaine and one count of possession of marijuana, the State lumping in all the drugs found in the house together with the drugs allegedly found in his pocket. C.P. 2. Trial counsel's objection to allowing the State a lesser included offense instruction regarding only the amount found in the pocket was overruled. Tr. 180. The State only requested a lesser included instruction after the court granted the defense a circumstantial evidence instruction based on the lack of direct evidence as to constructive possession of the larger amounts of drugs found in the house. Tr. 177-180.

The evidence was clearly insufficient to convict Jenkins as charged in the indictment. The court should not have allowed the case to go to the jury with a lesser included offense option, as the evidence was also insufficient to prove Jenkins possessed any drugs on his person. Jenkins's conviction and sentence should be reversed and rendered.

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[4] The shirt is partially seen in Ex. S-1(a).

ISSUE NO. 2. THE VERDICTS WERE AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE

In trial counsel's Motion for Judgment Notwithstanding the Verdict or in the Alternative, a New Trial, counsel again specifically argued that the jury's verdict was against the overwhelming weight of the evidence. C.P. 12-13, R.E.15-16. The trial judge also denied this motion. C.P. 14, R.E. 17. The trial judge erred in refusing to grant this motion.

"In determining whether a jury verdict is against the overwhelming weight of the evidence, this Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial." *Herring v. State*, 691 So.2d 948, 957 (Miss.1997). "Only in those cases where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal." *Id. See also Benson v. State*, 551 So.2d 188, 193 (Miss.1989); *McFee v. State*, 511 So.2d 130, 133-34 (Miss.1987).

As argued in Issue 3, *supra*, the State failed to sufficiently show the chain of custody of the shirt the prosecution alleged Jenkins was wearing when arrested. There was another adult male in the house at the time of the search, Marcus McCollough. Tr. 45, 61, 151. Although there was testimony that he was searched, the prosecution provided no other information about him. Tr. 48. It is unknown what clothing he wore, what, if any, drugs were found on him, or even if he was arrested. Without the testimony of Officer Hite, it is impossible to know beyond a reasonable doubt that the shirt Jenkins was wearing when

arrested was actually Ex. S-11. Without that testimony, the case, at least regarding the drugs allegedly found in Jenkins's pocket, should not have gone to the jury. Breaks in the chain of custody go to the weight of the evidence. *Robinson v. State*, 758 So.2d 480 (¶31) (Miss. App. 2000). Verdicts based on such weak evidence should not be allowed to stand. *Hawthorne v. State*, 883 So.2d 86 (¶13)(Miss. 2004). Jenkins should be granted a new trial.

ISSUE NO. 3 THE TRIAL JUDGE ERRED IN ADMITTING STATE'S EXHIBIT 11 WITHOUT A SUFFICIENT CHAIN OF CUSTODY.

During the trial, the State presented evidence that Jenkins was wearing a shirt with a pocket when he was arrested. Tr. 50, 57-58, 64. MBN Agent Jones testified that when he patted Jenkins down, he felt something that in his experience told him was a controlled substance in the pocket. Tr. 66. Although Bridges was called to take a picture of the contents of the shirt pocket, no picture was taken of Jenkins wearing this shirt. Tr. 67. Jenkins subsequently took the stand and denied wearing such a shirt. Tr. 154-55. The State failed to produce the officer who allegedly took the shirt from Jenkins on the night he was arrested to place it in the jail property bin. Tr. 123, 126-27. When the State then attempted to admit the shirt, Ex. S-11, into evidence, trial counsel properly objected.

> BY MR. SHACKELFORD: I don't think there's any question that this is the shirt that was in the evidence – that he retrieved from the evidence locker. There is no – still nothing to differentiate this shirt from any other shirt of that make and size. I mean he can identify – that's like saying that that's the same flag. There are a lot of flags like it. Without some identifying notation, there is no way that he can say that.
>
> BY MR. KIRKHAM: Your Honor, we've tracked that shirt from the defendant's possession when he was arrested on the day of the crime to the jail where he was arrested. We've had testimony as to the procedures that the

> Coahoma County jail uses to take inmate's property and put it in the property room, and we have tracked it to Ricky Bridge's hands from Sergeant Leroy Austin's hands at the Coahoma County Jail to this courthouse today. Every single link in that chain, from the date of the arrest to this instant, has been tracked by testimony, by documents in the form of the inmate movement sheet, Your Honor, and provided pictures submitted on the day of the – the State would allege on the day of the arrest, showing the pocket of the shirt being checked.
>
> BY MR. SHACKELFORD: Judge, if the Court looked at the pocket on that shirt, I don't believe even this gentleman, counsel, on the witness stand could say that he could identify it. However, there is a very big gap here. This witness, Leroy Austin, did not take this shirt from him. He only retrieved it. He did not take it from him. If they want to get this shirt in, they had to bring somebody in to say, "Okay. We took it off of him," and track it back to that evidence bin.
>
> BY MR. KIRKHAM: Your Honor, we have testimony as to the standard operating procedure for every person who is processed into that jail, and with the exception of their underwear, every piece of clothing is taken from every inmate who is processed into that jail. An inmate movement sheet is assigned, just as it was assigned in this case, and that property is tracked to a specific bin.
>
> BY THE COURT: All right. I've heard enough. Y'all go back.

Tr. 169-70.

Appellant is aware that the trial court judge is given significant discretion in admitting evidence over chain of custody objections. *Nalls v. State*, 651 So.2d 1074, 1077 (Miss.1995). However, Jenkins's testimony, along with the failure to call Officer Hite, or even to explain Hite's absence, clearly gives rise to a reasonable inference of probable tampering or substitution of the evidence. In this instance, the trial judge abused his discretion in admitting Ex. S-11 over trial counsel's objections. This was extremely prejudicial to Jenkins's case, as the officers testified the individual with the shirt with the front pocket had

the drugs. Without proof beyond a reasonable doubt that Jenkins was wearing the shirt with a pocket, no rational juror could have voted guilty. Without the chain of custody firmly established, proof beyond a reasonable doubt was lacking.

The test of whether there has been a proper showing of the chain of possession of evidence is whether there is any reasonable inference of likely tampering with or substitution of evidence. *Brooks v. State*, 761 So.2d 944, (¶18) (Miss.App. 2000), citing *Gibson v. State*, 503 So.2d 230, 234 (Miss.1987). The burden to produce evidence of a broken chain of custody is on the defendant. *Id.* citing *Hemphill v. State*, 566 So.2d 207, 208 (Miss.1990). Jenkins created at least a reasonable inference of tampering or substitution of the evidence by his testimony under oath, requiring the State to complete the chain. Sergeant Hite could have been called to testify as to what Jenkins was wearing at the time of his booking. There is no evidence to indicate whether or not McCollough was booked at the same time or if he was wearing a shirt with a pocket.

Sergeant Austin even agreed that his records did not indicate if Jenkins could have had a tank top on.

> Q. So this man could have had a pair – as far as you know and as far as your records are concerned, this man could have had a tank top and a pair of britches on, and there wouldn't be any records to show otherwise, would it?
>
> A. No.

Tr. 127.

Without any inventory procedures in place or the testimony of Sergeant Hite, there can be no presumption of regularity in the procedure used by the Clarksdale Police Department.

Neither a trial court, nor reviewing court, should blindly rely on the, perhaps mislabeled, "presumption of regularity." There must be a showing of reliability in the circumstances surrounding the handling of the evidence sought to be introduced for the presumption of regularity to arise. In *Nix v. State*, 276 So. 2d, 652, 653 (Miss. 1973), the Mississippi Supreme Court looked to *Gallego v. United States*, 276 F.2d 914 (9th Cir. 1960), where it was explained that a court must review, among other things, "the circumstances surrounding the preservation and custody" of the evidence.

Looking at the circumstances in the present case, there was not enough reliable evidence to create a presumption of regularity. This is not a case, such as *Ellis v. State*, 934 So.2d 1000 (Miss.2006), where there is perhaps a simple, excusable, gap in the chain of custody. In the case *sub judice*, there was never a reason given for Sergeant Hite's absence as a witness. There were no initials on the shirt or any identifying factors to indicate it came from Jenkins. There was nothing reliable for the trial court to conclude that the second link in the chain was reliable nor that the item was what it was represented to be as required by Miss. R. Evid. 901(a). When Jenkins testified that was not the shirt he was wearing, the State had an obligation to present a complete chain of custody to the jury.

In *Butler v. State*, 592 So.2d 983, 984-85 (Miss.1991), the Court explained:

> What must be provided as predicate is proof that will "support a finding" that the proffered item is what it is said to be . . . Whether the evidence will "support a finding" ... of the fact beyond a reasonable doubt. ...[under the] same notions of legal sufficiency as [a motion for] judgment of acquittal notwithstanding the verdict . . . [there is] a threshold to admissibility testimony along the several links of the chain of the manner of safekeeping and that there has been no change or

> alteration of the object, see *Monk v. State*, 532 So.2d 592, 599 (Miss.1988)... **the [state] must satisfy the trial court that there is no reasonable inference of material tampering with or (deliberate or accidental) substitution of the evidence.** [cites omitted]. If there is a reasonable inference of tampering or substitution, the proponent's proof is insufficient "to support a finding that the matter in question is what its proponent claims." This is so because, in such a case, a fair-minded jury may not reasonably have found the fact beyond a reasonable doubt. [emphasis added].

The above authority plus the lack in this case of proof that Ex. S-11 was not substituted on the night in question, supports the just conclusion that the trial judge abused his discretion in allowing Ex. S-11 into evidence without testimony from Sergeant Hite. It is entirely reasonable that the shirts were accidentally placed in the wrong bin, especially if McCollough was processed at the same time.

There is no point of having a chain of custody requirement if the State can skip crucial links in the chain without fear of reversible. The appellant testified under oath that Ex. S-11 was not the shirt he was wearing. He created a reasonable doubt the State was required to address by completing the chain of custody. They failed to do so. The trial court abused its discretion and Jenkins is entitled to a new trial.

ISSUE NO. 4 TRIAL COURT IMPROPERLY SENTENCED APPELLANT IN ABSENTIA.

On October 9, 2007, the trial court held a sentencing hearing without Jenkins being present. The prosecution represented that Jenkins had escaped from the custody of the sheriff sometime after his conviction on February 2, 2007. Trial counsel objected to proceeding with sentencing without Jenkins being present. Supplemental Volume 1, Tr. 4-6.

Without taking any evidence or testimony on whether or not Jenkins was no longer in custody, the court stated into the record that it had been told by law enforcement that Jenkins had escaped.

> BY THE COURT: All right. Your objection will be noted.
>
> The Court will further add that since the – shortly after the jury's rendering of their verdict in this criminal case, the Court was advised by members of law enforcement, including members of the Coahoma County Sheriff's Department, that Mr. Jenkins and, I think, one or two other individuals had escaped the custody, and since such time, the Court has been presented and has signed various orders and search warrants with affidavits attached thereto as concerns efforts by law enforcement to locate and obtain custody of Mr. Jenkins. It's the Court current understanding all those efforts at this time have been to no avail, and not withstanding the Defendant's objection, the Court is going to proceed with the sentencing here today on the basis of the Court's understanding and the Court's knowledge, as represented by officers of the Sheriff's Department of Coahoma County, as well as the District Attorney's Office, that Mr. Jenkins is not in custody but voluntarily left the custody of the Sheriff's Department, and as such, has voluntarily waived his right to be present for these proceedings.

Supplement Volume 1, Tr. 6-7.

The trial judge erred in sentencing Jenkins in absentia. There was insufficient evidence presented at the hearing to prove that Jenkins had, in fact, escaped. Jenkins suffered prejudice by being unavailable to dispute any of the prior convictions used to enhance his sentence, or to provided the court any mitigation evidence. As such, he is now serving life without parole for possession of .18 grams of cocaine.

This Court has held that it is not error to sentence a defendant who intentionally absents himself from trial. *Carmichael v. State*, 832 So.2d 568 (¶13) (Miss.App. 2002). However, the appellant would submit that there was no evidence or testimony presented to

prove Jenkins had fled custody. Trial counsel stated into the record that he did not know Jenkins's whereabouts and assumed he was in custody since he had no information to the contrary. Supplemental Volume 1, Tr. 4-6. The trial could should not have proceeded with sentencing until some proof was presented that Jenkins voluntarily absented himself from trial. This was a violation of appellant due process rights under the Fourteenth Amendment to the United States Constitution. The case should at least be remanded for resentencing to allow appellant's presence.

ISSUE NO. 5. JENKINS'S SENTENCE OF LIFE WITHOUT PAROLE AS AN *HABITUAL OFFENDER* FOR POSSESSION OF ESSENTIALLY A MISDEMEANOR AMOUNT OF COCAINE IS DISPROPORTIONATE TO THE CRIME AND CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

It seems as if the trial court was unfairly harsh on Jenkins because it believed Jenkins had fled custody, and because he was not convicted by the jury of possessing the larger amounts of drugs found in the house. Jenkins was given a life without parole sentence for possessing eight hundreds (.08) of a gram above what can be charged as a misdemeanor under Miss. Code Ann. §41-29-139(c)(1)(A) (Supp. 2005).

As alleged in the indictment, the prosecution submitted evidence that Jenkins had two prior felonies, one state conviction in 1995 for robbery (Supplement Ex. S-5), and one 2004 federal conviction for possessing a firearm as a convicted felon (Supplemental Ex. S-1 (a) and (b) and S-2(a) and (b)). As argued in Issue 4, *infra*, Jenkins was not present and no mitigation evidence was presented. The trial court conducted no proportionality review. Appellant asserts that a life sentence without parole for possessing .18 grams of cocaine is

unconstitutionally too severe and clearly disproportionate to the offense. U.S. Const. Eighth and Fourteenth Amendments, Miss. Const. Art. 3 § 28.

The United States Supreme Court in *Solem v. Helm*, 463 U.S. 277, 292 (1983), set out three factors for courts to consider when conducting a proportionality analysis. The criteria are:

(1) the gravity of the offense and the harshness of the penalty;

(2) the sentences imposed on other criminals in the same jurisdiction; and

(3) the sentences imposed for commission of the same crime in other jurisdictions.

In *Solem*, the Court held a life sentence without parole to be unconstitutional for the crime of writing a $100 bad check on a nonexistent bank account, even though the defendant had been convicted of six prior felonies including three for burglary. *Id.*

The Mississippi Supreme Court has consistently applied *Solem* in reviewing the imposition of habitual sentences. The case of *Clowers v. State*, 522 So.2d 762, 764 (Miss.1988), is a good example. In *Clowers*, the defendant was an habitual offender with a new conviction of forging a $250 check. As an habitual offender, Clowers was subject to the mandatory maximum sentence of fifteen years without parole. *Id.* The trial court imposed a sentence of less than fifteen years on the grounds that the mandatory maximum sentence would be disproportionate to the crime. *Id.*

The *Clowers* court affirmed the trial court, acknowledging that "a criminal sentence [even though habitual] must not be disproportionate to the crime for which the defendant is being sentenced." *Id.* at 765. Also, even though a trial judge may lack the usual discretion

in sentencing an habitual offender, it "does not necessarily mean the prescribed sentence meets federal constitutional proportionality requirements." *Id.* See also *Hoops v. State*, 681 So.2d 521, 538 (Miss. 1996).

In *Oby v. State*, 827 So.2d 731 (Miss.App. 2002), where a violent habitual drug dealer's life sentence was affirmed as being proportionate, the Court reiterated the important point that in a *Solem* review, a "correct proportionality analysis for a habitual offender sentence does not consider the present offense alone, but within the habitual offender statute." In other words, a reviewing court, and the trial court, should review an offender's past offenses together with the present offense.

In *McGruder v. Puckett*, 954 F.2d 313, 317 (5th Cir.1992), the court recognized the *Solem* three-part test be applied "when a threshold comparison of the crime committed to the sentence imposed leads to an inference of gross disproportionality." The violent habitual defendant in *McGruder* was sentenced to life imprisonment after his last offense of auto burglary. McGruder's prior convictions were armed robbery, burglary, escape, and auto burglary, and the Fifth Circuit held that McGruder's life sentence was not grossly disproportionate to his current offense. The *McGruder* court made it clear that an habitual sentence analysis is based on the sentence rendered in response to the severity of the current offense taking the prior offenses into consideration secondarily.

Jenkins's criminal record, as evidenced by what is included in the record, was not nearly as bad as McGruder's. Jenkins's prior offenses were purse snatching and being in

possession of a firearm. His triggering offense was possession of .18 grams of cocaine, barely above what can be charged as a felony.

In *Rummel v. Estelle*, 445 U.S. 263, 267 (1980), the defendant had two prior felonies of credit card fraud and uttering a forgery, and was convicted of a third felony of false pretenses. Rummel was sentenced to life in prison, a mandatory recidivist sentence for non-violent offenders. The Court held that Rummel's sentence was not unconstitutionally disproportionate to the offense "even though the total loss from the three felonies was less than $250," in part because he was eligible for parole after twelve (12) years. Jenkins has no hope for parole.

In *Bell v. State*, 769 So.2d 247, (¶8-16) (Miss. App. 2000), a drug dealer was tried and sentenced as a non-violent habitual offender. The trial judge reviewed Bell's prior convictions and afforded Bell the opportunity to present mitigating evidence. According to the court in *Bell*, the trial judge is required to justify, on the record, any sentence that appears harsh or severe for the charge. Citing *Davis v. State*, 724 So. 2d 342 (¶10) (Miss. 1998), the *Bell* Court recognized that, "[i]n essence, the Mississippi Supreme Court set forth a requirement that the trial judge justify any sentence that appears harsh or severe for the charge." *Bell*, 769 So. 2d at ¶15.

The previous convictions of Bell were acknowledged by the trial judge at the sentencing hearing prior to Bell receiving his habitual sentence. The *Bell* court "considered the gravity of the offense with the harshness of the sentence before imposing the thirty year sentence" which was a proper use of "the broad discretionary authority granted to it." Bell's

sentence was not seen as disproportionate, so no further review under *Solem* was conducted. *Id.* at ¶16.

In the present case, Jenkins was convicted of possession of a small amount of cocaine. There is no indication from the record he was a drug dealer of any kind. Yet, without commenting on the apparent harshness of the sentence, the court sentenced Jenkins, in accordance with Miss. Code Ann. §99-19-83, to life without the possibility of parole in Count I, which the jury found was possession of .18 grams of cocaine.

Applying the *Solem* test here, it is clear that the gravity of possession such a small amount of cocaine is petty. A *Solem* analysis leads to the legally sound conclusion that Jenkins's sentence is patently unconstitutionally disproportionate to his offense and should be vacated. If the Court does not reverse the conviction altogether, at a minimum, Jenkins's case should be remanded for resentencing, with him present, to include a proportionality hearing is required by *Bell, supra.*

ISSUE 6: THE TRIAL JUDGE COMMITTED REVERSIBLE ERROR GRANTING AN ABSTRACT INSTRUCTION ON EXAMPLES OF DIRECT AND CIRCUMSTANTIAL EVIDENCE.

The trial judge erred in instructing the jury, over defense objection, on the differences between direct evidence and circumstantial evidence, which included examples of the two.

> BY THE COURT: I'm looking at S-6.
>
> BY MR. SHACKELFORD: I don't think I have a copy of that. Yes, I do. I'm going to object to these examples, Judge. I believe that goes beyond the law.
>
> BY THE COURT: What says the State?

> BY MR. KIRKHAM: Judge, I believe this is a common instruction with a common set of examples that are used all the time to demonstrate the difference between direct evidence and circumstantial evidence. Sometimes they say it's snowing. Sometimes they say it's raining. But –
>
> BY THE COURT: I believe it's accurate. I'm going to give S-6.

Tr. 191-92.

The Mississippi Supreme Court has expressed concern in the past on how to define circumstantial evidence. Justice Robertson, in his concurrence in *Mack v. State*, 481 So.2d 793, 796-797 (Miss.1985), conveyed his concern about the difficulty of defining "circumstantial evidence."

> In *Keys* we defined circumstantial evidence as
>
> > evidence which, without going directly to prove the existence of a fact, gives rise to a logical inference that such fact does exist.
>
> Having no illusions about the matter, we made clear that we regarded this as merely "the least inadequate definition we can provide". The problem is that evidence in criminal cases does not fit into two nice, neat, mutually exclusive categories: direct and circumstantial. There are too many shades of gray. Most trials are full of evidence from one end of the spectrum to the other. Furthermore, circumstantial evidence like beauty is in the eye of the beholder. Suffice it to say that the perceptions of the members of this Court vary from judge to judge.

Id. citing *Keys v. State*, 478 So.2d 266, 268 (Miss. 1985).

The State's instruction goes far beyond the definition cited by the unanimous court in *Keys*. In fact, the *Keys* definition is not even included in Instruction C-11. C.P. 33. It was error to grant such an abstract instruction on the law. Adding to the error was the confusion the jury no doubt felt in having to consider circumstantial evidence for the original charge

and direct evidence for the lesser-included charge. Granting an abstract instruction is reversible error when it is apparent the jury was misled. *Kitchens v. State*, 300 So.2d 922, 925 (Miss. 1974), citing *Kidd v. State*, 258 So.2d 423, 428-29[5] (Miss. 1972).

The examples given in the instruction may have been appropriate for argument, but not for instruction to the jury by the court. The granting of this abstract instruction was reversible error.

CONCLUSION

Given the facts presented in the trial below, Decarlos Jenkins is entitled to have his convictions reversed and remanded for a new trial. Jenkins is serving a life without parole sentence for possession of less than a gram of cocaine.

Respectfully submitted,
MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Decarlos Jenkins, Appellant

By: _____
Leslie S. Lee

[5] The *Kidd* case involved an abstract instruction on homicide.

CERTIFICATE

I, Leslie S. Lee, do hereby certify that I have this the 3rd day of December, 2007, mailed a true and correct copy of the above and foregoing Brief Of Appellant, by United States mail, postage paid, to the following:

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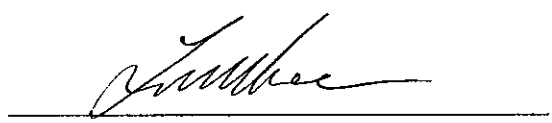

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