IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2007-KA-00445-COA

JAMES RILEY, a/k/a Boo-Lu — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

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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. James Riley

THIS 3rd day of August 2007.

GEORGE T. HOLMES
Mississippi Office of Indigent Appeals
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STATEMENT OF THE CASE

This appeal proceeds from a judgment of conviction for two counts of "trafficking in stolen firearms" under Miss. Code Ann. §97-37-35(3)(c)(2006 Supp.) against James Riley and two resulting concurrent sentences of 30 years each out of the Circuit Court of Attala County, Mississippi following a trial held March 6, 2007, Honorable Joseph H. Loper, Jr., Circuit Judge, presiding. James Riley is presently incarcerated with the Mississippi Department of Corrections.

FACTS

There was a rash of house burglaries in Holmes and Attala Counties in July and August 2006. [T. 28-62, 74-75]. At Riley's trial, there was testimony from several of the house burglary victims who described how they discovered their homes had been burgled. *Id.* These witnesses identified photographs of firearms and other matters

concerning the break-ins. *Id.* In the investigation of the burglaries, the Attala County Sheriff's Office questioned Martin Ickom and James Riley, the appellant here. [T. 75-77].

James Riley denied any involvement; but, he did state that he knew who had purchased some stolen weapons. [T. 76-77, 107-08] The investigation led to a person named William Robinson, who was found to be in possession of nine stolen guns. *Id.* Robinson testified he obtained the guns from Ickom and Riley on two occasions. [T.64-67].

Ultimately, Ickom and Riley were indicted separately. Ickom was only charged with two counts of house burglary and one count of business burglary. Riley, on the other hand, was indicted for two counts of house burglary, one count of business burglary and two additional counts of trafficking in stolen firearms. [R. 1; T. 104] There is nothing in the record that Robinson was ever charged in this case.

Robinson testified Ickom and Riley first came to him on August 13, 2006 and offered to sell three firearms. [T. 64-66]. Robinson said he told Riley that he was short on money and only had $125. According to Robinson, Riley said he needed to go check with his "friend" Ickom who was outside waiting in Ickom's car, about the price Robinson was offering. *Id.* Robinson said Ickom gave the okay, and Robinson purchased, or "pawned" three weapons for $125.00. *Id.*

Three days later on August 16, 2006, Robinson testified that Ickom and Riley

came back and Robinson purchased five more guns for $125.00. [T. 66-67]. However, during this second time, Ickom handled all the negotiations about price and the delivery of the weapons out of Ickom's automobile trunk. [T. 67, 72]. Robinson admitted to purchasing eight weapons; but, the investigation determined that he had at least one more for a total of nine (9). [T. 76-77].

Ickom, who admitted being a thief his whole life, had the following prior felony convictions: six auto burglaries, one house burglary and two business burglaries. [T. 101-03]. Ickom pled guilty in his separate case to house burglary and business burglary and received a sentence totaling thirty-two (32) years. [T. 93]. Ickom said he made no deal to testify in Riley's trial; however, Ickom was never charged with selling the stolen weapons and his sentence was thirty-two (32) years instead of a potential fifty-seven (57) years, so he did receive some benefit from testifying against Riley. *Id.*

Ickom, in his testimony, placed all the blame on Riley and accepted no responsibility himself. [T. 84-95]. Ickom described how Riley allegedly broke into the several houses while Ickom was merely at the scene, standing around or being a lookout. The jury did not believe Ickom as to Riley being involved any of the relevant burglaries; because, the jury acquitted Riley of all of the burglary counts I, II and III. [R. 24-27].

Investigating officers revealed that Ickom's girlfriend and mother received a considerable amount of jewelry; and, there were stolen items found in Ickom's automobile.[T. 79-81, 93]. Riley' house was never searched. [T. 112].

Immediately after the trial, Riley was sentenced to two concurrent 30 year terms of imprisonment. [R. 26-27; T.143-44] The court gave no explanation for the sentence. *Id.* There is nothing in the record indicating any prior convictions of Riley.

SUMMARY OF THE ARGUMENT

Miss. Code Ann. §97-37-35(3)(c)(2006 Supp.) is unconstitutional because it is vague, it creates illegal presumptions against a defendant and provides for cruel and unusual punishment incongruous with the seriousness of the underlying offense. The conviction is not supported by competent evidence. James Riley's sentence is unconstitutionally disproportionate to the alleged criminal conduct, and he was irreparably prejudiced by an improper jury instruction.

ARGUMENT

ISSUE NO. 1: WHETHER MISS. CODE ANN. §97-37-35(3)(c) (2006 Supp.) IS UNCONSTITUTIONAL?

Riley was indicted in Counts IV and V of the indictment in this case under Subsection (3)(c) of Miss. Code Ann. §97-37-35(2006 Supp.).[1] The appellant's position

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[1]Miss. Code Ann. §97-37-35. Stolen firearms.

(1) It is unlawful for any person knowingly or intentionally to possess, receive, retain, acquire or obtain possession or dispose of a stolen firearm or attempt to possess, receive, retain, acquire or obtain possession or dispose of a stolen firearm.

(2) It is unlawful for any person knowingly or intentionally to sell, deliver or transfer a stolen firearm or attempt to sell, deliver or transfer a stolen firearm.

(3) Any person convicted of violating this section shall be guilty of a felony and shall be punished as follows:

is that §97-37-35(3)(c) is unconstitutional for four reasons.

First, §(3)(c) is vague as to the elements. It requires no *mens rea*, no criminal intent, no *scienter* or knowledge that the weapons are stolen, nor does it require any criminal intent to sell the additional one or two weapons which triggers the enhancement.

Secondly, §(3)(c) of the statute is vague as to the number of weapons required for enhanced punishment.

Thirdly, by increasing an offense from mere possession to trafficking based on the number of weapons, the statute creates a "mandatory rebuttable presumption" of intent to trafficking in stolen firearms that reduces the state's burden of proof and precludes a jury from deliberating the defendant's criminal intent, *vel non*, to be a trafficker of stolen weapons.

Fourthly, §(3)(c) provides for sentences which are grossly disproportionate to the criminal conduct sought to be punished and or deterred.

(a) For the first conviction, punishment by commitment to the Department of Corrections for five (5) years;
(b) For the second and subsequent convictions, the offense shall be considered trafficking in stolen firearms punishable by commitment to the Department of Corrections for not less than fifteen (15) years.
(c) For a conviction where the offender possesses two (2) or more stolen firearms, the offense shall be considered trafficking in stolen firearms punishable by commitment to the Department of Corrections for not less than fifteen (15) years.

(4) Any person who commits or attempts to commit any other crime while in possession of a stolen firearm shall be guilty of a separate felony of possession of a stolen firearm under this section and, upon conviction thereof, shall be punished by commitment to the Department of Corrections for five (5) years, such term to run consecutively and not concurrently with any other sentence of incarceration.

Vagueness as to Mens Rea

As written, §(3)(c) of the subject statute can be read to make it a crime to sell stolen guns whether a person knows they are stolen or not. This knowledge of the firearms being stolen will be referred to as "guilty knowledge" for convenience sake. "Guilty knowledge", in the context of receiving stolen property, includes receiving the stolen property under circumstances that would put a reasonable person on notice that the goods are stolen. Miss. Code Ann. §97-17-70 (2006 Supp.). Since the present statute authorizes criminal prosecution without "guilty knowledge", i. e. without *mens rea*, it is an illegal strict liability criminal statute which runs afoul of the Fifth and Sixth and Fourteenth Amendments to the U. S. Constitution and Article 3 §14 and 26 of the Mississippi Constitution.

The word "knowingly" in the first part of the statute does not cure the vagueness. It is not clear whether "knowingly" includes "guilty knowledge". A person can knowingly possess or sell something, but not know the object's lineage. This arises in civil matters so much so that the definition of "a good faith purchaser is [specifically] 'one who has in good faith paid a valuable consideration *without notice* of ... adverse rights in another.'" [emphasis added] *Harrell v. Lamar Co., LLC*, 925 So.2d 870, 876 (Miss. App. 2005).

The necessity for requiring the state to have to prove the element of "guilty knowledge" can perhaps best be seen by comparing Miss. Code Ann. §97-37-35 (2006

Supp.), the statute here, with our receiving stolen property statute §97-17-70(1)(2006 Supp.), which states:

> (1) A person commits the crime of receiving stolen property if he intentionally possesses, receives, or retains or disposes of stolen property knowing that it has been stolen or having reasonable grounds to believe it has been stolen, unless the property is possessed, received, retained or disposed of with intent to restore to the owner.

According to *Washington v. State,* 726 So.2d 209, 212-13 (Miss. App. 1998), the statutory elements to be proven for the crime of receiving stolen property are "(1) the possession, receipt, retention or disposition of personal property (2) stolen from someone else **(3) with knowledge or a reasonable belief that the property is stolen.**" [emphasis added] No crime is committed without "guilty knowledge". *Id.* Since, the section of the statute in the present case under which Riley was prosecuted is silent as to "guilty knowledge" the statute is unconstitutionally vague. The statute does not even define what the term "firearm" includes.

In *Davis v. State,* 806 So.2d 1098, 1102 (Miss. 2001) the court declared Miss. Code Ann. §97-41-1 (1972)[2], a cruelty to animals law, to be unconstitutionally vague due to a lack of *mens rea* or a clear identification of criminal intent as an element of the

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Miss. Code Ann.§ 97-41-1. Cruelty to living creatures

If any person shall override, overdrive, overload, torture, torment, unjustifiably injure, deprive of necessary sustenance, food, or drink; or cruelly beat or needlessly mutilate; or cause or procure to be overridden, overdriven, overloaded, tortured, unjustifiably injured, tormented, or deprived of necessary sustenance, food or drink; or to be cruelly beaten or needlessly mutilated or killed, any living creature, every such offender shall, for every offense, be guilty of a misdemeanor.

offense. A statute is unconstitutionally vague if it does not set forth the elements of the criminal offense "with sufficient definiteness such that a person of ordinary intelligence has fair notice of what conduct is prohibited." *Id.*

The *Davis* court found there was no way for a reasonable person to discern what conduct was prohibited by the statute. An animal owner could be prosecuted for cruelty if they tried to treat or heal their own animal themselves and not involve a veterinarian. *Id.* The animal owner could be violating the statute, subjecting themselves to criminal prosecution, and not know it. Here, with the trafficking in stolen firearms statute as written, a person could be violating the statute thinking they are possessing or selling legitimate guns, but which are in reality stolen, and thus unknowingly violate the statute.

In *Lewis v. State,* 765 So. 2d 493, 500 (Miss. 2000), the court struck down a portion of a controlled substance statute (Miss. Code Ann. § 41-29-139(f) (Supp. 2006)) which provided for mitigation to offenders who cooperated with law enforcement. This is referred to as the "self-help" provision. There were "no specific guidelines or standards" provided in the statute to determine whether a person actually aided in a prosecution or not. The *Lewis* court found the "self-help" aspect of the statute unconstitutionally vague since its lack of clarity could lead to "arbitrary and capricious prosecution" violating the due process clause of the Fourteenth Amendment. *Id.* The same conclusion is required for §(3)(c).

Vagueness As To Quantity of Weapons

Subsection (3)(c) is also unclear as to the number of stolen firearms required for the increase in sentencing, and:

> (c) For a conviction where the offender possesses two (2) or more stolen firearms, the offense shall be considered trafficking in stolen firearms punishable by commitment to the Department of Corrections for not less than fifteen (15) years.

Applying the test from *Davis, supra,* an average person cannot determine whether (3)(c) increases the sentence for possessing or selling one gun while possessing two more or for selling or possessing one gun while possessing one more, which would also be a total of two firearms. Moreover, without "objective standards" and "legislative guidance" there is an acute danger of "arbitrary and capricious judgment" by courts interpreting the law and rendering sentence. The risk of arbitrary and capricious interpretation and application of §(3)c) extends to law enforcement and prosecutors in prosecuting offenses as well. *Id.* See also *Washington v. State*, 478 So.2d 1028 (Miss.1985).

A statute that is so indefinite that it "encourages arbitrary and erratic arrests and convictions" and which fails to give adequate notice to potential offenders is void for vagueness. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 92 S.Ct. 839, 843, (1972).

Shifting of Burden, Increasing Sentence Without Jury Deliberation

The statute here is also unconstitutionally vague, because, although the crime is called "trafficking in stolen firearms", the statue punishes mere possession of extra stolen firearms rather than the actual sale or trafficking. The statute does not state that the possession of the extra weapons has to be wilful, knowing, or that the extra weapons even have to be possessed with the intent to sell.

The substantial increase in sentence for mere possession without proof of intent to traffic needing to be proved by the state not only wrongfully reduces the state's burden of proof, it also illegally increases punishment without affording a defendant due process of a jury deliberating on intent to sell or traffic.

Subsection (3)(c), therefore, creates an improper presumption that a person who merely possess two or more stolen guns, knowingly or unknowingly, is a weapons trafficker without the state having to prove any intent to sell the extra guns.

In Riley's case, the jury was allowed to deliberate if the state met a burden to prove a requisite number of weapons; however, Riley's jury was not allowed to deliberate, as the statute does not require it, whether Mr. Riley was indeed a stolen weapons trafficker, which triggered the increase in sentence. [R. 9-10]. The presumption placed a burden on Riley to put on a defense. Otherwise, the presumption created by the number of weapons allegedly involved unconstitutionally guarantees conviction.

In *Sandstrom v. Montana*, 442 U.S. 510, 523, 99 S.Ct. 2450, 2459, 61 L.Ed.2d 39,

50 (1979), the defendant was charged with reckless homicide. The jury was instructed that, if they found the "defendant was under influence of alcohol at time of alleged violation, such evidence should be presumed to be evidence of a reckless act unless disproved by evidence to contrary." The Supreme Court found that it is error to give a jury instruction that creates an unconstitutional "mandatory rebuttable presumption" that "shifts the burden of persuasion to the defendant", because such presumptions relieve the state of the requisite burden to prove each element of the offense beyond a reasonable doubt. *Id.* This is because such "conclusive presumptions conflict with the overriding presumption of innocence ... and they invade the fact-finding function" of the jury. *Id.*

Application of the *Sandstrom* principle in an analogous set of facts to those before this Court now can be found in *People v. Miles*, 800 N. E. 2nd 122, 126-27 (Ill. App. 2003). In *Miles*, a defendant was charged with possession of six counterfeit credit cards under a statute which created a presumption of intent to defraud if a defendant possessed more than two.

As in the present case, in *Miles*, mere possession of something created a mental *animus* which increased punishment without the state having to prove even a scintilla of scienter or criminal intent. Following the requirements of *Sandstrom*, *supra*, the Illinois court reversed explaining that "the State was effectively relieved of its burden of proving defendant's intent to defraud beyond a reasonable doubt" which shifted a burden to the defendant to prove either an unknowing or benign possession of the counterfeit cards. 800

N. E. 2nd 122, 126-27. It was the shifting of the burden of proof which the Illinois court found to always be unconstitutional. *Id.*

The *Sandstrom* principle is no stranger to the courts in Mississippi. In *Edwards v. State*, 469 So. 2d 68, 71 (Miss. 1985), our Supreme Court reversed a food stamp fraud conviction under a statute which created an mandatory presumption of intent to defraud for failing to notify authorities of a change in circumstances. The *Edwards* court explained that any kind of presumption "must not undermine the fact finder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt." The factual similarities between *Edwards* and this case compel this court to now declare §(3)(c) unconstitutional and reverse and render Riley's conviction.

In *U.S. v. Booker*, 543 U.S. 220, 125 S.Ct. 738 (2005) the Supreme Court struck down the mandatory application of the U. S. Sentencing Guidelines under 18 U.S.C.A. § 3553(b)(1), because the guidelines allowed a sentencing court to make factual finding affecting sentencing rather than a jury. The *Booker* court relied on the previous decision of *Blakely v. Washington*, 542 U.S. 296, 301, 124 S.Ct. 2531, 2536 (2004) which confirmed a criminal defendant's fundamental right to have a jury deliberate and find, beyond a reasonable doubt, the existence of "any particular fact " essential to punishment. 542 U.S., at 301, 124 S.Ct., at 2536. The Court held that right is absolute whenever a judge seeks to impose a sentence that is not solely based on "facts reflected in the jury

verdict or admitted by the defendant". *Id.* See also *Ring v. Arizona,* 536 U.S. 584, 122 S. Ct. 2428 (2002); *Apprendi v. New Jersey,* 530 U.S. 466 , 120 S. Ct. 2348 (2000).

The state here could argue that the number of weapons was presented to the jury for their determination in Jury Instruction 2 (S-1), thus satisfying *Booker*. [R. 9-10]. However, that position misses the gravamen of the appellant's argument that it is the presumption of guilty knowledge of or the intent to sell the stolen weapons which makes the offender a trafficker and it is this knowledge and/or criminal intent which the jury never gets to consider which makes §(3)(c) offensive to due process, and which requires reversal here as a matter of law.

Cruel and Unusual Punishment

Subsection (3)(c) provides for open ended sentencing with a minimum of fifteen (15) years. For open ended statutes, like the one being considered by the Court now, the maximum is life. *United States v. Fields*, 923 F.2d 358, 362 (5th Cir.), cert. denied, 500 U.S. 937, 111 S.Ct. 2066, 114 L.Ed.2d 470 (1991) The statute under consideration is unconstitutionally disproportionate, authorizing absurdly cruel and unusual punishment; because, a first offender could merely possess two or three stolen pistols and be sentenced to die in prison.

Cruel and unusual punishment is prohibited by the Eighth and Fourteenth Amendments to the United States Constitution and Article 3 §28 of the Mississippi

Constitution. As for the statute at issue, going from five (5) years under Subsection (a) to a potential life sentence is giant leap of lunar proportions for the addition of one gun. It would be akin to increasing the sentence for possession of a controlled substance under Miss. Code Ann. §41-29-139 (2006 Supp.) from less than ten (10) years to a potential life sentence if the offender possessed the drugs with intent to distribute. One conclusion which could be reached is that possessing three stolen pistols is worse than selling one hundred kilograms of pure heroin. Subsection (3)(c) clearly lacks thoughtful proportionality in its sentencing scheme. A comparison of the present statute with the elements of "drug trafficking" in §41-29-139 (g)(2) (2006 Supp.)[3] reveals just how poorly drafted §(3)(c) is.

Ostensibly, Miss. Code Ann. §97-37-35(3)(c) (2006 Supp.) was passed in an attempt to stem the proliferation of stolen weapons and the plague of violence which spawns therefrom. Ironically, however, if a defendant has four stolen weapons and sells

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§41-29-139 (g)(2) "Trafficking in controlled substances" as used herein means to engage in three (3) or more component offenses within any twelve (12) consecutive month period where at least two (2) of the component offenses occurred in different counties. A component offense is any act which would constitute a violation of subsection (a) of this section. Prior convictions shall not be used as component offenses to establish the charge of trafficking in controlled substances.

(3) The charge of trafficking in controlled substances shall be set forth in one (1) count of an indictment with each of the component offenses alleged therein and it may be charged and tried in any county where a component offense occurred. An indictment for trafficking in controlled substances may also be returned by the State Grand Jury of Mississippi provided at least two (2) of the component offenses occurred in different circuit court districts.

all four separately, he is not trafficking in stolen weapons. If he has only two or three and sells one while possessing the other(s), he's trafficking. The statute, therefore encourages a career stolen gun trafficker to sell stolen weapons one at a time to as many different people as possible thus increasing the proliferation the statute seeks to reduce. This irony only exacerbates and confounds a sentencing court's discretion in sentencing. The career criminal selling one at a time can only get 10 years for selling two guns individually, while a first time offender can be sentenced to die in prison for selling one .22 caliber pistol while possessing one or two more, depending on how a reader interprets the vagaries.

In *Coker v. Georgia*, 433 U. S. 584, 592 97 S. Ct. 2861, 2866, 53 L. Ed. 2d 982 (1977), where the Supreme Court ruled that the death penalty was not a proportionate sentencing option for the crime of rape, the Court said that under the Eighth Amendment, a punishment is

> 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime.

So, as pointed out above, §(3)(c), makes no contribution to the goals of punishment because it encourages proliferation of stolen weapons rather that deters it and since it allows for the most severe sentence short of death for a first offense property crime, the statute cannot receive the approval of this Honorable Court and must, therefore, be declared unconstitutional as authorizing cruel and unusual punishment.

ISSUE NO.2: WHETHER THE VERDICTS FOR COUNTS IV AND V ARE ADEQUATELY SUPPORTED BY COMPETENT EVIDENCE?

Primarily the evidence failed in this case, because, no "firearms" were ever introduced into evidence, only photographs of purported weapons. [Exhibits 13, 22, 23, 21, 24, 25, 26, 27]. There was no proof that the objects in the photographs were actually operational "firearms" and not something else, e. g. toys. In the case of *Jones v. State*, 920 So.2d 465, 473 (Miss.2006), where the defendant was found guilty of being a felon in possession of a firearm, along with other crimes, the court found that the evidence was sufficient since the state introduced the weapon in question along with other evidence.

Secondly, the only evidence that James Riley arguably knew that the guns in this case were stolen came from Riley's co-defendant Martin Ickom. [T. 111] Even though Ickom controlled the transactions of the alleged sales, he placed all the blame on Riley. [T. 70-72].

For good reason, the jury wholeheartedly rejected Ickom's testimony about Riley being involved in any of the burglaries. It is the appellant's position, therefore, that the evidence was insufficient to support a verdict of guilty under the remaining two counts of trafficking, since there was no reliable evidence presented that Riley knew the guns were stolen if he indeed did possess or sell them.

In *Jones v. State*, 368 So. 2d 1265, 1270 (Miss. 1979), the Mississippi Supreme Court reversed and discharged the defendant Jones because his conviction for grand

larceny was based on the unreliable testimony of an alleged accomplice, Hawkins. In *Jones*, the co-defendant had worked out a plea bargain agreeing to incriminate his co-defendant who stood trial. *Id.* at 1266.

The *Jones* court stated the well established general rule of law that the testimony of an accomplice "must be viewed with great caution and suspicion. Where it is uncorroborated, it must also be reasonable, not improbable, self-contradictory or substantially impeached." *Id.* at 1267 [citations omitted]. After pointing out the weaknesses in the accomplices testimony, the *Jones* Court rendered its reversal, and discharged the defendant.

Even though Ickom said there was no deal in exchange for his testimony, he did benefit from his cooperation, because he was not indicted for the sale of the stolen weapons, and his sentence, which could have been fifty-seven (57) years for two house burglaries and one business burglary, was thirty-two (32) years (twenty-five for house burglary plus seven for business burglary).

The present facts meet all the elements of the test set forth in *Jones*. Ickom's testimony was uncorroborated. Pursuant to the jury's rejection, Ickom's testimony was obviously unreasonable, improbable, and was substantially impeached. See also *Derden v. State*, 522 So.2d 752, 754 (Miss.1988); *Winters v. State*, 449 So.2d 766, 771 (Miss.1984); *Parker v. State*, 378 So.2d 662, 663 (Miss.1980), *Mister v. State*, 190 So. 2d 869 (Miss. 1966), *Cole v. State*, 65 So. 2d 262 (MS 1953) and *Lyle v. State*, 8 So. 2d

459 (Miss. 1942).

It follows that Riley's conviction should be reversed and rendered.

ISSUE NO. 3: WHETHER RILEY'S SENTENCE IS UNCONSTITUTIONALLY DISPROPORTIONATE?

Riley was sentenced to serve thirty (30) years with the department of corrections for being involved in the sale of nine (9) stolen weapons. [R. 26-27]. His position is that the sentence is unconstitutionally disproportionate to the offense.

In *White v. State,* 742 So. 2d 1126, 1135-38 (Miss. 1999) the defendant was convicted of selling $40.00 worth of crack cocaine within 1500 feet of a church and was sentenced to sixty (60) years. White appealed the sentence on the basis that it was unconstitutionally disproportionate. The *White* court noted the general rule that "a sentence that does not exceed the maximum period allowed by statute will not be disturbed on appeal." Nevertheless, a sentence that raises an "inference of gross disproportionality" is subject to analysis on Eighth Amendment grounds.

The factors to evaluate the constitutional proportionality of a sentence are:

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

See: *Solem v. Helm*, 463 U.S. 277, 292, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), *Stromas v. State*, 618 So.2d 116, 122-23 (Miss.1993); *Wallace v. State,* 607 So.2d 1184, 1188

(Miss. 1992); *Hoops v. State*, 681 So.2d 521, 538 (Miss.1996) *Smallwood v. Johnson*, 73 F.3d 1343, 1347 (5th Cir.1996).

The *White* court remanded the 60 year sentence finding that there was nothing in the record to justify such a harsh penalty, since White was apparently a first offender. The *White* court found that the trial court did not exercise any discretion and simply arbitrarily rendered the maximum penalty. The same scenario transpired the same way in *Davis v. State*, 724 So. 2d 342, 344-45 (Miss. 1998) where again the court remanded a sixty year sentence for selling drugs within 1500 feet of a church, finding there was no justification on the record for such a sentence. See also *Towner v. State,* 837 So.2d 221, 227 (Miss.App. 2003).

Applying the *Solemn* test here, it is clear that the gravity of the offense of trafficking in stolen firearms is moderate and the harshness of the penalty is severe. In performing the two comparison aspects of the test, comparing Riley's sentence with sentences imposed on other criminals in Mississippi, and, comparing sentences imposed in other jurisdictions for commission of the same offense, there appear to be no reported cases involving the subject statute which indicate a sentence with which to compare the present case.

The subject offense of trafficking in stolen firearms is the only non-habitual property crime where a defendant can be sentenced to die in prison. A comparison of other offenses in Mississippi where a non-habitual defendant can receive a life sentence:

murder §97-3-19, rape §97-3-71, kidnaping (jury only) §97-3-53, armed robbery (jury only) §97-3-79.

A sampling of other crimes with non-life sentencing options is:

kidnaping, 1 to 30 years by court, Miss. Code Ann. §97-3-53
armed robbery, 3 to anything less than life , Miss. Code Ann§97-3-79
first degree arson, 5 to 20 years, Miss. Code Ann§97-17-1
receiving stolen goods, 10 year maximum, Miss. Code Ann§97-17-70
house burglary, 3 to 25 years, Miss. Code Ann §97-17-23
felon in possession of firearm, 3 year maximum, Miss. Code Ann§97-37-5
Aggravated Assault, 20 year maximum, Miss. Code Ann §97-3-7

Comparing other sentences in general, it appears as though the trial court here in Riley's case did not exercise a sufficient quantum of discretion, as it is unclear why Riley received basically the same sentence as his habitual co defendant. [4] A good example of a trial court exercising discretion can be found in *White v. State*, --- So.2d ----, 2007 (WL 1675089 Miss. App. 2007) (June 12, 2007), where a first time offender was sentenced to fifteen years, ten to serve, five suspended, for an aggravated assault. In *White,* the court noted that the sentence was proportionate and reasonable because the crime was serious, the maximum was twenty years, and the defendant had no prior felony convictions, steady employment and an otherwise "relatively clean record."

The court should also consider cases like *Denton v. State,* 955 So.2d 398, 399-400 (Miss.App. 2007), where a defendant committed a home invasion with a pistol and

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Present counsel can represent that, based on the criminal history provided by the state through discovery, Riley had no prior felony convictions.

assaulted the victims "leaving them traumatized" and still received a lesser sentence to serve than Mr. Riley. This leads to the proposition that Mr. Riley could have assaulted William Robinson with the alleged stolen weapons instead of selling the weapons to him and received a lighter sentence. Mr. Riley looks respectfully to this Court to correct the lack of balance in this situation.

There are no other state "trafficking in stolen firearms" statutes, *per se*, which the undersigned counsel could locate. There is comparable federal law.

If Riley had been charged federally under 18 U. S. C.§ 922(i) or (j), his sentence under §924(a)(2) could not have been more than ten (10) years. The advisory United States Commission, *Sentencing Guidelines Manual*, §2K2.1 (Nov. 2005), provides that the penalty for violation of §922(i) or (j) for nine (9) stolen weapons should be between 21 to 57 months depending on the defendant's criminal history.

It follows that Riley's sentence is not proportionate to his offense and should be vacated, and if the Court does not reverse the conviction, at a minimum, Riley's case should be remanded for resentencing.

ISSUE NO. 4: WHETHER JURY INSTRUCTION NO. 4 WAS IMPROPER?

Over objection, the trial court here gave Jury Instruction Number 4 (S-4) which read:

> The Court instructs the Jury that possession of property recently stolen is a circumstance which may be considered by you, and from which, in the absence of a reasonable explanation, you may infer guilt of larceny or theft of the property.

The appellant's position is that the instruction is improper as to counts IV and V because:

1. The instruction improperly shifts the burden of proof to the defendant; and,

2. The instruction relinquished the state from having to prove one of the elements of the crime, to-wit: knowledge that the firearms were stolen; and,

3. The instruction is a comment on the defendant's right to remain silent.

There are two lines of cases regarding this instruction. The inference instruction is allowed in theft cases; but disallowed in cases where "guilty knowledge" is an element, e. g. receiving stolen goods. Those two lines of authority converge to create a due process paradox in Riley's case.

In *Johnson v. State,* 247 So.2d 697, 698 (Miss. 1971), the defendant was charged with receiving stolen property. Johnson was convicted with evidence only that he was in possession of the stolen property without any proof whatsoever of "guilty knowledge.

The *Johnson,* court referring to *Sanford v. State*, 155 Miss. 295, 124 So. 353 (1929), stated:

> The unexplained possession of stolen property shortly after the commission of a larceny is a circumstance from which guilt of the larceny may be inferred, **but no inference can be drawn therefrom alone that the one in possession of the property received it from another knowing that it had been stolen.** [emphasis added]

Referring to *Crowell v. State*, 195 Miss. 427, 15 So.2d 508 (1943), the *Johnson* court said:

> One guilty of larceny or burglary necessarily knows the facts and circumstances connected with the crime, but in a prosecution for receiving stolen property, guilty knowledge is the very gist of the offense. Such knowledge must be both alleged and proved.

Finally, the *Johnson* court said:

> we conclude **that it is <u>never</u> proper, in a case for receiving stolen goods knowing them to have been stolen, for the jury to be instructed, in effect, that the unexplained possession alone of such recently stolen property is either a circumstance from which guilt may be inferred or that such possession is a circumstance strongly indicative of guilt which will justify**, support, or warrant a verdict for the state, where such possession is unaided by other proof tending to show that the accused received such property knowing it to have been stolen. [emphasis added].

See also *Thompson v. State* 457 So.2d 953 (Miss.1984) and *Madere v. State*, 227 So.2d 278 (Miss. 1969).

If "never" really means never, then Riley's conviction should be reversed.

Guilty knowledge was neither alleged nor proven nor deliberated by the jury in Riley's

case. Jury Instruction 4 filled all of the gaps.

At Riley's trial, the state relied on *Harris v. State,* 908 So. 2d 868, 873 (Miss. App. 2005) for the proposition that S-4 had been approved for use in cases involving trafficking of stolen firearms. However, a close reading of *Harris* reveals that the court, in its wisdom, did not make a direct ruling on the precise present issue, because the same issue was not before the court there. There is no reference to *Johnson, supra,* in the *Harris* decision.

Harris was charged with burglary and trafficking in stolen weapons. Harris, unlike Riley here, was found guilty on the burglary charges, and the court concluded that, knowledge of the theft supplied the necessary "guilty knowledge" on the sale of stolen firearms charge and that the inference for the theft/burglary counts was in line with previous authority. So, the *Harris* court did not have to go as far as to address the issue now before the Court.

There remains a serious conflict in this case between the inference of larceny instruction being giving in the same trial which includes trafficking in stolen firearms, a crime where guilty knowledge is required to be proven and no inference is allowed, as a matter of law. The inference cannot apply since Riley was acquitted of burglary; yet, the jury was allowed to improperly use the inference on Counts IV and V.

Jury Instruction Number 4 left the jury here free to infer guilty knowledge. This was a strict violation of a defendant's right to due process and constituted a direct

comment on Riley's right to remain silent by the court.

In *Doyle v. Ohio*, 426 U. S. 610, 617, 96 S. Ct. 2240, 2244, 49 L. Ed. 2d 91 (1976) the U. S. Supreme Court ruled that injection of evidence into a criminal trial concerning a criminal defendant's post arrest silence is constitutionally improper and constitutes reversible error. See also, *U. S. v. Kane*, 887 F. 2d 568, 575 (5th Cir. 1989), where it was confirmed that:

> The Fifth Amendment guarantees a defendant an absolute right to silence, and should the defendant choose to exercise this right, he is further guaranteed the right to be free from adverse prejudicial comments based on the assertion of the right.

In *Butler v. State*, 608 So. 2d 314, 318 (Miss. 1992), where the defendant, likewise, did not testify, it is the trial court's duty to protect a defendant's exercise of the fundamental constitutional right not to testify, the circuit judge must see that the state makes no direct or indirect comment on this fact. [citations omitted]. Though painful, the responsibility and duty of a circuit judge when such a comment is made is to declare a mistrial on the spot.

The *Butler* opinion describes how prosecutors should apply the utmost care to "refrain from making any remark which directly or by insinuation focused the jurors' attention or alerted them to the fact that [the defendant] did not take the stand." *Id.*

In *Butler*, the prosecutor's comments were that the defendant had not "told you the

whole truth yet"; objections were overruled. *Id.* The court reasoned that after such comment, "... there was no escaping a wonder in the jurors' minds that there was more to come if [the defendant] had taken the witness stand." *Id.* 319. "These comments were reversible error, so egregious in fact that even if there had been no objection at trial, we would nevertheless have been obligated to reverse". *Id.*

Since Riley was acquitted on the burglary charges, there is no implication that he knew the guns at issue were stolen without independent proof of how Riley came into possession of the alleged stolen guns. Jury Instruction Number 4 required to jury to presume larceny, hence guilty knowledge, unless they were provided an excuse by the defendant. Here Riley did not testify. Jury Instruction Number 4 drew attention to this fact as prohibited in *Butler*. If drawing attention to a defendant's silence was improper in *Butler*, it is surely improper here. The irreparable prejudice to Riley is obvious.

Here with the court actually instructing the jury, the prejudice by the comment of the defendant not presenting proof is even more prejudicial than if the prosecutor makes the comment in closing. This flaw in Riley's trial constitutes reversible error. The rule applies equally to direct comments and innuendo. *Griffin v. State*, 557 So. 2d 542, 552 (Miss. 1990), *Johnson v. State*, 596 So. 2d 865, 869 (Miss. 1992).

CONCLUSION

Riley's convictions should be reversed and rendered, or at a minimum, he is entitled to resentencing.

Respectfully submitted,

JAMES RILEY

BY: George T. Holmes

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CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 3d day of August, 2007, mailed a true and correct copy of the above and foregoing Brief Of Appellant to Hon. Joseph H. Loper, Jr., Circuit Judge, P. O. Box 616, Ackerman MS 339735, and to Hon. Michael Howie, Asst. Dist. Attorney, P. O. Box 1262, Grenada MS 38902, and to Hon. Charles Maris, Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid.

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