BEFORE THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MARCO TERRELL LAMAR — APPELLANT

VS. — NO. 2007-KA-00692-COA

STATE OF MISSISSIPPI — APPELLEE

CRIMINAL APPEAL FROM
THE CIRCUIT COURT OF PANOLA COUNTY, MISSISSIPPI
SECOND JUDICIAL DISTRICT

BRIEF FOR APPELLANT

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ORAL ARGUMENT NOT REQUESTED

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STATE OF MISSISSIPPI **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

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

(1) **MARCO TERRELL LAMAR,** Defendant/Appellant

(2) **DAVID L. TISDELL,** Counsel for Defendant/Appellant

(3) **JOHN W. CHAMPION**, District Attorney

(4) **ROBERT J. KELLY,** Assistant District Attorney

(5) **JIM HOOD**, Attorney General, State of Mississippi

(6) **ANDREW C. BAKER,** Trial Court Judge

(7) **ROY SMITH**, Trial Counsel

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ISSUE TWO:

LAMAR'S TRIAL LAWYERS WERE INEFFECTIVE FOR: 1. FAILURE TO OBJECT TO STATE'S WITNESS REGINALD KATHY TESTIFYING IN STATE'S CASE IN CHIEF BUT WAS NEVER IDENTIFIED FOR VOIR DIRE PURPOSES; 2. FAILURE TO FILE A MOTION FOR CHANGE OF VENUE, AFTER THE ALLEGED INCIDENT HAD BEEN HIGHLY PUBLICIZED; 3. FAILURE TO INVESTIGATE, DETERMINE, AND CALL WITNESSES TO TESTIFY ON BEHALF OF THE DEFENDANT; AND 4. FAILURE TO ALLOW DEFENDANT TO TESTIFY ON HIS OWN BEHALF.

ISSUE THREE:

THE COURT ERRED IN ALLOWING THE CELL PHONE, FOUND IN PARKING LOT BY CIVILIAN NON-TESTIFYING INDIVIDUAL, TO BE INTRODUCED INTO EVIDENCE.

ISSUE FOUR:

THE COURT ERRED IN REFUSING APPELLANT'S PROPOSED JURY INSTRUCTION D-4, AN IDENTITY INSTRUCTION.

ISSUE FIVE:

THE COURT ERRED IN FAILING TO ISSUE A CAUTIONARY INSTRUCTION TO THE JURY REGARDING THE TESTIMONY OF CO-CONSPIRATORS.

ISSUE SIX:

LAMAR SHOULD BE GRANTED RELIEF BASED ON THE CUMULATIVE EFFECT OF ALL ERRORS COMMITTED AT TRIAL.

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BEFORE THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MARCO TERRELL LAMAR — APPELLANT

VS. — NO.: 2007-KA-00692-COA

STATE OF MISSISSIPPI — APPELLEE

STATEMENT OF THE ISSUES

ISSUE ONE:

THE TRIAL COURT ERRED IN FAILING TO SUSTAIN THE DEFENSE MOTION FOR A NEW TRIAL OR, IN THE ALTERNATIVE FOR JUDGMENT NOT WITHSTANDING THE VERDICTS, AS THE WEIGHT AND SUFFICIENCY OF THE EVIDENCE DID NOT SUPPORT THE JURY'S VERDICTS.

ISSUE TWO:

LAMAR'S TRIAL LAWYERS WERE INEFFECTIVE FOR THE FOLLOWING REASONS: 1. FAILURE TO OBJECT TO STATE'S WITNESS REGINALD KATHY TESTIFYING IN STATE'S CASE IN CHIEF BUT WAS NEVER IDENTIFIED FOR VOIR DIRE PURPOSES; 2. FAILURE TO FILE A MOTION FOR CHANGE OF VENUE, AFTER THE ALLEGED INCIDENT HAD BEEN HIGHLY PUBLICIZED; 3. FAILURE TO INVESTIGATE, DETERMINE, AND CALL WITNESSES TO TESTIFY ON BEHALF OF THE DEFENDANT; AND 4. FAILURE TO ALLOW DEFENDANT TO TESTIFY ON HIS OWN BEHALF.

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ISSUE SIX

LAMAR SHOULD BE GRANTED RELIEF BASED ON THE CUMULATIVE EFFECT OF ALL ERRORS COMMITTED AT TRIAL

STATEMENT OF INCARCERATION

Marco Terrell Lamar is presently incarcerated at the South Mississippi Correction Institution of the Mississippi Department of Corrections.

STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction of this case pursuant to Article 6, Section 146 of the Mississippi Constitution and Miss. Code Ann. §99-35-101 (Supp. 2001).

STATEMENT OF THE CASE

Marco Terrell Lamar (also referred to hereinafter as "Appellant" and "Lamar") was indicted in a two (2) count indictment, during the September, 2006 term of the Grand Jury for the Seventeenth Circuit Court District, Panola County, Second Judicial District, Mississippi, for the felony offense of Aggravated Assault in direct violation of §97-3-7 (2)(b), Mississippi Code 1972 Annotated, as amended and Possession of more than one (1) kilogram but less than five (5) kilograms of marijuana, in direct violation of §41-29-139 (c)(2)(f), Mississippi Code 1972 Annotated, as amended, both being contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Mississippi. (R.E. 6) On or about December 21, 2006 the two (2) count indictment was amended, charging Lamar as an Habitual Offender and Recidivist. (R.E. 10-11)

A trial by jury was commenced on January 16, 2007, in Batesville, Second Judicial District, Panola County, Mississippi, before the Honorable Andrew C. Baker,

Circuit Court Judge, with the Defendant being represented by the Honorable Roy Smith and Honorable Kelsey Rushing, resulting in a jury verdict of guilty on both counts. (R.E. 20-21) Subsequently, the trial court sentenced Appellant in Count 1, Aggravated Assault, §97-3-7(2)(b) to serve a term of Twenty (20) years in an institution under the supervision and control of the Mississippi Department of Corrections as an habitual offender pursuant to §99-19-81. In Count 2, Possession of more than one (1) kilogram but less than five (5) kilograms of Marijuana, §41-29-139(c)(2)(f), the Defendant was sentenced to serve six (6) years Post -Release Supervision, §47-7-34 as an §99-19-81 offender, with the sentence in Count 2 to run consecutive to the sentence imposed in Count 1. (R.E. 48)

Following his sentencing and denial of his Motions for New Trial or in the alternative, Motions for J.N.O.V the Appellant being aggrieved, appeals his conviction and sentence to this Honorable Court. (R.E. 49)

On the evening of June 30, 2006, an alleged shooting took place at the Wal-Mart Shopping Center located in Batesville, Mississippi. According to the testimony given at trial, three (3) men, Eramus Spears (referred to hereafter as "Spears"), Demarquese Bledsoe (referred to hereafter as "Bledsoe"), and Alton Key (referred to hereafter as "Key"), after returning from Memphis, Tennessee agreed to meet Lamar at the Wal-Mart Shopping Center. When the men arrived at the Wal-Mart Shopping Center, Bledsoe and Spears exited the car they arrived in and got into a black Magnum allegedly driven by Lamar. Testimony also alleged that Lamar was seated in the front driver side, Spears was sitting in the front passenger side and Bledsoe was in the backseat. Further testimony alleged that the three men smoked a blunt together. That Bledsoe

and Spears intended to buy what's called a dime bag (ten dollars) worth of marijuana from Lamar.

Spears testified that after they exited Lamar's car and while walking back toward their vehicle, he noticed Bledsoe carrying a bag. Spears further stated that when he turned and saw Bledsoe with the bag, he also saw Lamar with a gun. Immediately Lamar begin firing, resulting in Spears being shot. In the meanwhile, Bledsoe dropped the bag containing the alleged marijuana and began running.

Next, Reginald Kathy (hereafter referred to has "Kathy") testified that he and a cousin were walking toward subway, which is located in Wal-Mart, he heard several shots, then saw two men running by really fast. Later, Kathy stated, that he noticed a black Dodge Magnum with tinted windows, driven by Lamar heading east toward Murphy Gas Station.

Other testimony given at trial alleged that a cell phone was found, which belonged to Lamar and that a gray bag was found which contained alleged marijuana. The content of the bag was later determined to be 3,000 grams or three (3) kilograms of marijuana.

At the conclusion of the trial Lamar was found guilty in Count one of Aggravated Assault and in Count two of possession of Marijuana, more than one kilogram, but less than five kilograms.

SUMMARY OF THE ARGUMENT

Marco Terrell Lamar's convictions for Aggravated Assault, Possession of a Controlled Substance and sentence of twenty (20) years for Aggravated Assault, six (6) years Post Release Supervision for Possession of a Controlled Substance, as an

habitual offender pursuant to §99-19-81 is the result of ineffective assistance of counsel, plain error, cumulative error and conspiracy against Mr. Lamar from the co-conspirators in this case.

The Appellant respectfully submits to this court that the trial court erred in allowing the cell phone found in the Wal-Mart parking lot by a civilian non-testifying individual to be introduced into evidence. The Court to allow the introduction of the cell phone in violation of ***M.R.E 401*** and ***M.R.E 901*** violated the Appellant's right to a fair and impartial trial.

Next, the Court erred in failing to give a cautionary instruction to the jury regarding the testimony of the co-conspirators. The proof revealed that the co-conspirators who testified against the Defendant at trial were originally charged as co-conspirators in the case, but after having agreed to turn state evidence said charges were dropped against the testifying witnesses, thus creating bias and prejudice against the Defendant at trial.

The Court erred in refusing Appellant's proposed jury instruction D-4, an identity instruction. The denial of instruction D-4 essentially prevented the Appellant from presenting his theory of the case and constitutes reversible error. Due to these errors, Appellant requests this Honorable Court to reverse the verdict of the trial court and remand for a new trial.

The Appellant will also assert that the verdict was against the overwhelming weight of the evidence as the jury verdict is not support by the conflicting testimony presented by the State. This Court should reverse the case and remand it for a new trial.

The errors committed during trial failed to protect the Defendant's substantive and fundamental rights afforded to every defendant who stand trial. The conviction demonstrates a manifest miscarriage of justice and under the doctrines of plain error and cumulative error, justice requires that Lamar's convictions be reversed and remanded for a new trial.

ARGUMENT

ISSUE ONE:

THE TRIAL COURT ERRED IN FAILING TO SUSTAIN THE DEFENSE MOTION FOR A NEW TRIAL OR, IN THE ALTERNATIVE FOR JUDGMENT NOT WITHSTANDING THE VERDICTS, AS THE WEIGHT AND SUFFICIENCY OF THE EVIDENCE DID NOT SUPPORT THE JURY'S VERDICTS.

Appellant request this Court to reconsider the trial court's denial of his request for a New Trial or J.N.O.V, based on the weight of the evidence. Appellant asserts that the many inconsistencies apparent in the testimony of the prosecution's witnesses, when viewed in connection with both the lack of forensic evidence and its inconsistency with the forensic evidence that was available show that the jury's verdicts were not supported by the evidence and therefore must be vacated.

The Supreme Court has held that motions for a new trial challenge the weight of the evidence presented to the jury, and we will only reverse if we find that the lower court abused its discretion in denying the motion. ***Dilworth v. State***, 909 So.2d 731, 737 (Miss. 2005). In our review of a trial, we consider the evidence in the light most favorable to the verdict and will only grant a new trial in exceptional cases where the evidence preponderates heavily against the verdict. ***Bush v. State,*** 895 So.2d at 844. The verdict will stand unless an unconscionable injustice would result. ***Id***

Lamar argues that the verdict for Aggravated Assault is against the overwhelming weight of the evidence and did not support the guilty verdict.

In determining whether a jury verdict is against the weight of the evidence, this Court accepts as true the evidence which supports the verdict and will reverse only when convinced that the trial court abused it discretion in failing to grant a new trial. ***Isaac v. State***, 645 So.2d 903, 904 (Miss.1994). "Any factual disputes are properly resolved by the jury and do not mandate a new trial." ***Smiley v. State***, 815 So.2d 1140, 1145 (Miss.2002).

Here, the trial court abused its discretion in failing to grant a new trial. Accepting all evidence produced at trial as true, the State failed to prove beyond a reasonable doubt that Lamar was guilty of the crime of Aggravated Assault. Testimony adduced at trial only proved that there was a shooting at Wal-Mart on June 30, 2006. The testimony failed to prove that Lamar was the person shooting or that he was the person who injured Spears. Spears initial statement was that, "I came out of Wal-Mart and somebody was shooting and I got shot." (TR. 116; 13-16) Bledsoe's initial statement was that stated that when he came out of Wal-Mart somebody was shooting.

Lamar contends that the statements and testimony given by Spears, Bledsoe and Kathy were all contradictory. Based on the evidence presented at trial, the State failed to show that Lamar willfully, unlawfully, feloniously, purposely or knowingly caused bodily injury to Spears.

Lamar also argues that there was not sufficient evidence to support the verdict for possession of marijuana, more than one (1) kilogram but less than five (5) kilograms and request this Court to reconsider the trial Court's denial of his Motions for a J.N.O.V

or in the Alternative, a Motions for New Trial based on the legal sufficiency of the evidence.

A challenge to the sufficiency of the evidence requires an analysis of the evidence by the trial judge to determine whether a hypothetical juror could find, beyond a reasonable doubt, that the defendant is guilty. ***May v. State,*** 460 So.2d 778, 781 (Miss. 1984). If the judge determines that no reasonable juror could find the defendant guilty, then he must grant the motion for a directed verdict and JNOV. ***Id.*** If the court concludes that a reasonable juror could find the defendant guilty ***229** beyond a reasonable doubt, then he must deny the motion. ***Id.*** This Court's scope of review is limited to the same examination as that of the trial court in reviewing the motions for directed verdict and JNOV; that is if the facts point in favor of the defendant to the extent that reasonable jurors could not have found the defendant guilty beyond a reasonable doubt, viewing all facts in the light most favorable to the State, then it must sustain the assignment of error. ***Blank v. State,*** 542 So.2d 222, 225-26 (Miss.1989). Of course, the opposite is also true. In ***Gossett v. State***, 660 So.2d 1285, 1293 (Miss.1995), the Mississippi Supreme Court held that it may only reverse where after considering "one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair minded jurors could only find the accused not guilty."

In this case, the marijuana which was introduced into evidence at trial was found on the Wal-Mart parking lot was placed there by Bledsoe. The record does not reveal any testimony or evidence presented at trial proving that the drugs belonged to Lamar. In fact, Bledsoe was the only person seen in possession of the bag, which allegedly

contained marijuana. The only witnesses who claimed the marijuana belonged to Lamar were Spears and Bledsoe, who were at one time also charged with the offense.

After considering all physical evidence presented at trial, and the unreliable contradictory statements given by co-conspirators, Spears and Bledsoe, the State did not present sufficient evidence to support guilty verdicts and the trial judge should have granted the defense motion for J.N.O.V., or in the Alternative Motion for a New Trial.

ARGUMENT

ISSUE TWO:

LAMAR'S LAWYERS WERE INEFFECTIVE FOR THE FOLLOWING REASONS: 1. FAILURE TO OBJECT TO THE STATE'S WITNESS REGINALD KATHY TESTIFYING IN STATES'S CASE IN CHIEF BUT WAS NEVER IDENTIFIED FOR VOIR DIRE PURPOSES; 2. FAILURE TO FILE A MOTION FOR CHANGE OF VENUE, AFTER THE ALLEGED INCIDENT HAD BEEN HIGHLY PUBLICIZED; 3. FAILURE TO INVESTIGATE, DETERMINE, AND CALL WITNESSES TO TESTIFY ON BEHALF OF THE DEFENDANT; AND 4. FAILURE TO ALLOW DEFENDANT TO TESTIFY ON HIS OWN BEHALF.

The standard of review for ineffective assistance of counsel is set out in ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The test to be applied is (1) whether counsel's overall performance was deficient and (2) whether or not the deficient performance, if any, prejudiced the defense. **Id.** The defendant has the burden of proving both prongs. ***Taylor,*** 682 So. 2d at 363. The adequacy of counsel's performance, as to it deficiency and prejudicial effect, should be measured by a "totality of the circumstances." ***Id.*** However, there is a strong, yet rebuttable, presumption that the actions by the defense counsel were reasonable and strategic. ***Cole v. State***, 666 So.2d 767, 775 (Miss.1995). In short, defense counsel is presumed competent. ***Foster v. State,*** 687 So.2d 1124, 1130 (Miss.1996). Finally, the

defendant must show that there is a reasonable probability that but for the error of counsel; the jury's verdict would have been different.

Lamar requests this court to review all errors under the **Plain Error Doctrine**. A party who fails to make a contemporaneous objection at trial must rely on plain error to raise the issue on appeal because it is otherwise procedurally barred. ***Williams v. State***, 794 So.2d 181, 187 (Miss.2001). The plain error doctrine requires that there be an error and that the error must have resulted in a manifest miscarriage of justice." ***Id.*** at 187 "Further, [the] Court applies the plain error rule only when it affects a defendant's substantive/fundamental rights." ***Id.*** The plain error doctrine has been construed to include anything that "seriously affects the fairness, integrity or public reputation of judicial proceedings." ***McClain v. State***, 929 So.2d 946, 951 (Miss. Ct. App.2005).

Lamar contends that his Lawyers were deficient as follows:

FAILURE TO OBJECT TO THE STATE'S WITNESS REGINALD KATHY TESTIFYING IN STATE'S CASE IN CHIEF BUT WAS NEVER IDENTIFIED FOR VOIR DIRE PURPOSES.

This Court has recognized that the right to a fair trial by an impartial jury is fundamental and essential to our form of government and that it is a right guaranteed by both the federal and state constitutions. ***Johnson v. State***, 476 So.2d 1195, 109 (Miss. 1985)(citing ***Adams v. State***, 220 Miss. 812, 72 So.2d 211 (1954). An accused is entitled to fair, unprejudiced, unbiased individual jurors, who are willing to be guided by the testimony given by the witnesses and the law as announced by the Court. ***Johnson,*** 476 So.2d at 1210. If an unbiased jury is not impaneled, it does not matter how fair the remainder of the proceedings may be. One of the crowning glories of our law is that no matter how guilty one may be, no matter how atrocious his crime, nor how

certain his doom, when brought to trial anywhere he shall nevertheless, have the same fair and impartial trial accorded to the most innocent defendant.

Further, the jury selection procedure should give the Defendant a fair opportunity to ask questions of individual jurors which may enable the defendant to determine his right to challenge any juror.

During the voir dire procedure in this case, the prosecution introduced several witnesses who would testify in the State's case in Chief; however, the State failed to identify witness Reginald Kathy. (TR. 37-46) Nevertheless, during the State's case in Chief, Reginald Kathy was allowed to testify without objection by defense counsels. (TR. 160-173)

Lamar claims that his counsels' failure to object to Reginald Kathy testimony and failure to request a limiting instruction regarding the jury's use of the testimony amounts to ineffective assistance. He argues that had his lawyer objected properly, this objection would have triggered the trial court to perform a balancing test to determine whether to allow the witness to testify. Since the proper procedures were not followed, Lamar was limited in his ability to Voir Dire the Jury, thus, denying him the chance to determine whether any bias or prejudice existed toward or for the witness, Reginald Kathy.

FAILURE TO FILE A MOTION FOR CHANGE OF VENUE, AFTER THE ALLEGED INCIDENT HAD BEEN HIGHLY PUBLICIZED.

The decision to grant a change of venue rests soundly in the discretion of the trial judge. ***Howell v. State***, 860 So.2d 704, 718 (Miss.2004). This Court will not disturb the ruling of the trial court where the sound discretion of the trial judge in denying a change

of venue was not abused. ***Id.*** There must be a satisfactory showing that a defendant cannot receive a fair and impartial trial in the county where the offense is charged." ***Id.*** at 715 (*citing* Miss. Code Ann. § 99-15-35 (Rev. 2000)). In ***Davis v. State***, 767 So.2d 986, 993 (Miss.2000), this Court held that "[a] motion for a change of venue must be in writing and support by affidavits of two or more credible persons showing that the defendant cannot receive an impartial and fair trial in that particular county because of prejudgment of the case or grudge or ill will to the defendant in the mind of the public." ***Id.*** at 718-719 (*citing* ***Hoops v. State***, 681 So.2d 521, 526 (Miss.1996))

The right to a fair trial by an impartial jury is guaranteed by both the federal and state constitutions. ***Johnson v. State***, 476 So.2d at 1208 (citing ***U. S. Const. Amend. VI and Miss. Const, art. 3, § 26***)). "The accused has a right to a change of venue when it is doubtful that an impartial jury can be obtained." ***Davis,*** 767 So.2d at 993 (citing ***White***, 495 So.2d at 1348). "Upon proper application, there arises a presumption that such sentiment exists; and, the state then bears the burden of rebutting that presumption." Johnson, 476 So.2d at 1211.

This Court enumerated "certain elements which, when present would serve as an indicator to the trial court as to when the presumption is irrefutable." ***White***, 495 So.2d at 1349. The elements are as follows:

(1) Capital cases based on considerations of a heightened standard of review;

(2) Crowds threatening violence toward the accused;

(3) An inordinate amount of media coverage, particularly in cases of

(a) Serious crimes against influential families;
(b) Serious crimes against public officials;
(c)Serious crimes;

(d) Crimes committed by a black defendant upon a white victim; and
(e) Where there is an inexperienced trial counsel.

Id*, *Davis, 767 So.2d at 993-94; ***Baldwin v. State***, 732 So.2d 236, 241 (Miss.1999); ***Burrell***, 613 So.2d at 1189-90.

Lamar agues that his trial Lawyers erred in failing to seek a change of venue. A change of venue was necessary because of extensive pretrial publicity in local newspapers. On March 12, 2007, the Panolian report on the alleged shooting was titled **"Wal-Mart shooting was "drug deal gone bad"**. This report stated that law enforcement was looking for a fourth suspect and possibly a fifth suspect. The report also stated the Bledsoe, Key and Spears had been charged with possession of a controlled substance with intent to sell, transfer or distribute. Another report in the Panolian on February 15, 2007, titled **"Alleged "Wal-Mart shooter" surrenders to BPD"**, referred to Lamar as "the alleged "Wal-Mart shooter," wanted for wounding another man during a botched drug deal last month,"... The reporter went on to say that Lamar had been charged with aggravated assault, possession of a controlled substance with intent to distribute, felon in possession of a firearm, and a misdemeanor charge for discharging a firearm in the city limits. On July 21, 2006, the Panolian printed a list of individuals who had been indicted and the crimes of which they were charged. Because of the nature of the alleged crime and the size of the community in which it occurred, the media coverage denied Lamar's right to a fair and impartial jury. A change of venue should have been requested and granted. (R.E. 31-42)

FAILURE TO INVESTIGATE, DETERMINE, AND CALL WITNESSES TO TESTIFY ON BEHALF OF THE DEFENDANT.

Lamar contends that his trial Lawyers failed to investigate, determine and call witnesses to testify on his behalf. The defense received discovery from the State, that contained a statement from Mr. Walter Earl Ware which read as follows:

> " I was walking in the crosswalk at the west end of the building by the baskets in the construction. I heard a gun shot, and I looked east. There were two young black males that were running from around aisle 10 running towards me. The boys were being chased by a black male wearing a white shirt and blue jeans. He fired six shots from the middle of the east crosswalk. The young male with the black bandana wearing the white t-shirt and blue jeans was shot in the back. The other black male wearing a muscle shirt and a pair of blue jean shorts was hit in the upper right shoulder. The shooter running in the grocery side door when the two victims went funning in the west entrance. We stayed in the parking lot and watched to make sure the shooter never came back-outside then the police arrived." (R.E. 19)

The Appellant asserts this evidence would have cast considerable doubt on the State's witnesses' credibility and would have, at the same time, supported the fact that someone other than Lamar was the shooter. Lamar concludes that his trial Lawyers failure to interview Mr. Ware and/or call him as a witness for the Defense, denied him the opportunity to support his theory of the case to the jury, thus denying him a fair trial.

FAILURE TO ALLOW LAMAR TO TESTIFY ON HIS OWN BEHALF AT TRIAL.

If an accused is denied the right to testify on his own behalf, it is a constitutional violation regardless of whether the denial is a result of a refusal by the court or a refusal by the Defendant's counsel to allow the accused to testify. ***Culberson***, 412 So.2d 1184 (Miss.1982). The Court went on to suggest that if the defendant does not testify, the trial judge should, outside the presence of the jury, advise the defendant of the right to

testify. ***Id.*** If the defendant wishes to testify, he should be allowed to do so. If the defendant does not wish to testify, he will not be required to testify. ***Id.***

Article 3, Section 26 of the Mississippi Constitution of 1890 provides the following:

> In all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both, to demand the nature and cause of the accusation, to be confronted by the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and, in all prosecutions by indictment or information a speedy and public trial by an impartial jury of the county where the offense was committed; .....

Section 26 gives an accused the right to testify on his own behalf. The denial of the right of an accused to testify is a violation of his constitutional right regardless of whether the denial stems from the refusal of the court to let a defendant testify, or whether the denial stems from the failure of the defendant's counsel to permit him to testify.

Lamar argues that he was not allowed the opportunity to testify on his own behalf and that he didn't waive his right. During the course of the trial, the Court made an effort to advise Lamar of his right to testify is evident as follows:

THE COURT: "We'll reach a point in this trial where you will have to decide whether you want to testify in your own behalf or remain silent and your lawyers will know when we reach that point in trial. At that time, your attorneys may have a suggestion as to what they think you ought to do or not do. Your decision along that regard will override your lawyer's decision. If they feel one way and you feel another, your decision prevails. Do you understand that?"

THE DEFENDANT: "Yes, sir." (TR. 81; 8-18)

However, when the time came for the Defense to present their case, Lamar was not given the chance to testify. Although, the Directed Verdict motion, jury instructions and other proceedings were heard in chambers, out of the presence of the Trial Jury, **Defendant was not present in chambers** during that time. (TR. 230; 19-21). Once the Court made the decision to deny the Defense Motion for Directed Verdict, testimony went as follows:

MR. SMITH: "Thank you, Your Honor."

THE COURT: "What about witnesses?"

MR. SMITH: "Defense rests, Your Honor."

MR. RUSHING: "We are going to rest.

THE COURT: "You are going to rest?"

MR. KELLY: "Should that be done in front of the jury or not?"

THE COURT: "It doesn't have to be done."

MR. KELLY: "So defendant rests?"

Although the court earlier in the trial proceeding did advise Lamar of his right to testify, Lamar did not waive his right to testify and his Lawyers failure to allow him to testify violated his constitutional rights.

Considering the totality of the circumstances, Lamar concludes that his trial lawyers overall performance was deficient and that their deficiencies prejudiced his defense and but for their deficient performance the jury's verdicts would have been different.

ARGUMENT

ISSUE THREE

THE COURT ERRED IN ALLOWING THE CELL PHONE, FOUND IN PARKING LOT BY CIVILIAN NON-TESTIFYING INDIVIDUAL, TO BE INTRODUCED INTO EVIDENCE

The trial Judge possesses a great deal of discretion as to the relevancy and admissibility of evidence; the appellate court will not reverse the Judge's ruling unless the court abuses it's discretion so as to be prejudicial to the accused. ***Farmer v. State,*** 770 So.2d 953, 958 (Miss. 2000) Lamar contends that the cell phone should have not been admitted into evidence for the following reasons:

1. The cell phone was not relevant to this trial pursuant to **M.R.E 401**;

2. The state failed to properly authenticate the cell phone by failing to satisfy the chain of custody pursuant to **M.R.E.901**.

"As a predicate to admission of the cell phone, the prosecution must prove that the cell phone is relevant as defined by **M.R.E 401**, as well as authenticated as required by **M.R.E 901.** ***Ragin v. State,*** 724 So.2d 901 (Miss. 1998). The cell phone passes the relevancy test for **M.R.E 401** if it has a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

As an additional condition precedent to admissibility, the cell phone must be proven authentic pursuant to **M.R.E. 901**. **Rule 901** is satisfied if evidence is introduced which is "sufficient to support a finding that the matter in question is what its proponent claims." ***Ragin,*** 724 So.2d 901 (Miss.1998). **Rule 901** requires the state to satisfy a proper chain of custody.

The proper test to determine whether or not there has been a showing of the proper chain of custody of the evidence is whether there is a reasonable inference of

A. "Yes."
Q. "Did Sergeant Myers give you a cell phone that she found?"
A. "Yes."
Q. "Did you maintain it in your custody?"
A. "Yes."
Q. Do you have it with you this morning?"
A. "Yes."
Q. "Now, sir, when you received the cell phone, did (Tr. 188; 14-29) you have it taken to the Batesville Police Department for safekeeping?"
A. "Yes."
Q. "A day or two later, did you try to examine or investigate the cell phone to determine if it was in working order?"
A. "Yes."
Q. "Was it?"
A. "Yes."
Q. "What did you do with the cell phone?"
A. " I went and obtained a charger from a local business and proceeded to charge it up and then once it come up I tried to get the number off it that was on the phone and the name popped up."
Q. "What name popped up?"
A. "Marco Lamar."
Q. "I'm handing you an item. What is that item?"
A. "This is the cell phone."
Q. "Where was it recovered?"
A. "In the parking lot."

(Cell Phone Rang.)

BY MR. KELLY: (Continuing)

Q. "Now, which one is playing, the item of evidence or your cell phone?"
A. "No, sir, it is not my phone."
Q. "It's not your phone?"
A. "No, sir."

THE COURT: "It was mine. I don't fuss at lawyers. It happens to all of us. Most of you (TR. 189; 1-29) would get upset about it; I don't because it is just a fact of life now. Just about everyone has one in their pocket and sometimes we don't think to turn them off."

BY MR. KELLY: (Continuing)

Q. "The item you have in your hand now, let's review it. Where was that item found?"
A. "In the parking lot of Wal-Mart."
Q. "And did you maintain it in your custody for safekeeping?"

A. "Yes."
Q. "And a day or two later, did you charge it up?"
A. "Yes."
Q. "And did you try to determine whose cell phone it was?"
A. "Yes."
Q. "And how did you make that determination?"
A. "I was playing with it and turned it on and the name popped up and the phone number also."
Q. "Which name popped up?"
A. "Marco Lamar."
Q. "And a phone number popped up?"
A. "Yes."
Q. "Did you try to trace that phone number?"
A. "I think the DA's office did and subpoenaed the phone records for it."
Q. "Do you know the results of that search?"
A. "I believe it came back to Marco Lamar."
Q. "You believe?" (TR. 190; 1-29)
A. "Yes, sir."

MR. KELLY: "Your Honor, at this point, I offer the cell phone into evidence."

THE COURT: "It can be marked into evidence." (TR. 191; 1-4)

During cross-examination of Sergeant Williford, testimony went as follows:

Q. "Okay. This phone that you recovered which is supposed to be Mr. Lamar's phone, where was it found?
A. "In the parking lot."
Q. "Do you recall who found it?"
A. "A young man gave it to Sergeant Myers. His name was Colton Stevens.
Q. "So it wasn't actually recovered by officers, it was found by an individual bystander, correct?"
A. "Yes, sir."
Q. "And do you have an idea of where that person found it at?
A. "No, sir, I don't other than in between the vehicles is my understanding."
Q. "In between the vehicles?"
A. "Yes."
Q. "So according to this diagram, do you know where?"
A. "No, sir, I don't know. Mr. Smith, when I arrived, Sergeant Myers already had it in custody and I don't know the exact spot where it was found."
Q. "So, Officer Myers didn't tell you where the cell phone was found just that the young man picked up a cell phone in between some

vehicles in the parking lot and was turned out to supposedly be Mr. Lamar's phone, correct?"

A. "That's my understanding, yes." (TR. 194; 4-27)

The contradictory testimony of Sergeant Williford revealed the following; first, the civilian who allegedly found the cell phone did not testify; Secondly, Officer Myers who allegedly received the cell phone from the civilian did not testify, and Thirdly, Sergeant Williford, in his testimony, could not give the location were the cell phone was found nor could he truthfully testify to its ownership.

Based on the above testimony, the State failed to authenticate (establish a proper chain of custody) the cell phone. Due to the lack of authentication, this Court must reverse the guilty convictions.

ARGUMENT

ISSUE FOUR

THE COURT ERRED IN REFUSING APPELLANT'S PROPOSED JURY INSTRUCTION D-4, AN IDENTITY INSTRUCTION.

A defendant is entitled to have jury instructions given which present the theory of the case, this entitlement is limited in that the court may refuse an instruction which incorrectly states the law, is covered fairly elsewhere in the instructions or is without foundation in the evidence ***Florence v. State,*** 786 So. 2d. 409, 412 (Miss. Ct. App. 2000); ***Heidel v. State,*** 587 So. 2d 835, 842 (Miss. 1991).

At trial Lamar proffered the following D-4 jury instruction:

> The Court instructs the jury that in reaching your verdict you are to consider all of the evidence concerning the entire case and the circumstances surrounding the crime. One of the issues in this case is the identification of Marco Terrell Lamar as the perpetrator of the crime. As with each element of the crime charged, the State has the burden of proving identity beyond a reasonable doubt and before you may convict

Marco Terrell Lamar you must be satisfied beyond a reasonable doubt of the accuracy of the identification of Marco Terrell Lamar. If, after considering all of the evidence concerning the crime and the witness' identification of Marco Terrell Lamar as the person who committed the crime, you are not convinced beyond a reasonable doubt he is the person who committed the crime, then you must find him not guilty. Identification testimony is an expression of belief or impression by the witness. You must judge its value and reliability from the totality of the circumstances surrounding the crime and the subsequent identification. In appraising the identification testimony of a witness, you should consider the following:

1) Did the witness have an adequate opportunity to observe the offender?
2) Did the witness observe the offender with an adequate degree of attention?
3) Did the witness provide an accurate description of the offender after the crime?
4) How certain is the witness of the identification?
5) How much timed passed between the crime and the identification?

If, after examining all of the testimony and the evidence, you have a reasonable doubt that Marco Terrell Lamar was the person who committed the crime, then you must find Marco Terrell Lamar not guilty (RE. 16-17)

"Where a defendant proffered instruction has a evidentiary basis, properly states the law, and is the only instruction presenting his theory of the case, refusal to grant constitutes reversible error. **Florence,** 786 So. 2d at 412; ***Hester v. State,*** 602 So. 2d 869, 872 (Miss. 1992)."

Conference in Chambers regarding jury instruction D-4 went as follows:

The Court: "No. D-4, there is no evidentiary basis in this case for D-4. Lamar has been identified by Spears and he sat in the car and smoked dope with him. Bledsoe, they have identified him on the witness line-up that's before the jury. I can't come in now and tell the jury that they have – that it is up to them whether it is credible testimony or not. It doesn't warrant a jury instruction as to whether or not they misidentified who they say they were in the car smoking dope with, so D-4 is not warranted by the evidence in this case and I think it is a totally improper instruction for this factual case.

Mr. Smith: May I just say one thing, Your Honor, in respect to that? If you remember in testimony, Mr. Spears and Mr. Bledsoe, they have

conflicting testimony on smoking dope and one of them said it was just two of them smoking dope, so that brings into question - -

The Court: I think that is a general credibility question that you can point out but (TR. 244; 8-29) for me to try to reduce it to an instruction of law, I just can't do it. It is not acceptable to put in a form of the instruction of law.
The Jury's sole function - - and you have every right to tell them out there that if they don't believe those witnesses they don't have to believe them at all or they can believe them partly or not at all or totally. This instruction would be misleading to the jury coming from me as the trial judge saying this is the law that is applicable to the case. It is just not warranted by the evidence in the case." (TR. 244; 1-12).

The proposed Jury Instruction D-4, (identity instruction) has an evidentiary basis, properly states the law, and is the only instruction presenting Lamar's theory of the case. Failure of the trial court to grant jury instruction D-4 constitutes reversible error.

ARGUMENT

ISSUE FIVE

THE COURT ERRED IN FAILING TO ISSUE A CAUTIONARY INSTRUCTION TO JURY REGARDING THE TESTIMONY OF CO-CONSPIRATORS.

"It is clear law in the State of Mississippi that the jury is to regard the testimony of co-conspirators with great caution and suspicion. ***Winters v. State***, 449 So.2d 766, 771 (Miss.1984); ***Simpson v. State***, 366 So.2d 1085 (Miss.1979); **Thomas v. State,** 340 So.2d 1 (Miss.1976)."

As a general rule a trial judge should not hesitate to grant the cautionary instruction when the State is relying upon the testimony of co-conspirators.

In this case two of the State's witnesses, Spears and Bledsoe were originally charged along with Lamar. However, the two agreed to turn State evidence and the charges were apparently dropped against them.

When questioned about the charges during cross-examination, Spears testified as follows:

Q. "Mr. Spears, were you charged when you – let me go back. Were you discharged from the hospital, you were taken to jail, correct?"
A. "Yes, sir."
Q. "And were you charged?"
A. "Yes, sir."
Q. "What were your charges?" (TR. 118; 23-29)
A. "Possession of marijuana."
Q. "Okay, And since then, what has happened to that charge?"
A. "I have no idea."
Q. "Were you indicted on the charge?"
A. "No, sir." (TR. 119; 1-8)

Bledsoe was also questioned about whether he was charged. He testified as follows:

Q. "Mr. Bledsoe?"
A. "Yes, sir."
Q. "Were you sentenced for your possession of marijuana?
A. "No, sir.
Q. "How long – now, you were arrested. How long did you stay in jail?"
A. "Three months."
Q. "Did you remember when you got out?"
A. "No, sir, I can't remember the exact date." (TR. 143; 15-26)

Based on Mississippi Law and the above testimony, it is clear that Bledsoe and Spears were testifying co-conspirators; therefore a cautionary instruction should have been given. The Court's failure to give a cautionary instruction denied Lamar the right to a fair trial.

ARGUMENT

ISSUE SIX

LAMAR SHOULD BE GRANTED RELIEF BASED ON THE CUMULATIVE EFFECT OF ALL ERRORS COMMITTED AT TRIAL

Finally, this Court should grant Lamar relief based on the cumulative effect of the aforementioned errors. The MS Supreme Court has held "individual errors, not

reversible in themselves, may combine with other errors to make up reversible error." ***Wilburn v. State***, 608 So.2d 702, 705 (Miss.1992).

An analysis of cumulative error must be based on the fact that each error found on appeal, standing alone, did not produce an unfair trial, but when evaluated cumulatively did produce an unfair trial. *Id.*

Appellant submits that based on individual errors cited and brief here-in-above, combined together make up reversible errors.

CONCLUSION

The Appellant herein submits that based on the propositions cited and briefed herein above, together with any plain error noticed by the Court which has not been specifically raised, the judgment of the trial court and the appellant's convictions and sentences should be reversed and vacated, respectively, and the matter remanded to the lower court for a new trial on the merits of the indictment on a charges of Aggravated Assault and Possession of marijuana more than one (1) kilogram, but less than five (5) kilogram, with instructions to the lower court. The Appellant further states to the Court that the individual and cumulative errors as cited herein above are fundamental in nature and therefore, cannot be harmless.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I, David L. Tisdell, Attorney for Appellant herein, do hereby certify that I have this day mailed postage full pre-paid or hand delivered, a true and correct copy of the foregoing Brief of Appellant to the following interested person:

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This the 2nd day of Nov, 2007.

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