IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

SCOTTY B. LYLES — APPELLANT

V. — NO. 2007-KA-0993-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

NO ORAL ARGUMENT REQUESTED

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SCOTTY B. LYLES **APPELLANT**

V. **NO. 2007-KA-0993-COA**

STATE OF MISSISSIPPI **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

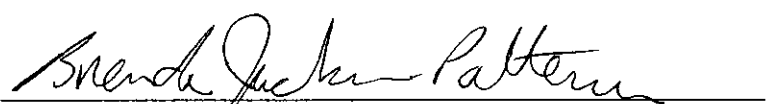
The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Scotty B. Lyles, Appellant
3. Honorable Forrest Allgood, District Attorney
4. Honorable James T. Kitchens, Jr., Circuit Court Judge

This the 30TH day of June, 2008.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

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STATEMENT OF THE CASE

Scotty B. Lyles was convicted in the Oktibbeha County Circuit Court, James T. Kitchens, Jr., in violation of Miss. Code Ann. Sec. 97-19-55 for obtaining merchandise of a total value of $100.00 or more under false pretenses by writing a bad check. After the indictment was amended to reflect the habitual offender status, Mr. Lyles was sentenced to serve a term of life imprisonment in the Mississippi Department of Corrections without the possibility of parole or probation. Feeling aggrieved, Mr. Lyles files his appeal.

STATEMENT OF THE FACTS

On December 23, 2005, Scotty B. Lyles (Mr. Lyles) purchased $105.79 worth of liquor from the Starkville Discount Liquor Store. To pay for his purchase, he presented a check to Gerald Richardson (Mr. Richardson), the store clerk, which he had dated December 23, 2008. Prior to accepting the check, Mr. Richardson required Mr. Lyles to write on the check his telephone number, driver's license number and his social security number. Mr. Richardson took the check and printed in Starkville Discount Liquor Store on the payee line in response to Mr. Lyles request for a stamp. Mr. Lyles then filled in the numerical amount of the purchase, however, the written amount was never filled in. He then signed his name on the memo line. He did not sign on the drawer line (signature line).[1] Mr. Richardson took the check, initialed it, and it was later taken to the bank and returned because of a closed account. Mr. Richardson had to pay for the check out of his funds because that was store policy. The check was later turned over to the district attorney's bad check unit. **T. 93-98.**

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[1]See State's Exhibit 1(Returned Check)

The second and last witness called by the state was Sammy Slaughter III (Mr. Slaughter), an employee with AmSouth Bank in Starkville, Mississippi. Over defense counsel's objection, Mr. Slaughter was allowed to testify that Mr. Lyles' account was closed September 9, 2005 because of a balance of fees of returned checks which totaled $7, 537.55. [2] **T. 127.** Mr. Slaughter further testified that bank statements are routinely mailed each month and account closed notifications are sent out within a few days after the actual account closure. Mr. Slaughter, however, testified that he had no personal knowledge whether or not Mr. Lyles was notified his account was closed. **T. 129.**

STATEMENT OF ISSUES

I. WHETHER THE EVIDENCE WAS SUFFICIENT TO SUPPORT MR. LYLES' CONVICTION FOR OBTAINING MERCHANDISE UNDER FALSE PRETENSES BY WRITING A BAD CHECK?

II. WHETHER MR. LYLES WAS DENIED A FAIR TRIAL BY INTRODUCTION OF EVIDENCE OF RETURNED CHECKS?

III. WHETHER THE INDICTMENT WAS FATALLY DEFECTIVE?

IV. WHETHER SENTENCE OF LIFE IMPRISONMENT WITHOUT POSSIBILITY OF PAROLE PROHIBITED BY EIGHTH AMENDMENT?

V. WHETHER THE TRIAL COURT ERRED IN GIVING JURY INSTRUCTION S-2?

SUMMARY OF THE ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT TO FIND MR. LYLES GUILTY OF FALSE PRETENSE.

Mr. Lyles was indicted under Miss. Code Ann. §97-19-55 which provides:

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[2]Bank records admitted into evidence as State's Exhibit 2.

§97-19-55. Bad checks.

> It shall be unlawful for any person with fraudulent intent to make, draw, issue, utter or deliver any check, draft or order for the payment of money drawn on any bank, corporation, firm or person, knowing at the time of making, drawing, issuing, uttering or delivering said check, draft or order that the maker or drawer has not sufficient funds in or on deposit with such bank, corporation, firm or person for the payment of such check, draft or order in full, and all other checks, drafts or orders upon such funds then outstanding.

Mr. Lyles case should be reversed because he did not violate this statute. The statue first requires that when the maker of the check writes it, [he] has to know at the time that [he]"... [does not have] sufficient funds in or on deposit with such bank. Henderson v. State, 534 So.2d 554, 556 (Miss. 1988).

In Henderson the Supreme Court reversed a conviction for false pretense. The Court found that even though there were insufficient funds in the defendant's checking account to cover the check at the time it was written on October 4, 1985, it was not to be presented for payment until October 28, 1985. At no time during the month of October was there on deposit sufficient funds to honor this check. The Court reasoned that, by endorsing the check for a date in the future, October 28, Mr. Lyles represented to the bank that there would be sufficient funds on deposit on that date. The Court stated, " This represents a future obligation as to payment of the check not contemplated by the statute". Id. Citing Miller v. State, 413 So.2d 1041, 1042 (Miss. 1982); Walley v. State, 458 So.2d 734 (Miss. 1984).

Mr. Lyles wrote a check on December 23, 2005 and dated it for December 23, 2008. This check was not negotiable until the latter date, which was three years after the date he received the merchandise. Mr. Richardson testified that he took the check from Mr. Lyles and examined the check for a local bank and the purchase amount. He requested Mr. Lyles to write down a telephone number, driver's license number and social security number. Mr. Richardson then took the check

and printed the name "Starkville Discount Liquor Store" on the payee to line and gave the check back to Mr. Lyles for him to sign. Afterwards, Mr. Richardson initialed it and placed it in the cash register. **T.95-98.** From Mr. Richardson's testimony, there is not evidence that he did not know or should have known that the check was dated for 2008. He thoroughly examined the check. Mr. Richardson's testimony together with reasonable inferences, shows that, Mr. Lyles obligated himself to have sufficient funds in the bank to cover the check on that date.

"Crime of false pretenses occurs when one makes false representation of past or existing fact, with intent to deceive and with result that accused obtains something of value from party deceived; thus, a representation such as promise to repay money in future is excluded. State v. Allen, 505 So.2d 1024, 1025 (Miss. 1987). Citing Miss. Code Ann. Sec. 97-19-39 (1972).

The date of the check was for 2008 which represents a future obligation; a promise to pay, not contemplated by the false pretense statute. " "Promises" by definition are future actions, not the past or present frauds prohibited under the false pretense statute. The Mississippi Supreme Court indicated that deceitful promises of future conduct are criminalized under [Miss. Code Ann. Sec. 97-19-83(1) (Rev.2000)]". McGee v. State, 853 So.2d 125, 128-129 (Miss. 2003). In McGee, the Court adopted the reasoning of the Court in McNally v. U.S., 483 U.S. 350, 359 (1987), holding that Mississippi's wire fraud statute reaches "false promises and misrepresentations as to the future as well as other frauds involving money or property".

Miss. Code Ann. §97-19-83 provides:

§97-19-83(1). Fraud by mail or other means of communication.

> (1) Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money, property or services, or for unlawfully avoiding the payment or loss of money, property or services, or for securing business or personal advantage by means of false or fraudulent pretenses, representations or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or

> procure for unlawful use any counterfeit or spurious coin, obligation, security or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, transmits or causes to be transmitted by mail, telephone, newspaper, radio, television, wire, electromagnetic waves, microwaves, or other means of communication or by person, any writings, signs, signals, pictures, sounds, data, or other matter across county or state jurisdictional lines, shall, upon conviction be punished.

Mr. Lyles' actions in writing the check for a date in 2008 would be considered a deceitful or false promise to pay, and therefore, it would not be covered under the false pretense statute. It would be covered under Miss. Code Ann. Sec. 97-19-83(1). Because the evidence does not support the conviction, this case should be reversed and rendered, discharging Mr. Lyles.

II. MR. LYLES WAS DENIED A FAIR TRIAL BY THE INTRODUCTION INTO EVIDENCE OF OVER $7000.00 IN BAD CHECKS NOT CHARGED IN THE INDICTMENT.

The trial court abused its discretion and committed reversible error by allowing in evidence of $7,537.55 of bad checks during trial. Mr. Lyles' defense counsel objected during trial, stating that because he was on trial for one bad check, it would be very prejudicial to allow evidence of over $7,000.00 in additional bad checks. T.115.

> M.R.E. 404 *(b)* Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
>
> M.R.E. 403 provides: Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

"A trial judge enjoys a great deal of discretion as to the relevancy and admissibility of evidence. Unless the judge abuses this discretion so as to be prejudicial to the accused, the Court will not reverse this ruling." Walker v. State, 878 So.2d 913, 915, (Miss. 2004) citing Jefferson v. State, 818 So.2d 1099, 1104 (Miss. 2002) (quoting Fisher v. State, 690 So.2d 268, 274 (Miss. 1996)). See also Hill v. State, 774So.2d 441, 444 (Miss. 2000); Crawford v. State, 754 So.2d 1211 (Miss. 2000); Gilley v. State, 748 So.2d 123, 126 (Miss. 1999); Hughes v. State, 735 So.2d 238, 269 (Miss. 1999) Citing Crawford, 754 So.2d at 1220 (Rule 403 is an ultimate filter through which all otherwise admissible evidence must pass).

Mr. Lyles offers a list of cases to support his argument that he received an unfair trial when the trial court abused its discretion by the admission of evidence of more than $7,000.00 worth of bounced checks.

In Elmore v. State, 510 So.2d 127 (Miss. 1987), the defendant was convicted for sexual battery of V.E., his 13 year-old stepdaughter. The Supreme Court found the trial court committed reversible error by admitting evidence of remote instances of sexual misconduct by the defendant with the complainant's sister. The Court stated that because Elmore was charged only with committing sexual battery upon V.E., it was Elmore's alleged criminal act toward V.E. which the state attempted to prove. Any attempt by Elmore to commit sexual battery on the rest of his family, while arguably relevant, is far less probative and at least equally, if not more, prejudicial. The Court stated that the question was whether the jury was improperly diverted from the only issue in this case that being, did Elmore commit sexual battery on August 6, 1983. The Court thought the likelihood that the jury was distracted was too great to allow Elmore's conviction to stand. The Court held that the admission of evidence of remote instances of sexual misconduct with someone other than the complainant was reversible.

The Court in Elmore cited King v. State, 6 So. 188, 189 (Miss. 1889), where the defendant was indicted for illegally selling liquor. During trial the state proved distinctly one unlawful sale of liquor. Afterwards, the trial court admitted testimony of other and different sales. The Mississippi Supreme Court found it was error for the trial court to admit testimony of other and different sales. That Court stated that,

> "The general rule is, that the issue on a criminal trial, shall be single, and that the testimony must be confined to the issue, and that on the trial of a person for one offense, the prosecution cannot aid the proof against him, by showing that he committed other offenses. Whart.Cr.Ev.§ 104; Bish.Cr.Pro., § 1120 et. Seq. The reason and justice of the rule is apparent, and its observance is necessary to prevent injustice and oppression in criminal prosecutions. Such evidence tends to divert the minds of the jury from the true issue, and while the accused may be able to meet a specific charge, he cannot be prepared to defend against all other charges that may be brought against him." Elmore, 510 So.2d at 130.

The Court in Elmore went on to provide that

> "It is well settled in this state that proof of a crime distinct from that alleged in an indictment is not admissible against an accused. There are certain recognized exceptions to the rule. Proof of another crime is admissible where the offense charged and that offered to be proved are so connected as to constitute one transaction, where it is necessary to identify the defendant, where it is material to prove motive and there is an apparent relation or connection between the act proposed to be proved and that charged, where the accusation involves a series of criminal acts which must be proved to make out the offense, or where it is necessary to prove scienter or guilty knowledge." Id.

The Court further provided that, "the question here is whether the jury was improperly diverted from the only issue in this case-that being, did Elmore commit sexual battery on August 6, 1983. We think the likelihood that the jury was distracted is too great to allow Elmore's conviction to stand." Id at 131.

In the present case, as the Court provided in the Elmore case, Mr. Lyles' jurors' minds were diverted from the actual charge in the indictment, by the admission of evidence of return checks totaling over $7,000.00. The likelihood that the jury was distracted is too great to allow his

conviction to stand.

The exception to the rule does not apply in Mr. Lyles' case because he was charged with false pretense and the evidence of the bounced checks totaling over $7,000.00 was for bounced checks unrelated to the charge in this indictment. Obtaining the merchandise from Starkville Discount Liquor and issuance and delivery of the check to Mr. Richardson by Mr. Lyles constituted a single transaction. Moore v. State, 38 So.2d 693, 695 (Miss. 1949). The more than $7,000.00 of bounced checks was a transaction totally unrelated to the charged indictment and it was not necessary to identify Mr. Lyles because Mr. Richardson knew him and was able to identify him. Had this evidence been excluded the testimony of Mr. Richardson, the closed account which the check was written on and the information on the returned check was sufficient to show motive, opportunity, intent, preparation, plan, knowledge, and absence of mistake or accident. First, the check was not written on the signature line. Second, the check did not have the amount written out. Third, the check was dated to be negotiable three years beyond the date Mr. Lyles received the liquor. Fourth, the account to which the check was written was closed. This is definitely enough to show intent to deceive and therefore the evidence of the bounced checks was not necessary to prove intent. The probative value of presenting those checks was substantially outweighed by the prejudice. Both the check written to the Starkville Discount Liquor Store and the more than $7,000.00 of return checks, were independent and distinct transactions and the evidence of the more than $7,000.00 in returned checks precluded the possibility of Mr. Lyles' getting a fair trial upon the charge in the indictment.

In Sumrall v. State, 272 So.2d 917 (Miss. 1973), the Supreme Court reversed and remanded the case because of the prosecution's repeated interjection and repeated questioning concerning other criminal acts committed by the defendant not charged in the indictment. The Court found that the evidence of other crimes precluded the possibility of a fair trial upon the charge in the indictment.

In Eubanks v. State, 419 So.2d 1330 (Miss. 1982), the Court provided, "Mississippi follows the general rule that proof of a crime distinct from that alleged in the indictment should not be admitted in evidence against the accused." Citing, E.g., Loeffler v. State, 396 So.2d18 (Miss. 1981); Massey v. State, 393 So.2d 472 (Miss. 1981). The Massey Court cited Floyd v. State, 148 So. 226 (Miss. 1933), which set forth the reason for this rule.

> "The reason and justice of the rule is apparent, and its observance is necessary to prevent injustice and oppression in criminal prosecutions. Such evidence tends to divert the minds of the jury from the true issue, and to prejudice and mislead them, and, while the accused may be able to meet a specific charge, he cannot be prepared to defend against all other charges that may be brought against him. "To permit such evidence," says Bishop, "would be to put a man's whole life in issue on a charge of a single wrongful act, and crush him by irrelevant matter, which he could not be prepared to meet." 1 Bish.Crim.Proc. § 1124. (148 So. at 230). Massey, 393 So.2d at 474.

The Eubanks Court found the error of admitting evidence of other crimes not charged in the indictment was prejudicial requiring reversal, though there was ample other evidence to convict the defendant.

A reversal of Mr. Lyles' conviction is necessary to prevent injustice. The presentation during trial of the more than $7,000.00 worth of returned checks diverted the minds of the jury from the true issue and prejudiced and mislead them. It is impossible for the jury not to have been prejudiced by the admission of this evidence even though the trial court gave a limiting instruction.[3] As previously argued, the probative value exceeded the prejudicial value and there was sufficient evidence to find intent without allowing that evidence in.

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See jury instruction D-7 RE 43

III. WHETHER THE INDICTMENT WAS FATALLY DEFECTIVE FOR FAILING TO ALLEGE THE PROPERTY WAS PROCURED WITH INTENT TO CHEAT AND DEFRAUD?

The indictment should have alleged with intent to cheat or defraud and the failure of the state to place these words in the indictment caused the indictment to be fatally defective.[4] Mr. Lyles was indicted under Miss. Code Ann. §97-19-55 which provides:

§97-19-55. Bad checks.

It shall be unlawful for any person with **fraudulent intent:**

> (a) to make, draw, issue, utter or deliver any check, draft or order for the payment of money drawn on any bank, corporation, firm or person, knowing at the time of making, drawing, issuing, uttering or delivering said check, draft or order that the maker or drawer has not sufficient funds in or on deposit with such bank, corporation, firm or person for the payment of such check, draft or order in full, and all other checks, drafts or orders upon such funds then outstanding.

In support of his argument he cites McBride v. State, 104 So. 454 (Miss. 1925). In McBride the Supreme Court reversed Mr. McBride's conviction for failure of the state to allege in the indictment the language "intent to defraud." The Court provided that the gist of the offense of false pretense is the intent to defraud and such must be alleged in the indictment. Id. The Court stated that the

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The indictment reads in part: in the County aforesaid unlawfully, wilfully & feloniously obtain merchandise, of a total value of $100.00 or more, the property of Larry Whitaker d.b.a. Starkville Discount Liquor, by presenting to Gerald Richardson a certain check on AmSouth Bank, Inc., well knowing at the time of issuing, signing and delivering said check, that he did not have an account in said bank with which to pay said check and which said check consisted of the following words and figures, to-wit: SEE COPY OF CHECK ATTACHED (ck. #591)

And the said check was afterwards presented to the said Bank for payment and the said check was not paid by the said Bank upon presentation for the reason that the said SCOTTY B. LYLES did not have an account in said Bank with which to pay said check in full upon presentation, and by means and color of making, issuing and delivering the said check to the said payee named herein, he, the said SCOTTY B. LYLES did then and there by virtue of said false and fraudulent representation, cheat and defraud the said Gerald Richardson, AmSouth Bank, Inc., Larry Whitaker d.b.a. Starkville Discount Liquor, and obtain or receive of and from the said payee named in the said check the aforesaid merchandise, in violation of MCA §97-19-55; RE.3

statute does not make it a crime to draw bad checks. The crime therein defined is the drawing, uttering, or delivering of bad checks, orders, or drafts with the intent to defraud. The words unlawfully and feloniously were included, however, the Court provided that this was not sufficient. The Court provided that the purpose of the Legislature was to prevent the drawing, uttering, or delivering of fraudulent checks and drafts. They were of the opinion that the indictment was fatally defective in that it did not charge that the check in question was drawn by appellant with the intent to defraud. Id. at 455.

The language in Mr. Lyles' indictment alleged that he, "unlawfully, wilfully and feloniously obtained merchandise, of a total value of $100.00 or more..." However, the fraudulent intent required by the statue was omitted from the indictment. **See Footnote 4 and RE 3.** The language with intent to defraud should have been charged in the indictment. As previously mentioned, Mr. Lyles' check was dated for 2008.

In Pittman v. State, 58 So. 532 (Miss. 1912), the Court provided that in order to obtain a conviction under false pretense, and intent to cheat or defraud must be alleged.

In Sherman v. State, 359 So.2d 1366,1368 (Miss. 1978), the Court provided, " "There are several statutes on "forgery." Some of them require a "criminal intent" and some do not. This is reflected by Code section 97-21-27, which reads in part that "Whenever, by any of the provisions of this chapter, an intent to defraud is required to constitute a forgery," etc". Because the indictment allege wilful and felonious this was a criminal intent and not an intent to defraud as required by Miss. Code Ann. §97-19-55. Therefore, the indictment was fatally defective.

IV. WHETHER LIFE IMPRISONMENT WITHOUT PAROLE DISPROPORTIONATE TO THE CRIME OF WRITING A CHECK ON A CLOSED ACCOUNT AND PROHIBITED BY THE EIGHTH AMENDMENT?

The Eighth Amendment provides that, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The final clause prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed. Solem v. Helm, 463 U.S. 277, 284 (1983).

In Solem, the Court provided that a proportionality analysis under the Eighth Amendment should be guided by an objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions. Id. at 292.

First, as to the gravity of the offense and the harshness of the penalty, the maximum punishment for a false pretense conviction is punishment in the penitentiary for a term of not less than two (2) years nor more than fifteen (15) years, provided, however, that when the amount of value involved is less than one hundred dollars ($100.00), in lieu of the above punishment provided for, the person convicted may be punished by imprisonment in the county jail for a term of not more than twelve (12) months, within the discretion of the court. Sherman v. State, 359 So.2d at 1367 (Miss. 1978) citing Miss. Code Ann. §97-21-27 (1972). Mr. Lyles' sentence of life imprisonment without the possibility of parole is not proportionate to his conviction for false pretense. Second, it is rare in Mississippi that a person who is an habitual offender is convicted of false pretense and sentenced to life without parole. It is common for the state to at the very least, drop the habitual offender status and sentence that person under Miss. Code Ann. §99-19-81 (1972) to the maximum term of imprisonment prescribed for the felony he is convicted of. This would have allowed a maximum sentence of fifteen (15) years. Third, it is also uncommon in other jurisdictions for persons convicted of false pretense to be sentenced to life in prison without the possibility of parole. Mr. Lyles has

paid the penalty for each of his prior offenses and in essence the life imprisonment without possibility of parole is punishing him again for the sentences he has already served.

V. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THE ELEMENTS OF THE INDICTED CHARGE.

During a review of the jury instructions defense counsel objected to S-2 as citing Miss. Code Ann. §97-19-57 instead of the statute under which Mr. Lyles was indicted which is Miss. Code Ann. §97-19-55.[5] The following testimony is of importance:

T. 144-148

BY MS. MALLETTE: My question is, Judge, is this going to - - I'm reading Mr. Hedgepeth's instruction, the instruction he's submitting under S-2 is an insufficient funds instruction. The maker is not insufficient funds in or on deposit with such faith of payment of such check. The indictment is an account closed indictment.

SKIP DOWN

BY MR. HEDGEPETH: - - if the account is closed, you don't. But it's still the same thing. He didn't have sufficient funds because he didn't have an account.

BY MS. MALLETTE: But it kicks in notice requirements and things if he's proceeding under insufficient funds, correct? Am I'm not - - he has to prove certain notice elements if he's proceeding under insufficient funds.

SKIP TO T. 146.

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The language in the indictment is different from the language in Miss. Code Ann. §97-19-55, the statute Mr. Lyles is indicted under.

BY MR. HEDGEPETH: Your Honor, we can prove it has not sufficient funds because the account was closed or had no account, I mean - -

BY MS. MALLETTE: But the indictment only alleges that the account was closed, Your Honor. It doesn't allege insufficient funds in any way in the indictment. It says that he did not have an account with which to pay the check. The statute delineates the difference.

T. 148.

BY MS. MALLETTE: and 55. I was fixing to refer back to that, Judge. 57 deals with notice and prima facia evidence, and 55 is the actual statute. And it says it would be unlawful for the person with fraudulent intent. And then 57 goes on to explain that it is per se pretty much fraudulent intent or prima facia fraudulent evidence fraudulent intent - -

Defense counsel then offers to have defense instruction D-5 instead of using S-2. The trial court refused stating:

T. 153.

BY MS. MALLETTE: I'm not trying to split hairs, Your Honor. The statute makes the delineation for notice purposes. So, the legislature clearly thinks there's a difference between the two things.

BY THE COURT: well, they really don't though. They just think there's a difference between notifying somebody, because as Mr. Hedgepeth raised, probably most of us in this courtroom have written a bad check at some point in their life. I certainly have.

But not everyone that writes a bad check gets prosecuted. The question is how long - - how much time do you have to make that check good before the criminal prosecution can begin? That's the question.

If it's written on a closed account, it can begin immediately. If it's written on an insufficient funds, then the state by law has to wait X number of days before they can begin a criminal

prosecution.

T. 154.

BY MS. MALLETTE: Your Honor, if I could just - - my objection - - my main concern is that you read the indictment to the jury at the beginning of voir dire; which says - - which is misleading I think. And that's my concern just for purposes of the record - -

BY THE COURT: All right.

BY MS. MALLETTE: you know, it makes it sound like that the state has to prove that he did not know that he had an account or that his account was closed. And then now they're going to get an instruction that says they just have to prove he didn't have enough money in the bank to pay the check - -

Defense counsel went on to object to S-2 and asked the court to use D-5. The court overruled the objection and gave instruction S-2. **T. 156.**

Instruction S-2 is part of an insufficient funds instruction and D-5 tracks the language of the indictment, which states that Mr. Lyles did not have an account with AmSouth Bank. **R.E. 3, 18,26**

The trial court should have refused Instruction S-2 because Miss. Code Ann. §97-19-57, which is not the statute he was indicted under, requires notice for insufficient funds. The statute reads:

> §97-19-57. Bad checks; presumption of fraudulent intent; notice that check has not been paid; notice returned undelivered as evidence of intent to defraud.
>
> (1) As against the maker or drawer thereof, the making, drawing, issuing, uttering or delivering of a check, draft or order, payment of which is refused by the drawee, shall be prima facie evidence and create a presumption of intent to defraud and of knowledge of insufficient funds in, or on deposit with, such bank, corporation, firm or person, provided such maker or drawer shall not have paid the holder thereof the amount due thereon, together with a service charge of Forty Dollars ($40.00), within fifteen (15) days after receiving notice that such check, draft or order has not

been paid by the drawee.

McBride v. State, 104 at 455, is a decision from 1925 where the Court stated that the language, "the failure of a person drawing a check to pay or have paid the amount of it within ten days after notification of nonpayment on presentation shall be prima facie evidence of obtaining amount thereof under false pretenses", is mere rule of evidence, not conclusive of guilt, and does not constitute definition of the offense. However, if the written notice is not given, of course the state cannot stand upon the prima facie case provided for by the statute, but must go further and show all the elements of the crime, including the intent to defraud. Id.

The state's failure to draft jury instructions consisted with Mr. Lyles' indictment was error. Jury instruction S-2 should have been replaced with refused instruction D-5 with the language "intent to defraud" added, as previously stated in Argument III. The language in Instruction S-2, "he did not have sufficient funds in or on deposit with Amsouth Bank" was consistent with an indictment under Miss. Code Ann. §97-19-57 which provides that there is a presumption of guilt if the state proved notice to Mr. Lyles that his check had been returned for insufficient funds. If the state proved that Mr. Lyles received notice, or if they did not prove that he received notice, the instruction should have stated, "if you are convinced that the state proved that Mr. Lyles received notice of insufficient funds, this shall be prima facie evidence and create a presumption of intent to defraud and of knowledge of insufficient funds in, or on deposit with, such bank, provided such maker or drawer shall not have paid the holder thereof the amount due thereon, together with a service charge of Forty Dollars ($40.00), within fifteen (15) days after receiving notice that such check, draft or order has not been paid by the drawee. However, if you find from the evidence that the state failed to prove Mr. Lyles received notice of insufficient funds then you must find that the state has proven beyond a reasonable doubt all of the elements of the crime, including the intent to defraud."

The language of the jury instruction should have been consistent with the language in the indictment. Had the indictment not been defective, D-5 should have been amended to include "with intent to defraud" and this instruction would have been the correct instruction to present to the jury.[6]

In Shaffer v. Mississippi, 740 So.2d 273 (Miss. 1998), the Supreme Court held that eliminating an element of the instruction constituted reversible error. In Shaffer, the defendant was convicted of depraved heart murder. However, the jury was given an instruction that failed to include the element of "evincing a depraved heart, regardless of human life." The state argued that Mr. Shaffer should be procedurally barred from raising that issue on appeal because he objected upon different grounds at trial. The Supreme Court disagreed and stated that "instructing the jury on every element of the charged crime is so basic to our system of justice that it should be enforced by reversal in every case where inadequate instructions are given, regardless of a failure to object or making a different objection at trial." Id. at 282.

> "Just as the State must prove each element of the offense, the jury must be correctly and fully instructed regarding each element of the offense charged." Failure to submit to the jury the essential elements of the crime is "fundamental" error...Indeed, "[i]t is axiomatic that a jury' verdict may not stand upon uncontradicted fact alone. The fact must be found via jury instructions correctly identifying the elements of the offense under the proper standards." "Where the jury had incorrect or incomplete instructions regarding the law, our review task is nigh unto impossible and reversal is generally required." Id. at 274.

"It is rudimentary that the jury must be instructed regarding the elements of the crime with which the defendant is charged....reversal on this issue is warranted." Id.

6

Refused instruction D-5 reads: If you find from all the evidence in this case beyond a reasonable doubt that: 1. Scotty B. Lyles, on or about December 23, 2005, in Oktibbeha County, Mississippi; 2. Unlawfully, wilfully and feloniously; 3. Presented to Gerald Richardson; 4. A check on AmSouth Bank, a check numbered 591; 5. That at the time of issuing, signing and delivering the check, Scotty B. Lyles knew that he did not have an account with Amsouth Bank; 6. By virtue of the false and fraudulent representation did cheat and defraud and deprive; 7. Gerald Richardson, AmSouth Bank, Inc., Larry Whitaker d.b.a. Starkville Discount Liquor, of merchandise of a total value in excess of $100.00 or more; then you shall find Scotty B. Lyles guilty as charged.

The Court in Shaffer cited its ruling in Hunter v. State, 684 So.2d 625, 636 (Miss. 1996). In Hunter, the defendant offered a confusing instruction, which the trial court refused. The State did not offer any instruction on the elements of the underlying offense of robbery. The Supreme Court held the State had a duty to ensure that the jury was properly instructed on the elements of the underlying crime. The Court found reversible error because even though the defendant did not submit a suitable instruction, it found that the State was obligated to do so. Id. The Court in Hunter further stated, "It is horn book criminal law that before a conviction may stand the State must prove each element of the offense. Not only is this a requirement of the law of this State, due process requires that the State prove each element of the offense beyond a reasonable doubt." Id.

The Court in Shaffer went on to cite Davis v. State, 586 So.2d 817, 819 (Miss. 1991), where the Court stated that "a conviction is not valid where the prosecution does not prove each element of the charged offense beyond a reasonable doubt. "The Court further reasoned that, "a conviction is unenforceable where the jury does not find each element of the offense beyond a reasonable doubt. Where the jury is not even instructed on one of the vital elements of the offense, the conviction must not survive the scrutiny of this court." See Shaffer, 740 So.2d at 282.

In Ballenger v. State, 761 So.2d 214 (Miss. 2000), the Supreme Court granted post conviction relief and the conviction of capital murder and death sentence by lethal injection of Mrs. Ballenger was vacated and remanded for a new trial pursuant to the decisions in Hunter and Shaffer.

In Ballenger, the State did not offer an instruction on the elements of the underlying offense of robbery. The defendant offered a confusing instruction, which the trial judge refused. The Supreme Court held that the state had a duty to ensure that the jury was properly instructed on the elements of the underlying crime. Id. at 216-217.

Along with relying on the Hunter and Shaffer decisions, the Court in Ballenger also cited Neal v. State, 451 So.2d 743, 757 (Miss. 1984), "because the State has to prove each element of the crime beyond a reasonable doubt, then the State also has to ensure that the jury is properly instructed with regard to the elements of crime."

The Court in Ballenger went further and cited Screws v. United States, 325 U.S. 91, 107 (1945), where Petitioner Screws, the sheriff of Baker County, Georgia, a policeman and a special deputy arrested Robert Hall and while Mr. Hall was handcuffed, the three-petitioners began beating him with their fists and with a solid-bar blackjack. Even after they had knocked Mr. Hall to the ground, the petitioners continued to beat him from fifteen to thirty minutes until he was unconscious. He was then dragged feet first through the court house yard into the jail and thrown upon the floor dying. The petitioners claimed Mr. Hall had reached for a gun and had used insulting language as he alighted from the police car. Mr. Hall died within the hour after having been taken to a hospital. The petitioners were charged with willfully depriving the deceased of federal rights and of a conspiracy to do so. The lower court instructed the jury that petitioners acted illegally if they applied more force than was necessary to make the arrest effectual or to protect themselves from the prisoner's alleged assault. The United States Supreme Court in Screws reversed the lower court finding fundamental error because the jury was not instructed on the essential elements of the offense. The Court stated that to convict it was necessary for the jury to be instructed that they had to find that petitioners had the purpose to deprive the prisoner of a constitutional right, e.g., the right to be tried by a court rather than by ordeal. And in determining whether that requisite bad purpose was present the jury would be entitled to consider all the attendant circumstance the malice of petitioners, the weapons used in the assault, its character and duration, the provocation, if any, and the like.

CONCLUSION

Miss. Code Ann. §97-19-55, false pretense, does not encompass a fraudulent future promise to pay. Miss. Code Ann. §97-19-83 does. At most, Mr. Lyles' conduct in dating the check for Dec. 23, 2008 would be a fraudulent future promise to pay and therefore, the evidence is insufficient to find him guilty of false pretense. He further contends that the trial court abused its discretion by allowing the evidence of more than $7,000.00 worth of bad checks into evidence. However, because Argument I requires dismissal and discharge of Mr. Lyles this case should not be remanded on Argument II. Next, the indictment was fatally defective for failing to allege intent to defraud and as previously stated this case should not be remanded because the evidence was insufficient to find Mr. Lyles guilty. Further, the sentence is disproportionate to the crime, but because of the insufficiency of the evidence in Argument I this case should be dismissed. Finally, because instructing the jury on every element of the charged crime is so basic to our system of justice, reversal is required. However, because the evidence is insufficient to find Mr. Lyles guilty, this case should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Brenda Jackson Patterson, Counsel for Scotty B. Lyles, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

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This the 30th day of June, 2008.

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