2007-KA-01626-COA RT

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I. REPLY TO APPELLEE'S CLAIM THAT "DEFENSE COUNSEL'S LEGAL REPRESENTATION WAS SUFFICIENT." (A.B. 20).

The State's claim that defense counsel was sufficient is without foundation. The State claims that not enough error exists for Brewer's representation to have been ineffective. This of course is not the reality of the case. Fraise has demonstrated in his initial brief, and will further demonstrate herein numerous errors and the prejudice that resulted. Nevertheless, this case contains enough single errors that if standing alone would result in Brewer being ineffective, and shatters the State's claim that "surely one or two mistakes will not render a defense completely insufficient,"(A.B. 21). Nero v Blackburn, 597 F. 2d 991 (5th Cir. 1979) tells a different tale:

"(Sometimes) a single error is so substantial that it alone causes the attorney's assistance to fall fellow the Sixth Amendment standards."

Id at 994.

1. Jury Instructions

One such error the State has failed to touch on in its brief is Brewers failure to submit jury instructions related to the defense.

"To claim ineffective assistance of trial counsel due to failing to submit jury instructions, it is the appellant's duty to demonstrate both error in failing to receiving the instruction and the prejudice to the defense." Burnside v State, 882 So. 2d 212, 216 P22 (Miss. 2004).

It was error for Brewer to fail to submit jury instructions that instructed them on both how to evaluate eyewitness identification testimony, as well as the law on alibi defense. This was the theory of the defense and it is well established that failing to instruct the jury on the law relating to the defense is error, Giles v. State, 650 So. 2d 846,849 (Miss. 1995).

A. Eyewitness identification testimony.

The prejudice in failing to instruct the jury on how to consider and evaluate eyewitness identification testimony is substantial viewing the fact that the state's entire case revolved around

If the jury were properly instructed there is a reasonable probability that the jury could have found Quintana's identification unreliable and thus acquit Fraise. The first three (3) Biggers factors weigh heavy in favor of Fraise, which in turn would have a positive effect, for the defense, on the 4th and 5th Biggers factors.

The jury could have concluded that Quintana's opportunity to view the robber was limited and less than that of the other two (2) witnesses who did not identify Fraise as the robber. The robber wore a mask that completely covered the face (R. 250). Quintana, also testified that she was behind the robber and was able to get a short side view of the robber's masked face, for a split second when he turned and demanded that she "don't move". Quintana, was at least 16 feet behind the robber while the other two witnesses were less than 5 feet away from the robber. The jury cannot be expected to evaluate Quintana's testimony in the Biggers factor if they are not instructed to do so by the court.

Quintana's degree of attention could have also failed the jury's evaluation if they had been instructed to apply it to that Biggers factor. Quintana gave no description of the robber except for contradicting skin tones and races. There was no indication of age or features such as hair type or color, eye color facial hair, teeth, etc.

The same goes for the accuracy of prior descriptions. Quintana testified that she has always said that the robber was a "light skinned mixed guy" (R. 207), yet evidence introduced in the form of police reports (R.E. 14, 16, 18) indicates that Quintana described the robber, the night of the crime, as a "black male" (R.E. 16), having "dark skin" (R.E. 18) and four days later as saying a 'possible white male with a dark complexion' (R.E. 14). There is more than a reasonable probability that the jury could have given the reports more attention and consideration and found them more reliable than testimony from Quintana, had they known that prior descriptions were a factor to be considered, by law, when evaluating the identification testimony

of Quintana. They also could have found the report of Clark (R.E. 14), where Quintana stated the robber was a 'possible white male with a dark complexion' to indicate that she did not know Fraise as she so adamantly indicated during testimony. To absolutely state that he is of "mixed race" is indicating personal knowledge of that person, while 'possible white male with a dark complexion' leaves doubt of personal knowledge.

There also still exists the height of the robber given by both Quintana when she testified the robber was the height of Stevens, (R. 207), and Stevens who testified his height being 6'5" (R. 269) and that the robber was between 6'1" and 6'5" (R. 268). Then there is the actual height of Fraise who is 5'8".

Furthermore, it is quite possible that the jury considered Quintana's degree of certainty as the only proofer for truthfulness and reliability when they should not have. The jury is to legally evaluate her testimony based on all of the Biggers factors, not based on who can be more convincing in their mannerism alone. The jury should have been instructed that a witness' identity testimony is an expression of belief or impression by the witness and its value depends on the opportunity they had to observe the offender at the time of the offense and to make a reliable identification later, along with the other Biggers factors, Davis v. State, 568 So. 2d 277 (Miss. 1990). Instead, the jury may have reversed things and used Quintana's belief of certainty as proof that her testimony was reliable as opposed to evaluating the Biggers factors first to determine if her belief was reliable.

Brewer also argued that the photo lineup was impermissibly suggestive and gave rise to a very substantial likelihood of misidentification. He questioned Clark on the photo lineup and Clark admitted that all the subjects in the photo lineup, with the exception of Fraise, were obviously black men (R. 156-160). This was not explained to the jury as to how to consider the possibility that the photo lineup was impermissibly suggestive and is the reason Quintana

believes the robber to be Fraise. The photo lineup should have been evaluated under the Biggers factors, as well, York v. State, 413 So. 2d 1372 (Miss. 1982).

Brewer's failure to instruct the jury on eyewitness identification testimony was prejudicial to the defense and leaves the conviction unreliable due to the fact that a reasonable probability exists that had the jury been so instructed, the results of the trial would have been different.

B. Alibi Defense

The prejudice in failing to instruct the jury on Fraise's alibi defense is that the jury was not made aware of Fraise not bearing the burden of proving his alibi. The jury could have erroneously placed on the defense, such a burden that could have easily caused them (the jury) to convict him for such a failure. That probability is substantially increased if Det. Krantz testimony is considered and the role it played to discredit Fraise's alibi witness (R. 338-344). Failing to inform the jury that Fraise is not required to establish the truth of his alibi to their satisfaction, may have nudged their natural tendency to expect such proof.

Although the jury was instructed on the Burden of Proof and the Presumption of Innocence, they should have specifically been instructed on the law of alibi defense. The Burden of Proof and Presumption of Innocence instructions not attached to alibi defense did not suffice. In this case, as in Newton v. State, 229 Miss. 267, 90 So. 2d 375 (1956), the State's case, as to identity of the appellant rested entirely upon one witness, Jackson v. State, 645 So. 2d 921, 925 (Miss. 1994), and a proper alibi instruction was required. The presumption of innocence and burden of proof was found to be insufficient for an alibi defense and resulted in prejudice to the defense, see Newton v. State, Id.

The jury should have been instructed that if there were a probability of Fraises' innocence, due to his alibi defense, they should acquit him. It is a legal defense that if evidence was presented at trial, the jury should have been instructed accordingly.

2. Failure to challenge illegal search and seizure.

The State has offered argument to the issue of Brewer failing to challenge the illegal search of Fraise's apartment. The State's argument is off base and cannot hold up against the solid case-law that addresses this issue. The State's entire reasoning is exactly what other district courts have found to be Fourth Amendment violations. The State claims that because Varnado was "actively engaged" in the search of Fraise's apartment, the search was legal. The State next claims that Varnado "may not initially had any suspicion, but once she was told of the robbery, she willingly went" (A.B. 23). The State then claims that being that it was Varnado who found the photo of Fraise with a gun, makes it legal.

Although I have not been able to find any Mississippi case-law that addresses the issue of warrantless searches of parolee's residences, involving their parole officer, I have found some case-laws from other districts and I pray that this court will acknowledge the Fourth Amendment issue considered in those district's decisions. Based on those decisions, the warrantless search of Fraise's apartment was illegal.

Based on Fraise's probation officer, Brenda S. Varnado's incident report (R.E. 20), the Picayune police contacted her and advised her that Fraise was a suspect in the armed robbery of a local pit stop and asked if she would accompany them to Fraise's apartment to speak to him. This was to avoid getting a legal search warrant for Fraise's apartment. Varnado, agreed and once they were at Fraise's apartment, the detectives conducted a warrantless search of the apartment after discovering that Fraise was not at home. The officers seized several items some of which were later used as evidence at trial.

In Smith v. Rhay, 419 F. 2d 160, 16263 (9th Cir. 1969), the court found a Fourth Amendment violation in a parole officer 'searching a parolee's possession while acting on the prior request of law enforcement officials and in concert with them'. The search in Smith is almost identical to the warrantless search here. The United Stated Ninth Judicial Circuit Court, has called this type of use of the parole system, a "stalking horse" and has held in United Stated of America v. Butcher, 926 F. 2d 811, 815 (9th Cir. 1991), that "under no circumstances should cooperation between law enforcement officers and probation officers be permitted to make the probation system a subterfuge for criminal investigation".

Brewer insisted, and now the State argues, that because Fraise was on probation and his probation officer participated in the search, it was a legal search, (R. 142-143). However in Lotta v. Fitzharris, 521 F. 2d 246, 246-49 (9th Cir. 1975), held that it was 'too late in the day to assert that searches of parolees by their parole officers present no Fourth Amendment issues. Rather, such searches may be held illegal and the evidence obtained there from suppressed unless they pass muster under the Fourth Amendment test of reasonableness'.

The U.S. Supreme Court in Griffin v. Wisconsin, 483 U.S. 868 at 872-80(1987), upheld the constitutionality of a warrantless search of a probationer's residence conducted pursuant to a state regulation which authorized such searches on the basis of reasonable suspicion. The court, nevertheless, specifically refused to consider the state's contention that "any search of a probationer's home by a probation officer is lawful when there are 'reasonable grounds' to believe contraband is present". Id at 880.

In U.S. v Scott, 945 F. Supp. 205, at 207-08(1996), that court held that the warrantless search of Scott's person and property was authorized by Nebraska state law and/or the probation conditions he agreed to. Also, that police had 'reasonable suspicion' to conduct a probation search based on the facts outlined in the case. "The search therefore, on its face would appear to

pass constitutional muster under the Fourth Amendment, yet, unlike the situation in Griffin, where the search was conducted by probation officers, the search here was performed by police officers and, as such, requires further scrutiny". Id. At 208

"Courts have uniformly held that a probation search may not be used as a 'subterfuge for a criminal investigation' and that a probation officer must not act as a 'stalking horse' for the police". Scott at 208. U.S. v McCarty, 82 F. 3d 943, 947 (10th Cit.) cert. Denied, 1996 U.S. LEXIS 5986, 117 S. Ct. 257, (1996); U.S. v. Watts, 67 F. 3d 790, 794(9th Cit. 1995), cert. Denied, 134 L. Ed. 2d 534, (1996); U.S. v Martin, 25 F. 3d 293, 296 (6th Cit. 1994); Shea v. Smith, 966 F. 2d 127, 132-33 (3rd Cit. 1992); U.S. v Giannetta, 909 F. 2d at 581 (1st Cir. 1990) citing U.S. v Cardona, 903 F. 2d 60, 65-66 (1st Cir. 1990), cert. Denied, 498 U.S. 1049 (1991).

Varnado's incident report dated 9-26-06 (R.E. 20) was a part of the State's discovery and clearly outlined the fact that she was acting as "the agent of the very authority upon whom the requirement for a search warrant is constitutionally imposed", Smith at 163. I specifically pointed out to Brewer that it was the Picayune police who contacted Varnado and not the other way around.

"It is likewise clear that the search was initiated at the behest of [the detectives], not [Varnado], and that police, rather than probation objectives, were the real motivation behind the search". Scott, 945 F. Supp. 209.

The evidence in this case reveals the subterfuge and overreaching on the part of the police. The facts establish that police had targeted Fraise as a suspect in the armed robbery investigation, and then enlisted the help of Varnado in order to search Fraise's apartment without a warrant. "This court joins other courts in condemning the use of a search condition, imposed on a probationer such as defendant, as a broad investigatory tool for law enforcement. Probation

searches must be used for rehabilitative and security purposes and not as a mechanism for solving crimes and circumventing the proscriptions of the Fourth Amendment." Scott, at 209.

If Brewer had motioned to have the seized property suppressed, the state's case would have been much weaker than it already was. In such a case with little evidence, every little bit counted in the decision making process of the jury. The absence of one piece of 'so-called' evidence may have resulted in a different outcome. Surely, if the State could not have used Fraise's head rag, gloves, money and self-photograph, there is a reasonable probability that the trial results would have been different. The adversarial process that helps to insure fairness in the legal system was not afforded Fraise, due to Brewer's constant short cuts and misinformation of the laws that apply to this case. Strickland at 680, require that the 'effective assistance must be based on professional decisions and informed legal choices'. In Ward v State, 708 So 2d 11, (Miss. 1989) the court held that a lawyer who is not familiar with the facts and law relevant to the client's case cannot meet the constitutionally required level of effective assistance of counsel.

If Brewer had motioned to suppress the seized property and the lower court denied it, there is a substantial likelihood that this court would have found error in the lower court's ruling. "This Court has a long tradition of reversing convictions based on the admission of illegally obtained evidence." Woodward v. State, 635 So. 2d 805 at 807 (Miss 1993). Therefore, it was a prejudicial error for Brewer to not motion the court to suppress the evidence seized from Fraise's apartment.

The State lastly asks this court to not apply the Fourth Amendment violation that is so evident in this case because Varnado was involved in the search. This is against the overwhelming case-law that supports the opposite. The Appellee requests and would have this Court turn its back on its honorable tradition and spirit outlined in Newell v State, 308 So. 2d 71 (Miss. 1975). Although Newell is specifically dealing with legislation yielding to the

Constitution and not a Fourth Amendment issue in itself, its application is far reaching and relates here when it held that:

"We hasten to say that as long as rules of judicial procedure enacted by the legislature coincide with fair and efficient administration of justice, the Court will consider them in a cooperative spirit to further the state's best interest, but when, as here, the decades have evidenced a Constitutional impingement, impairing justice, it remains our duty to correct it." at 78.

The Appellee can neither deny, nor ignore, nor avoid the constitutional issue that arises here.

3. Failing to object.

The State has attempted to belittle Brewer's poor performance and inaction in objecting yet it sought to use such inaction as a tool to claim that the issues raised in this appeal should not be reviewed because of it. However, in each instance, Brewer failed to object that has been mentioned by the Appellant, it was substantial and had an effect of prejudice on the defense and the jury and leaves the trial results unreliable.

Fraise's trial consisted of many instances where Brewer should have objected to insure that Fraise receive a fair trial without the use of illegal evidence and improper and prejudicial questions and comments by the prosecution. On the very few occasions that Brewer did object, he did not request that the jury be properly instructed or request for a mistrial.

A contemporaneous objection is necessary to preserve Fraise's right to raise the issue on appeal. If no objection is made, the issue is deemed waived, McQuarter v. State, 574 So. 2d 685, 688 (Miss. 1990). Such procedural rules place a burden on the trial counsel to be prepared for trial and attentive to what occurs at trial, Robertson v. State, 595 So. 2d 1310, 1315 (Miss. 1992), Byrom v. State, 863 So. 2d at 891 (Miss. 2003).

An attorney's failure to step up to this responsibility was addressed specifically in Brooks v. State, 209 Miss, 160, 154,46 So. 2d 94,96 (1950), where the conviction was reversed because counsel made no objections to "highly improper and prejudicial" tactics and evidence of the

state. It was held that 'if objections had been made on the questions pointed out above, and such objections had been overruled, a reversal would be obvious'. As in Brooks, the state obtained Fraise's conviction with the use of improper and prejudicial tactics and evidence, all made possible by the ineffective assistance of the trial counsel, which prevented Fraise from receiving a fair trial.

A. Clark and Quintana's in-court identification and Quintana's out-of-court identification of Fraise.

In Howard v. State, 319 So. 2d 219, 221 (Miss. 1975), the Mississippi Supreme Court applied Wade, and placed a burden on trial counsel to scrutinize out-of-court identifications. Brewer, failed to file any motion to suppress the out-of-court identification of Fraise. Yet, during trial, he argued that the out-of-court identification was a result of an unfair suggestive photo lineup. With such a theory of defense and his failure to motion for suppression, it was unreasonable to not object to any and all in-court identifications that resulted from the unfair photo lineup. The failure prejudiced the defense because the state's entire case revolved around the identification testimony of Quintana and absent this conviction is highly unlikely.

Clark's in-court identification (R.140) should have been objected to for obvious bolstering reasons. Clark should not have been allowed to give an in-court identification of Fraise based solely on Quintana's identification. This simply bolstered Quintana's testimony and the state's case, Young v. State, 451 So, 2d 208, 212(Miss. 1968).

B. Presumption of innocence comment.

As outlined in ISSUE I, on page 5 of appellant's brief, the prosecution was permitted to make prejudicial comments to the jury regarding Fraise's presumption of innocence, (R. 29). This comment contributed to Fraise receiving an unfair trial and should have been objected to. The lower court should have been asked to correct the prejudicial comment by admonishing the

jury or declaring a mistrial. Allowing the state to dilute Fraise's presumption of innocence right was unfair and falls below the standards of the professional norms for trial counsel.

C. Statements and questions regarding Fraise's pretrial incarceration.

As is outlined in ISSUE I, on page 6 of appellant's brief, the prosecution improperly informed the jury that Fraise was in jail. This was blatantly done when prosecutor Creel asked Joe Blank, "and isn't it a fact that you have visited Jael Fraise in the jail?" (R. 305). This question was never objected to by Brewer, but two questions later he requested to approach, (R. 305), he proceeded to complain about the state mentioning Fraise's incarceration. He did not, however, request that the jury be instructed to not consider Fraise's being in jail. This, of course prejudiced the jury because they were never warned not to consider the fact that Fraise was in jail. This question was, in fact, the set up for every other subtle reference to Fraise being in jail. The prosecutor no longer had to mention "jail" as it was quite clear that questions such as, 'Mr. Blank, you've spoken with Jael Fraise a couple of times by phone since he's been back in Pearl River County, haven't you?' (R.306), was referring to Fraise being in jail. Other examples of such questions and comments were asked to Hernandez, such as: 'Because he got picked up in March in California', (R.321); 'He got picked up. All right. But since he's been here you've talked to him quite a bit, haven't you?' (R. 322); 'You visit him quite often?' (R. 322).

In fact, the entire cross-examination of Hernandez set a prejudicial tone. The prosecutor made accusations and insinuations that had no foundation in the facts. The prosecutor pressed upon the minds of the jury that Hernandez supported and aided Fraise in evading arrest, and most importantly to this issue, that Fraise was in jail awaiting trial. Brewer should have objected to the entire cross-examination.

D. Questions and comments relating to flight.

As is outlined in ISSUE I, page 8 of the appellant's brief, the prosecutor was allowed to question and comment on Fraise's possible flight without objection from Brewer. The cross-examination of Hernandez was riddled with the prejudicial questions and comments regarding Fraise being on the run from the law (R. 319-21). And, at no time did Brewer object and request a mistrial. These comments, questions and accusations were the most prejudicial of all of the prosecutor's errors, yet, not even a hint of objection was made. This in itself was enough to prejudice the jury and deny Fraise a fair trial.

During closing arguments, the state made it a point to impress flight onto the minds of the jury. "They never found him till later, much later", (R. 354). "Jael Fraise works at Heritage Plastics, I believe that's what his witness says, worked at Heritage Plastics. After September 25th, Poof, he was gone. He was gone. Where did we finally get him? In California in March", (R. 367). These were blatant comments on flight, when it is prejudicial and was prohibited by the trial court's order; (R. 49). However, trial counsel failed to object to it being presented to the jury. This of course prejudiced the defense.

E. Prosecutor's insinuations and intimations.

As it is outlined in ISSUE I, page 10 of appellant's brief, the prosecutor was allowed to illegally intimate and insinuate that Hernandez was aiding and preventing Fraise from being arrested. This was never proven by any rebuttal witnesses and Brewer, at the closing of the state's rebuttal witnesses should have objected to the questions and insinuations that the prosecutor used to impeach Hernandez.

This case turns on the credibility the jury places on the witnesses and for the state to illegally impeach Fraise's alibi witness with unfound accusations was prejudicial to the defense. Brewer should have seen the harm this was to the defense and should have been prepared to object to the use of such tactics when the state failed to provide any rebuttal testimony to prove

these accusations. Brewer should have requested a mistrial due to the fact that Hernandez was Fraise's alibi witness and her credibility was important and should not have been allowed to be impeached by the state without any proof. "The prejudice to the appellant is substantial, in view of the fact that [Hernandez], the sole eyewitness establishing appellant's defense was improperly impeached concerning the essential fact of appellant's defense." Smith v. State, 457 So. 2d 327,335 (Miss. 1984).

The state was allowed to continually insinuate that Hernandez was in contact with Fraise between September 25th, 2006 and March 2007, and aided his evasion. The state asked Hernandez 'Q. You knew they were looking for him and you didn't call [them]?-A. Right-Q. Because you were hiding him out down there, weren't you? – A. No- Q. You were keeping him from coming up here, you were hiding him, because you didn't want him to get arrested?-A. No.'(R. 320-21).

F. Discovery violation & the State's use of evidence not disclosed to the defense.

As is outlined in ISSUE II, page 11 of the appellant's brief, the state used undisclosed oral statements that were substantial and material to the outcome of the proceedings. Brewer not once objected to the state's use of this surprising testimony, which should have been barred from the state's use due to the fact that the defense was not made aware of such testimony until trial. The defense could have requested and had granted, a mistrial if such a motion was overruled a reversal would be obvious because the law is clear on evidence that has not been disclosed before trial being inadmissible. Kolberg v. State, Id at 1318 held that 'if the district attorney does not provide the evidence to the opposing counsel during discovery, then it should not be introduced as evidence in the trial'.

G. The use of information illegally obtained during the cross-examination of Hernandez.

As is outlined in ISSUE IV, on page 17 of the appellants brief, the state used information obtained from the illegally seized phone records of Fraise during the testimony of Krantz and Hernandez. The state should not have been allowed to use illegal evidence without Brewer objecting to it. 'The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court but that it shall not be used at all.' Silverthorne Lumber Company v. United States, 251 U.S. 385, 392 (1920). The state was allowed to use investigation testimony when the investigation was based on illegally obtained evidence. Davidson v. State, 240 So. 2d 463, 464 (Miss. 1970).

Brewer knew the facts and circumstances surrounding the illegal acquisition of Fraise's records prior to both Hernandez and Krantz testimony and objected to the testimony of Krantz but failed to object to any testimony or questions relating to the phone calls the police made using the illegally obtained phone records of Fraise when the state cross-examined Hernandez. This allowed the state to illegally impeach Hernandez, Fraise's sole alibi witness at trial. This was prejudicial to the defense.

H. Failing to request that the jury be instructed after objection to hearsay was sustained.

During the direct examination of state's witness, Poche, she testified to inadmissible hearsay. Brewer objected and the court sustained the objection, (R.104). However, Brewer neglected to request that the jury be instructed to disregard the hearsay testimony.

This point is tricky due to the fact that Brewer objected to 'hearsay' on the apartment manager, then later, admitted the exact same hearsay statements into evidence, via Clark's report (R.233, R.E.14). This is just another stick placed on the pile that makes up the totality of circumstances.

This hearsay supported the state's case, a fairly weak case, where every little bit counts. What was the rationalization in objecting to hearsay that the jury has already heard if no

request to instruct the jury to disregard the hearsay follows? This shows a lack of strategy and indicates that Brewer's actions were being determined at the spur-of –the-moment. Nothing was actually planned out before trial.

II. REPLY TO APPELLEE'S CLAIM THAT "NO COMMENTS OR IMPEACHMENT EFFORTS MADE BY THE PROSECUTOR DURING TRIAL CONSTITUTED PROSECUTORIAL MISCONDUCT." (A.B. 6)

Apellee claims harmless error in the prosecutor's Parchman comment and claims because the jury received instructions regarding the presumption of innocence that no reversible error occurred, and sites Taylor v Kentucky. However, Taylor never addresses this issue as the state claim. The Court there only pointed out other prosecutor errors that effected the defendant's presumption of innocence, and never addressed whether they would rise to reversible error standing alone, or combined with other prosecutor errors. Taylor at 486-87.

The State next claims harmless error in the questions raised by the State regarding Fraise's incarceration. It claims that the single comment was "far less prejudicial than cases dealing with shackles and prison garb, which can be a constant reminder of the defendant's incarceration." (A.B. pg.7). Nevertheless, the jury was constantly reminded of Fraise's incarceration with continued questioning of his being in jail. (R. 306,321,322,305).

The State also argues that the question about Fraise being incarcerated was an attempt to establish bias but these were unfounded insinuations used simply to convey to the jury, Fraise's incarceration. This combined with the other prosecution misconduct resulted in reversible error.

Next, the State claimed, "the defendant's counsel only objected to the introduction of evidence regarding when and where the defendant was finally served." (A.B. 8).

However, the State has failed to recognize that the question of flight was addressed in the motion in limine. The following portion of the record is relevant:

THE COURT: Ownership. And then there's evidence of the defendant's alleged flight, the State will be allowed just to introduce when the warrant was issued for the defendant and

when it was served, because there is no direct proof of escape from the scene of the armed robbery and the length of time between when the defendant was found. But the State will be allowed just as a matter of fact to state when the warrant was issued and when the defendant was actually served or placed into custody.

(R. 49-50). The court clearly forbade the State from introducing any allegations of flight. Indeed Fraise's trial counsel failed to object to such flight evidence, which lends a hand to Fraise's claim of ineffectiveness, the issue was presented to the trial court in Fraise's JNOV (R.E. 7).

The State did not, however, argue that they did not introduce evidence of flight but instead asserts that "the evidence was admissible"(A.B. 9), simply overlooking or ignoring the unavoidable fact that the trial court forbade any such evidence.

Finally, the State claims that questions and statements made during the cross-examination of Hernandez were proper because there was "sufficient factual basis to support the question". (A.B. 9). The State claims that because she admitted to seeing Fraise once in New Orleans and had not called the police, they could insinuate and intimate her aiding and supporting Fraise in flight. The State now fails to recognize that she stated that she had no knowledge of Fraise's whereabouts prior and after that encounter with him. (R. 319-322). Furthermore, the question was an accusation in a question form, and when the answer was "No", the prosecutor made an accusation statement, which was not a question at all.

III. REPLYTO APPELLEE'S CLAIM THAT "THE STATE PROPERLY PRODUCED THE TWO WITNESSES UNDER UNIFORM CIRCUIT AND COUNTY RULE 9.04." (A.B. 10)

The State first claims that no objection was made to the testimony of neither Poche nor Stevens. Although no objection was made, their testimony was substantial and had a huge impact on the jury that denied Fraise a fair trial and due process, which are fundamental rights. This Court has always reviewed issues alleging violation of fundamental rights even where no objection was made. Sims v State, 919 So. 2d 264 at 266(Miss.2006). Furthermore, this issue

can be attributed to prosecutorial misconduct and this Court is not constrained from considering the merits of the issue when no objection was made. Mickell v State, 735 So. 2d 103 (Miss. 1999).

The State goes on to argue that Stevens was on the witness list and testified to all that was presented to the police. Fraise agrees that Stevens and Poche were on the witness list but that their testimony was not disclosed to the defense. The mere fact that it was told to the police and was not included in the state's discovery was a violation of rule 9.04. No police reports indicated that Stevens was taken to the red Oldsmobile and that he identified it as the vehicle involved in the crime, yet he testified to that during trial (R. 262). Such information if disclosed could have changed the entire approach of the defense. Trial counsel spent a lot of time disassociating the vehicle from the crime, unaware of Stevens testimony when more focus should have and would have been given to disassociating Fraise from the vehicle if his testimony was disclosed according to rule 9.04.

The State then argues that Poche's testimony was not disclosed to the defense but that its substance was mentioned during trial and was not objected to, thus this issue is nonreviewable. However, each time the State and Poche mentioned Fraise in use of the vehicle, they were general statements that could only be denied with general testimony dissociating him from the vehicle. But during cross-examination Poche, for the first time, testified that the only time she witnessed Fraise using the vehicle was the day of the robbery, (R. 108, 110-11). This gives a date and time in which the defense can establish Fraise's location, akin to an alibi. This makes her testimony substantial to the state's case and equally prejudicial to the defense.

The State also claims "there was no unfair surprise as the defense had plenty of opportunity to learn of her eventual testimony" (A.B. 10). This idea the State introduced has previously been shunned by this Court in Kolberg v State, at 1317.

The fact that the State admits that Poche's testimony was not disclosed in discovery and still called her as a witness indicates prosecutorial misconduct and a blatant disregard for the discovery rules. This Court has held that it is not only the duty of the defense counsel and trial judge to protect a defendant's constitutional rights but also the duty of the prosecutor, Livingston v State, 525 So. 2d 1300 at 1306 (Miss. 1988).

The State admits that if objections under rule 9.04 had been made and a request for mistrial followed, it would have been fitting.

IV. REPLY TO APPELLEE'S CLAIM THAT 'THE TRIAL COURT DID NOT ERR IN ALLOWING THE PHOTO LINEUP AND TESTIMONY FROM JEANETTE QUINTANA AND DETECTIVE CLARK." (A.B. 12)

The State has attempted to equate this case to others with less compelling and consistent inconsistencies, and has misstated and misrepresented the facts of this case. The State claims that Quintana had an "unobstructed view" of the robber when in fact all witnesses reported that the robber's face was completely covered with a black mask. The State claims that she had the "entirety of the robbery" to observe the robber, when she reported that the robber's back was to her the entire time except for the split second where she had a side view of his face when he told her "don't move". "He looked at me once" (R.221), "long enough to tell me don't move"(R. 221).

The State claims that Quintana's description of the robber was "consistent through the reports that she was unsure if he was a light skinned black man or a dark skinned white man", and that the only confusion was "which race the man was, but she had no doubts as to the color of his skin." (A.B. 13). However, Quintana has never indicated she saw the robber's skin during her testimony. She in fact testified to have never seen the robber's skin (R. 220,222-3). Also, all reports from the night of the robbery states clearly "dark skin", "black man", "black male"(R.E.16). None say dark skinned white man or light skinned black man. A single report

from four (4) days later states mixed race or possible white male with dark complexion, (R.E. 17). There have always been discrepancies with what the robber's skin color and race was and is evident from the record. Furthermore, it is what Quintana testified to that shed light on the situation because she denied every description attributed to her in all of the police reports (R. 231, 237,242,244). She testified that she knew who the robber was and that she has always said the robber was a "light skinned mixed guy" (R. 231).

The State did not comment on the illegality of the photo lineup, nor did they show that Quintana could identify Fraise as the robber absent the suggestive photo lineup. The State cannot rationalize all of the discrepancies and inconsistencies in her identifying Fraise as the robber. She gave the robber the same height as Stevens height (R. 207,215), Stevens who is 6'5" (R. 270), while Fraise is 5'9". She saw no facial featured (R. 218), saw no skin (R. 222-23). She claims she gave no description of the robber the night of the crime (R. 226-27), admits that Stevens had a better opportunity to see the robber (R. 220). She says that she saw the robber through his mask (R. 207) and whom she saw was Fraise. Stevens says that he could not identify Fraise as the robber, and that he was closest to the robber (R. 281). He testified that the robber was between 6'1" and 6'5" in height (R. 268). Quintana's reported description from the night of the crime is "black male"(R.E.16), "dark skin"(R.E. 14,18), "possibly a white male with a light complexion"(R.122), "a dark skinned male"(R.170), "either a dark skinned white male or a light skinned black male"(R.170). The Biggers factors substantially favor Fraise. The record is void of the required "substantial credible evidence" to uphold such a conviction, Buggs v State, 754 So. 2d 569 (Miss. Ct. App. 2000). Nor has the State given any energy into why the photo lineup was impermissibly suggestive". York v. State, at 1378. The State has failed in its attempt to legitimize the photo lineup.

V. REPLY TO APPELLEE'S CLAIM THAT "THE COURT DID NOT ERR IN ALLOWING THE TESTIMONY OF HOLLY KRANTZ." (A.B. 15)

The State claims that Hernandez told detectives "she was with the defendant on the night of the robbery". This cannot be found in any part of the record because it was untrue. The State claims that Hernandez admits to speaking to Krantz. Again, this cannot be found in any part of the record because it is untrue. Hernandez testified that a male officer called her not a female. (R. 313). The State is clearly attempting to change the issue on review.

This issue was not one of surrebuttal or conflicting testimony, but rather an issue of improper impeachment and illegal search and seizure. The Picayune police invaded Fraise's personal records online and without warrant, searched and seized his telephone records, (R. 340).

The improper impeachment derived from Krantz's testifying as to what Hernandez said to her during an alleged telephone interview. That portion of this issue has so far gone unchallenged by the State and should be decided in favor of the Appellant.

The illegal search and seizure portion of this issue has also been distorted by the State. The State claims that "the second issue is whether Ms. Hernandez was properly called as a witness since her phone number was found in the defendant's phone records without a search warrant." (A.B. 15). The State did not call Hernandez as a witness; the defense did, so there is no claim of Hernandez being an improper witness.

The issue is that Krantz's testimony was illegal because it was based on information obtained from an illegal search and seizure. The State claims that regardless to the search being illegal they would have discovered Hernandez's phone number from an independent source. However, the State fails to recognize that it is not only Hernandez's phone number that was illegally seized but also Fraise's entire phone records. The State must show that an "independent source" would have provided them the entire record seized not just Hernandez's phone number. The State has even failed to show that an "independent source would have inevitably discovered

Hernandez's phone number. The State expects this Court to "assume" that the detectives would have found Hernandez "eventually".

The only source "available" to the police was Fraise himself who has never made any statement to the police, and who was not obligated to give any alibi information until ten (10) days prior to trial, at which point, the situation would be different and defensive counsel would be involved and the chances of discrepancies of what was said would be less likely.

The police did not know of any possible alibi at the time of the illegal search and seizure of Fraise's phone records and they randomly called numbers from the phone records. This sort of police activity should not be condoned. There are no constitutional protections in such actions. Silverthorne Lumber Co. at 392 was clear that the "essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."

If the police are allowed to illegally seize a suspects phone records and call everyone that suspect has on his phone record, and they are of the opinion that the suspect is the criminal and the suspect later gives an alibi with any one of those on his phone records. The police can later claim they spoke to that someone and they could not give an alibi to the suspect, regardless to its truthfulness. Then pending an inquiry into the legality of the seizing of the records, the State claims "eventual" discovery from an "independent source" because it is the defendant's alibi. There is no constitutional protection there.

VI. REPLY TO THE STATE'S CLAIM THAT "THE TRIAL COURT DID NOT ERR IN ADMITTING INTO EVIDENCE THE PHOTOGRAPH OF THE APPELLANT." (A.B. 17)

"Just a gun." Is how the State attempts to justify its use of the totally unrelated, remote, and prejudicial photograph. Just a gun, but the State claims it's one of its' most probative pieces of evidence. The State cites and relies on Grant v State, 762 So. 2d 880 (Miss. App. 2000), a

case with totally different facts and circumstances, which played a major part in the Court's decision. In Grant, a gun was recovered and presented at trial, and the judge gave the jury a limiting jury instruction on the photograph's use. Here, no gun was recovered nor did the judge give a limiting jury instruction.

The State argues that because the photograph is one of its' "most probative pieces of evidence" it was properly admitted. However, the photograph had no legal probative value at all. It was used to insinuate that Fraise had a weapon in his possession without any indication as to the date of the photograph or having a gun to compare to the photo.

None of the victims were asked about the gun in the photograph and if they were to be asked, as was mentioned in Grant v State, in honorable Irving's dissent, there are plenty of guns that look exactly alike. No distinguishing marks or characteristics were described by any of the witnesses. There is more than one black and silver gun, of various makes and models, and the gun in the photograph has never been identified as any particular weapon type or even a weapon at all.

The photograph is remote and cannot be linked to any time near 9-25-06, except that it was seized from Fraise's computer illegally on 9-26-06. It could not be used in any way to show that Fraise possessed it on 9-25-06, that it is actually a firearm, or that it was used in the robbery. No connection was made by the State to show why the photo was being used at all. The State simply displayed it to the jury and allowed the jury to draw whatever conclusions they so chose. Which is why Hickson v State, 472 So. 2d 379 (Miss. 1985) was cited. "There is a natural tendency to infer from the mere production of a material object the truth of all that is predicated of it. Second, the sight of death weapons, cruel injuries, etc., tends to overwhelm reason, and associate the accused with the atrocity without sufficient evidence." Id 385, emphasis added. It was not "just a gun". This denied Fraise a fair trial because there was no possible defense to

such evidence that is not related in any way to the crime charges, nor did the State attempt to connect it to the crime.

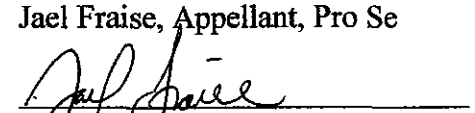
Another difference is that the State was relieved of its burden to prove possession of a weapon. The State had to prove that it was Fraise who committed the robbery and was relieved of any burden related to a gun. If the State was allowed to use the photo to show that Fraise committed the robbery, this itself is proof of prejudice because there is no fair way to defend against the photo with the circumstances as they are here. The photograph was old and remote.

CONCLUSION

For the reasons cited in the appellant's brief and in the reply brief for the appellant, Fraise's conviction should be reversed.

Respectfully submitted,

Jael Fraise, Appellant, Pro Se



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CERTIFICATE OF SERVICE

I, Jael Fraise, appellant, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **REPLY BRIEF FOR APPELLANT** to the following:

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Dated this the 13th day of Oct., 2008.

Jael Fraise