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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-KA-02016-COA

VINCENT HUDSON — APPELLANT

vs.

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 disqualification or recusal:

Vincent Hudson, Appellant;

Steve Wright, Esq., trial attorney;

Tameika Cooper, Harriett Johnson, and Phillip W. Broadhead, Esqs., Attorneys for the Appellant, Criminal Appeals Clinic, University of Mississippi School of Law;

Doug Evans, Esq., Assistant District Attorney, Office of the District Attorney;

Jim Hood, Esq. Attorney General, State of Mississippi;

Honorable C.E. Morgan, III., presiding Circuit Court Judge; and

Winston County Police/Sheriff's Department, investigating/arresting agency.

Respectfully submitted,

PHILLIP W. BROADHEAD, MSB #4560
Clinical Professor, Criminal Appeals Clinic

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

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VINCENT HUDSON — APPELLANT

vs.

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STATEMENT OF ISSUES

ISSUE ONE:

WHETHER THE MANDATORY SENTENCE OF LIFE IMPRISONMENT WITHOUT POSSIBILITY OF PAROLE FOR POSSESSION OF A TRACE AMOUNT OF COCAINE WITHOUT CONSIDERING EXTENUATING FACTORS SUCH AS THE PROPORTIONALITY OF THE TYPE OF CONVICTION COMPARED TO THE AMOUNT OF COCAINE PETITIONER WAS ACCUSED OF HAVING POSSESSION THEREOF AND THE FACT THAT THE PETITIONER HAS NEVER BEEN CONVICTED AS A DRUG TRAFFICKER CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT PROHIBITED UNDER THE EIGHTH AMENDMENT.

ISSUE TWO:

WHETHER THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT APPELLANT'S MOTION FOR MOTION J.N.O.V. OR, IN THE ALTERNATIVE, A NEW TRIAL, WHEN THE STATE FAILED TO PROVE BY LEGALLY SUFFICIENT EVIDENCE BEYOND A REASONABLE DOUBT ALL THE ESSENTIAL ELEMENTS OF KNOWING AND FELONIOUS POSSESSION OF A TRACE AMOUNT OF COCAINE ON HIS CLOTHING AND THE JURY RETURNED A VERDICT OF GUILTY ON THE MEAGER AMOUNT OF EVIDENCE WHERE THE SUBSTANCE IN QUESTION IS SO SMALL THAT IT CANNOT BE SEEN.

STATEMENT OF INCARCERATION

Vincent Hudson is presently incarcerated in the Winston County Correctional Facility.

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

This is the story of how a routine traffic stop that resulted in the loss of a mechanic's continuing chance at redemption after a wayward youth. His luck dramatically changed when he was arrested for having an open container during a traffic stop, charged with the possession of drugs found his brother's car, and later sentenced to life without the possibility of parole as an habitual offender for possession of a trace amount of cocaine that could not be seen by the naked eye.

This story begins on the evening of February 6, 2007, on a county road near the small town of Louisville, Mississippi. Just at six o'clock, the Appellant in this case, Vincent Hudson (hereinafter "Mr. Hudson"), was riding as a passenger with his brother, Hillute Hudson, when it was pulled over for a traffic violation by Officer Patrick Estes (hereinafter "Officer Estes") of the Louisville City Police Department. Hillute Hudson (hereinafter "Hillute") had passed Officer Estes' patrol car at an excessive speed. and was pulled over by the policeman. During the traffic stop, Officer Estes ran a background check on Hillute, and

discovered he had a suspended license, an outstanding warrant for his arrest, and proceeded to place Hillute under arrest. As Officer Estes arrested and searched Hillute, he found several types of drugs in his possession, but also noticed Mr. Hudson, who was still seated in the car moving around in the passenger seat. (T. 33) During the traffic stop, Mr. Hudson remained seated while eating chicken and drinking beer as a passenger in his brother's car. (T. 44) As a result of having an open container of alcohol while in his brother's car, Mr. Hudson was also arrested, but the scope of the traffic stop did not end there. Officer Estes called narcotics agent, Barry McWhirter (hereinafter "McWhirter"), to search Hillute's car, who accused Mr. Hudson of possessing the drugs found both on his brother and in the car and attempted to coerce Mr. Hudson into taking the blame for Hillute. (T. 64) Mr. Hudson denied having knowledge of or anything to do with the drugs, but McWhirter continued to insist they were his "because his brother had a family and he did not." (T. 64) Mr. Hudson confidently and consistently affirmed his innocence. Why Mr. Hudson was thereafter arrested instead of merely ticketed for having an open container is not clear from the record, and there is some discrepancy as to the whereabouts of his clothing after the arrest. (T. 61) Mr. Hudson was then taken into custody to Winston County Jail where his clothing was seized from him for testing, but was not taken immediately to the Mississippi Crime Laboratory until two days later. Where the clothes were stored for those two days is also unclear, but the Mississippi Crime Laboratory report stated that "trace" amounts of cocaine were found on the clothing.

On April 24, 2007, the Appellant was formally indicted on four counts of drug

possession by a grand jury in Winston County, Mississippi, charging him with one count of the possession of cocaine in an amount greater than 10 grams, one count possession of 8 dosage units of Methylenedioxymethamphetamine, one count of possession of marijuana amounting in less than 30 grams, and possession of cocaine amounting in less than .10 grams. On November 1, 2007, the trial of the Appellant began.

The State's evidence consisted of the testimony of Officer Estes concerning the details of the traffic stop, including that at the time of the stop, the Appellant did not possess any visible, obvious, or detectable cocaine. Mc Whirter's testimony also did not include any testimony regarding drugs found on the person of the Appellant. It was only after a tedious lab test, conducted two days after the stop, concluded that the Appellant possessed an unmeasurable "trace" amount of cocaine, that was only "visual" with the aid of scientific instruments. (T.48)

Mr. Hudson was found not guilty by the jury on the first three counts contained in the indictment of possession of the drugs found in his brother's car. However, Mr. Hudson was found guilty of the fourth count of possession of the "trace" cocaine amounting in less than .10 grams of cocaine. (T. 104)

While the Appellant was found guilty on only the one count of possession of a "trace" amount of cocaine, he was sentenced to life in prison without the eligibility of parole under ***Miss. Code Ann. § 99-19-83*** (Supp. 2006). After the post-trial motions for a new trial or, in the alternative, J.N.O.V., were denied by the trial court (CP. 35, RE. 16), and feeling aggrieved by the verdict of the jury and the sentence imposed by the trial judge, the Appellant

perfected this appeal to this honorable Court. (CP. 38, RE. 19).

SUMMARY OF THE ARGUMENT

The trial court took away the life of the Appellant's continuing redemption when it entered a mandatory sentence of life imprisonment to the Appellant, when it failed to require the State to present sufficient evidence of possession, refused to dismiss the case after hearing the meager evidence of a microscopic amount of cocaine on the Appellant's clothes, then sentenced him to a life sentence without the possibility or hope of parole.

Under ***Miss. Code Ann. § 41-29-139(c)(1)(A)*** (Supp. 2006), a defendant can only be convicted of possession if two criteria are met: (1) knowledge and (2) intent. The facts presented throughout the record do not prove beyond a reasonable doubt the knowledge by the Appellant of the presence of the substance because the amount in question was so insignificant that it could not possibly be seen with the naked eye. Additionally, no evidence in the record conclusively proved that the clothing worn by the Appellant was indeed his clothing, or if the clothing was contaminated at the Winston County Jail prior to crime laboratory testing. These unanswered questions alone present a insurmountable amount of reasonable doubt and effectively illustrate that the State failed to carry the burden of proof in the "guilty knowledge" element, thus failing to adequately establish its case-in-chief and causing the unlawful conviction of the Appellant. It also logically follows that since under the facts of this case where conclusive proof of knowledge has failed, the State failed to prove by legally sufficient evidence the second element of the statute, "intent to possess."

Secondly, Mr. Hudson has been denied his last chance to live in a free world with such an extraordinary prison sentence for the conviction of a "trace" amount of cocaine. He has never even been accused of being a "drug dealer," yet, for the possession of a "trace" amount of cocaine, Mr. Hudson has been sentenced to live the rest of his life within the confines of prison. The trial court ruled that Mr. Hudson's life sentence without parole was justified under ***Miss. Code Ann. § 99-19-83*** (Supp. 2006), due to his prior convictions, which occurred over twenty-five years ago. It defies logic that such a small amount of cocaine could result in such an excessive sentence. Regardless of the evaluation method employed by the trial court in reaching the decision concerning this sentence, a term of life imprisonment for a trace amount of cocaine is unconstitutionally excessive under the Eighth Amendment.

Therefore, the Appellant herein respectfully requests this Court to reverse, render, and discharge him from the custody of the Mississippi Department of Corrections for the State's failure to establish each and every element of proof in this case beyond a reasonable doubt, or, in the alternative to reverse this case, thereby remanding it to the lower court for a new trial with proper instructions, or, in the alternative, reverse the sentence of the trial court, and remanding with proper instructions for re-sentencing.

ARGUMENT

ISSUE ONE:

WHETHER THE MANDATORY SENTENCE OF LIFE IMPRISONMENT WITHOUT POSSIBILITY OF PAROLE FOR POSSESSION OF A TRACE

AMOUNT OF COCAINE WITHOUT CONSIDERING EXTENUATING FACTORS SUCH AS THE PROPORTIONALITY OF THE TYPE OF CONVICTION COMPARED TO THE AMOUNT OF COCAINE PETITIONER WAS ACCUSED OF HAVING POSSESSION THEREOF AND THE FACT THAT THE PETITIONER HAS NEVER BEEN CONVICTED AS A DRUG TRAFFICKER CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT PROHIBITED UNDER THE EIGHTH AMENDMENT.

Under ***Miss. Code Ann. § 41-29-139*** (Supp. 2006), possession of a Schedule II controlled substance carries a maximum sentence of thirty years. As a result of his previous convictions that occurred over twenty five years ago, the trial court sentenced Mr. Hudson to life in prison. (T. 117) Mr. Hudson calls for this Court to declare that imposing such a cruel prison term on a conviction of possession of a trace amount of cocaine is an excessive sentence, resulting in cruel and unusual punishment, and, therefore, that the sentence should be vacated and remanded for re-sentencing. Possession of a trace amount of cocaine, without any evidence of guilty knowledge of the presence of the substance or any intent to sell, is not a crime that justifies a life of imprisonment.

A sentence of this magnitude is grossly disproportionate and violates the Eighth Amendment of the United States Constitution. ***U. S. CONST., amend. VIII.*** Furthermore, the United States Supreme Court has held that a criminal sentence must not be disproportionate to the crime for which the accused is charged or the prison term may be unconstitutional according to the terms against cruel and unusual punishment. ***Solem v. Helm***, 463 U.S. 277 (1983). The ***Solem*** Court utilized a three-prong test to determine:

A. The gravity of the offense and the harshness of the penalty;

B. A comparison of the sentence imposed with sentences imposed on other criminals in the

same jurisdiction; and

C. A comparison of the sentence imposed with sentences imposed for the commission of the same crime in other jurisdictions.

Nonetheless, the Supreme Court also considers that the Eighth Amendment does not demand a rigid proportionality between the accused crime and the prison term enforced, but forbids only circumstances that involve "grossly disproportionate" sentences compared to the crime. ***Harmelin v. Michigan***, 501 U.S. 957, 1001 (1991). The trial court's sentence is indeed the harshest at the end of the sentencing spectrum, especially when considering the sentence is the punishment for a crime in which there was only a "trace" amount of cocaine found on the clothing Mr. Hudson was wearing that fateful night.

Abuse of discretion is generally the standard of review most reviewing Courts apply when examining issues involving the proportionality of sentencing in appeal cases. ***White v. State***, 742 So. 2d 1126, 1136 (Miss. 1999). Sentencing, of course, is always within the sound discretion of the trial judge, and if the imposed sentence is within the bounds of terms implied in the statute, the sentence will not usually be overturned. ***Id.*** In addition, "judicial discretion" is defined as a "sound judgment, which is not exercised arbitrarily, but with regard to what is right and equitable in circumstances and law, and which is directed by the reasoning conscience of the trial judge to just result." ***Id***. At 1136 (quoting ***Black's Law Dictionary*** at p. 848 (6th ed. 1990). In ***White***, the Mississippi Supreme Court explained that "the failure of our courts to use discretion in sentencing may result in the loss of this freedom through the adoption of sentencing guidelines as was done in the federal system." ***White***, 742

So.2d at 1137. More importantly, the decision in ***White*** has encouraged the theory that grossly disproportionate sentences should be weighed in light of the gravity offense to be applied more frequently within this jurisdiction. This is especially true in the facts of the case at bar.

A. THE GRAVITY OF THE OFFENSE AND THE HARSHNESS OF THE PENALTY.

In ***Solem***, a South Dakota trial court convicted the defendant of uttering a "no account" check for $100, but he also had three prior convictions for third-degree burglary, one prior conviction for obtaining money under false pretenses, one prior conviction of grand larceny, and one prior conviction of third-offense driving while intoxicated. ***Solem***, at 277. As a result, he was sentenced to life imprisonment without possibility of parole. ***Id.*** On appeal, the United States Supreme Court ruled that the prison term was significantly disproportionate to his crime, and was forbidden by ***The Eighth Amendment to the United States Constitution***, because uttering a "no account" check was a nonviolent crime, defendant's prior felonies were relatively minor, the sentence was the most severe that the state could impose on any criminal, and only one other state authorized life sentence without parole in circumstances of the defendant's case. ***Solem***, at 300-303.

In the present case, Mr. Hudson was sentenced to life without parole for possession of a "trace" amount of cocaine. The criminal act charged here was one of simple possession, not one of action. There was absolutely no evidence or testimony that Mr. Hudson used, intended to use, or attempted to use the trace amount of cocaine. As a matter of fact, it is undisputed from the trial transcript that it does not contain any evidence that Mr. Hudson

actually knew the meager amount of cocaine discovered on his clothing was present. Given the nonviolent nature of the crime, the sentence imposed by the trial court is disturbing. In addition, it is grossly disproportionate to the crime of which Mr. Hudson was convicted.

Solem emphasizes that a defendant's eligibility for parole is crucial to applying the "***Solem*** test." ***Solem***, at 297. Mr. Hudson will spend the rest of his natural life in prison, unless this honorable Court acts by reversing this case. This contrasts with the factual scenario in ***Solem*** where the defendant was eligible to parole after serving only twelve years of a life sentence. Further, although the jury found Mr. Hudson not guilty of possession of the other drug counts with which he was charged, the trial court sentenced him to prison for life without the possibility of parole for an unmeasurable amount of cocaine. (T. 75) It is quite apparent that the gravity of the offense and the harshness of the penalty imposed upon Mr. Hudson trigger the further analytic perspective of the last two prongs of the ***Solem*** test.

B. COMPARED TO SENTENCES IMPOSED ON OTHER CRIMINALS WITHIN THE SAME JURISDICTION.

The second part of the ***Solem*** test demands the Court to compare the accused's sentence with the sentence imposed on other defendants charged with the same offense in the same jurisdiction. ***Miss. Code Ann. § 41-29-139, 277*** (Supp. 2006). In the landmark case of ***Harmelin v. Michigan***, the United States Supreme Court further defined the analysis to be used in determining whether a sentence is disproportionate to the offense and in violation of the Eighth Amendment. ***Harmelin v. Michigan***, 501 U.S. 957 (1991). In ***Harmelin***, the accused was convicted of possessing more than 650 grams of cocaine and was sentenced to

a mandatory term of life in prison without possibility of parole. ***Harmelin*** at 957. The Court ruled that the imposition of a sentence of life in prison without possibility of parole, without any consideration of other mitigating factors present, such as the fact that the accused had no prior felony convictions, did not constitute cruel and unusual punishment *per se* in that case. ***Id.*** at 1027. As stated by the Court, "Only if we infer that the sentence is grossly disproportionate to the offense will we then consider the remaining factors of the ***Solem*** test and compare the sentence received to (1) sentences for 'similar' crimes in the same jurisdiction and (2) sentences for the 'same' crime in other jurisdictions." ***Id.*** (emphasis added).

Although the ***Harmelin*** Court upheld the sentence in that case, it did stress the importance of conducting this proportionality analysis. ***Id.*** at 1025-27. Compared to Mr. Hudson's case, the accused in ***Harmelin*** was convicted of possession of so great of an amount of drugs that can actually be seen, used, and sold. The meager amount of which Mr. Hudson was convicted of possessing cannot even been seen by the naked eye. (T. 73) In the Mississippi case of ***Davis v. State***, the accused, who similarly had prior convictions, was convicted of the sale of a small amount of cocaine within 1500 feet of a church and sentenced to 60 years in prison. ***Davis v. State***, 724 So. 2d 342 (Miss. 1998). However, the ***Davis*** Court remanded to determine if a sentence of sixty years for the sale of .2 (two-tenths) grams of crack cocaine was excessive and in violation of the Eighth Amendment by holding:

> Even as to those circumstances for which the statutes provide mandatory sentences, the punishment must be weighed against the prohibition imposed in the Eighth Amendment to the United States Constitution against cruel and

> unusual punishment. In ***Clowers v. State***, 522 So. 2d 762 (Miss. 1988), the defendant was convicted of uttering a forged $ 250 check, and although finding that he was an habitual offender, the trial court sentenced Clowers to a term of five years, in spite of the controlling statute which mandated a sentence of fifteen years without possibility of parole. In doing so, the trial judge found that the mandated sentence would be cruel and unusual under the facts. The State objected and cross-appealed, and we upheld the trial judge's sentence, relying in part on ***Solem v. Helm***, 463 U.S. 277, 77 L. Ed. 2d 637, 103 S. Ct. 3001 (1983), and its declaration that a criminal sentence must not be disproportionate to the crime for which the defendant is being sentenced.
>
> P15. In summary, under the facts of this case and given the lack of justification for the sentence on the face of the record on appeal, it is appropriate that the case be remanded for further consideration of the sentence imposed, consistent with those principles declared in ***Presley***, ***McGilvery*** and ***Clowers*** and in the spirit of ***Solem***.

Davis, supra, at 345 (emphasis added).

The remand was a result of the reviewing court's examination of the proportionality of the crime compared to the gravity of the offense. It should be noted that the accused in ***Davis*** was convicted for possession of a much greater amount of cocaine as Mr. Hudson.

Unlike in the ***Harmelin*** or ***Davis*** cases, the trial court in Mr. Hudson's case compared prior convictions to the current convicted crime as though the habitual offender status is an actual crime. The habitual offender status is not an actual offense but is merely a statutory provision that allows enhancement of the sentence imposed for the principal crime. ***Gray v. State***, 605 So.2d 791, 793 (Miss. 1992). Unlike the ***Davis*** case, the trial court in Mr. Hudson's case failed to consider that the present crime has to be in and of itself to be considered as a "similar," or the "same" crime in conducting the proportionality analysis. ***Harmelin***, supra, at 988-89.

According to ***Miss. Code Ann. § 41-29-139*** and *277* (Supp. 2006), the prosecution

had the discretion to charge the offense in this case as a misdemeanor. Other judicial districts within this state would have simply treated Mr. Hudson's alleged possession of such a trace amount of cocaine as a misdemeanor and not attempted to convict him of a crime that would sentence him to a life term of imprisonment without the possibility of parole. Using the ***Solem*** test as a guidance, the proportionality analysis, which is basically a "sentence comparison" test, should have been made with sentences received for principal crimes similar to, or the same as Mr. Hudson's principal offense within this state. Statistical data as to the prosecutorial discretion found in cases such as this is impossible to recite to this honorable Court, but, in so reducing the potential penalty for possession of trace amounts of cocaine, the Mississippi Legislature implicitly recognized the problems that arise in the incarceration of citizens for long terms of imprisonment for such relatively minor offenses. The disparity of sentencing outcomes becomes so obvious that when mandatory sentences as considered in the ***Davis*** case, supra, are thrown into the mix, the differences in possible sentencing in different judicial districts violates the spirit, if not the letter, of ***Solem*** and ***Harmelin***.

C. A COMPARISON OF THE SENTENCE IMPOSED WITH SENTENCES IMPOSED FOR THE COMMISSION OF THE SAME CRIME IN OTHER JURISDICTIONS.

At the case before the reviewing court, the trial court's sentence is indeed at the harshest end of the sentencing spectrum, especially when considering the sentence is the punishment for a crime which could have been charged and prosecuted as a misdemeanor. Whether or not Mr. Hudson would have met the same fate in another state requires a comparison of the life sentence imposed in this case with sentences imposed for the

commission of the same crime in other state jurisdictions.

Many cases within the states falling in the United States Fifth Circuit Court of Appeal deal with varied conclusions concerning excessive sentences imposed upon those who have habitual offender status. For example, in ***Harbison v. State***, the Arkansas Supreme Court adopted a "usable-amount criteria" in the prosecution of drug cases, in which the accused must possess a "usable amount" of methamephetamine in order to be convicted. ***Harbison v. State***, 302 Ark. 315, 790 S.W.2d 146 (1990). In that case, the accused was convicted of possession of a bottle containing only cocaine dust or residue. ***Id.*** The crime laboratory discovered the residue inside two plastic drinking straws as being a trace amount of cocaine that was too minute to even weigh. ***Id.*** The reviewing court refused to uphold a conviction for such a microscopic amount of cocaine, by holding:

> The intent of the legislation prohibiting possession of a controlled substance is to prevent use of and trafficking in those substances. Possession of a trace amount or residue which cannot be used and which the accused may not even know is on his person or within his control contributes to neither evil. We recognize the possibility that one may be in possession of an amount of a controlled substance sufficient to permit knowledge of its presence and yet still not be in possession of a useable amount. We agree, however, with the courts that have concluded that possession of less than a useable amount of a controlled substance is not what legislators have in mind when they criminalize possession because it cannot contribute to future conduct at which the legislation is aimed, that is, use of or trafficking in drugs.
>
> It is clear in this case that Harbison was found to be in possession of a bottle which had less than a useable amount of cocaine. As a practical matter, it was a bottle which had had cocaine in it, and that is not a crime.

Harbison, supra, at 322-23.

In contrast, the accused in ***Conley v. State***, who was also labeled as an habitual

offender, was charged with possession of .141 grams of cocaine with intent to sell, convicted, and sentenced to serve forty years in prison. ***Conley v. State***, 308 Ark. 70, 71 (Ark. 1992). The reviewing court upheld the conviction because the accused was observed and caught in the act of selling the substance. ***Id.*** at 73. In addition, the court ruled that .141 grams of cocaine is more than an usable amount of cocaine and could not deemed to be a trace amount. ***Id.*** Using the ***Harbison*** case as a guide to decide ***Conley***, "the usable amount is a factor to be considered where the accused is charged with possession of a controlled substance." ***Id.*** (*See also*, ***Harbison***, 790 S.W.2d at 322 ("The cases we have discussed all drive toward the same logical point, whether the rationale is that the amount of a controlled substance is either (1) sufficient to permit knowledge of its presence without the need for scientific identification or (2) sufficient to be useable in the manner in which such a substance is ordinarily used.)).

Mr. Hudson was also accused of felony possession of an "unusable" trace amount of cocaine. Unlike the circumstance in ***Conley***, there was not enough substance found on Mr. Hudson's clothing to weigh or in any way measure as to quantity. Ms. Goodman, the forensic scientist at the Mississippi Crime Laboratory, testified at the trial of the case before this honorable Court that during her drug analysis, the amount of substance found was barely sufficient to determine identification. (T. 78) According to ***Conley***, .141 grams does not constitute a usable amount, while ***Harbison***, considering that the accused had an intent to distribute, concluded that a residue amount of cocaine can not be deemed as a "usable" amount. While the ***Conley*** court upheld the excessive conviction for the accused who also

had the intent to sell, the ***Harbison*** court reversed the excessive conviction for the accused who had no intent to sell. Both reviewing courts determined the excessiveness of the accused's sentence based on the amount of the cocaine discovered and the intent to distribute.

Applying the ***Harbison*** "usable-amount criteria" analysis to Mr. Hudson's case, the "unmeasurable" amount of cocaine in the case at bar should be also considered as an amount that cannot be "used." In addition, Mr. Hudson was not accused of having any intent to sell. The third prong of ***Solem*** also weighs heavily in favor of the conclusion that the Appellant's sentence in this case is grossly disproportionate to the "crime" of which he was convicted, therefore, the Appellant urges this honorable Court to reverse the conviction and sentence of the trial court and remand this case to the lower court with proper instructions for a new trial.

ISSUE TWO:

WHETHER THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT APPELLANT'S MOTION FOR MOTION J.N.O.V. OR, IN THE ALTERNATIVE, A NEW TRIAL, WHEN THE STATE FAILED TO PROVE BY LEGALLY SUFFICIENT EVIDENCE BEYOND A REASONABLE DOUBT ALL THE ESSENTIAL ELEMENTS OF KNOWING AND FELONIOUS POSSESSION OF A TRACE AMOUNT OF COCAINE ON HIS CLOTHING AND THE JURY RETURNED A VERDICT OF GUILTY ON THE MEAGER AMOUNT OF EVIDENCE WHERE THE SUBSTANCE IN QUESTION IS SO SMALL THAT IT CANNOT BE SEEN.

Mr. Hudson's life has been forfeited because the clothes he was wearing had a meagerly amount of cocaine on them such that could not have been measured by weight, volume, or quantity. The State's failure to produce legally sufficient evidence, in

conjunction with the guilty verdict reached by the jury, was against the overwhelming weight of the evidence produced at trial. As a result of the trial court's refusal to dismiss this case, the Appellant is forced to spend the rest of his natural life in prison, leading to the only logical conclusion that can be drawn from this case: an unconscionable injustice has come to pass.

The appropriate standard of review for the denial of a post-trial motion for J.N.O.V. or, in the alternative, a new trial is abuse of discretion. ***Dilworth v. State***, 909 So. 2d 731, 736 (Miss. 2005). A motion for a J.N.O.V. should be granted if the evidence presented by the State fails to establish all of the necessary elements needed to warrant a conviction beyond a reasonable doubt. ***Dilworth***, 909 So.2d at 737. Under the principles laid down in ***Bush v. State***, 895 So. 2d 836, 844 (Miss. 2005), "[t]he appropriate standard that should be applied in determining whether or not the evidence presented at trial was enough to sustain a conviction in the face of a motion for a directed verdict or for judgement not withstanding the verdict, is whether or not the evidence shows 'beyond a reasonable doubt that the accused committed the act charged, and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction.'" ***Id.*** at 843 (emphasis added). However, this inquiry does not require an appellate court to "'ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt.' Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ***Id.*** at 843 (citing

Jackson v. Virginia, 443 U.S. 307, 315, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)) (citations omitted). Should the facts and inferences considered in a challenge to the sufficiency of the evidence 'point in favor of the defendant on any element of the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty,' the proper remedy is for the appellate court to reverse and render[, i.e. reverse and discharge]. ***Dilworth***, *supra*, at 736.

If the appellate court finds that the lower court abused its discretion by failing to grant such a motion, the only acceptable remedy is reversal. ***Id.*** at 737. The ***Bush*** case also posits that when hearing a challenge to the weight of the evidence as supportive of the jury's verdict in the form of a motion for a new trial, the trial court sits as a "thirteenth juror," and has the discretion, and power to grant a new proceeding in exceptional cases when the evidence presented is contrary to the verdict rendered. ***Id.*** at 844. The Court also held that when considering whether the trial court should have ordered a new trial, the evidence should be weighed in the light most favorable to the verdict. ***Id.*** In order to warrant a reversal on appeal, the verdict must be "so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." ***Bush***, 895 So. 2d at 844. Though the standard of review in such cases is high, "this Court has not hesitated to invoke its authority to order a new trial and allow a second jury to pass on the evidence where it considers the first jury's determination of guilt to be based on extremely weak or tenuous evidence[,] even where that evidence is sufficient to withstand a motion for a directed verdict." ***Dilworth***, *supra*, at p. 737.

Recognizing the inherent differences between challenges for lack of legal sufficiency and challenges for lack of the necessary weight of the evidence, the Appellant herein would present both to the Court in this single issue argument.

A. Legal Sufficiency of the Evidence

The lower court erred when it failed to hold the State to the requisite standard of proof necessary to warrant a possession conviction. In the case at bar, the State failed to prove in its case-in-chief that Mr. Hudson knowingly and feloniously possessed a trace amount of cocaine when the contraband in question was neither found in his possession during his arrest, nor when he was booked into the Winston County Jail. Additionally, the State failed to adequately establish that the clothing in question, indeed belonged to Mr. Hudson, and he had the requisite guilty knowledge of the substance that was contained in the pockets.

> What constitutes a sufficient external relationship between the defendant and the narcotic property to complete the concept of "possession" is a question which is not susceptible to a specific rule. However, there must be sufficient facts to warrant a finding that defendant was aware of the presence and character of the particular substance and was intentionally and consciously in possession of it. It need not be actual physical possession. Constructive possession may be shown by establishing that the drug involved was subject to his dominion or control. Proximity is usually an essential element, but by itself is not adequate in the absence of other incriminating circumstances.

Dixon v. State, 953 So. 2d 1108, 1112 (Miss. 2007), *citing* ***Curry v. State***, 249 So.2d 414, 416 (Miss. 1971) (emphasis added).

Since the prosecution did not even attempt to offer any "other" evidence supporting "incriminating circumstances" in order to prove constructive possession, and the trial judge

refused to grant a jury instruction defining the issue of constructive possession (T. 85), the focus of the inquiry by this honorable Court in this regard is on actual possession: that is, did the State prove beyond a reasonable doubt that Mr. Hudson knew of the presence of the cocaine found on the clothes he was wearing that night and that was he "intentionally and consciously in possession of it"? This lack of evidence and testimony illustrates that the case at bar has no determinative direct or circumstantial evidence of "possession" to conclusively prove that the Appellant was "aware of the presence and character of the particular substance and was intentionally and consciously in possession of it." ***Dixon***, *supra.*

Reviewing the evidence in the light most favorable to the prosecution's case, a variety of vital questions from the State's case-in-chief remain unanswered. First, the State failed to establish that Mr. Hudson knowingly possessed cocaine. On the contrary, it is undisputed from the evidence presented at trial when Mr. Hudson was asked about drugs he replied that he did not know anything about what was found in the vehicle. (T. 57) In addition to failing to prove that Mr. Hudson possessed any of the contraband in question found in the vehicle, when he was taken into custody and searched on the scene, no testimony was presented by the State to conclusively establish drugs were found on his person or in his clothing. (T. 63) When searched again at the Winston County Jail, the prosecution failed to produce any evidence of visible possession of cocaine, which illustrates that the "knowledge" requirement of the statute fails under this proof. (T. 63) Not only did the police not find any visible evidence of possession, they also failed to produce any evidence that would constitute the statutory element of possession, such as a "baggie" containing a white powdery substance.

The only testimony relating to contraband being found on Mr. Hudson's person came from Brandy Goodman, a Mississippi Crime Laboratory employee (T. 65), and that testimony took the form of her conclusion that a "trace amount" of cocaine was present in the pocket of the clothes she analyzed. (T. 73) On cross-examination, she admitted that the amount she observed through scientific means was much less than the tenth of a gram charged in the indictment, and that it was literally not a "weighable amount of substance." (T. 75) In fact, at trial, the State only produced Ms. Goodman, McWhirter (the narcotics agent), and Officer Estes (the patrolman) to establish the essential elements of the crime charged: that the Appellant was aware of the presence and nature of the contraband found on the clothes he was wearing and that he was "intentionally and consciously in possession of it."

Secondly, several issues arise in regards to the source and the whereabouts of the clothing Mr. Hudson was wearing when he was taken into custody on February 6, 2007. (T. 61). McWhirter did not seize the clothing until the next day from the Winston County Correctional Facility. (T. 61) The facts suggest that the clothing given to McWhirter was placed in a sack and was not delivered to the crime laboratory until two days after Mr. Hudson's initial arrest. (T. 61-62) In fact, no evidence was presented by the State concerning where and how the clothing was stored when Officer McWhirter came to retrieve them on February 7, 2007. (T. 62). The failure of the State to present proof relating to the origin and location of the clothing tested presents reasonable doubt as to the State's burden of proof because there is no factual basis to refute that the clothing could have been exposed to trace amounts of cocaine while being stored at the correctional facility. In addition to the

possibility of cross-contamination, absolutely no evidence established that the clothing actually belonged to Mr. Hudson. Therefore, the State's case fails on the record because it did not satisfactorily establish the "knowledge" requirement of actual possession of the "trace amount" of cocaine found on the clothes in an amount of proof beyond a reasonable doubt.

As a result of the State's failure to prove that Mr. Hudson "possessed" a substance which he could neither see, nor be aware of its presence, this conviction should be overturned since the State failed to prove the "guilty knowledge" requirement under ***Miss. Code Ann. §41-29-139(c)(1)(A)*** (Supp. 2006). In order to be convicted of possession under Mississippi case law, conclusive proof was required that the Appellant was "aware of the presence and character of the particular substance"; that burden was not met by the State, even giving all inferences favorable to the prosecution's case. It logically follows that if the Appellant could not see, nor was even aware of the presence of the particular substance, he could also not be "intentionally and consciously in possession" of it as required by the case law set out hereinabove. The Appellant contends that these failures of the State's burden of proof constitutes grounds for reversal of this case as legally insufficient under the evidentiary guidelines of ***Bush*** and ***Dilworth***. As such, Mr. Hudson's conviction should be overturned by this honorable Court, this matter reversed and rendered, and the Appellant discharged from the custody of the Mississippi Department of Corrections.

B. Weight of the Evidence

Turning now to the issue of the weight of the evidence presented at trial as not supportive of the jury's verdict of guilty to the trace amount of cocaine as set out

hereinabove, it is undisputed from the evidence that the jury concluded that the contraband found in Mr. Hudson's brother's car was not in his possession and they properly acquitted him of those charges. (CP. 30, RE. 13) What is not clear, however, is how the jury found guilt from the evidence presented on the charge of possession of what turned out to be an unmeasurable "trace amount" of a substance that could only be observed with the aid of a forensic crime laboratory specialist. This verdict is simply not supported by the overwhelming weight of the evidence and testimony of the three witnesses produced by the State against the Appellant. As noted above, the Mississippi Supreme Court has stated in ***Bush***, *supra*, that on a motion for new trial, "the court sits as a thirteenth juror." The disposition and review of a motion for a new trial should be exercised with caution, and the power to grant a new trial should be invoked only in "exceptional cases in which the evidence preponderates heavily against the verdict." ***Bush***, 895 So. 2d at 844. The Appellant's case is the "exceptional" circumstance where the evidence, weighed in the light most favorable to the verdict, simply does not support the jury's finding of guilt. The Mississippi Crime Lab employee, using a "gas chromatograph mass spectrometer" to test "a very, very minute amount of substance," was able to observe the chemical, but she was uncertain whether or not the substance she tested could be seen with the naked eye. (T. 75-76) The ultimate question in this case then presents itself again: "How can someone be in 'knowing possession' of that which cannot be seen?" Surely the fictional "reasonable, fair-minded juror" described in ***Bush*** and ***Dilworth*** could no more find this "guilty knowledge" element of proof was met beyond a reasonable doubt by the State's meager case than could

they come to the conclusion that Mr. Hudson was "intentionally and consciously in possession of it." ***Dixon***, *supra*, at p. 1112. Therefore, the Appellant respectfully contends that the verdict of the jury was not supported by the overwhelming weight of the evidence and that the conviction and the resulting sentence handed down by the trial judge of life without the possibility of parole should be reversed by the Court and this matter remanded to the lower court with proper instructions for a new trial.

CONCLUSION

The Appellant herein submits that based on the propositions cited and briefed hereinabove, 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 conviction and sentence 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 charge of possession of a controlled substance, with instructions to the lower court. In the alternative, the Appellant herein would submit that the judgment of the trial court and the conviction and sentence as aforesaid should be vacated, this matter rendered, and the Appellant immediately discharged from the custody of the Mississippi Department of Corrections, as set out hereinabove. The Appellant further states to the Court that the individual and cumulative errors as cited hereinabove are fundamental in nature, and, therefore, cannot be harmless.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Phillip W. Broadhead, Criminal Appeals Clinic Professor and attorney for the Appellant herein, do hereby certify that I have this day mailed postage fully pre-paid/hand delivered/faxed, a true and correct copy of the foregoing Brief of Appellant to the following interested persons.

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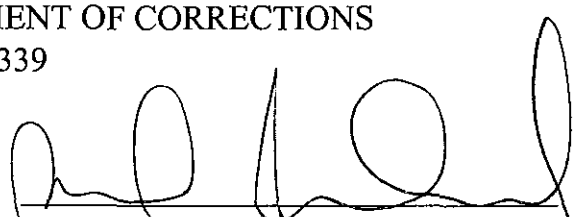
This the 2nd day of April, 2008.



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