

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-KA-02253-COA

JOHN GALES

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:

John Gales, Appellant;

David C. Vanderburg Esq., trial attorney;

Roslyn N. Griffin, Brian K. Harris, Leslie S. Lee, and Phillip W. Broadhead, Esqs., Attorneys for the Appellant, Criminal Appeals Clinic, University of Mississippi School of Law;

Celeste E. Wilson, Esq, Assistant District Attorney, Office of the District Attorney;

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

Honorable Robert Chamberline, presiding Circuit Court Judge; and

Horn Lake Police Department, investigating/arresting agency.

Respectfully submitted,

PHILLIP W. BROADHEAD, MSB [REDACTED]
Clinical Professor, Criminal Appeals Clinic

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STATEMENT OF INCARCERATION

John Gales is presently incarcerated in the Mississippi Department of Corrections.

STATEMENT OF JURISDICTION

This honorable Court has jurisdiction of this case pursuant to *Article 6, Section 146 of the Mississippi Constitution* and *Miss. Code Ann. 99-35-101 (Supp. 2007)*.

STATEMENT IN SUPPORT OF ORAL ARGUMENT

This case is very fact-intensive and the Appellant, through counsel, would respectfully request this Court to grant oral argument to point out conflicts in the rulings of the trial court based on the evidence and testimony presented at trial that are alleged to be erroneous.

STATEMENT OF THE CASE

Alleged, but uncorroborated, "confessions" supposedly made by the Appellant herein, tenuous circumstantial evidence, and the erroneous admittance of extremely prejudicial and

highly inflammatory evidence constitutes the State's entire proof in this case. It is the classic "he said, he said" drama, where police officers say the Appellant confessed to purchasing pseudoephedrine pills to sell to a methamphetamine cook. (T. II. 149) Mr. Gales has consistently maintained his innocence to these charges as an unsuspecting victim of a conniving woman who lured him from his house under the pretext of payment of one hundred dollars to drive her in her own car to meet what she assured him was her wayward boyfriend at a Mississippi casino. (T. II. 265)

John Gales, the Appellant, (hereinafter, "Mr. Gales") lived in Des Arc, Arkansas. On July 25, 2005, Denise Horn (hereinafter, "Horn") visited Mr. Gales at his mother's home. *Id.* She offered him one hundred dollars to drive her to a casino in Tunica, Mississippi to catch up with her drug-dealing boyfriend. She said that she did not like to drive in traffic, so Mr. Gales agreed to drive her car to meet her boyfriend. Before leaving Arkansas, Mr. Gales warned Horn he did not want any part of any illegal behavior, and told her that he was not going to go if she had anything criminal planned. (T. II. 272) She assured him that she did not, and the two set out for Mississippi in her car.

While in route to the casino, Horn asked Mr. Gales to stop at the Walgreens in the city of Horn Lake, Mississippi. (T. III. 276, 284) She had told him she had cancer and needed to pick up her medication. *Id.* at 276. Mr. Gales agreed to stop, however, he began to grow suspicious after Horn returned empty-handed with varying excuses as to why the pharmacy was out of her medicine. (T. III. 281) Next, he drove her to another Walgreens. However,

Horn then told Mr. Gales it would be an hour and a half before the medicine could be ready. *Id.* Reluctantly, he drove her to a third Walgreens. *Id.* This time, Horn exited the store with a small bag. Mr. Gales thought nothing of it, until he noticed police lights behind him. Immediately, Horn began furtively moving around in her seat and stuffing things from the bag down her clothes. (T. II. 266)

Unbeknownst to Horn, the Walgreens pharmacist had called the police to report the suspicious purchase of "Wal-phed" by a blond woman, but no word of a male was mentioned by the clerk. (T. I. 130) Mr. Gales immediately pulled over for the blue lights, stopped the car, and he got out, wanting to quickly find out the problem and return home. (T. I. 270) The officer asked Mr. Gales to return to the car, and he complied with the request. The police officer approached the car and asked him for his license. Additionally, he agreed to a body search as well as a search of the car, as he had nothing to hide. (T. II. 272)

It is at this point that stories in this case begin to diverge in a very significant way. The police officers who arrested Mr. Gales claim he gave them several statements after his arrest. Police Officer Riggs (hereinafter, "Riggs"), the first officer on the scene, testified that he observed Horn holding white pills in her hand and standing awkwardly outside of her car with more pills hidden in her clothes. (T. II. 145) Accordingly, he searched the rest of Horn's car and found more pills scattered throughout the passenger side of the car where she was seated. Riggs testified at trial that he immediately read Horn and Mr. Gales their *Miranda* rights, and that both had told him they understood. (T. II. 146) According to Riggs,

Mr. Gales told him Horn was his "girlfriend," the two were in Mississippi to purchase Pseudoephedrine pills for a methamphetamine maker, and that they would receive the drug in exchange for the pills. (T. II. 149) Narcotics detective Shawn May (hereinafter, "May") testified to similar statements supposedly made by Mr. Gales, although neither police officers obtained written *Miranda* forms, nor in any way recorded these alleged statements. *Id.* However, according to the sworn testimony of Mr. Gales, neither of these conversations ever occurred. (T. III. 280) The only statement that is recorded in this case came from Denise Horn's confession: "I came today to Mississippi to buy Wal-phed to take back to Arkansas to sell someone to make money that needed. Not for the reason to cook them myself" (T. II. 197, 260; *see also*, Exh. S-5, RE. 15), which did not implicate the Appellant in any way.

Police Officer Todd Baggett (hereinafter, "Baggett") transferred Mr. Gales to the station following the incident. Baggett admitted at trial he did not "Mirandize" Mr. Gales, yet he freely admitted asking the Appellant questions about what happened that night. (T. I. 34, 36) Baggett then was allowed to testify Mr. Gales told him he came to Horn Lake to purchase pills and take them back to Arkansas to sell to a methamphetamine cook in exchange for drugs or money. (T. I. 32) Again, Mr. Gales denied this conversation ever took place. (T. III. 280)

Because of this factual predicate, on August 14, 2007, a DeSoto County grand jury returned a two-count indictment against the Appellant and Horn, charging them with the illegal possession of precursors to methamphetamine and also as co-conspirators to the

possession. The Appellant was also charged as a habitual offender under Section 99-19-81 of the Mississippi Code of 1972, as amended.

On August 27, 2007, a motion seeking approval for the mental evaluation of Mr. Gales was filed with the trial court, and the court subsequently approved to mental examination. The evaluation was conducted at the Mississippi State Hospital and the state psychologist found the petitioner competent to stand trial. On December 6, 2007, defense counsel filed a motion to suppress any evidence arising from the law enforcement stop, search, and seizure of the Appellant, a motion to dismiss the indictment as, as well as, a motion to suppress any testimony from law enforcement officers concerning an admission of guilt by the petitioner. (T. I. 6-63) All defense motions were denied by the court. (T. I. 62-63)

Also on December 6, 2007, the trial court granted the State's pre-trial motion to admit evidence of prior convictions over the objection of defense counsel and the State used his prior convictions of "Theft by Receiving" and to "Conspiracy to Possess Drug Paraphernalia With Intent to Manufacture Methamphetamine" in its case and in closing argument. (T. II. 241, 238-244, 321) Later that same day, both the defense and the State submitted proposed jury instructions and the trial began. During the trial, over defense objections, the State also introduced a line of irrelevant and prejudicial testimony regarding the methamphetamine manufacturing process. (T. II. 218-231) Additionally, the State's witness used unnecessary, irrelevant, and inflammatory language such as "crystal alley" to describe the geographical area in which Mr. Gales was found. (T. II. 184-85). Despite continued objections by defense,

this evidence was admitted and considered by the jury. (T. II, 239)

After the State rested, the defense for a directed verdict of acquittal which was denied. (T. II. 244-247) The Appellant testified on his own behalf, putting at issue all of the evidence produced by the prosecution. (T. II. 265-III. 297) The defense also re-called Officer Riggs in order to admit into evidence the written statement of Denise Horn, which she had given to police on the night of her arrest. (T. II 260; Exh. S-5, RE. 15) The trial concluded later that day with the jury finding the petitioner guilty of both counts of the indictment. Sentencing was had on December 12, 2007, and the trial court found that the defendant to be a habitual offender under *Miss. Code Ann. § 99-19-81 (Supp. 2006)* and sentenced the petitioner to five years in count one and in count two, five years to run consecutively with count one. (CP. 76-77, RE. 16-17) After sentencing, the defense filed motions for a J.N.O.V. and for a new trial. (CP. 56-64, RE. 18-25) Both of these motions were denied by the trial court. (CP. 72-73, RE. 26-27) Feeling aggrieved by the verdict of the jury and the sentence of the trial court, the Appellant timely perfected this appeal to this honorable Court. (CP. 64-65, RE. 28-29)

SUMMARY OF THE ARGUMENT

The criminal justice system provides that all criminals are presumed innocent until proven guilty, but unfortunately, Mr. Gales was not afforded this guarantee. Immediately after he was pulled over by Officers, Mr. Gales was branded a "repeat offender." Officers

took for granted he was an irresponsible methamphetamine addict who was only in Mississippi to buy drugs to use them in his methamphetamine laboratory. Mr. Gales was not given a fair chance to prove that his life had changed and this "repeat offender" label no longer applied to him. The prosecutor continuously and intentionally presented highly irrelevant and immaterial testimony regarding the illegal operation of drug laboratories and the production of methamphetamine and also used his prior convictions to inflame the bias, passion, and prejudice of the jury. This illicit testimony unfairly inflamed the jury and denied Mr. Gales' his fundamental right to a fair trial.

By admitting, over defense objection, highly prejudicial, immaterial, and irrelevant evidence regarding the operation of methamphetamine laboratories the jury was improperly persuaded to convict Mr. Gales of conspiracy and constructive possession. Regardless of the fact that the only uncontested, documented evidence against him was purely circumstantial. Despite the copious testimony concerning the operation of methamphetamine laboratories, Mr. Gales was not charged with operating a drug laboratory or the manufacture methamphetamine. This testimony presented by the State served no purpose other than to prejudice the jury against Mr. Gales. Accordingly, it violated Mr. Gales constitutionally guaranteed right to a fair trial.

Mr. Gales was found guilty on both charged counts on a weight of evidence that could only be described as "underwhelming," following a trial replete with many errors. The lack of any substantial evidence leads to the conclusion that the jury was improperly influenced

by the testimony mentioned above and improperly found Mr. Gales guilty on a basis of anemic evidence lacking the weight to affirm such convictions. The evidence presented by the prosecution was also legally insufficient to even make out a *prima facie* case of possession of precursors as charged in the indictment in this case.

To compound the prejudice created by the prosecution in this case, the State of Mississippi was allowed by the trial judge to enter orders of prior convictions from the "pen pack" into evidence, over defense objection, concerning the prior criminal record of the Appellant, one of which was for "Conspiracy to Possess Drug Paraphernalia With Intent to Manufacture Methamphetamine." The Appellant respectfully contends that this was an abuse of discretion of the trial court to allow documents of what had to have appeared to the jury as substantive proof of guilt to the current charges under the old "he did it once, he'll do it again" illusion.

The Appellant herein was found guilty after a trial flawed with so many fundamental errors and based on a weight and legal sufficiency of evidence that did not rise to the level established by the Constitution's requirement that all citizens accused of crimes must be proven guilty by credible evidence beyond a reasonable doubt. The vast majority of the evidence pointed to the fact that the pills were purchased by Denise Horn, as most of them were found on her, the rest of the pills were found on the passenger side of the car where she was riding, and all the pills were recovered from Horn's vehicle. Therefore, for the above reasons, this honorable Court should reverse and render this case, thereby discharging the

Appellant from custody, or, in the alternative, reverse and remand this case for a new trial on the merits of the case, with proper instructions to the lower court.

ARGUMENT

ISSUE ONE:

WHETHER THE TRIAL COURT ERRED IN ALLOWING IRRELEVANT AND HIGHLY PREJUDICIAL TESTIMONY REGARDING THE OPERATION OF METHAMPHETAMINE LABORATORIES GENERALLY, THEREBY VIOLATING HIS FUNDAMENTAL RIGHT TO A FAIR TRIAL PURSUANT TO THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE 3, SECTIONS 14 AND 26 OF THE CONSTITUTION OF THE STATE OF MISSISSIPPI.

This case is one of inaccurate assumptions made by the police, the prosecution, and ultimately the Appellant's jury in finding him guilty of conspiracy and possession of precursors, which the facts gathered on the street and the evidence presented in the courtroom simply did not prove guilt beyond a reasonable doubt. What is clear from this case is that when the trial judge allowed the State's police witness to testify in excruciating detail about how the drug methamphetamine is illegally manufactured, the jury was so poisoned by this "expert" testimony to the point of convicting a man who was simply driving a car belonging to the person who was actually and exclusively guilty of this crime.

Mr. Gales was charged with conspiracy to commit a crime and possession of precursors as a habitual offender. He was never charged with manufacturing methamphetamine, nevertheless, argument, evidence, and testimony of methamphetamine laboratories and the production of methamphetamine was continuously mentioned throughout

the jury selection process, the opening statements, and the trial. The Appellant contends that the trial court erred by admitting evidence regarding the production of methamphetamine over defense objection (T. II. 225-26, RE. 30-31), despite the fact the testimony was not relevant to the issues in the case or in any way material to the charges with which Mr. Gales was indicted by the grand jury.

- A. The trial court abused its discretion by failing to try the case based on the merits, instead choosing to allow highly inflammatory and prejudicial testimony that did nothing more than confuse, inflame and prejudice the jury with "expert" testimony regarding the "day-to-day" operation of methamphetamine laboratories.

Ultimate discretion rests with the trial judge when deciding whether or not to admit evidence. *Jones v. State*, 912 So. 2d 501, 504. *See also, Church of God Pentecostal, Inc. v. Freewill Pentecostal Church of God, Inc.*, 716 So. 2d 200, 210 (¶36) (Miss. 1998). However, a trial court can be reversed upon a finding of abuse of discretion. *Id.* The trial court in this case clearly abused its discretion by admitting a totally irrelevant line of testimony concerning the method of production of illegal drugs. This testimony severely prejudiced the jury against Mr. Gales, by unfairly painting him as a "drug addict," and served only to deprive the Appellant of a fundamentally fair trial pursuant to the *Fourteenth Amendment of the United States Constitution* and *Article 3, Sections 14 and 26 of the Constitution of the State of Mississippi*.

The Mississippi Rules of Evidence is clear and concise concerning the necessity of proof being relevant to the issues in the case as the only evidence admissible at trial:

"Relevant Evidence" means evidence having any tendency to make the

existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Miss. R. Evid. 401.

Since the testimony regarding methamphetamine production had no “tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence,” it was clearly not relevant to the case and should have been excluded. Because the said testimony did not directly or indirectly concern the indicted offenses of conspiracy or the actual or constructive possession of precursors to methamphetamine, it served no purpose other than to inflame the jury and subtlety attack Mr. Gales’ character.

The Mississippi Supreme Court has consistently applied the rule of relevancy in criminal trials concerning attempts by the prosecution to present proof of uncharged conduct by repeatedly holding:

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.

McGowen v. State, 859 So. 2d 320 (¶32) (Miss. 2003) (citations omitted).

The evidence in question in the case at bar is testimony from Southaven Police Officer Kyle Hodge, an “expert” witness (T. II. 225-26) who was called by the State solely for the purpose

of describing to the jury how the drug methamphetamine is manufactured in illegal laboratories. Even when considered in the indicted charge of possession with intent to manufacture, this testimony cannot be seriously considered to “prove motive,” or “an apparent relation or connection between the act proposed to be proved and that charged,” or to even establish a situation “where it is necessary to prove scienter or guilty knowledge.”

Id. Even if this Court might find a slight connection to one of the *McGowan* exceptions, this testimony regarding the detailed process of manufacturing methamphetamine did not contribute the type of “probative value” of relevance to the question of whether Mr. Gales possessed or conspired with Horn to purchase methamphetamine, and was offset by the highly prejudicial nature of the evidence, and, therefore, not admissible. *See M.R.E. 403.*

The only minimal evidence that even suggested Mr. Gales may have been involved in a conspiracy with Horn to possess precursors was the unsubstantiated testimony of police officers that Mr. Gales and Horn were in the same car and that he supposedly made incriminating, though unrecorded, statements. Neither of these elements of proof show, beyond a reasonable doubt, that Mr. Gales and Horn were somehow involved in a conspiracy. Contrarily, it merely places Mr. Gales and Horn in the same place at the same time, a fact that was explained by Mr. Gales’ testimony that he was only driving Horn because she offered to pay him one hundred dollars if he drove her to meet her boyfriend at a casino in Tunica.

(T. II. 265)

Moreover, this irrelevant “expert” testimony did not add substance to the State’s

theory of prosecution or their burden of proof that Mr. Gales was in possession of precursors. Almost 180 lines of testimony are dedicated to the detailed process used to manufacture methamphetamine, yet, the testimony regarding this process does not make the State's theory of prosecution "more or less probable" that Mr. Gales was involved in a conspiracy or was in constructive possession of precursors. Conversely, it merely served to inflame the jury by painting Mr. Gales as a methamphetamine addict who would do anything simply to get drugs. (T. III. 230) "Fundamental fairness requires that any defendant should not be subjected to testimony and tactics which are highly inflammatory and prejudicial as shown by the record before us." *Tudor v. State*, 299 So. 2d 682, 685 (Miss. 1974)

In *Tudor*, the Supreme Court of Mississippi reversed and remanded the drug conviction after finding the case was subject to irrelevant, inflammatory, and prejudicial testimony such as to deny him his fundamental right to a fair and impartial trial. *Id.* at 686. Similar to the Gales' case, the only direct evidence against Tudor was the testimony of an undercover police officer, and, also like the case at bar, the trial court admitted evidence offered by the prosecution simply designed to confuse, mislead, and inflame the jury. *Id.* at 684. The trial court improperly allowed testimony of Tudor's possible connection to crystal methamphetamine, although Mr. Tudor was not on trial for selling crystal methamphetamine. *Id.* at 685. Similarly, Mr. Gales was not charged with manufacturing methamphetamine, however, the trial court allowed evidence of the methamphetamine production process.

Additionally, comparable to *Tudor*, the prosecution presented evidence designed to

portray Mr. Gales as guilty of the charges merely by association with another person. The prosecution's opening statement acknowledged the undisputed fact that all of the pseudoephedrine pills were found on Horn's side of the vehicle, stuffed down Horn's clothing, and in Horn's personal belongings. (T. I. 123) Although Mr. Gales and Horn were in the same car (owned by Horn), the evidence clearly indicated that Horn was the person who purchased the pseudoephedrine and who possessed all of the pills at the time of her arrest. The prosecution witnesses did not identify Mr. Gales as the person purchasing the pseudoephedrine, nor where any of the pills found on Mr. Gales's person or his side of her car. The only evidence connecting Mr. Gales to Horn is the fact that he was driving her vehicle, a fact in the case that was put in issue by the Appellant's own testimony of his belief that he was driving Horn to Tunica to meet up with her wayward boyfriend. (T. II. 265-266) He also agreed to stop at the Walgreen's store at Horn's request so that she could purchase her cancer medication. *Id.* The only remaining evidence against Mr. Gales was alleged unrecorded statements he made to officers regarding the reason he was in Horn Lake, and at least one of these officers admitted that he failed to read the Appellant his *Miranda* rights. (T. II. 167).

It is important to note that *Tudor*, is distinguished by two subsequent cases; however, one of those cases was found to be distinguishable by the facts of an entrapment defense was asserted by the appellant in that case, and in the other by the fact that the trial court judge took extraordinary steps to ensure the jury was not prejudiced by the highly inappropriate

testimony. These same factual scenarios did not occur in the present case, therefore, the trial court erroneously admitted primarily irrelevant and highly prejudicial evidence.

B. The trial court's admission of this extraneous irrelevant evidence constituted reversible error, which cannot be said to be "harmless" beyond a reasonable doubt.

But for the trial court's admission of highly prejudicial, extremely irrelevant and deeply prejudicial testimony regarding methamphetamine production, the jury probably would not have convicted Mr. Gales of the indicted crimes, which cannot be "harmless."

It is error in the course of a trial where one is charged with a criminal offense for the state to inject extraneous and prejudicial matters and lay them before the jury. A combination of such instances may become fatal error and ground for reversal even though the court sustains objections to such questions. . . .

Tudor, 299 So. 2d at 685.

Undoubtedly, testimony regarding methamphetamine laboratories, past convictions, and unfair comparisons greatly contributed to the jury's decision to convict Mr. Gales of conspiracy and possession of precursors. However, this evidence was improperly admitted because it was irrelevant to the crimes with which Mr. Gales was charged. Consequently, continued admission of such evidence throughout the trial severely and unfairly prejudiced the jury against Mr. Gales.

The State's only other evidence presented against Mr. Gales at trial was circumstantial at best, although police officers insist he "confessed" to the conspiracy and possession, there is simply no tangible evidence of this supposed statement to police. They do not have a written or audio statement from the Appellant concerning any of the alleged conversations

between Mr. Gales and officers on the night of the arrest. Accordingly, in view of the meager evidence of such an alleged statement and the remaining circumstantial nature of the proof offered by the State, the trial court's admittance of this totally irrelevant and highly prejudicial evidence violated the Appellant's fundamental right to due process of law and a constitutionally fair trial.

In order for a violation of a constitutional right to be held harmless, this Court must determine that the violation was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 23, 87 S. Ct. 824 (1967). Similarly, this Court has held "errors involving a violation of an accused's constitutional rights may be deemed harmless beyond a reasonable doubt where the weight of the evidence against the accused is overwhelming."

Clark v. State, 891 So.2d 136, 142 (Miss. 2004) (emphasis added) (citing *Riddley v. State*, 777 So.2d 31, 35 (Miss. 2000)).

The trial court's admission of the prejudicial testimony did not constitute harmless error where the State failed to provide its case by an overwhelming amount of concrete evidence linking Mr. Gales to the crime alleged in the indictment. But for the admission of the highly irrelevant and extremely prejudicial testimony regarding methamphetamine laboratories, Mr. Gales' prior conviction, and inflammatory language such as "crystal lane" the jury would not have convicted Mr. Gales of these crimes. The *Tudor* case also is instructive on the issue of the inherently harmful effect that highly prejudicial and inflammatory evidence has on juries:

Incompetent evidence, inflammatory in character, when presented to a jury carries with it a presumption that it was harmful. *McDonald v. State*, 285 So.2d 177 (Miss. 1973). We will reverse a conviction unless it can be said with confidence that the inflammatory material had no harmful effect upon the jury.

Coleman v. State, 198 Miss. 519, 23 So.2d 404 (1945). In *McDonald*, supra, Justice Broom speaking for the Court said:

It is error in the course of a trial where one is charged with a criminal offense for the state to inject extraneous and prejudicial matters and lay them before the jury. A combination of such instances may become fatal error and ground for reversal even though the court sustains objections to such questions. . . . One of the ingredients of a fair and impartial trial is that an accused person should be tried upon the merits of the case. Expressing it another way, the question of guilt or innocence of the crime charged should be received by the jury unhampered by any suggestion or insinuation of any former crime or misconduct that would prejudice jurors. . . . We commend vigorous prosecutions so long as they are conducted within the rules of evidence. Our adversary system of jurisprudence does not contemplate that attorneys for either side will be completely passive or indifferent during court trials. Yet, fundamental fairness requires that any defendant should not be subjected to testimony and tactics which are highly inflammatory and prejudicial as shown by the record before us. See *Allison v. State*, 274 So.2d 678 (Miss. 1973); *Kelly v. State*, 278 So.2d 400 (Miss. 1973); and *Wood v. State*, 257 So.2d 193 (Miss. 1972). *McDonald*, 285 So.2d at 180.

Tudor, 299 So. 2d at 685-86 (emphasis added).

Accordingly, due to the continued admission of highly irrelevant and extremely prejudicial testimony, Mr. Gales was denied his right to a fair and impartial trial. Accordingly, this case should be reversed and remanded to the lower court with proper instructions for a new trial based on the trial court's admission of the extremely prejudicial and highly irrelevant evidence which denied Mr. Gales' fundamental right to a fair trial pursuant to the *Fourteenth Amendment of the United States Constitution* and *Article 3, Section 26 of the Constitution of the State of Mississippi*.

ISSUE TWO:

WHETHER THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT THE APPELLANT'S MOTION FOR A NEW TRIAL ON THE GROUNDS THAT THE WEIGHT OF THE EVIDENCE WAS SUCH THAT THE APPELLANT SHOULD NOT HAVE BEEN CONVICTED BY A REASONABLE, FAIR-MINDED JURY OF CONSPIRACY TO POSSESS AND CONSTRUCTIVE POSSESSION OF A PRECURSOR.

The familiar standard of review for the denial of a post-trial motion seeking a new trial is abuse of discretion. *Dilworth v. State*, 909 So. 2d 731, 736 (Miss. 2005). A motion for a new trial challenges the weight of the evidence presented at trial. *Dilworth*, 909 So.2d at 737. A reversal is warranted only if the lower court abuses its discretion in denying a motion for new trial. *Id.* When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, an appellate court will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that allowing it to stand would sanction an unconscionable injustice. *Bush v. State*, 895 So. 2d 836, 844 (Miss. 2005). In a hearing on a motion for a new trial, the trial court sits as a thirteenth juror, but the motion is addressed to the discretion of the court, which 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. *Id.* The evidence should also be weighed in the light most favorable to the verdict. The *Bush* Court stated:

A reversal on the grounds that the verdict was against the overwhelming weight of the evidence, unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict. Rather, as the "thirteenth juror," the court simply disagrees with the jury's resolution of

the conflicting testimony. This difference of opinion does not signify acquittal any more than a disagreement among the jurors themselves. Instead, the proper remedy is to grant a new trial.

Id.

In the context of a defendant's motion for new trial, although the circumstances warranting disturbance of the jury's verdict are "exceedingly rare," such situations arise where, from the whole circumstances, the testimony is contradictory and unreasonable, and "so highly improbable that the truth of it becomes so extremely doubtful that it is repulsive to the reasoning of the ordinary mind." *Thomas v. State*, 92 So. 225, 226 (1922). Though this standard of review is high, the appellate court does not hesitate 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 to be based on extremely weak or tenuous evidence, even where that evidence is sufficient to withstand a motion for directed verdict. *Dilworth*, 909 So.2d at 737.

In the case at bar, the State was not able to put on any evidence that was not later refuted, or at least put at issue, by the defense. The State only showed that a blonde woman came into Walgreen's and requested pseudoephedrine pills. (T. I. 130) It is undisputed that the State never showed that Mr. Gales ever entered a Walgreen's or purchased any pills on the day in question. (T. I. 135) The facts demonstrated that the car in which the pills were found belonged to Horn. (T. II. 154) The State never showed that police ever found any narcotics on Mr Gales. (T. II. 144) State and defense evidence showed that the pills were found on Horn, concealed in the front of her pants. (T. II. 145-46) Undisputed evidence showed that all of the other pills were found on the floorboard of the passenger side where

Horn was sitting in the car. (T. II. 146) The State put on evidence alleging that Mr. Gales confessed to police. (T. II. 149) Mr. Gales, however, stated in front of jury that he never gave such a statement (T. II. 269) and it is undisputed that no such statement was ever written down or signed by the Appellant. (T. II. 188)

The only written and signed statement from anyone is from Horn which states, "I came today to Mississippi to buy Wal-phed to take back to Arkansas to sell someone to make money that needed. Not for the reason to cook them myself" (T-197; Exh. 5, RE. 15) In order to bolster their anemic evidence, the State also introduced irrelevant, prejudicial evidence about the geographical area Mr. Gales was found in as being known as "crystal alley." (T. II. 184-85) To demonstrate the extent of the irrelevant and highly prejudicial evidence used against Mr. Gales it is important to note that the State put on lengthy evidence demonstrating how to manufacture methamphetamine and the operation of meth labs. (T. II. 225-231) This testimony covers six pages of the transcript, and no less than 178 lines of testimony in the transcript. (T. II. 225-231) Even viewing all of the evidence in the light most favorable to the jury's verdict, it cannot be said with any confidence that all of the evidence adduced at trial supports the jury's verdict in any substantial way.

Mr. Gales took the stand in his own defense stating that Horn was a friend he brought over from Arkansas in order to make money for being her driver. (T. II. 265-66) Mr. Gales stated that he was suspicious of some of Horn's behavior, but that he knew she had cancer and believed they were stopping at Walgreen's for her medicine. (T. II. 265-66) Mr. Gales

took the stand and testified to the same thing to the jury that he said that day to the police; he denied ever entering into a conspiracy with Ms. Horn or possessing narcotics. (T. II. 272)

The Court has laid down the rule in "weight of the evidence" cases that holds:

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 737 (citations omitted).

An affirmance of the convictions in this case "would sanction an unconscionable injustice" based on the tenuous, anemic weight of the evidence presented in this trial, which resulted in a guilty verdict on both of these counts. For these reasons, the trial court erred in refusing to set aside the guilty verdict of the jury as to both charged counts of the indictment in this case, and, as a result, this honorable Court should reverse and remand this case to the lower court with proper instructions for a new trial.

ISSUE THREE:

WHETHER THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT THE APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE THE STATE FAILED TO MEET ITS BURDEN OF PROOF BY ESTABLISHING BY LEGALLY COMPETENT EVIDENCE BEYOND A REASONABLE DOUBT EACH AND EVERY ESSENTIAL ELEMENT OF THE INDICTED OFFENSES OF CONSPIRACY TO POSSESS AND CONSTRUCTIVE POSSESSION OF A PRECURSOR.

This is a case where each of the essential elements of the charges laid by the indictment were never proven by credible evidence beyond a reasonable doubt at trial. Mr.

Gales, the Appellant herein, committed no crime when he simply acted as a driver for Horn on July 25, 2005. Count one of the indictment charges Mr. Gales as having engaged in a conspiracy to possess pseudoephedrine and count two charges him with being in possession of the same. The State failed to offer evidence at trial which would meet the elements of conspiracy or possession. Specifically, in count one the State did not prove that Mr. Gales agreed to conspire with Horn to possess precursors. In count two, the State failed to show that Mr. Gales actually or constructively “. . .possessed two-hundred fifty (250) dosage units of pseudoephedrine, or that he knowingly or under circumstances where one reasonably should know. . .” that the pseudoephedrine would be used to manufacture a controlled substance. Therefore, the State failed to offer legally sufficient credible evidence proving that Mr. Gales acted with the requisite *intent* required by the law. In essence, even viewing the prosecution’s case in the light most favorable to their case-in-chief, the State failed to make out a basic *prima facie* case by credible evidence that the Appellant was guilty beyond a reasonable doubt and the resulting conviction is the very definition of an “unconscionable injustice.”

The standard of appellate review for challenges to the legal sufficiency of the evidence is articulated in *Bush v. State*, 895 So. 2d 836 (¶17) (Miss. 2005). In *Bush*, the Court restated that “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.” *Bush*, 895 So. 2d at ¶17 (*citing Jackson*

v. *Virginia*, 443 U.S. 307, 315 (1979)). The Court emphasized that “[s]hould 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.” *Id.* (emphasis added) (citing *May v. State*, 460 So. 2d 778, 781 (Miss. 1984)).

Mississippi Code Annotated 97-1-1(a) defines conspiracy, in pertinent part, as follows: “If two (2) or more persons conspire; (a) to commit a crime.” *Miss. Code Ann. § 97-1-1* (Supp. 2007). The language of the statute indicates that, for a person to be convicted of being a member of a conspiracy, two elements must be met. The State must show that the person charged (1) agreed to (2) commit a crime. In the case at hand, neither element was ever proven. The only evidence offered to demonstrate any such agreement is the alleged “confession” of Mr. Gales, of which there is no video- or audio-taped proof, no written confession; only the word of these officers who say it’s true because they say so. (T. II. 149)

Mississippi Code Annotated 41-29-313 defines “Possession of Precursor Chemicals of Drugs,” in pertinent part, as follows:

It is unlawful for any person to purchase, possess, transfer, or distribute, two hundred-fifty (250) dosage units, of psuedoephedrine and/or euphedrine, knowing, or under circumstances where one reasonably should know, that the psuedoephedrine and/or euphedrine would be used to unlawfully manufacture a controlled substance.

Miss. Code Ann. § 41-29-313 (Supp. 2007).

The second element the State failed to prove is that Mr. Gales was in possession of two-hundred fifty (250) dosage units of pseudoephedrine. There is utterly no proof that established by credible evidence beyond a reasonable doubt (or even "clear and convincing" evidence) that Mr. Gales actually or constructively possessed two-hundred fifty (250) dosage units of pseudoephedrine, or that he knowingly or under circumstances where one reasonably should know, that the pseudoephedrine would be used to manufacture a controlled substance.

In the trial court, the prosecution attempted to prove the possession element of the crime by putting on evidence that Mr. Gales was driving the vehicle. (T. II. 142) It is undisputed that Mr. Gales did not have actual possession of the pills. (T. II. 145-46) Therefore, the State needed to show constructive possession. It is also undisputed that Mr. Gales was not the owner of the vehicle and that Horn was in possession of all of the pills. (T. II. 154) In *Hamburg v. State*, the Mississippi Supreme Court stated that one who is the owner of the vehicle in which contraband is kept or transported, is presumed to be in constructive possession of the articles found in or on the property possessed. *Hamburg v. State*, 248 So. 2d 430, 432 (Miss. 1971). Furthermore, the Court stated that this is a "rebuttable presumption," and that the presumption "does not relieve the State of the burden to establish defendant's guilt as required by law, and the defendant is presumed innocent until this is done." *Hamburg*, at 432. Even in such a case, where the State enjoyed a presumption of constructive possession, the Court found that where a State witness identified the person in possession of the narcotics to be someone other than the person charged with

constructive possession, the State rebutted its own presumption “by showing facts of actual possession to be in another than. . .the operator of the vehicle.” *Hamburg*, at 432. The Court went on to say that under such facts, the motion for directed verdict should have been sustained at the close of the State’s case. *Hamburg*, at 433.

In the instant case, Mr. Gales was not even the owner of the car as was the defendant in *Hamburg*, so the State would enjoy no such presumption. (T. II. 154) Just as in *Hamburg*, the State’s own evidence demonstrates someone else was in actual possession of the pills. (T. II. 145-46) That person, Horn, confessed to police that committed the crime by purchasing the pills. (T. II. 197) Furthermore, the pills were found concealed beneath Horn’s clothing, so much so, that the police themselves didn’t notice them until they began a search of Horn’s person. (T. II. 145-46) The State cannot rely on the circumstantial evidence of a few pills found on the floorboard because, first they were on the passenger side where Horn was sitting in her car, (T. II. 146) and second, there were only twenty pills on the floorboard, which is too few to meet the two-hundred fifty count requirement in the statute. (T. II. 146) As the Mississippi Supreme Court noted in *Dixon v. State*, “constructive possession may be shown by establishing that the drug involved was subject to dominion and control. Proximity is usually an essential element, but by itself is not adequate in the absence of other incriminating circumstances. . . . [t]here must be evidence in addition to physical proximity, showing the defendant consciously exercised control over the contraband, and absent this evidence, a finding of constructive possession cannot be sustained.” *Dixon v. State*, 953

So.2d 1108 (¶9) (Miss. 2007) (emphasis added).

The third essential element the State failed to prove is that Mr. Gales knowingly, or under circumstances where one reasonably should know, that the pseudoephedrine would be used to unlawfully manufacture a controlled substance. The only evidence that the State used to attempt to establish this element was in the police officer's testimony that Mr. Gales supposedly "confessed" (T. II. 149), an assertion which he denied before and during the trial, has continued to deny (T. II. 269), and which there is no tangible, concrete, or recorded proof. (T. II. 188) It has already been demonstrated without dispute that the entirety of the pills in this case were found either concealed on Horn's person, in her purse, or on her side of her own car. (T. II. 146) Furthermore, there was no evidence that Mr. Gales even saw the pills on the floorboard and seat on the passenger side of someone else's car or that they were precursors for narcotics. Their mere presence alone would certainly not be legally sufficient evidence to establish the essential element of proof "to know or reasonably should have known" that they would be used in the manufacture of methamphetamine.

These bare assertions are simply insufficient to legally sustain the crimes charged in this case. The implications from above, standing alone, cannot and do not prove any element of the crimes alleged. Due to the State's failure to prove, by legally competent and credible evidence, the essential elements of both statutes beyond a reasonable doubt, the Appellant respectfully requests that this Court reverse the verdict, render judgment on his behalf and discharge him from custody.

ISSUE FOUR:

**WHETHER THE TRIAL COURT'S FAILURE TO CORRECTLY APPLY
MISSISSIPPI RULE OF EVIDENCE 609, INCLUDING CONDUCTING AN ON-
THE-RECORD BALANCING TEST AND/OR GIVING A LIMITING
INSTRUCTION WHEN THE TRIAL COURT ALLOWED THE APPELLANT'S
PRIOR CRIMINAL HISTORY CONCERNING POSSESSION AND
CONSPIRACY IN DRUG-RELATED CONVICTION DURING THE STATE'S
CASE AND THEIR CLOSING ARGUMENT.**

As a part of the prosecution's attempt to impeach the credibility of the Appellant's testimony and in closing argument, the prosecutor improperly informed the jury of the Appellant's criminal history, including a convictions for "Theft by Receiving" and "Conspiracy to Possess Drug Paraphernalia With Intent to Manufacture Methamphetamine," and the jury was improperly given documents of the convictions from the "pen pack" to use in their deliberations. (T. II. 214, 240-41, 238-244, 321; Exh. S-3 and S-4, RE. 32- 36) *See also, Miss. R. Evid. 609.* The testimony was ostensibly elicited to impeach Mr. Gales' testimony regarding his reason given for being in Mississippi. However, during the closing argument for the State, the prosecution stated, "He's been previously convicted of this or a – of Conspiracy to Possess Drug Paraphernalia With Intent to Manufacture Methamphetamine in Arkansas. Y'all will have this exhibit to take and look at while you're back there. The Defendant has told you he was a drug addict. That's uncontested." (T. III. 321; Exh. S-3 and S-4, RE. 32- 36) The prosecutor then stated, "He was collecting the drugs – I'm sorry – he was collecting the pseudo-phed to give to a meth cook in Arkansas." (T. III. 324)

The State's evidence in this case for both of the charges of possession and conspiracy were not strong against the Appellant, as aforesaid. When the evidence is not strong, procedure should be on its toes in order to ensure fairness. In this case, defense counsel timely objected and the prosecutor took advantage of this improper evidence in incorrectly eliciting Mr. Gales's prior conviction in order to further prejudice the jury against him. In addition, the court allowed the prior conviction and gave no specific facts of how this highly prejudicial evidence (the prejudicial effect/probative value of the evidence) weighed in favor of the prosecution, nor gave a limiting instruction to the jury. *M.R.E. 609 and 403*. Finally, the prosecutor submitted these prior convictions to the jury basically as substantive evidence during closing argument without interference from the trial court. (T. III. 214) Therefore, the Appellant contends that the trial court abused its discretion in allowing documentation of these convictions to go to the jury room as exhibits (*see ante*), committed reversible error that further prejudiced the jury, and the Appellant is entitled to a new trial.

Mississippi Rule of Evidence 609 sets out the proper procedure for attempting to impeach a criminal defendant's testimony by prior conviction of crime, and requires that before admitting evidence of a defendant's felony conviction, the judge must determine "that the probative value of admitting this evidence outweighs its prejudicial effect." *Miss. Rule. Evid. 609(a)(1)*. The language of the rule is clear enough, but the Mississippi Supreme Court in *Peterson* held that "Rule 609(a)(1) requires the trial judge to make an on-the-record determination that the probative value of the prior conviction outweighs its prejudicial effect

before admitting any evidence of a prior conviction.” *Peterson v. State*, 518 So.2d 632, 636 (Miss. 1987) (emphasis added). However, the prosecution first has to clear a threshold requirement of the impeachment evidence’s probative value. *Hickson v. State*, 697 So. 2d 391, 397 (Miss. 1997)(citing *Peterson v. State*, 518 So.2d 632, 636-37 (Miss. 1987)).

The *Peterson* court outlined the necessary factors for the trial court to weigh in considering whether to admit the evidence of conviction of the defendant at a subsequent trial. Those factors are: (1) the impeachment value of the prior crime, (2) the point in time of the conviction and the witness’ subsequent history, (3) the similarity between the past crime and the charged crime, (4) the importance of the defendant’s testimony, and (5) the centrality of the credibility issue. Though the court should consider all the factors, the court will not be reversed if it gives an “honest effort” to the balancing test. *Bush v. State*, 895 So. 2d 836, 848 (Miss. 2005). Regardless, the “trial judge must make an on-the-record finding

Triplett v. State, 881 So.2d 303, 305 (Miss. 2004) (emphasis added). “An on-the-record finding that the probative value outweighs the prejudicial effect is not merely an idle gesture.” *Id.* (emphasis added). The Mississippi Supreme Court found plain error when a trial judge failed to perform an on-the-record balancing test that the probative value of prior conviction evidence outweighed the prejudice of such evidence. See *Signer v. State*, 536 So. 2d 10, 12 (Miss. 1988). The judge here also performed no prejudicial/probative balancing test and the jury was also not instructed to consider the evidence for impeachment purposes

only. Hence, it is logical that the Court should entertain a claim of error in this case for improperly admitting this “impeachment” evidence and also entertain a claim of error for the prosecutor’s statements to the jury during closing arguments that effectively told the jury since he was a drug addict, these prior convictions were substantive evidence of guilt.

Application of the *Peterson* factors militate against admitting the evidence in this case. The first *Peterson* factor is the impeachment value of the crime. Neither theft or conspiracy to possess precursors are crimes involving dishonesty. Calling it a “rule of thumb,” the Mississippi Supreme Court has expressed that “convictions which do not relate to credibility, i.e., deceit, fraud, cheating, generally have little probative value for impeachment purposes.” *Johnson v. State*, 525 So. 2d 809, 812 (Miss. 1988) (emphasis added). Therefore, the first *Peterson* factor weighs against admitting the prior convictions.

The next factor is the temporal proximity of the crime for which the defendant is on trial and the crimes to be used as impeachment evidence. The prior conviction for “Theft by Receiving” was recorded July 3, 2002, and the prior conviction of “Conspiracy to possess Drug Paraphernalia With Intent to Manufacture Methamphetamine,” a felony, of which he was sentenced occurred in May 7, 2002. (Exh. S-3 and S-4, RE. 32-36) This trial took place in 2007, over five years from date these convictions, much less the dates of their commission. Therefore, the second *Peterson* factor also weighs against admitting the prior crimes evidence because of remoteness in time and the “Theft” would also instruct the jury that since he was still a “drug addict,” he would do anything to get illegal contraband.

The third factor to be considered is the similarity between the crimes for which the defendant has been convicted and those for which the defendant is on trial. This factor “weighs *heavily* against admissibility.” *Hopkins v. State*, 639 So. 2d 1247, 1253 (Miss. 1993) (emphasis in original). The analysis in *Hopkins* is instructive on this crucial factor. The Court explained the problem with impeachment by prior similar crimes, noting “it was quite likely that the jury would believe ‘if he did it before he probably did it this time.’” *Id.* In this case, in which the Appellant herein was on trial for drug-related charges, the prosecutor elicited evidence of prior convictions of “Theft by Receiving” and “Conspiracy to Possess Drug Paraphernalia With Intent to Manufacture Methamphetamine.” The danger that the jury viewed the prior crimes as substantive evidence of guilt was heightened due to the exact nature of the charges. Further, this danger was not mitigated by a limiting instruction. This factor alone should have required exclusion of the prior convictions, but the trial judge did not mention any of these factors in the decision to admit them.

The fourth factor in *Peterson* examines the importance of the witness’s testimony. Clearly, Mr. Gales’s testimony was very important in this case as this was a circumstantial, “he said, he said” trial. *Peterson* enunciated that the more important the defendant’s testimony is to his defense, the more likely prior crimes are to be prejudicial. *Peterson*, 518 So. 2d at 637. Mr. Gales’s testimony was the only way for him for him to assert his defense of no guilty knowledge. Therefore, the fourth *Peterson* factor also weighs in favor of the Appellant that this impeachment by prior identical convictions should have never occurred

in a case where the accused had to testify to explain why he was present.

The fifth factor is the centrality of the credibility issue. Clearly, credibility was very important to this case because there was a total void of physical evidence, so the jurors had to rely only on witness testimony to reach their verdict. The prosecutor's argument in closing was clearly designed to further prejudice the credibility of the Appellant in the eyes of the jury. Since the defense was unable to locate Denise Horn before trial (T. II. 250-60), his credibility was central to his defense and again weighs heavily towards exclusion in the probative value/prejudicial effect balancing test.

Had the trial court performed a detailed *Peterson* balancing test, the proper result would obviously require the exclusion of the prior convictions. Simply following the procedural requirements of *M.R.E. 609*, all five factors would have clearly militated against admitting the prior conviction. As stated by the Mississippi Supreme Court, crimes which do not involve dishonesty have little probative value. *Johnson v. State*, 525 So. 2d 809, 812 (Miss. 1988). The prosecutor also took advantage of this highly prejudicial evidence by improperly instructing the jury in closing that it was no mystery Mr. Gales, an admitted "drug addict" would commit these charged crimes because he had committed drug-related offenses twice before, compounding the trial court's admission of this procedurally and substantively inadmissible documentation. One can surely imagine that the jury considered these convictions as substantive evidence in considering their verdict against the Appellant. Because the prior convictions were admitted into evidence without even a minimal factual

consideration of the their prejudicial effect, the trial court committed an abuse of discretion *per se*, and, due in large part to this improperly admitted evidence, Mr. Gales was denied a fundamentally fair trial before an unprejudiced, impartial jury.

In *Jones v. State*, 702 So. 2d 419, 421 (Miss. 1997), the Mississippi Supreme Court held that an appellate court has two basic choices when the trial court fails to conduct the required *Peterson* balancing test: The appellate court can either perform the balancing test that should have been performed in the lower court or it can simply reverse and remand the case for retrial. *Id.* The Court also specifically held, “in those cases where the accused’s credibility was central to his defense or where the evidence [in the case] was hotly disputed, we took a different course and remanded the case for retrial.” *Id.*

In the case at bar, the Appellant contends that this honorable Court should choose the second option and remand this case for a new trial. Certainly Mr. Gales’s credibility was central to his defense, and the issues at trial were “hotly disputed.” Mr. Gales’s prior convictions were not only erroneously admitted, but were actually and physically given to the jury in document form without the necessary *prima facie* showing by the State of their probative value (see *Signer, supra*, at 13) , no *Peterson* balancing of the factors, no limiting instruction to the jury, and then the prosecutor essentially told the jury on closing argument was to consider the prior crimes as substantive evidence of the Appellant’s guilt. Further, the proof produced a evenly-matched case, in which the proof boiled down to “he said, he said” and was completely void of any physical evidence connecting the Appellant directly to

the pseudoephedrine pills found on Horn and on the passenger side of her own car. The prosecutor played fast and loose with rules of evidence and neither defense counsel nor the trial court choose to rein in the prosecutor, which constituted a miscarriage of justice, and seriously calls into question the fairness, integrity, or reputation of the judicial proceedings. *Porter v. State*, 749 So.2d 250, 261 (Miss. Ct. App. 1999).

The procedures enumerated in the rules of evidence and Mississippi common law are not idle suggestions or optional choices for our trial courts to consider. These procedures are mandatory and serve the ultimate goal of fairness in our criminal justice system. "In criminal procedures, due process requires, among other things, that a criminal prosecution be conducted according to established criminal procedures." *Mackbee v. State*, 575 So.2d 16, 24 (Miss. 1990). The jury was improperly informed by the prosecution that the defendant was a two-time felon who had been in and out of jail for convictions relating to possessing drugs and/or obtaining drugs. The prosecution made no showing these prior crimes were probative under the rules of evidence, and the trial court obviously did not consider the prejudicial effect of that evidence. To seal the fate of Mr. Gales, the jury was told by the prosecution in closing arguments that Mr. Gales would commit drug crimes because he had done so before. Mr. Gales was denied the basic protections of criminal procedure when he needed them the most.

Additionally, the prosecutor's use of Mr. Gales's prior drug conviction during closing arguments was a bald-faced attempt to improperly influence the jury as proof of substantive

guilt through the use of inadmissible evidence. This improper use of this “proof” was a clear example of calculated conduct that could rise to the level of prosecutorial misconduct. “The standard of review that appellate courts must apply to lawyer misconduct during opening statements or closing arguments is whether the natural and probable effect of the improper argument is to create unjust prejudice against the accused so as to result in a decision influenced by the prejudice so created.” *Flora v. State*, 925 So. 2d 797, 812 (Miss. 2006, citing *Banks v. State*, 725 So.2d 711, 718 (Miss. 1997)). “[P]rosecutors are not allowed to use tactics which are inflammatory, highly prejudicial, or reasonably calculated to unduly influence the jury.” *Id.* (emphasis added).

In a recent case, the Court of Appeals of Mississippi also addressed statements by the prosecution made during closing argument that are very similar to the ones made in the case at bar. In *Chandler*, the prosecutor in referencing prior assault charges of the defendants stated “that where there is smoke there’s usually fire, ladies and gentlemen.” *Chandler v. State*, 967 So. 2d 47 (¶13) (Miss. Ct. App. 2006). Although the case was affirmed because (1) the defense counsel was said to have invited the comment and (2) due to the “shocking” and overwhelming nature of the crime (beating a pregnant woman to death), this honorable Court acknowledged that the comments were improper, but stated that the statements likely did not create “harmful, outcome-changing prejudice.” *Id.* at ¶18.

In this case, however, the prosecutor’s improper argument in summation clearly created this “harmful, outcome-changing prejudice,” which was absent in *Chandler*. It is

clear from the record that there was very little substantive, direct supporting evidence, beyond the conflicting testimony, upon which the jury could base its decision to find that Mr. Gales was not simply "along for the ride." The prosecution managed to get Mr. Gales's prior convictions introduced into evidence in document form (after getting in prejudicial evidence of drug laboratories (*see ante*)), and then proceeded to tell the jury to consider those prior convictions as propensity evidence of substantive guilt, instead of the normal use for impeachment purposes only. Surely, the jury did exactly what the prosecutor wanted by accepting these court exhibits as evidence of guilt and not as impeachment, as the Rules of Evidence intend. They were never told to do otherwise through a limiting instruction; hence, it is highly likely that the natural effect of the argument was to create an unjust prejudice against Mr. Gales which resulted in an incongruous conviction that was obviously tainted by that prejudice. Since the original intention of the State was obviously to "use tactics which are inflammatory, highly prejudicial, or reasonably calculated to unduly influence the jury," this Court should reverse and remand this case to the lower court with proper instructions for a new trial due to the improper arguments made by the prosecutor during closing arguments.

Whether the prejudice of these improperly admitted prior convictions against the Appellant was created due to an abuse of discretion by the trial court in erroneously admitting the documents or by the improper argument in closing by the State, this Court should reverse and remand this case as to the guilty verdicts of the jury and the sentences of the trial court as to both counts of the indictment to the lower court with proper instructions

for a new trial.

CONCLUSION

Branded as a "repeat offender" from the start of this investigation, this stigma followed the Appellant into the courtroom and he was convicted on "he said, he said" testimony, highly prejudicial and irrelevant testimony as set out hereinabove, and an absence of evidence of constructive possession and conspiracy that seriously call into question the accuracy, dependability, and veracity of the jury's verdict. Conspicuously, the improper "he did it once, so he'll do it again" argument made by the prosecutor sealed Mr. Gales' fate. 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 convictions and sentences should be reversed and vacated, respectively, and the matter remanded to the lower court for a new trial on the merits of the indictment on the charges herein, with proper 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 discharged from custody, as set out hereinabove. The Appellant further states to the Court that the individual and cumulative errors as cited hereinabove are fundamental in nature, the proof not "overwhelming," and, therefore, they cannot be said to be harmless beyond a reasonable doubt. 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. The claims of error in this brief are brought by the Appellant under *Article 3, Sections 14, 23, and 26 of the Mississippi Constitution* and the *Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution*.

Respectfully submitted,

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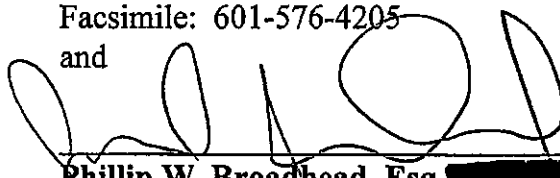
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CERTIFICATE OF SERVICE

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 5th day of November, 2008.



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