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TABLE OF AUTHORITIES

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OTHER CITATIONS:

REPLY ARGUMENT

TERRY'S CLAIM REGARDING THE INADEQUACY OF THE INDICTMENT WAS NOT PROPERLY BROUGHT TO THE TRIAL COURT'S ATTENTION.

The State argues that the inadequacy of the indictment was not adequately brought to the trial court's attention. One need only look at the language of the motion to dismiss, and Terry's arguments on directed verdict and post-trial motion for new trial, to see that this argument is absurd¹.

The motion to dismiss, filed before trial, states:

1.

The Indictment is so vague and indefinite that Defendant has not been advised of the nature of the charge against him, as required by the United States Constitution Amendment 6 and 14, and Article III, § 26 of the Mississippi Constitution.

2.

The Indictment is, in the alternative, charging Defendant with "fraud or embezzlement." The elements of these two offenses are different. Furthermore, such a charge would allow a verdict by less than a unanimous jury, since some jurors might find Defendant guilty of fraud, and others of embezzlement. Thus, a verdict by a non-unanimous jury may result.

3.

As a matter of law, the indictment fails to state an offense.

Supp to the Record, pp. 001-006.

¹ Of course, a large part of the problem was the State's charging the trips it alleged were wrongful at the trial itself. Defendant's counsel could not complain about a change in the nature of the charge until it happened.

The indictment does not contain any specific dates, times and place as to when Terry allegedly either “defrauded” or “embezzled” county money, but simply alleges, in general terms, that he did so over the two-year time period of January 1, 2004 through December 31, 2005.

After the Court overruled the motion to dismiss, all defense counsel could do to prepare for trial was to study the discovery materials and try to reach some conclusion as to the dates and times that Terry was being charged. This, however, proved futile when the State, immediately before trial, furnished a spreadsheet containing dates and times, and then at trial, introduced a different spreadsheet with some of those times and places removed, and others added.

When the trial began, the State itself did not know the specific incident it was complaining about. The spreadsheet, Exhibit “9,” contains entries which were not listed on the copy of the same document furnished to defense counsel at trial, T.T., pp. 238-241. The prosecutor even removed some entries that it had furnished to defense counsel. T.T., p. 242. When the prosecutor cannot tell what dates and times it claims that Terry made illegal trips, how can the defense possibly prepare to rebut those dates and times?

Contrary to the State’s argument, defense counsel made it perfectly clear that he was concerned about this failure to have proper notice when he moved for directed

verdict. In moving for a directed verdict at the close of the State's case, defense counsel argued:

"The evidence that the State presented is so far removed from what's in the indictment, which is very vague and conclusory, that the Defendant did not have notice of the charges as required by the Mississippi and constitution clauses requiring notice of the charge being given..."

T.T., p. 270.

Then, when arguing the Defendant's motions for a directed verdict or new trial, at the close of the case, defense counsel once again complained about this failure of notice, stating:

"The indictment in this case charges embezzlement or fraud over a two-year period, 2005 and 2006 (sic). It does not allege any specific dates. It does not allege any specific acts. It does not allege specifically that he went to Tunica on such a date, or he went through Tupelo and went to Philadelphia, anything of that sort.

Your Honor, at this trial Your Honor will recall I asked the State's witness on cross examination whether the charges that they had listed up on the State's chief exhibit -- I believe it was Exhibit nine -- were those the same charges they had furnished me in discovery in a spreadsheet, and she said no, not exactly; we have added some and taken away some. Some of them we thought we gave the defendant the benefit of a doubt and we didn't rely on those, and I've added some others that we think he was using the car for private business..."

T.T., pp.580-81.

The Court will see from examining Exhibit "9" that the essence of the charge, for which Terry was convicted, was that on certain specific dates and at certain

specific times, he took trips to a casino, or otherwise used a county vehicle for personal purposes. The Defendant was absolutely entitled to know, in advance of trial, what specific dates and times were involved. There was no way for his counsel to prepare for trial, and no way for him to prepare for trial, by attempting to ascertain his whereabouts and purpose on specific dates he learned about during trial.

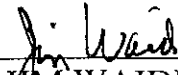
It is a basic, fundamental, constitutional right to be accurately informed of the notice of the charges before trial. This was not done in this case, and the conviction should be reversed. See, *Brawner v. State*, 947 So.2d 254, 265 (Miss.2006)(“The purpose of the indictment is to provide the accused reasonable notice of the charges against him so that he may prepare an adequate defense”); *Evans v. State*, 916 So.2d 550, 551 (Miss. App. 2005)(“The primary purpose of an indictment is to notify a defendant of the charges against him so as to allow him to prepare an adequate defense”); *Brown v. State*, 890 So.2d 901, 918 (Miss. 2004) (“The major purpose of any indictment is to furnish the accused a reasonable description of the charges so an adequate defense might be prepared”).

CONCLUSION

Defendant did not get a fair trial, because he did not have enough specific information to prepare a defense. This case should be reversed.

Respectfully Submitted,

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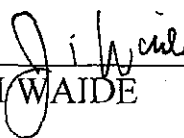
I, Jim Waide, attorney for Appellant, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing to the following:

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THIS the 27 day of October, 2008.



JIM WAIDE

**MISSISSIPPI SUPREME COURT
MISSISSIPPI COURT OF APPEALS**

NO. 2007-KA-02260-COA

JIM TERRY

APPELLANT

VERSUS

STATE OF MISSISSIPPI

APPELLEE

CERTIFICATE OF COMPLIANCE

Pursuant to Miss. R. Civ. P. 32, the undersigned certifies this brief complies with the type-volume limitations of Rule 32.

1. Exclusive of the exempted portions in Rule 32(c), the brief contains:

A. 1,107 words in proportionally spaced typeface.

2. The brief has been prepared:

A. In proportionally spaced typeface using WordPerfect 12.0 in Times New Roman, 14 point.

3. If the Court so requires, the undersigned will provide an electronic version of the brief and/or a copy of the word or line printout.

4. The undersigned understands a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in Rule 32, may result in

the Court's striking the brief and imposing sanctions against the person signing the brief.

This, the 27 day of October, 2008.

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CERTIFICATE OF SERVICE

I, Jim Waide, attorney for Appellant, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing, as well as a 3.5 WP Disk, to the following:

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