MISSISSIPPI SUPREME COURT
MISSISSIPPI COURT OF APPEALS

NO. 2007-KA-02260-COA

JIM TERRY

APPELLANT

VERSUS

STATE OF MISSISSIPPI

APPELLEE

CERTIFICATE OF INTERESTED PARTIES

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 the Supreme Court and/or Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Jim Terry, Appellant;

2. Jim Waide, Esq., Attorney for Appellant;

3. Waide & Associates, P.A., Attorneys for Appellant;

4. State of Mississippi, Appellee; and

5. Charles Maris, Esq., Attorney for Appellee.

This the 4 day of June, 2008.

JIM WAIDE

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STATEMENT OF THE ISSUES

1. Whether an indictment alleging "embezzlement" or "fraud" occurring over a two-year period is sufficient when it does not give specific dates of embezzlement or fraud, or state what facts constitute the embezzlement or fraud.

STATEMENT REGARDING ORAL ARGUMENT

The important issue of the extent to which a criminal defendant is entitled to notice of the charge warrants oral argument.

STATEMENT OF THE CASE

A Lowndes County indictment charges:

> That . . . on or about or between January 1, 2004 through the 31st day of December 2005, . . . did unlawfully, wilfully, and feloniously commit a fraud or embezzlement while holding a public office, to-wit: Supervisor of District 4 of Lowndes County Mississippi, by fraudulently obtaining gasoline and the use of a county owned vehicle for his personal activities, having a total aggregate value of over $500.00, by charging said gasoline on his county Fuelman card and using his county vehicle for personal purposes; contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the State of Mississippi.

R. 3.

Terry filed a motion to dismiss, alleging that the indictment failed to give notice of the nature of the charge, as guaranteed by the Mississippi and United States Constitutions.[1] A hearing was held on the motion on October 12, 2007, T. 7-23, and it was denied the same day. T. 25; R. 10.

Trial began on November 27, 2007 and concluded with a verdict of guilty on November 29, 2007. R. 55. Terry filed a motion for judgment notwithstanding the verdict, and again argued that the indictment did not give notice of the charge against him. R. 68. The Court, as it had before done at the close of the State's proof, T. 270, and again at the close of the case, once again denied the motion to dismiss. T. 586-

[1] The motion to dismiss is noted in the docket, R. 1, but through clerical error, is not contained in the record. Terry has filed a motion to supplement the record to include the motion to dismiss. A copy of this motion is attached to the record excerpts.

87.

On November 30, 2007, the Court imposed the following sentence:

> Thirteen (13) months in the Mississippi Department of Corrections and Five (5) years Post Release Supervision and to pay restitution to Lowndes County, Mississippi in the amount of $2227.29 and to pay $4000.00 to the Mississippi Department of Audit; and the Defendant is hereby removed from the office of Supervisor of District 4 of Lowndes County, Mississippi. The Defendant is hereby directed to return any and all county property in his possession to the Lowndes County Inventory Control Officer immediately.

R. 63.

Terry filed his notice of appeal on December 17, 2007. R. 71.

FACTS

The proof at trial was that Lowndes County, Mississippi utilizes two different methods of allowing travel expenses for its supervisors. Under one method, the supervisors charge the County mileage based upon their own records of travel. T. 130-31.

The other method is to utilize a county-issued "Fuel Man" gas card to put gas into a vehicle owned by the County. Under this method, each supervisor is assigned a personal identification number, which allows the supervisor to purchase fuel for the County vehicle to be later paid for by the County. T. 127-28.

At trial, the State introduced "redemption" records, which document specific

dates when Terry was present at a casino. To make redemptions, one has to show personal identification. T. 172-73, 184, 190, Exhibits 7A, 7B, 8A, and 8B. State's Exhibits 7A, 7B, 8A, and 8B demonstrate that Terry was certainly present at a casino on 26 different specific dates in 2004, and on 23 specific dates in 2005. T. 191, Exhibits 7A, 7B, 8A, and 8B.

Additionally, through the casino representative, the State proved that it was highly likely that Terry was at the casino on numerous other occasions. A person or persons using Terry's "player's card," gambled at the casino a total of 47 different dates in 2004, and on 37 different dates in 2005. T. 190-91, Exhibit 6. Thus, utilizing all the evidence from casino records, Terry made trips to the casino on a minimum of 26 specific dates and a maximum of 47 specific dates in 2004, and on a minimum of 23 specific dates and a maximum of 37 specific dates in 2005. T. 191-95.

The State tied these dates of trips to the casino with dates when Terry had utilized his "Fuel Man" card to buy gas for the county-owned vehicle. The State introduced Exhibits 4 and 5, which are records of Lowndes County's payment of the Fuel Man charges. Exhibits 4 and 5 disclose the specific dates and places where Terry utilized his personal identification number to buy gas for the county vehicle. T. 158, Exhibits 4 and 5.

Through state auditor/investigator Tracy Hill-Watts, the prosecutor then introduced into evidence a "spreadsheet," to demonstrate that the dates when Terry utilized his "Fuel Man" card to purchase gas for the county vehicle corresponded, approximately, with dates when Terry made trips to the casino. T. 196-266, Exhibit 9.[2]

By comparing the dates of the Fuel Man fill-ups with the dates when Terry either made redemptions at a casino, or Terry's players card was used at the casino, the auditor-investigator concluded that during the 2004-05 time period, Lowndes County had expended $2,227.00 on fuel for Terry's personal use. T. 208.

Conflicting with Exhibit "9," the indictment does not disclose any specific information about the dates of gas purchases, nor dates of trips to a casino.

It became apparent during cross-examination of the state auditor-investigator (Hill-Watts) that the prosecutor knew about the specific dates and specific actions for which Terry was being charged only immediately before, or during, the trial. The copy of the spreadsheet, which was furnished to defense counsel during the trial, was not the same as the spreadsheet (Exhibit "9") introduced during trial. On cross-

[2]The entire thrust of the State's proof at trial may be found in Exhibit "9," which is the spreadsheet containing on the left side, the dates and places where Terry utilized the Fuel Man card to buy gas for the county vehicle, and on the right side, the dates when the state auditor found that Terry's players card was used at the casino, or Terry made redemptions at the casino. Because this document is the heart of the State's entire case, it is included in the record excerpts.

examination, Hill-Watts compared the exhibit furnished defense counsel (Exhibit "11"), with the spreadsheet which she actually introduced (Exhibit "9"). T. 238-44. Hill-Watts admitted that the exhibit furnished defense counsel at trial (Exhibit "11") is substantially different from the spreadsheet (Exhibit "9"), which was introduced into evidence. Hill-Watts specified that one difference was that the records furnished to defense counsel at trial, unlike Exhibit "9," did not contain any entries between October 2005 and December 2005. T. 238-39. Also, based upon "redemption records," the auditor had added entries not contained in the exhibit furnished to defense counsel at trial. T. 240. For example, the state auditor added to the information furnished defense counsel entries that had been made on February 13, 2004, and February 17, 2004. T. 241. Additionally, Hill-Watts testified that she had removed certain entries in the copy of the exhibit furnished to defense counsel, because further study had convinced her that these casino trips did not correspond with the Fuel Man gas purchases. T. 242.

Hill-Watts' testimony, and her spreadsheet, Exhibit "9," make it clear that the State's case was based mostly upon the proposition that Terry must have driven the county vehicle to the casino because he purchased gas at or around the same day that he was at a casino. Of course, it would have been possible for Terry to fill-up the county vehicle on or around the same date that he went to a casino in a different

vehicle. In fact, the auditor agreed that the only time when it can be proved that Terry's county vehicle was at the casino, is when Terry actually purchased gas for the county vehicle in either Robinsonville or Philadelphia, and these dates of gas purchases correspond with records of Terry's gambling activities. T. 246-47. Terry purchased gas in either Philadelphia or Robinsonville only seven times over the two year period, T. 247, and there was no gambling activity on some of those seven occasions. Exhibit "9".

Auditor Hill-Watts admitted that if one counted as illegal purchases only those times when gas was purchased in casino towns, the amount involved would be less than $500.00.[3] T. 252. Furthermore, the amount would be even less, if one included only those occasions when there were records of gambling activity on the same dates as gas was purchased in a town where a casino was located. T. 256.

Tracy Hill-Watts testified that it was her opinion that anytime Mr. Terry purchased gas outside of Lowndes County, there was an illegal use of the vehicle. T. 256. However, if one counted only the gas purchases outside of Lowndes County, it is clear that there would still be less than $500.00 in controversy. T. 256, Exhibit "9."

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[3]Embezzlement is a felony if more than $500.00 is involved. Miss. Code Ann. § 97-23-19.

The cross-examination also made it clear that the State's case depends entirely upon the theory that a gas purchase, either on the same day as there was a trip to the casino, or near that date, amounts to use of the county vehicle for personal purposes. Most of Exhibit "9" consists of entries made when Terry actually purchased gas in Columbus, but made a trip to the casino either on the day of the gas purchase, the day before, or the day after. T. 261-63, Exhibit "9."

Testifying on his own behalf, Terry swore that it was his invariable practice that he would not take the county vehicle to a casino, when his sole purpose was taking a gambling trip. According to Terry, when he was going to a casino location solely for gambling purposes, he utilized his wife's personal vehicle. He agreed that there were some occasions when he had taken the county vehicle to a city where gambling occurs, but always on those occasions, he had some other county purpose in mind, not gambling. T. 288-94; 295. Terry's wife corroborated his testimony by testifying that they "didn't go (to casinos) directly in the county vehicle. . . If something else was going on that we had to do in the county vehicle and we were in an area where a casino was, we have gone by there then. But we've never just gone directly to the casino in a car." T. 447.

Without having advance notice of the specific dates of alleged illegal personal use, it was impossible for Terry to testify as to his specific activities on a particular

date with which Exhibit "9" charged Terry. Terry could give only general testimony that it was his practice not to take the county vehicle to a gambling site unless he was going on some other county business near that site. T. 288-94, 295. Terry's testimony that he was not making any excessive personal use of the vehicle was corroborated by his expert witness, retired Internal Revenue Service agent, Timmy Millis, who testified that based upon his examination of the records, Terry did not utilize the county vehicle to a greater extent in weeks when he made trips to the casino, than he did on weeks when he did not make trips to the casino. T. 402-03. Also, Millis testified there was no indication of any criminal intent by Terry, since Terry had made records of his trips to the casino, and had not attempted to hide in any way the fact that he was a frequent gambler, or to conceal that he was going to a casino. Millis testified: "He used his Fuelman card on his county vehicle and used his player card when he was at the gambling casinos." T. 403-04.

SUMMARY OF THE ARGUMENT

The State's proof at trial was that on numerous specific dates, Terry had used the county vehicle for personal purposes, mostly gambling trips. However, the indictment gives no notice whatsoever of these specific dates, nor does the indictment reveal a particular private use, such as gambling. It was impossible to prepare the case for trial without knowing the specific dates of alleged illegal activity, and

without knowing precisely what specific personal activity the State was alleging. Terry's rights under the Mississippi and United States Constitutions to be given notice of the charges were violated.

STANDARD OF REVIEW

Whether the indictment afforded sufficient notice of the charge is a question of law. Questions of law are reviewed *de novo*. *Gray ex rel. Rudd v. Beverly Enters.-Miss., Inc.*, 390 F.3d 400, 405 (5th Cir. 2004); *Hart v. Bayer Corp.*, 199 F.3d 239, 243 (5th Cir. 2000).

ARGUMENT

THE INDICTMENT WAS INSUFFICIENT TO ALERT TERRY TO THE NATURE OF THE CHARGE. THUS, THE CONVICTION VIOLATED TERRY'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND UNDER MISSISSIPPI CONSTITUTION, ART. 3, § 26.

At every stage of this prosecution, the Defendant unsuccessfully argued that the indictment was insufficient to give him notice of the charge against him. See Motion to Dismiss, R. 10, and argument thereon, T.9-23, Motion for Directed Verdict at Close of State's Case, T. 270, Request for Preemptory Instruction following State's resting, T. 530-31, Motion for JNOV, R. 70, and argument thereon, T. 579-87.

The United States Supreme Court has held that "[n]o principle of procedural

due process is more clearly established than that *notice of the specific charge*, and a chance to be heard in a trial of the issues raised by that charge . . . are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." *Cole v. Arkansas,* 333 U.S. 196, 201 (1948) (emphasis added).

Moses v. State, 795 So.2d 569, 571 (Miss. App. 2001), held that an indictment must inform the defendant of the "nature of the charges brought against him so that he may have a reasonable opportunity to prepare an effective defense." *Moses v. State*, 795, So.2d 569, 571 (Miss. Ct. App. 2001). In *Moses,* the defendant was first charged under an original indictment with fifteen counts of rape, two counts of sexual battery, and five counts of fondling. The only notice of the specifics of the charges was that the crimes had occurred between June 1994 and September 2007. The Court of Appeals held an indictment is constitutionally deficient when it does not contain the specific dates of the alleged crime, so the defense can have meaningful notice of the charge. *Moses*, 795 So.2d at 571. In holding that the indictment was required to contain the dates of the alleged crimes, the Court of Appeals wrote:

> An indictment serves a valuable purpose in the criminal process. Its purpose is to inform the defendant with some measure of certainty as to the nature of the charges brought against him so that he may have a reasonable opportunity to prepare an effective defense and to enable him to effectively assert his constitutional right against double jeopardy in the event of a future prosecution for the same offense. *U.S. v. Gordon,* 780 F.2d 1165, 1169 (5th Cir.1986). In furtherance of that underlying

> purpose, Uniform Rules of Circuit and County Court Rule 7.06(5) requires, as an essential element of an indictment, a statement of "[t]he date and, if applicable, the time at which the offense was alleged to have been committed." URCCC 7.06(5). We have little doubt in determining that this indictment, in the form returned by the grand jury, did not adequately fulfill its purpose. Multiple accusations of crimes that are, word for word, identical to each other simply cannot by any logical argument provide the necessary information that a defendant is entitled to receive by way of the indictment.

Moses, 795 So.2d at 571.

This case is very much like *Moses*. In this case, the indictment failed to specify that on a particular time or specific date, the Defendant used the county vehicle for a specific personal purpose, such as going to the casino. Instead, the indictment charged, in general terms, that the Defendant had been guilty of either fraud or embezzlement, by utilizing the vehicle for personal purposes, and that this occurred on some unspecified dates, either on January 1, 2004, or on December 31, 2005, or sometime during that two year period. There was no way for defense counsel to prepare for this trial, because there was no way for the defendant to know the date that it was being claimed that he had used the car for personal purposes, or even that, on a specific date, he was charged with using the county vehicle for a casino trip.

Complete information on the nature of the charge was not furnished until trial, and even that information was not accurate. According to the State's witness, Hill-Watts, the crucial spreadsheet which defendant saw for the first time at trial, Exhibit

"9," is different from the copy of that same exhibit furnished to defense counsel during trial. Exhibit "9," the State's key evidence at trial, contains a number of entries which were not even listed in the copy of the exhibit furnished to defense counsel at trial. T. 238-39. No entries from October 25, 2005 through December 31, 2005, were in defense counsel's copy furnished at trial, because the prosecutor added them after the auditor examined the records further. T. 240. For example, entries of February 13, 2004 and February 27, 2004, were made after defendant was furnished his copy at trial, because the auditor later discovered certain "redemptions." T. 241. Furthermore, the prosecutor even removed some entries which had been listed on the copy furnished to defense counsel, because the auditor concluded there was no evidence of purchase of gas at or around those dates. T. 242.

If the prosecution itself does not know, at trial, two years after the indictment was returned, and two years after the events at issue, the basis of the prosecution, how can the defendant possibly have adequate notice of the charge?

Given the fact that the indictment does not specify any particular times or activities which are being charged, it is impossible to know precisely for what acts the jury intended to convict Terry. It will readily be seen from the crucial State's Exhibit "9," included in the Record Excerpts, that the overwhelming majority of entries are occasions when Terry purchased gas in Lowndes County, but made a trip

to the casino, either on the same day as he purchased gas in Lowndes County, or made a trip to the casino the day after purchasing gas in Lowndes County. Except by the sheerest of speculation, there is no way to know whether Terry actually took the county vehicle to the casinos on or about the same day as he filled it up, or whether he went to the casino in his wife's vehicle on or around the same dates as he purchased gas for the county vehicle.[4] Indeed, given the frequency of Terry's trips to the casinos, there are bound to be many dates when Terry fills up the county vehicle on or near the same date as he goes to casinos.

It may be that the jury accepted the testimony given by Hill-Watts at one point, that anytime the vehicle was filled up outside of Lowndes County, Mississippi, illegal use of county funds had been made. T. 256. If the jury accepted that theory, there would be less than $500.00 in controversy, since adding up only those occasions when there was a fill-up outside of Lowndes County, Mississippi, would result in total gas purchases of less than $500.00.[5]

Since the indictment does not specify whether or not conducting official

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[4]Both Terry and his wife testified that they frequently took her vehicle to the casinos, and that they only took a county vehicle when there was some county business in the area. T. 295; 447.

[5]Exhibit 9 indicates the overwhelming majority of fill-ups with the Fuel Man card were made inside Lowndes County. The next largest number is Starkville, a county which joins Lowndes County, and two are in Tupelo, which is not in the line of travel going to a casino.

business on the same occasions when Defendant also gambles is a criminal activity, one can also not know whether or not the jury accepted Terry's testimony that on many occasions, he gambled and also conducted county business. Given the vagueness of the indictment, one cannot know whether the jury would consider it a criminal offense to gamble on a day when defendant went by a casino when he was in the general area on county business. For example, it is impossible to know whether or not this jury considered Terry guilty of the entry on October 13, 2004, when he filled up in Lauderdale, Mississippi, went to the Silver Star for a workshop conference, and also made a redemption at a casino. Exhibit "9."

Similarly, since the indictment does not specify the particular dates and activities involved, it is impossible to know whether the jury would consider Terry guilty on occasions when he went to a town where a casino was located, but not actually gambling on that day. For example, on June 11, 2005, Terry purchased gas in Robinsonville, but Exhibit "9" contains no record that he either gambled or redeemed on that day.

Furthermore, a few of the entries contained in Exhibit "9" are records of activity for which no rational inference could be drawn of any personal use. For example, on June 9, 2005, Terry filled up in Columbus, Mississippi, but there is no indication that Terry even went to a casino on that date. It is the sheerest of

speculation to base a guilty verdict on the fact that on June 10, 2005, Mr. Terry took a trip to the Horseshoe Casino in Robinsonville, since one has no way of knowing whether he went in the county vehicle on June 10, 2005, or whether he went to the casino in his wife's personal vehicle. For example, from examining Exhibit "9," one sees no evidence that Mr. Terry either gambled or redeemed in Robinsonville or Philadelphia on June 9, June 11, or June 25, 2005, even though all these dates are alleged in Exhibit "9" as dates on which Terry improperly utilized the county vehicle. Had the indictment charged Terry with personal use through gambling on specific dates, a directed verdict could have been requires as to certain of the dates, but since the State made only a general charge, covering a two-year period, the State was free to allege the specific dates only at trial, and allow the jury to sort out which particular dates may fit the charge.

In *Quang Thanh Tran v. State*, 962 So.2d 1237 (Miss. 2007), a defendant was indicted for money laundering, but the indictment did not specify "the alleged illegal activity which produced the money."

The chief issue in *Tran* was whether an indictment for money laundering was "required to disclose the underlying activity which the State alleges produced the money." *Tran*, 962 So.2d at 1239. The indictment in *Tran* charged only "money laundering, and did not charge that the underlying illegal activity was drug

trafficking, and that the proceeds involved were from drug activity." The Mississippi Supreme Court held that where illegal activity is alleged, the underlying indictment must specify precisely what illegal activity is involved. The Mississippi Supreme Court stated:

> The government may not prosecute a criminal defendant "for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury...." U.S. Const. amend. V. The purpose of an indictment is to satisfy the constitutional requirement that a "defendant be informed of the nature and cause of the accusation ..." U.S. Const. amend. VI; Miss. Const. art. 3, § 26. *See also* U.R.C.C.C. 7.06 (indictment must include a "plain, concise and definite written statement of the essential facts constituting the offense charged and *shall fully notify the defendant of the nature and cause of the accusation.*") (emphasis added). The purpose of these requirements is to ensure that criminal defendants have a fair and adequate opportunity to prepare for and defend against the charges brought against them by the government.

Tran, 962 So.2d at 1241.

In the course of holding that the indictment was required to specify the unlawful activity, the Court analogized the case to cases involving burglary. "Because the offense of burglary requires the State to prove a defendant broke into a dwelling with the intent to commit 'some crime,' the indictment must specify the crime the accused intended to commit." *Hodges v. State*, 912 So.2d 730, 774 (Miss. 2005).

The Mississippi Supreme Court then held:

> *Tran* argues that his indictment employing the term "unlawful activity" is unconstitutionally vague, and he is entitled to be informed of the "unlawful activity" which allegedly produced the funds he is accused of laundering. We agree. We find *Tran*'s indictment to be no more informative than a hypothetical indictment which charges a defendant with entering a conspiracy to commit "some unlawful activity."

Tran, 962 So.2d at 1243.

The Mississippi Supreme Court then concluded:

> "[T]his court concludes that an indictment for money laundering under the Mississippi statute requires a thorough disclosure of the underlying offense. Indeed, the state recognized that to convict *Tran* and Mguyn of money laundering, had the burden of proving that a predicate crime, here, drug trafficking, was committed. We find that *Tran*'s indictment to be defective."

Tran, 962 So.2d at 1246.

The defect in this case is similar. The State charged personal use of the vehicle, but failed to give any dates of personal use, and failed to specify what personal use was being charged. This left the State free to fill in the particulars at trial, when it was impossible for Mr. Terry to reconstruct his activity on many specific dates of long ago.

In *Tran*, the Mississippi Supreme Court held, that because defendant had filed various pretrial motions, where he admitted that he knew that the underlying offense was drug activity, and because the State gave notice it would call an expert on determining proceeds of drug trafficking, *Tran*, 962 So.2d at 1247-48, defendant had

adequate notice.

Here, absolutely no notice of the dates or specifics of any alleged personal use by Terry was given in any form. The indictment simply charges that in general terms, the defendant was guilty of either "fraud" or "embezzlement" by using the vehicle for personal purposes, either on January 1, 2004, December 31, 2005, or between those dates.

The indictment neither specifies the prosecution theory that the illegal personal use was gambling activity, nor does it specify the State's alternative theory that anytime the Defendant took the vehicle out of Lowndes County, an illegal usage would be demonstrated. Most significantly, even by the time the State's witnesses testified, the State itself did not even know the specific instances which formed the basis of the prosecution. T. 238-42.

The spreadsheet, Exhibit "9," was not furnished defense counsel until trial, and even then, the copy introduced into evidence was different from the copy furnished defense counsel.

Defendant had no notice of the particular dates being charged, nor even notice of the particular illegal purpose being alleged. Unlike *Tran*, this defect was not cured by any other pretrial pleadings. To the contrary, the State's own witness admitted on the stand that, even by the time of the trial, the defendant was given different

charging information from that being introduced into evidence. As the State's witness herself admitted, unless one keeps a careful record of where he is on a particular date, it is impossible for the defendant to know precisely what he was doing on a date years in the past. T. 244-45.

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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CERTIFICATE OF SERVICE

I, Jim Waide, attorney for Plaintiff/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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THIS the 4 day of June, 2008.

JIM WAIDE