IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JIMMY LEE DANIELS a/k/a JIMMY — APPELLANT

V. — NO.2008-KA-00127-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

ORAL ARGUMENT REQUESTED

MISSISSIPPI OFFICE OF INDIGENT APPEALS
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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 disqualifications or recusal.

1. State of Mississippi
2. Jimmy Lee Daniels
4 Dewitt (Dee) Bates, Jr., and the Pike County District Attorney's Office
5. Honorable David H. Strong, Jr.

THIS 14th day of August, 2008.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Jimmy Lee Daniels, Appellant

By: _____
Leslie S. Lee, Counsel for Appellant

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STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Pike County, Mississippi, and a judgment of conviction for the crime of possession of at least ten (10) grams but less than thirty (30) grams of cocaine within 1,500 feet of a playground against the appellant, Jimmy Lee Daniels. Tr. 175, C.P. 44, R.E. 13. Daniels was subsequently sentenced, based on a sentence enhancement allowed in Miss. Code Ann. §139-29-142, to serve thirty (30) years in the custody of the Mississippi Department of Corrections, with sixteen (16) years to serve and fourteen (14) years suspended with five (5) years post-release supervision, and ordered to pay a ten thousand dollars ($10,000.00) fine and court appointed attorney fees of seven hundred fifty ($750.00) dollars and court costs. Tr. 180, C.P. 45-46, R.E. 15. This sentence

followed a jury trial on November 13-14, 2007, Honorable David H. Strong, Jr., Circuit Judge, presiding. Daniels is presently incarcerated with the Mississippi Department of Corrections.

FACTS

After opening statements, the trial court admitted into evidence exhibits offered by the State in the Appellant's, Jimmy Lee Daniels ("Daniels"), previous trial, which ended in a mistrial due to a discovery violation by the State. Tr. 63-65. The evidence was admitted by stipulation by both the prosecution and the defense. Tr. 63. The exhibits consisted of several photographs, a brown paper bag, digital hand scales, and a crime lab bag containing five smaller bags containing cocaine. Tr. 64. In addition, the trial court admitted the report of Archie Nichols, an analyst with the Mississippi Crime Lab, in lieu of his testimony. Tr. 65.

The State called Agent Sheldon Jolliff ("Agent Jolliff"), a member of the Mississippi Bureau of Narcotics, as its first witness. Tr. 66. Agent Jolliff testified that on June 15, 2006, while working in McComb, MS, his partner, Agent James Cotton ("Agent Cotton"), received a phone call from a confidential source concerning Daniels. The confidential source told Agent Cotton that Daniels was at Community Parks in a red Jaguar. The prosecution then asked what the source said Daniels was doing. Defense counsel immediately objected and the trial court sustained the objection based on hearsay. Tr. 68.

After receiving this information, Agent Jolliff and Agent Cotton proceeded to Community Parks. Upon entering Community Parks, Agent Jolliff saw Daniels sitting in a

vehicle ahead of his own. Agent Jolliff testified that he was already acquainted with Daniels because he had previously executed a search warrant in the apartment where Daniels was residing. Tr. 69.

Instead of stopping by Daniels's car, Agent Jolliff made the block and came back around to try and catch Daniels by surprise. Tr. 69-70. When Agent Jolliff came back around and pulled in behind Daniels, Daniels exited his vehicle and walked at a fast pace to an apartment. Agent Jolliff confronted Daniels before he reached the apartment. Agent Jolliff told Daniels that they had information alleging that he was selling drugs. According to Agent Jolliff, Daniels agreed to talk and handed his drivers license over to Agent Cotton. Agent Jolliff also testified that Daniels gave consent to a search of the vehicle. Tr. 70.

Agent Jolliff contended that at first Daniels's demeanor was calm, but that Daniels became very nervous after handing the keys over and giving consent to search the vehicle. Tr. 70-71. It was at that point that Daniels took off on foot with Agent Cotton giving chase. Agent Jolliff remained with the vehicle and called Pike County Sheriff's Office for backup. Tr. 71. Agent Jolliff then began his search of the vehicle. Tr. 72.

When Agent Jolliff searched the vehicle, he found a brown paper bag sitting on the driver's side seat next to the console. Tr. 72. He opened the bag and found several plastic bags inside containing what he described as a "solid rock like substance." Tr. 73. Agent Jolliff also found a set of digital scales in the vehicle under the driver's seat. Tr. 74. Agent Jolliff identified a copy of the crime lab report indicating that the rock like substance found in the plastic bags was cocaine. Tr. 78-79, Ex. 9. Lastly, Agent Jolliff testified that the

cocaine found in Daniels car was within fifteen hundred (1500) feet of a playground. Tr. 80.

The State called Agent Cotton as its second and last witness. Agent Cotton testified that he received a call from a confidential source concerning the sale of cocaine at the Community Parks Apartments in McComb by the Appellant. Tr. 103. After receiving the call, he and Agent Jolliff proceeded to Community Parks and spotted Daniels in the car described by the confidential source. Agent Cotton claimed that Daniels exited the vehicle, but stopped to talk with them after Agent Jolliff got his attention. Tr. 104.

Agent Cotton testified that he had no prior knowledge of Daniels. Tr. 104. On the day in question, he identified Daniels by obtaining Daniels's driver's license. The agents then asked for consent to search the vehicle. According to the agents, Daniels gave them consent to search the vehicle. Tr. 105. Agent Cotton claimed that once Daniels gave consent to search the vehicle, Daniels became very nervous. Tr. 105-106. Agent Cotton asked why he was acting that way. Daniels responded by asking Agent Cotton to come to the rear of the vehicle. When Agent Cotton reached the rear of the vehicle, Daniels ran from the scene. Tr. 106.

Agent Cotton testified that when he returned to the vehicle after failing to catch Daniels, he saw Agent Jolliff holding a brown paper bag. Agent Jolliff said he found the bag in the car. Tr. 107, 113. Subsequently, Agent Jolliff discovered the vehicle was registered to Janice Todd. Tr. 107. While on the scene, Agent Cotton was approached by Patricia Perkins, who claimed the car belonged to her aunt. Tr. 107-108. The car was later returned to Janice Todd. Tr. 108.

After a directed verdict motion was denied, Daniels called Taisha Martin ("Martin"). Martin testified that on June 15, 2006, she was present near Community Park Apartment 24 when the two agents confronted her first cousin, Daniels. It was her testimony that she came around the block and saw Daniels on the porch. Tr. 123. She also saw a red Jaguar near the apartment, but contended that no one was inside the vehicle. Tr. 124-125. She further testified that there was a large group of about fifteen to twenty people in the area. Tr. 125.

Martin testified that the two agents pulled in behind the red Jaguar and called Jimmy Daniels by name. Tr. 126. According to Martin, Daniels, who was sitting on the porch, got up and walked towards the officers to see what they wanted. Tr. 126-127. Daniels then emptied his pockets, began talking with the two agents, and later ran from the scene. Tr. 127.

Daniels took the stand in his own defense. He testified that on June 15, 2006, he was on the porch when Agent Cotton and Agent Jolliff pulled up behind the red Jaguar. Tr. 131-132. He testified that he had not driven the car nor was he sitting in the car when the agents pulled up. Tr. 132. He further testified that the agents jumped out of their vehicle and ran at him, which scared him. After jumping out of their vehicle and running towards him, the agents asked him why he was so nervous. Daniels declared he was nervous because he did not know who they were and because of the way they came at him. Tr. 133.

Daniels testified that the agents told him they were there because of an anonymous tip concerning the sale of cocaine. Daniels told the agents that he was not selling any drugs. The agents then asked if they could search him and Daniels consented. Tr. 134. After they searched him, Daniels testified that they asked for consent to search the vehicle. Tr. 134-135.

Daniels responded that he could not give consent because he did not own the vehicle. According to Daniels, they repeatedly asked to search the vehicle, even saying they would gain permission anyway, which in turn made him more afraid. Tr. 135. Because he was so afraid of the agents and of being sent to jail, he decided to run. Tr. 135-136.

SUMMARY OF THE ARGUMENT

The trial judge committed plain error in failing to completely instruct the jury on all the essential elements of constructive possession. The jury instruction submitted by the State left out that the jury had to find Daniels was aware of both the presence and character of the cocaine. Again, it is a fundamental right for the jury to be instructed on every element of the offense. This was reversible error.

Daniels's sentence was also illegally enhanced, as he was only convicted by the jury of possession of cocaine. The enhancement statute, Miss. Code Ann. §41-29-142, is only applicable in sale cases or possession with intent cases. This was plain error, and at the very least, the case must be reversed for resentencing.

Furthermore, the evidence presented was also insufficient to support the verdict and was against the overwhelming weight of the evidence. The cocaine was not found on Daniels's person, but in a car that was not owned by or even operated by Daniels. Therefore, the State was required to show constructive possession. However, the State failed to present any additional competent evidence linking Daniels to the cocaine.

Finally, the trial judge erred in denying Daniel's motion to dismiss the indictment prior to his second trial. Daniels's first trial ended with a mistrial caused by the State's failure to

disclose crucial discovery to the defense. It is fundamental that a criminal defendant may not be placed twice in jeopardy. Here, the defendant was tried twice for the same offense. An incurable prosecutorial discovery violation led to a mistrial. Because the defendant successfully moved for a mistrial, he was subsequently retried. However, his fundamental right to be free from double jeopardy was violated due to the intentional action of the prosecution to create a situation in which the only possible option was to move for a mistrial. Daniels's conviction should be reversed and rendered.

ARGUMENT

ISSUE NO. 1 THE TRIAL JUDGE COMMITTED PLAIN ERROR IN FAILING TO PROPERLY INSTRUCT THE JURY ON ALL THE ELEMENTS OF CONSTRUCTIVE POSSESSION.

As will be discussed in Issue No. 3, *supra*, this was a case of constructive possession, as the cocaine was not found on Daniels's person. The State submitted Jury Instruction S-6 in order to define construction possession. The instruction read:

> The Court instructs the Jury that to constitute a possession there must be sufficient facts to warrant a finding that the defendant was aware of the presence of the particular item or substance and was intentionally and consciously in possession of it. It need not be actual physical possession; construction possession may be shown by establishing that the item or substance involved was subject to the defendant's dominion or control.

C.P. 31

However, the Mississippi Supreme Court has held that in a constructive possession case, there must be sufficient facts to warrant a finding that defendant was aware of the presence *and character* of the particular substance and was intentionally and consciously in

possession of it. *Pate v. State*, 557 So.2d 1183 (Miss.1990), citing *Curry v. State*, 249 So.2d 414, 416 (Miss.1971). In the case at bar, the instruction granted by the trial court only instructed the jury that Daniels had to be aware of presence of the item. The instruction left out the essential element of the character of the substance. *See also Campbell v. State*, 566 So.2d 475, 476-77 (Miss. 1990).

The record is clear that Daniels did not object to this instruction[1]. Tr. 142-46. Therefore, this issue must be analyzed under the doctrine of plain error. The Mississippi Supreme Court has held that plain error exists when there is a violation of a substantive right of a defendant.

> A review under the plain error doctrine is necessary when a party's fundamental rights are affected, and the error results in a manifest miscarriage of justice. *Williams v. State*, 794 So.2d 181, 187-88 (Miss.2001). To determine if plain error has occurred, we must determine "if the trial court has deviated from a legal rule, whether that error is plain, clear or obvious, and whether the error has prejudiced the outcome of the trial." *Cox v. State*, 793 So.2d 591, 597 (Miss.2001) (relying on *Grubb v. State*, 584 So.2d 786, 789 (Miss.1991); *Porter v. State*, 749 So.2d 250, 260-61 (Miss.Ct.App.1999)).

McGee v. State, 953 So.2d 211 (¶8) (Miss. 2007).

The jury was not instructed on an essential element of constructive possession. To be instructed on each and every element of the offense is obviously a fundamental right.

> Because it is the State's duty to prove every element of the crime beyond a reasonable doubt, the State also has a duty to make sure the jury is properly instructed with regard to the essential elements of the crime. *Hunter v. State*, 684 So.2d 625, 635 (Miss. 1996). "It is rudimentary that the jury must be

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[1] Counsel was also granted an additional instruction on constructive possession, but that instruction also failed to explain to the jury that they must find Daniels was aware of both the presence and character of the cocaine. C.P. 37.

> instructed regarding the elements of the crime with which the defendant is charged." *Hunter*, 684 So.2d at 636. See *Henderson v. State*, 660 So.2d 220, 222 (Miss. 1995); *Neal v. State*, 451 So.2d 743, 757 (Miss.), *cert. denied*, 469 U.S. 1098, 105 S.Ct. 607, 83 L.Ed.2d 716 (1984).

Reddix v. State, 731 So.2d 591 (¶4) (Miss. 1999).

This Court has also held that the defendant's knowledge of the character of the substance is an additional, essential element to possession of a controlled substance. *Dora v. State*, No. 2005-KP-00487-COA (¶29) (Miss.App. May 15, 2007), *cert. granted, Dora v. State*, 973 S.2d 244 (Miss. 2008), *rev'd on other grounds*, No. 2005-CT-00487-SCT (Miss. June 12, 2008).

Accordingly, allowing the jury to be incompletely instructed on the law of constructive possession was plain error. Daniels is entitled to a new trial.

ISSUE NO. 2: THE TRIAL COURT COMMITTED PLAIN ERROR IN SENTENCING APPELLANT TO AN ENHANCED SENTENCE WHEN APPELLANT WAS CONVICTED ONLY OF POSSESSION AND NOT POSSESSION WITH INTENT UNDER MISS. CODE ANN. § 41-39-142.

Although Daniels was indicted on a charge of possession of cocaine with intent to distribute within 1500 feet of a playground[2], the trial court allowed the jury to be instructed on the lesser charge of simple possession of cocaine within 1500 feet of a playground. C.P. 3, 27-28. The jury found him guilty of the lesser offense. C.P. 43. However, Daniels would

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[2] Daniels would also submit that there was insufficient evidence to find this enhancement, as the statute specifically mentions "public park,"not "playground." There was absolutely no evidence presented that this "playground" was open to the public, but at most, was a private playground owned by the apartment complex. Regardless, since Daniels was convicted of simple possession, and the claim that his sentence is illegal is dispositive, the issue of the sufficiency of this enhancement is immaterial and will not raised as error.

submit there is no such offense. Miss. Code Ann. §41-29-142 allows enhancement only in possession with intent cases as defined by Miss. Code Ann. §41-29-139(a)(1). It can not reasonably be disputed that the jury actually found Daniels guilty of simple possession under Miss. Code Ann. §41-29-139(c)(1)(D). Accordingly, the trial court had no authority to sentence Daniels to thirty (30) years with sixteen (16) years to serve and fourteen (14) years suspended with five (5) years post-release supervision[3]. This is clearly an illegal sentence and is plain error.

> ...Mississippi Rule of Evidence 103(d) permits review of "plain errors affecting substantial rights although they were not brought to the attention of the court." "According to the Mississippi Supreme Court, the reviewing court may address issues as plain error 'when the trial court has impacted upon a fundamental right of the defendant.' " *Moore v. State*, 755 So.2d 1276, 1279 (¶9) (Miss.Ct.App.2000) (quoting *Berry v. State*, 728 So.2d 568, 571 (¶6) (Miss.1999)). "The right to be free from an illegal sentence has been found to be fundamental." *Davis v. State*, 933 So.2d 1014, 1022 (¶32) (Miss.Ct.App.2006) (quoting *Ethridge v. State*, 800 So.2d 1221 (¶7) (Miss.Ct.App.2001)).

Jefferson v. State, 958 So.2d 1276 (¶15) (Miss.App. 2007).

If this Honorable Court finds no merit in the other assignments of error, this case must at least be remanded for resentencing.

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[3]The appellant would note, that prior to his first trial, the State did file a motion to amend the indictment to allege a second narcotics offense to allow enhancement under Miss. Code Ann. §41-29-147. C.P. 11-14, Tr. 6-8, 14, Sup. Vol. 1. The court held its ruling in abeyance until the time for sentencing. However, the record indicates this issue was never brought back up by the State. At Daniels's sentencing, the court relied only on the enhancement for the offense being next to the "playground" under Miss. Code Ann. §41-29-142. Tr. 180, C.P. 45-46, 49, R.E. 15. There is no record of an order ever being filed granting the State's motion to amend. No reference was even made during the sentencing hearing to the State's motion to amend the indictment. Tr. 180. It is clear the trial court did not sentence Daniels under Miss. Code Ann. §41-29-147 as a second offender.

ISSUE NO. 3. THE TRIAL JUDGE ERRED IN FAILING TO GRANT A DIRECTED VERDICT.

In trial counsel's Motion for Judgment Notwithstanding the Verdict, or in the Alternative, a New Trial, counsel specifically argued that the evidence was insufficient to support the verdict. C.P. 47, R.E.17. The trial judge denied this motion. C.P. 50, R.E. 19. The trial judge also denied Daniel's motion for a directed verdict at the close of the State's case, as well has his renewed motion for a directed verdict at the close of the defense case. Tr. 119, 141. This was error.

Review of a motion for a directed verdict tests the sufficiency of the evidence. *Bush v. State*, 895 So. 2d 836, 843 (¶15) (Miss. 2005). The court must determine whether the evidence shows "beyond a reasonable doubt that the accused committed the act charged and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction." *Id.* at ¶16 (quoting *Carr v. State*, 208 So. 2d 886, 889 (Miss. 1968)). Taking the evidence in the light most favorable to the verdict, the question is not whether the court believes the evidence established guilt beyond a reasonable doubt but whether a rational trier of fact could have found all the elements beyond a reasonable doubt. *Bush*, 895 So. 2d at 844 (¶16) (quoting *Jackson v. Virginia*, 443 U.S. 307, 315 (1979)).

The evidence in this case simply did not support a finding of constructive possession. When approached by officers, Daniels was calm and readily consented to the search of his person. Tr. 134. Daniels testified, however, that he could not give them permission to search

the car because it did not belong to him. He denied sitting in the red Jaguar. Tr. 132. Daniels finally ran as he was scared he was about to be arrested for something. Tr. 135-36.

Agent Jolliff determined the car belonged to Janice P. Todd. Tr. 79. However, he gave his expert "opinion" that Daniels knew there were drugs in the car.

> A. I believe Mr. Daniels had knowledge the drugs were in the car. It was sitting right next to where I saw him sitting at in the vehicle. Where he was sitting in the driver's side seat of the vehicle, the cocaine was sitting right next to the center console of the same seat. And the scales was right under the seat.

Tr. 92-93

When asked if it were possible Daniels had simply gone to the car to retrieve something, Agent Jolliff opined Daniels was in control of the car. This "opinion" was not based on evidence, but on the hearsay from a "confidential source." Tr. 93. Since Daniels did not physically possess the cocaine, the State was required to prove, beyond a reasonable doubt, that Daniels was in constructive possession of the cocaine. "Constructive possession may be shown by establishing that the drug involved was subject to his dominion or control. Proximity is usually an essential element, but by itself is not adequate in the absence of other incriminating circumstances." *Dixon v. State*, 953 So.2d 1108 (¶ 9) (Miss.2007), quoting *Curry v. State*, 249 So.2d 414, 416 (Miss.1971). The State must also show additional incriminating facts to link Daniels to the contraband since he was not the owner of the car. *Ferrell v. State*, 649 So.2d 831, 835 (Miss.1995).

The State utterly failed to show Daniels had dominion and control over the drugs. The officers never saw Daniels driving the car. Tr. 93. No testimony showed he touched the

drugs in any manner. Taking the officers testimony as true, *arguendo*, they briefly saw him sitting in a car he did not own. Tr. 69, 104. The drugs were in a brown paper bag on the console. Tr. 72. Agent Jolliff had to open the bag to see what was in it. Tr. 73. Agent Jolliff testified simply that he was not able to determine if the owner of the vehicle had any knowledge of the drugs in the vehicle. Tr. 80.

Unlike several other constructive possession cases recently analyzed by this Court[4], there were no additional incriminating facts to link Daniels to the drugs found. The burden was upon the State to show by competent evidence sufficient facts to establish that the cocaine was subject to Daniel's dominion and control. Hearsay is insufficient to prove constructive possession. *Campbell v. State*, 566 So.2d 475, 476-77 (Miss. 1990), citing *Sisk v. State*, 290 So.2d 608, 610-11 (Miss.1974).

In the case *sub judice*, Daniels did not confess or give any incriminating statement to officers to suggest he knew there were drugs in the car. There was no testimony he regularly used the car. Although Daniels did flee the scene, his flight was explained. Daniels testified he was scared and thought officers were about to arrest him for something. Tr. 135, 137. Without additional facts connecting Daniels to these drugs, the court should have granted the

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[4] See *Barnett v. State*, No. 2007-KA-01571-COA (¶8-9) (Miss. App. July 22, 2008) (co-defendant connected defendant to the drugs), *Harris v. State*, 977 So.2d 1248 (¶8) (Miss.App. 2008) (defendant was the driver and trooper smelled marijuana in the car and defendant confessed to possessing marijuana found, but not cocaine); *Watts v. State*, 976 So.2d 364 (¶11) (Miss.App. 2008) (defendant's wife owned the car and he frequently drove it and the drugs were visible inside the open bag found on the seat); *Robinson v. State*, 967 So.2d 695 (¶13) (Miss.App. 2007) (defendant admitted he owned the car and a large amount of cash also found); *Stingley v. State*, 966 So.2d 1269 (¶12) (Miss.App. 2007) (defendant admitted he had drugs because he was going to a Cheech and Chong party).

motion for a directed verdict or granted the defense request for judgment notwithstanding the verdict. Daniels's mere presence near the area where the cocaine was found, without more, is simply not enough. *Martin v. State*, 804 So.2d 967 (¶7-12) (Miss.2001). Daniels's conviction should be reversed and rendered.

ISSUE NO. 4: THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Daniels also asserts that the verdict was against the overwhelming weight of the evidence. This issue was raised in trial counsel's Motion for Judgment Notwithstanding the Verdict, or in the Alternative, a New Trial. C.P. 47, R.E.17. The trial judge denied this motion. C.P. 50, R.E. 19. This was also error. "In determining whether a jury verdict is against the overwhelming weight of the evidence, this Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial." *Herring v. State*, 691 So.2d 948, 957 (Miss. 1997). "Only in those cases where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal." *Id. See also Benson v. State*, 551 So.2d 188, 193 (Miss. 1989); *McFee v. State*, 511 So.2d 130, 133-34 (Miss. 1987).

Even conceding for the sake of argument that the evidence was sufficient to submit the case to the jury, the verdict was clearly against the overwhelming weight of the evidence. As argued above, the State was unable to prove constructive possession. Furthermore, the jury was not even instructed that they must find beyond a reasonable doubt that Daniels was

aware of both the presence and character of the cocaine. A verdict based on such weak evidence should not be allowed to stand. There was absolutely no evidence presented that Daniels even had exclusive possession of the Jaguar. In such cases a defendant is entitled to acquittal "absent some competent evidence connecting him with the contraband." *Fultz v. State*, 573 So.2d 689, 690-91 (Miss. 1990), citing *Powell v. State*, 355 So.2d 1378, 1379 (Miss. 1978). Daniels should at least be granted a new trial.

ISSUE NO. 5. THE TRIAL JUDGE ERRED IN FAILING TO DISMISS THE INDICTMENT PRIOR TO DANIELS'S SECOND TRIAL ON THE BASIS OF DOUBLE JEOPARDY.

The Fifth Amendment to the United States Constitution and Article 3, §22 of the Mississippi Constitution protect criminal defendants from being placed twice in jeopardy. This protection begins when the jury is selected and sworn to try the case. *Jones v. State*, 398 So. 2d 1312, 1314 (Miss. 1981).

"The general rule is said to be that the double jeopardy clause does not bar reprosecution, '. . . where circumstances develop not attributable to prosecutorial or judicial overreaching . . . even if defendant's motion is necessitated by prosecutorial error." *Oregon v. Kennedy*, 456 U.S. 667, 670 (1982) (citing *United States v. Jorn*, 400 U.S. 470, 485 (1971). Criminal defendants who request a mistrial are generally barred from asserting a double jeopardy violation. *Jenkins v. State*, 759 So. 2d 1229, 1234 (¶17) (Miss. 2000). A double jeopardy violation occurs in those circumstances where "the governmental conduct in question is intended to 'goad' the defendant' into asking for a mistrial. *Oregon*, 456 U.S.

at 676; *see also Roberson v. State*, 856 So. 2d 532 (Miss. App. 2003); *Carter v. State*, 402 So. 2d 817, 821 (Miss. 1981).

> Generally, a defendant who moves for mistrial is barred from later complaining of double jeopardy. *McClendon v. State*, 387 So.2d 112, 114 (Miss.1980). To overcome this bar, (Defendant) must show that error occurred and that it was committed by the prosecution purposefully to force (Defendant) to move for a mistrial. *Carter v. State*, 402 So.2d 817, 821 (Miss.1981); see also *Divans v. California*, 434 U.S. 1303, 1303, 98 S.Ct. 1, 1, 54 L.Ed.2d 14, 15 (1977). Without proof of judicial error prejudicing the defendant, or "bad faith prosecutorial misconduct," double jeopardy does not arise. *United States v. Jorn*, 400 U.S. 470, 482, 91 S.Ct. 547, 557, 27 L.Ed.2d 543, 555 (1970) (plurality).

Jenkins, 759 So.2d at (¶17), citing *Nicholson on Behalf of Gollott v. State*, 672 So.2d 744, 750 (Miss.1996).

In the case at bar, Daniels was tried twice for the same crime. The first trial ended when the trial judge declared a mistrial because of a discovery violation by the prosecution. Tr. 70-72, Sup. Vol. 1. The prosecution failed to disclose that a key witness identified the defendant by obtaining his driver's license. Tr. 62-63, Sup. Vol. 1. Moreover, the prosecution elicited this undisclosed testimony on redirect where the defense had no chance to question the witness or rehabilitate its case. Tr. 64-65, Sup. Vol. 1. Therefore, the trial judge had no choice but to declare a mistrial. Tr. 70-72, Sup. Vol. 1.

Daniels filed a motion to dismiss his indictment prior to his second trial. C.P. 21, R.E. 10. A hearing was held on the motion on November 9, 2007. Tr. 259-65 Sup. Vol. 2. The court found no prosecutorial misconduct that would warrant dismissal of the charge. Tr. 264-65 Sup. Vol. 2.

Daniels would submit, however, that the record clearly shows that the prosecution consciously failed to disclose this evidence to the defense prior to trial. During the mistrial motion, the prosecution admitted to having knowledge of the evidence prior to the witness being called. Tr. 64, Sup. Vol. 1. Despite that knowledge, the prosecution failed to disclose that evidence. Tr. 64-65, Sup. Vol. 1. This intentional act is what led the defendant to move for a mistrial.

Even if not directly admitted to, improper prosecutorial intent may be inferred from the objective circumstances of the case. *Roberson*, 856 So.2d 532 at ¶15, citing *Oregon*, 456 U.S. at 675. The prosecutor admittedly failed to disclose important testimony to the defense, and further elicited this undisclosed testimony on redirect. The defense had no chance to rebut the testimony. Although Daniels was the party who moved for the mistrial, he did so only because of the intentional action of the prosecutor. The trial court's finding of no prosecutorial misconduct is not supported by the record.

Daniels had no choice to request a mistrial. The evidence was elicited on redirect and was damaging to his theory of the case. He had no opportunity to rebut. The evidence was not disclosed prior to the witness being called and the evidence would have altered the defense of the case. The only option was to move for a mistrial. The prosecution made a conscious decision not to disclose this information to the defense, causing the mistrial. From these facts, it is clear that the prosecution purposefully attempted to goad the defendant into moving for a mistrial by disregarding its duty of disclosure. This conduct was impermissible and the trial judge violated the double jeopardy clause of the Fifth Amendment to the United

States Constitution and Article 3, §22 of the Mississippi Constitution by allowing Daniels to be tried a second time. This conviction should be reversed and rendered.

CONCLUSION

Given the evidence presented in the trial below, Jimmy Lee Daniels, Jr. is entitled to have his conviction for unlawful possession of more then 10 grams but less than 30 grams reversed and rendered. In the alternative, based on the above arguments, together with any plain error noticed by the Court which has no been specifically raised, the judgment should be reversed and remanded for a new trial on the merits. At the very least, this case must be remanded for resentencing without the enhancements reserved for the illegal sale or possession with intent to sell illegal narcotics.

Respectfully submitted,
MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Jimmy Lee Daniels, Jr., Appellant

By: 
Leslie S. Lee

CERTIFICATE

I, Leslie S. Lee, do hereby certify that I have this the 14th day of August, 2008, mailed a true and correct copy of the above and foregoing Brief of Appellant, by United States mail, postage paid, to the following:

Honorable David H. Strong, Jr.
Circuit Court Judge
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