IN THE CIRCUIT COURT OF THE STATE OF MISSISSIPPI

PAUL HOUSER — APPELLANT

V. — NO. 2008-KA-0588-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
Benjamin A. Suber, MS Bar No. [redacted]
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201
Telephone: 601-576-4200

Counsel for Paul Houser

IN THE CIRCUIT COURT OF THE STATE OF MISSISSIPPI

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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. Paul Houser, Appellant
3. Honorable Forrest Allgood, District Attorney
4. Honorable James T. Kitchens, Jr., Circuit Court Judge

This the 6 day of October, 2008.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

Benjamin A. Suber
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39205
Telephone: 601-576-4200

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ISSUE NO. 1

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ISSUE NO. 3

THE TRIAL COURT ERRED IN DENYING HOUSER'S MOTION FOR A NEW TRIAL BECAUSE THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Lowndes County, Mississippi, and a judgment of conviction for the crime of Possession of Methamphetamine Precursors against the appellant, Paul Allen Houser. The trial judge subsequently sentenced the Appellant as a Habitual Offender and Prior Violator of the Uniform Controlled Substances Act to sixty (60) years in the custody of the Department of Corrections. C.P. 104, R.E. 32-33. The conviction and sentence followed a jury trial on December 6-7, 2007, Honorable James T. Kitchens, Jr., Circuit Judge, presiding. Houser was previously tried November 15-16, 2007 for the crime of Possession of Methamphetamine Precursors and the jury was unable to decide the case, which resulted in a mistrial. Houser is currently in the custody of the Mississippi Department of Corrections.

FACTS

In the early hours of May 5, 2006, Paul Houser had just left the mechanic's shop. Tr. 610. Houser had been working on a truck for several hours. *Id.* He had a sinus headache and decided to stop at Dutch Village on his way home. *Id.* While at Dutch Village, Houser purchased BC powder, Mountain Dew, two lithium batteries, and a Tradewind. *Id.* Houser purchased the lithium batteries to use for a game camera. Tr. 616.

According to the testimony of Crystal Strickland, Houser came into the Dutch Village store twice a week. Tr. 450. Strickland was a cashier at Dutch Village on May 5, 2006. Tr. 449. Strickland stated that Houser would routinely buy BC powder, Mountain Dew, ice

cream, and a Tradewind. Tr. 450-51. However, Houser disputes that he was buying BC powder twice a week, and no other evidence was presented to suggest otherwise. Tr. 615.

Strickland continued to state that around 3:00 am on May 5, 2006, Houser came into the store on a cell phone, and walked around looking for about thirty minutes. Tr. 452. Houser put BC powder, Mountain Dew, Lithium Batteries, and a Tradewind on the counter to purchase. Tr. 453.

Strickland alleges that when Officer Beard pulled into the parking lot and began to walk in the store, Houser began to act nervous. Tr. 453-54. She continued to state that Houser was telling Strickland to hurry up and put the items in the bag. Tr. 453. When Officer Beard came in the store, Houser was walking fast out the door. Tr. 455. Houser got in his truck and backed out fast and left. *Id.* Strickland told Officer Beard about Houser's actions and told him about the items that Houser had purchased. Tr. 456.

Officer Beard claimed that Houser was acting in a way that caused him some concern and suspicion. Tr. 488. Therefore when Houser left, Officer Beard followed Houser away from Dutch Village. Tr. 490. Officer Beard stayed behind Houser and Officer Beard saw Houser stopped in the middle of the road. *Id.* When Officer Beard came around the curve, Houser let off of the brakes and turned right onto Sand Road. *Id.* Officer Beard continued to testify that Houser was driving fast down Sand Road and Officer Beard turned on his blue lights and pulled over Houser. Tr. 491.

Officer Beard asked Houser to search the truck and Houser said no. Tr. 492. Officer Beard used his dog, Merck, to go around the truck looking for methamphetamine. Tr. 492-

93. According to the dog, Officer Beard stated that residual odor of a narcotic type was coming from the vehicle. Tr. 494. Officer Beard stated that syringes and BC powder was found within the truck. Tr. 495. Officer Smith found the batteries in the road where Officer Beard saw the truck stopped in the middle of the road. Tr. 518.

Officer Beard did testify that no methamphetamine was found within the truck that Houser was driving. Tr. 511. Houser was arrested, charged, and convicted with Possession of Methamphetamine Precursors. Houser is currently incarcerated with the Mississippi Department of Corrections.

SUMMARY OF THE ARGUMENT

Houser's speedy trial rights were violated by the five hundred fifty-nine (559) day delay. Upon a balancing of the ***Barker*** factors, this Honorable Court should conclude that the Appellant was denied his constitutionally-mandated right to a speedy trial. All four factors weigh in favor of the Appellant; therefore, this Honorable Court should grant appellant the proper remedy for the violation of his constitutional rights. It is widely established that the sole remedy for a Sixth Amendment speedy trial violation is the dismissal of the charges with prejudice. ***Bailey v. State,*** 463 So. 2d 1059, 1062 (Miss. 1985).

Appellant asserts that a sixty (60) year sentence without parole for possessing essentially BC Powder and lithium batteries is unconstitutionally too severe and clearly disproportionate to the offense. A ***Solem*** analysis leads to the legally sound conclusion that Houser's sentence is patently unconstitutionally disproportionate to his offense and should be vacated.

The verdict was also against the overwhelming weight of the evidence. Houser testified that the two items that he purchased that night at Dutch Village were for the normal listed use of the product. Tr. 610. No evidence was presented of Houser using any needles, no evidence of current drug use, no confession as to intent which was illegal, no testimony of any affirmative act to manufacture methamphetamine besides that purchase of the two (2) items and no methamphetamine was found within the vehicle. The verdict was against the overwhelming weight of the evidence and this was reversible error. Houser is entitled to a new trial.

ARGUMENT

THE APPELLANT'S SPEEDY TRIAL RIGHTS WERE VIOLATED BY A FIVE HUNDRED FIFTY-NINE (559) DAY DELAY WHICH PREJUDICED HIS DEFENSE AT TRIAL.

For the ease of this Honorable Court's analysis of the argument, in the case *sub judice*, the applicable time line went as follows:

SPEEDY TRIAL TIME LINE

Event	Date	Time Elapsed
Arrest (C.P. XX)	May 5, 2006	0 days
Indictment (C.P. 4, R.E. 17)	February 1, 2007	272 days
Waiver of Arraignment (C.P. 10, R.E. 18)	February 12, 2007	283 days
Continuance by Prosecution (C.P. 18, R.E. 19)	June 1, 2007	392 days

-Court's order apparently reset case for August 30, 2007

Motion for Fast and Speedy trial
or to Dismiss Charges for Failure

to Provide a Fast and Speedy Trial (C.P. 19-23,R.E. 22-26).	June 15, 2007	406 days
Continuance by Prosecution (C.P. 24, R.E. 20)	August 30, 2007	482 days
- Court's order apparently reset case for September 4, 2007		
Continuance by the Court (C.P. 32,R.E. 21)	September 7, 2007	490 days
-Court's order apparently reset case for November 11, 2007		
Motion to Dismiss for Violation of Sixth Amendment Right to Speedy Trial and Violation of 270 Day Rule (C.P.33-36, R.E. 27-30)	November 2, 2007	546 days
First Day of Trial	November 15, 2007	559 days

A. Standard of Review

Review of a speedy trial claim involves a question of fact: whether the trial delay arose from good cause. ***Flora v. State***, 925 So. 2d 797, 814 (Miss. 2006) (citing ***Deloach v. State***, 722 So. 2d 512, 516 (Miss. 1998)). An appellate court will uphold the trial court's finding of good cause if the decision is supported by substantial credible evidence. ***Id.*** (citing ***Folk v. State***, 576 So. 2d 1243, 1247 (Miss. 1991)). On the other hand, if no probative evidence supports the trial court's findings, the appellate court must reverse the decision and dismiss the charge. ***Ross v. State***, 605 So. 2d 17, 21 (Miss. 1992) (citing ***Strunk v. United States***, 412 U.S. 434, 440 (1973)). The State bears the burden of proving good cause for the speedy trial delay, and thus bears the risk of non-persuasion. ***Flores v. State***, 574 So. 2d 1314, 1318 (Miss. 1990); ***Nations v. State***, 481 So. 2d 760, 761 (Miss. 1985).

The Sixth Amendment of the United States Constitution guarantees the right to a speedy trial, which is a fundamental right. ***State v. Woodall***, 801 So. 2d 679, 681 (Miss. 2001). Unlike the statutory right provided to a criminal defendant via the Statutes of the State of Mississippi, a defendant's constitutional right to a speedy trail arises when an indictment or information is returned against him, or when "actual restraint [are] imposed by arrest and holding to a criminal charge." ***Bailey v. State***, 463 So. 2d 1059, 1062 (Miss. 1985); *See also* ***U.S. v. Marion***, 404 U.S. 307 (1971). The Mississippi Supreme Court has held that the placing of a detainer against an individual "suffices to make him an accused." ***Perry v. State***, 419 So. 2d 194, 198 (Miss. 1982).

In ***Barker v. Wingo***, the United States Supreme Court established the test for judging the merits of speedy trial claims. ***Barker v. Wingo***, 407 U.S. 514 (1972). There, the United States Supreme Court declined to make a bright line rule, but instead adopted a four-factor balancing test "in which the conduct of both the prosecution and the defendant are weighed." ***Id.*** at 529. The four factors are: (i) length of the delay, (ii) the reason for the delay, (iii) the defendant's assertion of his right, and (iv) prejudice to the defendant. ***Id.*** at 530.

B. Length of the Delay

Any delay of over eight months is presumptively prejudicial and triggers the balancing of the other three ***Barker*** factors. ***Woodall***, 801 So. 2d at 682. The lodging of a detainer against a person otherwise in custody suffices to make the prisoner an accused. ***Bailey***, 463 So. 2d at 1062. An indictment was returned against Houser on February 1, 2007, which was two hundred and eighty-seven (287) days from the his first trial. Also, Houser had been in

custody since his waiver of arraignment on February 12, 2007. Two Hundred seventy-six days had passed between his waiver or arraignment and trial. Therefore, a balance of the other three factors of the ***Barker*** test should be conducted.

C. Reason for the Delay

Under the ***Barker*** test, "'different weights' are to be 'assigned to different reasons' for delay" ***Doggett v. United States,*** 505 U.S. 647, 657 (1992)(quoting ***Barker,*** 407 U.S. at 531). The trial court granted three continuances. Two for the prosecution and due to the court. The first continuance was requested by the prosecution on June 1, 2007, which was eight (8) days after the trial was to begin. The second continuance was requested by the prosecution on August 30, 2007, in order to obtain medical records. The third and final continuance was ordered by the court on September 7, 2007, due to the fact that the court was involved in a previously set criminal case.

Official negligence and court congestion, the likely causes of the delay in this instance, are "more neutral" reasons that weigh "less heavily," but are nevertheless counted against the government in terms of balancing. ***Barker***, 407 U.S. at 531.

This factor weighs in favor of Houser.

D. The Defendant's Assertion of his Right

The duty to bring a defendant to trial always rests with the State. ***Stevens v. State***, 808 So. 2d 908, 917 (Miss. 2002); ***Sharp v. State***, 786 So. 2d 372, 381 (Miss. 2001). While the State bears the burden to bring the defendant to trial, the defendant has some responsibility to assert the speedy trial right. ***Wiley v. State***, 582 So. 2d 1008, 1012 (Miss. 1991). Mr.

Houser asserted his speedy trial right on three separate occasions: twice through his attorney, one with a motion and the other before the court and once in a *pro se* motion by Houser. Tr. 27-31, C.P. 19-22, 33-36.

In recent cases, the courts have relied on ***Perry vs. State***, for the proposition that the defendant's demand for dismissal or for an instant trial is insufficient to assert the speedy trial right. ***Perry v. State***, 637 So. 2d 871, 875 (Miss. 1994). The facts in ***Perry***, however, are easily distinguishable from the case at bar. In ***Perry***, the defendant did not assert his right until he filed a motion to quash and dismiss the indictment. ***Id.*** In the current case, the Appellant made a *pro se* motion for a speedy trial. C.P. 19. It was nearly five (5) months after his motion for a speedy trial that the defendant, through counsel made another motion to dismiss charges for failure to provide a fast and speedy trial. C.P. 33. Houser was incarcerated from the time he waived arraignment until his first trial began on November 15, 2007, whereas the defendant in ***Perry*** was only in jail for one month during the delay. ***Id.*** It should further be noted that Mississippi courts have been open to demands for speedy trials offered by defendants. *See,* ***State v. Fergusson***, 576 So. 2d 1252, 1254 (Miss. 1991) (noting "Nothing in the law requires that the demand [for a speedy trial] be in writing").

Therefore, this factor weighs in favor of Mr. Houser.

Should this Honorable Court find this case to be similar to ***Perry*** and conclude that Appellant did not sufficiently assert his demand for a speedy trial, it should be noted that Mr. Houser made a demand for a speedy trial on two (2) separate occasions. This Court should

consider that more persuasive and more in the favor of Houser than if he had merely filed one demand for a speedy trial or one motion to dismiss for failure to provide.

E. Prejudice

There are three interests that an individual's speedy trial rights are intended to protect: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *See* ***Jenkins v. State***, 607 So. 2d 117 (Miss. 1992).

In ***Doggett***, the United States Supreme Court concluded that "the speedy trial enquiry must weigh the effect of delay on the accused's defense just as it has to weigh any other form of prejudice." ***Doggett***, 505 U.S. at 655. The ***Doggett*** Court further concluded that "affirmative proof of particularized prejudice is not essential to every speedy trial claim." ***Id.*** at 655. Excessive delay may compromise the trial in ways that neither side can prove, so that the longer the delay becomes, the prejudice it may cause, even without proof, should take an increasing role in the mix of relevant factors. ***Id.*** at 656.

In the case *sub judice*, Houser's defense was exceedingly disadvantaged by the delay in bringing him to trial. Because of the delay, Houser was unable to pursue his defense that and provide outside assistance to counsel because of his incarceration.

F. Conclusion

Upon a balancing of the ***Barker*** factors, this Honorable Court should conclude that the Appellant was denied his constitutionally-mandated right to a speedy trial. All four

factors weigh in favor of the Appellant; therefore, this Honorable Court should grant appellant the proper remedy for the violation of his constitutional rights.

It is widely established that the sole remedy for a Sixth Amendment speedy trial violation is the dismissal of the charges with prejudice. ***Bailey,*** 463 So. 2d at 1064. *See also* ***Ross v. State***, 605 So. 2d 17 (Miss. 1992); ***Strunk v. United States***, 412 U.S. 434 (1973). Because of this, appellant asks this Honorable Court to reverse appellant's conviction and release him from the custody of the Mississippi Department of Corrections. In the instant case, the trial judge, more than once, refused or failed to properly consider the speedy trial arguments of the Appellant. Moreover, for the delays, the state has provided no good faith explanation and, therefore, cannot carry its burden.

The State's failure to bring the Appellant to trial within the appropriate time, and, additionally, provide good faith explanations as to why it failed to bring the Appellant on for trial on two (2) separate occasions clearly weighs against the State. For the violation of the Appellant's statutory right to a speedy trial, the judgment of the trial court should be reversed and a judgment of dismissal rendered.

ISSUE NO. 2

HOUSER'S SENTENCE OF SIXTY (60) YEARS WITHOUT PAROLE AS AN HABITUAL OFFENDER FOR POSSESSION OF METHAMPHETAMINE PRECURSORS IS DISPROPORTIONATE TO THE CRIME AND CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

Houser asserts that a sentence of sixty (60) years without parole is unduly harsh and constitutes cruel and unusual punishment. As alleged in the indictment, the prosecution submitted evidence that Houser had two prior felonies, one conviction in 1983 for sale of

marihuana and sentenced to a term of three (3) years in the custody of the Mississippi Department of Corrections. Tr. 677-78, Exhibit 5. Furthermore the prosecution alleged that Houser was convicted twice in Neshoba County in 2002 for possession of methamphetamine and possession of methamphetamine precursors and sentence to a term of four (4) years in the custody of the Mississippi Department of Corrections. Tr. 678, Exhibit 5.

Appellant asserts that a sixty (60) year sentence without parole for possessing essentially BC Powder and lithium batteries is unconstitutionally too severe and clearly disproportionate to the offense. U.S. Const. Eighth and Fourteenth Amendments, Miss. Const. Art. 3 § 28.

The United States Supreme Court in ***Solem v. Helm***, 463 U.S. 277, 292 (1983), set out three factors for courts to consider when conducting a proportionality analysis. The criteria are:

(1) the gravity of the offense and the harshness of the penalty;

(2) the sentences imposed on other criminals in the same jurisdiction; and

(3) the sentences imposed for commission of the same crime in other jurisdictions.

In ***Solem***, the Court held a life sentence without parole to be unconstitutional for the crime of writing a $100 bad check on a nonexistent bank account, even though the defendant had been convicted of six prior felonies including three for burglary. *Id.*

The Mississippi Supreme Court has consistently applied ***Solem*** in reviewing the imposition of habitual sentences. The case of ***Clowers v. State***, 522 So.2d 762, 764 (Miss.1988), is a good example. In ***Clowers***, the defendant was an habitual offender with a

new conviction of forging a $250 check. As an habitual offender, Clowers was subject to the mandatory maximum sentence of fifteen years without parole. *Id.* The trial court imposed a sentence of less than fifteen years on the grounds that the mandatory maximum sentence would be disproportionate to the crime. *Id.*

The ***Clowers*** court affirmed the trial court, acknowledging that "a criminal sentence [even though habitual] must not be disproportionate to the crime for which the defendant is being sentenced." *Id.* at 765. Also, even though a trial judge may lack the usual discretion in sentencing an habitual offender, it "does not necessarily mean the prescribed sentence meets federal constitutional proportionality requirements." *Id.* See also ***Hoops v. State***, 681 So.2d 521, 538 (Miss. 1996).

In ***Oby v. State***, 827 So.2d 731 (Miss.App. 2002), where a violent habitual drug dealer's life sentence was affirmed as being proportionate, the Court reiterated the important point that in a ***Solem*** review, a "correct proportionality analysis for a habitual offender sentence does not consider the present offense alone, but within the habitual offender statute." In other words, a reviewing court, and the trial court, should review an offender's past offenses together with the present offense.

In ***McGruder v. Puckett***, 954 F.2d 313, 317 (5th Cir.1992), the court recognized the ***Solem*** three-part test be applied "when a threshold comparison of the crime committed to the sentence imposed leads to an inference of gross disproportionality." The violent habitual defendant in ***McGruder*** was sentenced to life imprisonment after his last offense of auto burglary. McGruder's prior convictions were armed robbery, burglary, escape, and auto

burglary, and the Fifth Circuit held that McGruder's life sentence was not grossly disproportionate to his current offense. The ***McGruder*** court made it clear that an habitual sentence analysis is based on the sentence rendered in response to the severity of the current offense taking the prior offenses into consideration secondarily.

Houser's criminal record, as evidenced by what is included in the record, was not nearly as bad as McGruder's. Houser's prior offenses were sale of marihuana and possession of methamphetamine and possession of methamphetamine precursors.

In ***Rummel v. Estelle***, 445 U.S. 263, 267 (1980), the defendant had two prior felonies of credit card fraud and uttering a forgery, and was convicted of a third felony of false pretenses. Rummel was sentenced to life in prison, a mandatory recidivist sentence for non-violent offenders. The Court held that Rummel's sentence was not unconstitutionally disproportionate to the offense "even though the total loss from the three felonies was less than $250," in part because he was eligible for parole after twelve (12) years. Houser has no hope for parole, due to being sentenced as an habitual offender.

In ***Bell v. State***, 769 So.2d 247, (¶8-16) (Miss. App. 2000), a drug dealer was tried and sentenced as a non-violent habitual offender. The trial judge reviewed Bell's prior convictions and afforded Bell the opportunity to present mitigating evidence. According to the court in ***Bell***, the trial judge is required to justify, on the record, any sentence that appears harsh or severe for the charge. Citing ***Davis v. State***, 724 So. 2d 342 (¶10) (Miss. 1998), the ***Bell*** Court recognized that, "[i]n essence, the Mississippi Supreme Court set forth a

requirement that the trial judge justify any sentence that appears harsh or severe for the charge." *Bell*, 769 So. 2d at ¶15.

The previous convictions of Bell were acknowledged by the trial judge at the sentencing hearing prior to Bell receiving his habitual sentence. The *Bell* court "considered the gravity of the offense with the harshness of the sentence before imposing the thirty year sentence" which was a proper use of "the broad discretionary authority granted to it." Bell's sentence was not seen as disproportionate, so no further review under ***Solem*** was conducted. *Id.* at ¶16.

In the present case, Houser was convicted of possession of BC powder and lithium batteries. Even though those two items can be used to make methamphetamine, that does not mean that Houser was going to use the items for that purpose. Yet, without commenting on the apparent harshness of the sentence, the court sentenced Houser, in accordance with Miss. Code Ann. §99-19-81, to sixty (60) without the possibility of parole, which is essentially a life imprisonment .

Applying the ***Solem*** test here, it is clear that the gravity of possession such a small amount of cocaine is petty. A ***Solem*** analysis leads to the legally sound conclusion that Houser's sentence is patently unconstitutionally disproportionate to his offense and should be vacated. If the Court does not reverse the conviction altogether, at a minimum, Houser's case should be remanded for resentencing, with him present, to include a proportionality hearing is required by ***Bell***, *supra*.

ISSUE NO. 3

THE TRIAL COURT ERRED IN DENYING HOUSER'S MOTION FOR A NEW TRIAL BECAUSE THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

In trial counsel's Motion for Judgment of Acquittal Notwithstanding the Verdict (JNOV) or in the Alternative Motion for a New Trial, counsel specifically argued that the jury's verdict was against the overwhelming weight of the evidence. C.P. 128-133, R.E. 34-39. The trial judge denied this motion. C.P. 138, R.E. 40.

In ***Bush v. State***, the Mississippi Supreme Court set forth the standard of review as follows:

> When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, we will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. ***Herring v. State***, 691 So.2d 948, 957 (Miss.1997). We have stated that on a motion for new trial, the court sits as a thirteenth juror. The motion, however, 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. ***Amiker v. Drugs For Less, Inc.***, 796 So.2d 942, 947 (Miss.2000). However, the evidence should be weighed in the light most favorable to the verdict. ***Herring***, 691 So.2d at 957. 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." ***McQueen v. State***, 423 So.2d 800, 803 (Miss.1982). Rather, as the "thirteenth juror," the court simply disagrees with the jury's resolution of the conflicting testimony. *Id.* This difference of opinion does not signify acquittal any more than a disagreement among the jurors themselves. *Id.* Instead, the proper remedy is to grant a new trial.

Bush v. State, 895 So.2d 836, 844 (Miss. 2005) (footnotes omitted).

In the present case, Houser is at a minimum entitled to a new trial as the verdict was clearly against the overwhelming weight of the evidence. During the trial, an officer of the Columbus Police Department and two officers of the Lowndes County Sheriff's Office testified. In their testimony, Officer Beard stated that he stopped Houser after receiving a report from a store clerk that Houser had bought BC Powder cold and sinus, which contained pseudoephedrine, and lithium batteries. Tr. 486.

Upon stopping Houser, officers searched the vehicle that Houser was driving. Tr. 532-33. Law enforcement officers allegedly found unused syringes with no evidence of methamphetamine residue or other indication of use with methamphetamine. Tr. 533. Also found in the truck was a propane gas valve and a cutoff piece of garden hose. Tr. 538. The propane gas valve had a bluish-green coating on the valve. Tr. 499. Neither the valve or the cut-off piece of garden hose was checked or tested for any kind of use for making methamphetamine. The propane gas valve and the cut-off piece of garden hose was not kept and not presented as evidence and no photographs were taken of either item.

Even though Officer Brackin also testified that he believed the items were used in the process of making methamphetamine, Officer Brackin did not test the valve or hose, did not photograph the valve or hose, nor did save the items for trial. Tr. 549-552.

None of these items were connected to Houser in any way by the evidence at trial besides mere presence in the vehicle he was driving. There were no fingerprints, no testimony from the owner of the vehicle and no testimony that Houser was using any of these items. *See* ***Fultz v. State***, 573 So.2d 689 (Miss. 1990) (commenting that the police

performed insufficient investigations where the owner of the vehicle was not interviewed and no fingerprints were attempted in finding that the mere presence of marijuana in trunk of vehicle that belonged to someone else was not sufficient to confer possession upon driver).

Furthermore, the prosecution presented no evidence other than Houser's prior conviction, that Houser had any intent to use or manufacture methamphetamine with the BC powder and lithium batteries. Houser testified that the two items that he purchased that night at Dutch Village were for the normal listed use of the product. Tr. 610. No evidence was presented of Houser using any needles, no evidence of current drug use, no confession as to intent which was illegal, no testimony of any affirmative act to manufacture methamphetamine besides that purchase of the two (2) items and no methamphetamine was found within the vehicle.

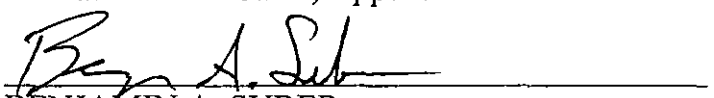
The verdict was clearly against the overwhelming weight of the evidence. Houser therefore respectfully asserts that the foregoing facts demonstrate that the verdict was against the overwhelming weight of the evidence, and the Court should reverse and remand for a new trial. To allow this verdict to stand would sanction an unconscionable injustice. *See* ***Hawthorne v. State***, 883 So.2d 86 (Miss. 2004).

CONCLUSION

Houser contends that his constitutionally-mandated right to a speedy trial was violated by the delaying of his first trial. From the time that Houser was arrested, over five (500) hundred days lapsed till Houser was actually brought to trial. For the violation of the Appellant's statutory right to a speedy trial, the judgment of the trial court should be reversed

and a judgment of dismissal rendered. A ***Solem*** analysis leads to the legally sound conclusion that Houser's sentence is patently unconstitutionally disproportionate to his offense and should be vacated. Houser also assents that the verdict was against the overwhelming weight of the evidence, and therefore the Court should reverse and remand for a new trial.

Respectfully submitted,
MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Paul Allen Houser, Appellant

BY: 

BENJAMIN A. SUBER
MISSISSIPPI BAR NO. [redacted]

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 N. Lamar Street, Suite 210
Jackson, Mississippi 39201
Telephone: 601-576-4200

CERTIFICATE OF SERVICE

I, Benjamin A. Suber, Counsel for Paul Houser, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

Honorable James T. Kitchens, Jr.
Circuit Court Judge
325 College Street
Columbus, MS 39703

Honorable Forrest Allgood
District Attorney, District 16
Post Office Box 1044
Columbus, MS 39703

Honorable Jim Hood
Attorney General
Post Office Box 220
Jackson, MS 39205-0220

This the 6 day of October, 2008.

Benjamin A. Suber
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201
Telephone: 601-576-4200