IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2008-KA-00747-COA

BRENDA LIDDELL — APPELLANT

vs.

STATE OF MISSISSIPPI — APPELLEE

## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal:

**Brenda Liddell,** Appellant;

**Wilbert Johnson, Esq.,** trial attorney;

**E. Daniel Martin, Laurel Blue,** and **Phillip W. Broadhead, Esqs.,** Attorneys for the Appellant, Criminal Appeals Clinic, University of Mississippi School of Law, and **Leslie S. Lee, Esq.,** Mississippi Office of Indigent Appeals;

**Jennifer Msuulewhite, Esq.** and **Walter Bleck, Esq.,** Assistant District Attorney, Office of the District Attorney;

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

**Honorable Kenneth L. Thomas,** presiding Circuit Court Judge; and

**Mississippi Bureau of Narcotics,** investigating/arresting agency.

Respectfully submitted,

**PHILLIP W. BROADHEAD,** MSB #[redacted]
Clinical Professor, Criminal Appeals Clinic

## TABLE OF CONTENTS

## TABLE OF CASES AND AUTHORITIES

**STATUTES, CODE SECTIONS, AND CONSTITUTIONS**

**OTHER SECONDARY AUTHORITIES:**

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2008-KA-00747-COA

BRENDA LIDDELL — APPELLANT

vs.

STATE OF MISSISSIPPI — APPELLEE

## STATEMENT OF ISSUES

**ISSUE ONE:**

**WHETHER THE TRIAL COURT ERRED WHEN IT FAILED TO SUSTAIN DEFENSE COUNSEL'S CONTINUING OBJECTION TO THE ADMISSION OF HIGHLY PREJUDICIAL TESTIMONY ALLEGING PRIOR DRUG TRANSACTIONS, AND WHEN THE TRIAL COURT DETERMINED THAT A LIMITING INSTRUCTION GIVEN AFTER THE PREJUDICIAL TESTIMONY WAS SUFFICIENT TO PROTECT THE APPELLANT FROM UNFAIR PREJUDICE.**

**ISSUE TWO:**

**WHETHER THE APPELLANT WAS DENIED HER SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL DUE TO HER ATTORNEY'S FAILURE TO TIMELY RAISE OBJECTIONS TO IMPROPER STATEMENTS, HIS INSUFFICIENT ADVICE TO THE APPELLANT REGARDING WHETHER SHE SHOULD TESTIFY, AND THE CUMULATIVE PREJUDICIAL EFFECT OF DEFENSE COUNSEL'S DEFICIENT PERFORMANCE AT TRIAL.**

**ISSUE THREE:**

**WHETHER THE TRIAL COURT ERRED WHEN IT FAILED TO SUSTAIN APPELLANT'S MOTION TO SET ASIDE THE JURY'S VERDICT AS LEGALLY INSUFFICIENT, OR, IN THE ALTERNATIVE, FOR FAILING TO GRANT THE MOTION FOR A NEW TRIAL AS THE JURY'S VERDICT WAS CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE.**

## STATEMENT OF INCARCERATION

Brenda Liddell is presently incarcerated in the Mississippi Department of Corrections.

## STATEMENT OF JURISDICTION

This honorable Court has jurisdiction of this case pursuant to ***Article 6, Section 146 of the Mississippi Constitution*** and ***Miss. Code Ann. § 99-35-101 (Supp. 2001)***.

## STATEMENT IN SUPPORT OF ORAL ARGUMENT

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

## STATEMENT OF THE CASE

This is a case that turned on discrepant testimony by a paid government informant who had a personal vendetta against the Appellant, Brenda Liddell (hereinafter "Ms. Liddell"). Based on this inconsistent and substantially contradicted testimony by a "confidential informant," in a case where the judge found that "minimally speaking a prima facie case [was] established" by the prosecution (T. II. 100), Ms. Liddell was found guilty by a jury after only four minutes of deliberation. (CP. 70, RE. ___). Considering the number of obvious discrepancies in the confidential informant's testimony, it is likely that Ms. Liddell was convicted based on the significant amount of prejudicial testimony that was admitted during trial regarding irrelevant and highly prejudicial prior drug transactions alleged between the confidential informant and Ms. Liddell. Had this improper testimony been excluded from the prosecution's case-in-chief, it is very likely that the jury would have reached a verdict of "not guilty."

On December 7, 2006, Agent Louis Hawkins (hereinafter "Agent Hawkins") of the Mississippi Bureau of Narcotics (hereinafter "MBN") sent a confidential informant into an area of

Tunica, Mississippi, called Clark Cove; this area was considered a problem area for drugs. (T. I. 26). Agent Hawkins arranged for Dustin Purser (hereinafter "Confidential Informant" or "CI"), a drug user and convicted felon, to be a CI for the MBN. (T. I. 68, 71). Agent Hawkins met Dustin Purser while Purser was in jail. (T. I. 69). As a confidential informant, Purser was paid a monetary fee contingent upon his actually purchasing drugs. (T. I. 69). The CI claimed to be familiar with Clark Cove as he had been there many times before in order to buy drugs for himself. (T. I. 69). He also claimed that he knew Ms. Liddell and the people in Clark Cove personally from these alleged drug transactions. (T. II. 105). As a CI, Purser was able to choose the person targeted, and he would be paid according to the amount of drugs he was able to buy. (T. I. 70). He was not required to buy drugs from a specific person, but he would not be paid if he did not buy drugs on that particular day. (T. I. 69).

Before going to Clark Cove, Agent Hawkins met the Confidential Informant at a "pre-buy" location. (T. I. 49). At the pre-buy meeting, Agent Hawkins and Agent Maeena Cody (hereinafter "Agent Cody") alleged that they searched the CI and his vehicle for drugs to ensure he had no drugs with him before going to buy drugs for the MBN. The CI was then equipped with a covert video camera, a digital audio recorder, a body transmitter, and $150 dollars of state funds in order to gather evidence on a drug transaction. (T. I. 26). Agent Hawkins and Agent Cody then followed the CI to an area near Clark Cove and waited for the CI to make a transaction. (T. I. 27).

The night before the alleged transaction, the Confidential Informant called Ms. Liddell to set up a transaction to buy drugs. (T. I. 49). Several people resided or spent a great deal of time at 1002 Clark Cove and the surrounding trailers, including Ms. Liddell, John "John L." Clark, Ruby Gooden, Mable White, Marlo Wade, Melvin "Pork Chop" Trippe, and Catherine "Doll" Bogan. (T. II. 105-06). Michael Simmons lived in his vehicle right outside the trailer. (T. II. 106). Although Ms.

Liddell lived at 1002 Clark Cove, the trailer was actually owned by her current husband, John Clark. From the CI's own experience, he considered the entire area to be a "known dope trade." (T. I. 78).

When the Confidential Informant arrived at 1002 Clark Cove, Ms. Liddell answered the door to the trailer. (T. I. 51). The CI entered the trailer and placed the $150 on a counter in the trailer. (T. I. 50). He then went outside and sat in his truck. (T. I. 51). Ms. Liddell and Catherine Bogan (hereinafter "Ms. Bogan") came outside the house; Ms. Bogan threw a container of crack cocain onto the front lawn. (T. I. 53). The CI retrieved the container, checked its contents, spoke with Ms. Liddell about the availability of other drugs, then left the premises. (T. I. 54). The CI returned to the pre-buy location and gave the container to Agent Hawkins, who later put the container into a safe to which five or six officers had access. (T. I. 62).

Many people were present when the Confidential Informant bought drugs at Clark Cove. (T. I. 74-74). The CI never exchanged money with a specific person, and Ms. Bogan was the person who threw the container of crack to the CI in the front lawn. (T. I. 53). Despite no direct evidence against Ms. Liddell, she was indicted for the sale of a controlled substance on August 15, 2007. (CP. 5, RE. ___).

Ms. Liddell was indicted on sale of a controlled substance (CP. 5, RE. __), and then she was tried before a jury in the Circuit Court of Tunica County on April 4, 2009. (T. I. 1). The State of Mississippi led the prosecution's case with an opening statement in which she told the jury that the evidence would show that the Confidential Informant for the MBN went to Ms. Liddell's house on December 7, 2006, that the CI paid $150.00 to Ms. Liddell, and that Ms. Bogan then threw some crack cocaine out to the CI. (T. I. 3-4). In addition, the Prosecution's opening statement unequivocally told the jury that this CI had bought drugs from Ms. Liddell multiple times before the day listed in the indictment. (T. I. 4).

Immediately following the prosecution's opening statement, however, Ms. Liddell's attorney requested that he be allowed to reserve his opening statement for the beginning of the defense's case-in-chief. (T. I. 5). Before the State began its case-in-chief, defense counsel requested a bench conference at which point he asked the judge to instruct the State's witnesses not to refer to any prior transactions with Ms. Liddell. (T. I. 7-8). In response, the prosecution argued that such testimony was admissible under ***Mississippi Rule of Evidence*** (hereinafter "***MRE***") ***404(b)*** to show a "common plan." (T. I. 9). Defense counsel countered that this type of testimony is not allowed under ***MRE 404(b)***, or, in the alternative, that the testimony should be excluded as unduly prejudicial under ***MRE 403***. (T. I. 10, 13-14). Weighing both sides' arguments, and noting defense counsel's continuing objection, the judge decided to allow the CI to testify regarding prior transactions with Ms. Liddell; however, the judge first required the State to draft a limiting instruction regarding the proper use of such testimony by the jury. (T. I. 17-18).

Following the judge's ruling on the prior transaction testimony, a conference was held in the judge's chambers during which Officer Leonard Dotson testified that juror number ten and Ms. Liddell knew each other. (T. I. 19). Upon hearing this, the juror, Eddie Gray, was brought into chambers where he testified that he did know Ms. Liddell, that he did not indicate this when questioned during voir dire, and that his failure to answer was due to a lack of attentiveness. (T. I. 20-21). As a follow up to the judge's questioning of Mr. Gray, defense counsel asked whether Mr. Gray "could be a fair juror in this case[,]" to which he responded with a yes. (T. I. 21). However, despite Mr. Gray's belief that he could be a fair juror, the judge dismissed Mr. Gray and replaced him with the first alternate juror. (T. I. 21-22).

Following the replacement of Mr. Gray, the State called Agent Hawkins of the MBN as its first witness. (T. I. 23). Agent Hawkins testified that on of December 7, 2006, he and Agent Cody

were involved in an operation in which they used the Confidential Informant to buy drugs from an area known as Clark Cove in Tunica County. (T. I. 26, 39). Agent Hawkins testified that prior to the undercover buy, the CI was subjected to a pre-buy search of both his person and his vehicle. (T. I. 26). Agent Hawkins stated that Agent Cody searched the CI while Agent Hawkins searched the vehicle, and that no drugs were found. (T. I. 26). However, on cross, Agent Hawkins admitted that the CI was not strip searched, nor was his mouth specifically searched, nor did he see the CI remove his shoes or socks. (T. I. 36-38).

After describing the pre-buy search, Agent Hawkins gave testimony as to what he heard through the audio surveillance of the Confidential Informant; however, after several statements given by Agent Hawkins "based on [his] experience and training . . ." defense counsel objected on the ground that Agent Hawkins had not been qualified as an expert. (T. I. 28-29). After the judge sustained defense counsel's objection, the prosecutor continued to question Agent Hawkins as a lay witness, at which point she had Agent Hawkins identify State's Exhibit "A" as being the audio and video surveillance from the undercover buy. (T. I. 31). After Agent Hawkins briefly explained how he recognized the exhibit, the State moved to offer the exhibit into evidence. Defense counsel objected on the grounds that the State had not presented sufficient chain of custody testimony. (T. I. 32). Although the judge did not specifically rule on the objection, the State continued questioning Agent Hawkins about the chain of custody, and the judge asked the State to continue its chain of custody testimony up to the point of trial, after which point State's exhibit S-A was admitted. (T. I. 33, Exh. S-A, RE. ____). Finally, the State had Agent Hawkins give some chain of custody testimony about States' Exhibits B-1 and B-2, which he identified as the crack cocaine that the CI relinquished to him on December 7, 2006 (Exh. S-B-1, RE. ___), as well as the container in which the crack was located (Exh. S-B-2, RE. ___). (T. I. 33-34).

On cross, Agent Hawkins testified that he did not know who owned the trailer located at 1002 Clark Cove, that he did not know who or how many people lived at that location, and that he did not know under whose name the utilities for that residence were listed. (T. I. 41). In addition, Agent Hawkins testified that the Confidential Informant used on December 7, 2006, had previously told him that someone had sold the CI "bad dope." (T. I. 46). On re-direct, the State asked Agent Hawkins if the CI had told him who had sold the CI the "bad dope," to which he answered "Ms. Liddell." (T. I. 48).

The next witness called by the State was the Confidential Informant. (T. I. 48). The testified that he was working as a confidential informant on December 7, 2006, and that he was going to buy drugs in Clark Cove in Tunica, which is somewhere that he had previously gone to buy drugs. (T. I. 48-50). After the CI testified about the transaction in question, the prosecution asked him "[h]ad you ever purchased drugs at that . . . place before from Ms. Liddell?" (T. I. 52). After defense counsel's objection was overruled, the CI responded with a "yes," after which he described "how those transactions normally took place[.]" (T. I. 52-53). After stating that his prior transactions with Ms. Liddell usually involved placing the money on the counter, and the drugs being delivered by a "runner," the CI testified that, on the day in question, he had placed the money on the counter, gone outside, and then Ms. Liddell and Ms. Bogan both came to the door, but that Ms. Bogan threw the drugs to him. (T. I. 53).

Following this line of questioning, the State played the surveillance video for the jury. Although defense counsel had requested that the video be shown in its entirety, the State told the judge at some point that the remaining video was irrelevant, at which point the judge asked defense counsel whether "you have some irrelevant part of the video that you wish to be seen?" (T. I. 59). Rather than insisting that the remainder of the video be played, defense counsel said no. (T. I. 60).

Similarly, although defense counsel requested that the State play the audio surveillance in its entirety, the prosecutor simply turned it off at a certain point, and defense counsel failed to object. (T. I. 64, 67).

On cross examination, the Confidential Informant testified that the MBN paid him based on the amount of the drugs that he was able to purchase; however, he also testified that he knew in advance of the buy how much he would be paid. (T. I. 70). Then the CI testified that during the pre-buy search on December 7, 2006, he was given "[a] complete search. Shoes off, searched the car completely." (T. I. 73). In addition, the CI stated that the agents had him hold his tongue out while they searched his mouth, and he testified that Agent Hawkins was present when Agent Cody had the CI remove his shoes and socks. (T. I. 76). Turning to the transaction in question, the CI testified that both Ms. Liddell and Ms. Bogan were present, that there was an unidentified third person in the yard, and that at least one other person from whom the CI had purchased drugs in the past was in Clark Cove on the day in question. (T. I. 74-75). In addition, the CI admitted that he only went into the kitchen and the living room, meaning that he did not go into the bedroom, the bathroom, or any other rooms that the trailer might have had. (T. I. 76).

Finally, in a line of impeachment questioning, defense counsel was able to extract testimony from the Confidential Informant in which he admitted that, while he saw both Ms. Liddell and Ms. Bogan on the porch after the drugs were thrown out, he was not sure who actually threw them. Following a statement by the CI that all of Clark Cove "was a known dope trade[,]" the following transpired between defense counsel and the CI:

Q: Was she a runner?

A: Who? Brenda?

Q: Yes.

A: No.

Q: Okay. But you, now, when you, when this package was thrown out to you, you don't know who threw it, right?

A: Huh-uh.

Q: And you didn't know where it came from, do you?

A: It came from out the door.

Q: It came from in that trailer; is that correct?

A: That's right.

Q: But there was other people present in that trailer, right?

A: Right.

(T. I. 79).

However, when defense counsel asked the CI whether it was possible that Ms. Liddell was not the person selling the drugs, the CI said "I'd run over there six, seven, eight times a day to buy dope from her every day for months." (T. I. 81).

After a brief re-direct by the State in which the Confidential Informant testified that he had previously paid Ms. Liddell for drugs that were delivered by someone else, the court then read a limiting instruction. The limiting instruction stated as follows:

> The witness Dustin Purser, who just left the witness stand, has testified concerning prior drug transactions with the defendant. This testimony is not to be considered by you as proof of guilty [sic]. Rather, this testimony should only be considered by you as proof of the defendant's intent, plan and/or identity of the defendant.

(T. I. 87).

Following the Confidential Informant's testimony, the judge permitted the State to re-call Agent Hawkins to complete his testimony on the chain of custody of the crack cocaine

and the container in which it was delivered, which the State sought to have admitted into evidence. (T. I. 87-88). Following this additional testimony, the court admitted the container, marked State's Exhibit B-1, into evidence over defense counsel's objection. (T. I. 88-89).

The State then called Gary Fernandez (hereinafter "Mr. Fernandez"), a forensic scientist with the Mississippi Crime Lab. (T. I. 89). Mr. Fernandez was accepted as an expert forensic scientist without objection. (T. I. 91-92). Fernandez testified that the substance that his lab received from Agent Hawkins tested positive as cocaine, and he also testified regarding the chain of evidence while the cocaine was at the crime lab. (T. I. 93-95). Following this testimony, the State moved for admission of the crack cocaine as State's Exhibit B-2. (T. I. 95). Defense counsel had no objection, so the crack was admitted. (T. I. 96). Finally, the prosecution had Mr. Fernandez identify State's Exhibit C as a certified copy of his report identifying the substance as crack cocaine. (T. I. 96, Exh. S-C, RE.___). After Mr. Fernandez identified the report, the State moved for its admission into evidence, and defense counsel had no objection, so the report was admitted. (T. I. 97).

Following a brief cross-examination of Mr. Fernandez by Defense counsel, the State rested. Outside the presence of the jury, defense counsel moved for a directed verdict. (T. I. 99). After the court "f[ound] that minimally speaking a prima facie case [had] been established[,]" the judge denied defense counsel's motion for directed verdict. (T. II. 100).

At this point, before the defense began its case-in-chief, there was a brief discussion regarding whether Ms. Liddell would testify. (T. II. 100). The judge asked Ms. Liddell whether she had discussed this issue with her attorney, and, after saying that she had, Ms. Liddell told the judge that she "decided to testify." (T. II. 101).

Now defense counsel began its case-in-chief with an opening statement. (T. II. 101).

Following the opening statement, defense counsel called Ms. Bogan as the defense's only witness. (T. II. 103). Ms. Bogan testified that she, and a number of other people, would often stay at the residence at 1002 Clark Cove. (T. II. 106). Next, defense counsel wanted to play the surveillance video for Ms. Bogan and the jury; however, when Ms. Bogan stated that she had seen the tape, defense counsel proceeded to question her about the contents of the video without playing it. (T. II. 107). Testifying about the contents of the tape from memory, Ms. Bogan stated that she did not throw any drugs nor see Ms. Liddell throw any drugs, and that she did not see any money exchanged. (T. II. 107-08). In addition, Ms. Bogan testified that she had never seen anybody sell drugs to the Confidential Informant at 1002 Clark Cove. (T. II. 109). Finally, Ms. Bogan testified on direct that she had never been a runner. (T. II. 111).

On cross-examination, the State impeached Ms. Bogan's testimony by pointing out that Ms. Bogan was currently in jail for selling drugs from that address. In fact, the prosecution pointed out that, based on Ms. Bogan's own explanation of the facts leading to Ms. Bogan's imprisonment, that she was actually in jail for being a "runner" in a drug transaction. (T. II. 112). Although defense counsel objected to the relevancy of questions concerning Ms. Bogan's unrelated drug charges, the judge overruled the objection, and the testimony was allowed. (T. II. 112-13).

Following Ms. Bogan's testimony, the defense rested. After the jury was sent out of the courtroom, the judge called the attorneys and Ms. Liddell to the bench to question whether Ms. Liddell would testify. (T. II. 114). Following some discussion, Ms. Liddell said that she would not testify; however, she told the judge that she wanted to say something to him and was told that she could not do so at that time. (T. II. 116). The judge then discussed jury instructions with the parties, and defense counsel offered a single instruction, (T. II. 116),

which stated "[t]he Court instructs the jury to find the Defendant Ms. Liddell not Guilty." (CP. 56, RE. __). The jury returned to the courtroom following the acceptance by both parties of the court's proposed jury instructions. Defense counsel and Ms. Liddell were then asked to come forward to allow Ms. Liddell to make her statement to the judge. (T. II. 120).

The following conversation occurred "in the presence and out of the hearing of the jury . . . ." (T. II. 120):

> LIDDELL: I wanted to know, you know, should I speak for myself or?
>
> COURT: Oh, well, your attorney has advised you.
>
> LIDDELL: I don't want to say nothing to hurt me, but I'm going to tell the truth whatever's asked.
>
> COURT: Well, that may or may not hurt.
>
> LIDDELL: That's what I'm saying.
>
> COURT: Okay. Well, your attorney has advised you. I have given you the ramification both ways and the opportunity to decide.

(T. II. 120-21).

Despite Ms. Liddell's obvious uncertainty, the Defense rested its case without Ms. Liddell's testimony, and, notably, no jury instruction was given regarding Ms. Liddell's right not to testify, or the fact that no negative inference could be made from that decision. (T. II. 121, 122-29).

After the court read the jury instructions and each side gave its closing arguments, the jury retired from the court room to deliberate on the verdict. According to the record, the jury recessed at 5:50 p.m. to deliberate, and at 5:54 p.m., the jury was re-seated with a unanimous

verdict of "guilty." (T. II. 146-47).[1]

After having been found guilty in her jury trial, Ms. Liddell was sentenced to a three year sentence that would run consecutively to the other sentence that she was already serving. (T. II 160). After sentencing, Appellant filed a Motion for JNOV which was denied by the trial court. (CP. 71, RE. __). Feeling aggrieved by the verdict of the jury and the sentence handed down by the trial judge, the Appellant, through counsel, perfected her appeal to this honorable Court. (CP. 77, RE. ___).

## SUMMARY OF THE ARGUMENT

This is a case that turned on the mendacities of a paid government informant whose testimony was biased based on his personal vendetta against the Appellant, Brenda Liddell. Evincing the Confidential Informant's motivation to present damaging testimony against Ms. Liddell are a couple of enlightening facts. First, as the audio recording from the date of the alleged transaction demonstrates, this CI had an incentive to purchase drugs on the date in question because he admittedly needed the money that he would receive only upon making a purchase. Second, the CI was personally motivated to help the State obtain a conviction specifically against Ms. Liddell because, as the CI testified at trial, Ms. Liddell had allegedly sold him "bad dope" in the past. A careful comparison of the discrepancies between the CI's testimony with that of Agent Hawkins further exposes the weakness of the Confidential Informant's testimony. Therefore, considering the weakness of the State's case against Ms.

---

[1] Although the record reflects that the jury recessed at 5:50 p.m., and returned with a verdict at 5:54 p.m., the Clerk's Papers indicate that the jury recessed at 5:59 p.m., and returned with its guilty verdict at 6:10 p.m. (CP. 70, RE. __).

Liddell without any consideration of the improper prior transaction testimony, it is almost certain that the jury would have returned a verdict of "not guilty" based on the weight of evidence. Furthermore, excluding improper testimony would likely have demonstrated that the State's evidence was legally insufficient to support the conviction of Ms. Liddell. Compounding the unfairness of proceedings against Ms. Liddell, defense counsel's performance appears to have been both ineffective and prejudicial, both of which ultimately could have contributed to Ms. Liddell's conviction.

Beginning with the prosecution's opening statement, and carrying on through the State's key witness, the paid Confidential Informant, it was blatantly clear that the entire case of the prosecution against Ms. Liddell rested on the admission of testimony regarding alleged prior drug transactions between the CI and Ms. Liddell. Despite defense counsel's continuing objection to the admissibility of this highly prejudicial testimony by the CI, the trial court judge allowed the testimony, with the aid of a limiting instruction, finding that the prior transaction testimony was admissible under ***MRE 404(b)***. However, because the State had no credible evidence showing that Ms. Liddell actually took the money that was placed on the counter on the day in question, and because the State also had no evidence that it was Ms. Liddell who transferred or delivered the drugs to the CI on the day in question, it is clear that the prior transaction testimony presented at trial was improper, either because it was offered as proof of guilt in violation of ***MRE 404(b),*** or, in the alternative, because the probative value of the testimony was substantially outweighed by the danger of unfair prejudice under ***MRE 403.*** In addition, although the trial judge gave a limiting instruction in an attempt to minimize the unfair prejudice that would be caused by this prior transaction testimony, by the time the limiting instruction was read, it was too late because the jury had already been tainted.

Therefore, the limiting instruction was too little, too late, and it would be nothing more than a "legal fiction" to believe that the jurors could ignore all of the improper testimony that was presented to them.

During the trial, defense counsel failed to provide even minimally effective assistance for Ms. Liddell by failing to object to Agent Hawkins testifying as an "expert" witness when he was neither qualified nor was offered as an expert under ***MRE 702***. Agent Hawkins testified to the behavior that is "very common for drug violators." Defense counsel objected to Agent Hawkins expert testimony after the jury had been prejudiced against the defendant by the improper testimony. Further compounding the ineffective assistance of counsel, Ms. Liddell was not prepared or advised by counsel for trial. During trial, but out of the presence of the jury, Ms. Liddell stated, "I'm going to testify." (T. II. 115). Later, after changing her mind and saying that she would not testify (T. II. 116), Ms. Liddell posed several questions to the trial judge, rather than her own defense counsel, regarding whether she should testify. These statements evince defense counsel's complete lack of preparation of his client for trial. Finally, during the sentencing phase of the trial, defense counsel misstated the term of a prior sentence that Ms. Liddell was currently serving, leading to a mis-informed decision by the trial judge in sentencing Ms. Liddell. These errors satisfy the ***Strickland*** test that if not for defense counsel's deficient performance at trial, the jury would not have been prejudiced, and the outcome of the trial would have been different.

The outcome of the trial was against the weight of evidence and there was not legally sufficient evidence to establish the guilt of the Appellant. The State presented a case dependant on the contradictory, inconsistent, and biased testimony of the Confidential Informant. Further deflating the weight of the evidence was Agent Hawkins's improper testimony to the behavior

that is "very common for drug violators." The improper association between the behavior common of drug violators and the alleged transaction on the day in question unduly prejudiced the jury. Based on the lack of solid, credible evidence against Ms. Liddell, the outcome of the trial was not supported by the weight of the evidence, and the court erred in failing to grant the Ms. Liddell's motion for JNOV. Furthermore, the State's evidence in its case-in chief was not legally sufficient to establish a *prima facie* case of guilt as to each and every essential element of the crime charged beyond a reasonable doubt. From the evidence presented, there was not a valid line of reasoning established and permissible inferences raised which could lead a trial judge to a conclusion that the prosecution had met its burden of proof sufficiently to withstand a motion for directed verdict. The trial court also erred when it failed to sustain Ms. Liddell's post-trial motion to set aside the jury's verdict as legally insufficient, or, in the alternative, to grant a new trial.

In conclusion, the Appellant, Brenda Liddell, respectfully requests for the above reasons that this honorable Court reverse the decision below, and that this case be rendered in her favor, discharging her from the custody of the Mississippi Department of Corrections. In the alternative, the Appellant requests that this Court reverse the verdict of the jury and the sentence of the trial court and remand the case to the lower court with proper instructions for a new trial.

## ARGUMENT

### ISSUE ONE:

### WHETHER THE TRIAL COURT ERRED WHEN IT FAILED TO SUSTAIN DEFENSE COUNSEL'S CONTINUING OBJECTION TO THE ADMISSION OF HIGHLY PREJUDICIAL TESTIMONY ALLEGING PRIOR DRUG TRANSACTIONS, AND WHEN THE TRIAL COURT DETERMINED THAT A LIMITING INSTRUCTION GIVEN AFTER THE PREJUDICIAL TESTIMONY

**WAS SUFFICIENT TO PROTECT THE APPELLANT FROM UNFAIR PREJUDICE.**

The issue presented to this honorable Court is whether it was proper for the trial court to admit highly prejudicial testimony by a biased Confidential Informant regarding alleged prior drug transactions between the CI and Ms. Liddell under ***MRE 404(b).*** Because this issue involves a decision by the trial court to allow evidence, this Court must review the trial court's decision for an abuse of discretion. ***Jones v. State***, 904 So. 2d 149, 153 (Miss. 2005). Due to its failure to remain within the confines of its discretion, as are defined by the Mississippi Rules of Evidence and case law interpreting the rules, *see, e.g.*, ***Sumrall v. State***, 758 So. 2d 1091, 1094 (Miss. Ct. App. 2000) ("The discretion of the trial judge must be exercised within the boundaries of the Mississippi Rules of Evidence."), the Appellant respectfully requests that this honorable Court reverse the lower court and remand this case with proper instructions for a new trial.

1. <u>The Confidential Informant's testimony regarding uncorroborated alleged prior drug transactions with the defendant were improperly admitted, resulting in prejudice to the Defendant</u>

Under Mississippi law, the general rule is that evidence of prior bad acts is generally not admissible. ***Neal v. State***, 451 So. 2d 743, 758 (Miss. 1984) ("Evidence of prior offenses committed by a defendant, not resulting in a conviction, is generally inadmissible . . . as a part of the State's case in chief."). However, with the adoption of the Mississippi Rules of Evidence, a number of exceptions to this general rule were codified, allowing prior bad act testimony to be admitted for certain, carefully limited purposes. Specifically, ***MRE 404(b)*** states as follows:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It

> may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, *or* absence of mistake *or* accident.

***MRE 404(b)*** (emphasis added).

*A. Predicate for Admissibility of Prior Bad Act Evidence*

Before analyzing whether prior bad act testimony is offered for a proper purpose, a court must first consider whether the State has complied with the procedural safeguards that the Court has set in place for this type of highly prejudicial evidence. As the Mississippi Supreme Court stated shortly after promulgation of the Mississippi Rules of Evidence,

> Rule 404(b) is a specialized rule of relevancy. Accordingly, as with any determination pursuant to Rule 401, counsel must be prepared to (1) identify the consequential fact to which the proffered evidence of other crimes, wrongs or acts is directed, (2) prove the other crimes, wrongs, or acts, and (3) articulate precisely the evidential hypothesis by which the consequential fact may be inferred from the proffered evidence. Evidence which passes muster up to this point must, in addition, satisfy the balancing test imposed by Rule 403 which requires the probative value of the other crimes evidence to outweigh the harmful consequences that might flow from its admission.[2]

***Edlin v. State***, 533 So. 2d 403, 408 (Miss. 1988) (*quoting* 2 Weinstein's Evidence, 404-53 - 404-54 (1986)) (emphasis added). Thus, in order for any prior bad act testimony to be properly admitted in court, such evidence must be offered by the proponent for a specific purpose, including a statement by the offering party as to the exact inference that would allow the jury to properly consider the evidence. ***Id.*** In addition, when talking about prior bad acts, as opposed to prior convictions, the offering party should be prepared to give an offer of proof

---

2

According to at least one commentator, ***Edlin*** can be said to have created a specialized version of the Rule 403 balancing test which, when applied to proposed prior bad act testimony under Rule 404(b), would "start[ ] with the evidence being presumed to be unfairly prejudicial. The burden is then on the offering party to persuade the judge that the probative value outweighs that prejudice." *See* **Tom R. Mason,** NAVIGATING THE MAZE OF EVIDENCE OF CHARACTER & OTHER CRIMES WRONGS OR ACTS, 71 MISS. L.J. 835, 876 (2002).

sufficient to convince the judge that the alleged prior bad acts were in fact committed by the defendant. ***Id.***; *see also* ***Darby v. State***, 538 So. 2d 1168, 1173 (Miss. 1989) ("[T]he trial court must be satisfied that 1) there is plain, clear and convincing evidence of similar offence, 2) the offense is not too remote in time, 3) the element of the similar crime for which there is a recognized exception is a material issue in the case, and 4) there is a substantial need for the probative value of the evidence.").

Once the procedural requirements have been met, the question becomes whether the prior bad act testimony is being offered for a proper purpose. A plain reading of ***MRE 404(b)*** confirms that evidence of prior bad acts cannot be used as proof of a defendant's guilt based on conformity with his or her prior bad acts. ***Scruggs v. State***, 756 So. 2d 817, 821 (Miss. Ct. App. 2000). On the other hand, the question of what is a proper use of prior bad act testimony under ***MRE 404(b)*** is much more complicated; therefore, a survey of case law on this issue is necessary to provide a clearly defined rule under which to analyze the question presented in this appeal. Specifically, the issue in the case before this honorable Court is under what circumstances prior bad act testimony can be properly admitted "as proof of the defendant's intent, plan and/or identity of the defendant." (T. I. 17, RE. __).

*B. "Plan" refers to prior bad acts consisting of a conspiracy between at least two people, or acts that are so interrelated as to create the appearance of a single, continuing transaction that is related in both time and place.*

Because the entire discussion between the trial judge, the prosecutor, and the defense revolved around the admissibility of prior bad act testimony for the purpose of showing a common plan, this issue is a good place to begin the discussion. ***MRE 404(b)*** clearly provides that prior bad act testimony can be admitted to prove a "plan." However, because the word "plan" is not defined by the rule, its meaning must be derived from judicial interpretations of

the rule.

One such example in which the State properly offered prior bad act testimony "to show [a] scheme or plan" is ***Smith v. State***, 716 So. 2d 1076, 1079 (Miss. 1998). In ***Smith***, the State wanted to present testimony by a co-conspirator that described an elaborate scheme that at least three people, including the witness, had employed multiple times to deliver marijuana from Texas to Mississippi. ***Id.*** at 1079. In holding that the prior bad act testimony was properly admitted in ***Smith***, the Mississippi Supreme Court reasoned that "[a] conspiracy exists where two or more persons agree to accomplish any unlawful purpose or to accomplish a lawful purpose by any unlawful means . . . [and] [t]here must be recognition by the conspirators that they are entering a common plan and that they knowingly intend to further its common purpose." ***Id.*** at 1079-80 (internal citations omitted). Thus, one interpretation of the word "plan" is a conspiracy among at least two people.

However, other cases seem to have interpreted ***MRE 404(b)*** to allow testimony under the "plan" exception when the prior bad acts testified to are so interrelated in both place and time that it can be said that all of the acts constituted a single, continuing transaction. *See, e.g.*, ***Bennett v. State***, 738 So. 2d 300, 304 (Miss. Ct. App. 1999) ("Prior bad acts can be admitted when they are so much a part of the charged crime that they could be considered part of a single event or as part of a closely related series of events."); *see also* ***Ford v. State***, 555 So. 2d 691, 694 (Miss. 1989) (finding that testimony regarding a conspiracy to commit bank robbery was admissible to prove plan or knowledge when the two robberies were closely related in time and location, and because "in a *conspiracy* prosecution, the range of relevant evidence is quite wide.") (emphasis original); and ***Neal***, 451 So. 2d at 759 ("Proof of another crime is admissible where the offense charged and that offered to be proved are so interrelated

as to constitute a single transaction or occurrence *or* a closely related series of transactions or occurrences." (emphasis added)).

*C. The Confidential Informant's alleged prior drug transaction testimony should not have been admitted to prove the existence of a "plan."*

Turning to the facts of the present case, the first question that must be addressed is whether the State met its burden under ***Edlin***, which is a prerequisite for the admission of prior bad act testimony under ***MRE 404(b)***. After the State's opening statement, the defense counsel requested a bench conference outside the presence of the jury at which time defense counsel objected to the admission of any testimony regarding alleged prior drug transactions between Ms. Liddell and the Confidential Informant. (T. I. 7-8). When asked whether the State intended to introduce any such testimony, the prosecutor responded that "the State would be seeking to introduce that testimony under 404(b) to show that there's a common plan." (T. I. 8). In support of this proposition, the prosecutor essentially told the trial judge that the CI would testify as to how the defendant allegedly carried out the business of selling drugs in totally unrelated, unconvicted, and uncorroborated allegations of "bad acts." (T. I. 12).

However, the State notably failed to provide any information whatsoever regarding the recency of the alleged prior transactions in relation to the transaction for which the defendant was on trial, or any information tending to prove that the defendant had, indeed, committed such prior transactions. (T. I. 8-13). On the other hand, while the prosecution offered no information regarding the recency or accuracy of these uncorroborated assertions, the defense counsel explicitly argued to the judge that the alleged prior transactions were "too remote." (T. I. 10). Additionally, the Confidential Informant obviously had a personal bias against the defendant, as evidenced in the testimony of Agent Hawkins who stated that the CI had told him

that Ms. Liddell had previously sold him "bad dope." (T. I. 48) Based on these facts, it appears that the judge abused his discretion by admitting this prior bad act testimony without any additional information regarding recency in time or conclusive proof of the alleged prior transactions. ***Edlin***, 533 So. 2d at 408; *see also* ***Darby***, 533 So. 2d at 1173.

However, even if that State had met its predicate burden under ***Edlin***, the prior transaction testimony should not have been admitted to show a common plan. As stated above, the term "plan," as used in ***MRE 404(b)***, is generally used to show evidence of either (1) a conspiracy to commit a crime, *see* ***Smith***, 716 So. 2d at 1079; or (2) a series of transactions that are so interrelated in time and place as to be considered a single, continuing transaction carried out under a common plan, *see* ***Bennett***, 738 So. 2d at 304. Neither of these factual situations are present in Ms. Liddell's case, and the Appellant asserts to this Court that the trial judge erred in allowing such highly prejudicial testimony implying that "she did it once, she'll do it again."

First of all, because Ms. Liddell is the only individual implicated in the alleged sale of crack cocaine, by definition, there is no "conspiracy." (CP. 5, RE. ___), (T. II. 107, RE. ____). Further, even if there had been a conspiracy, the Confidential Informant would not have been a part of the conspiracy to sell drugs, ***Smith***, 716 So. 2d at 1079 ("A conspiracy exists where two or more persons agree to accomplish any unlawful purpose . . . . There must be recognition by the conspirators that they are entering a common plan and that they knowingly intend to further its common purpose."); therefore, he could not have testified to a conspiracy because he would lack personal knowledge. *See* ***MRE 602***.

Additionally, without any allegation that the prior transactions were so interrelated in time and place to the charge in the present indictment, (CP. 5, RE. __), there is absolutely no

logical reason to believe that the prior transactions are relevant to the present charges, or that the transactions could be thought to have been carried out as part of a single, continuing transaction. (T. I. 8-13). Therefore, because the prior transaction testimony could not be used to prove a "common plan," as is evinced by the prosecution's obvious inability to "articulate precisely the evidential hypothesis by which . . ." the jury could find a common plan within its meaning under ***MRE 404(b)***, it was an abuse of the judge's discretion to admit the evidence for that purpose.

*D. The prior transaction testimony was not offered to prove identity, nor was it necessary, making such use of the evidence improper.*

During the bench conference when the prosecutor and the defense counsel debated over whether the prior transaction testimony was admissible, the only purpose for which the State argued that the proffered testimony was admissible was "to show that there's [sic] a common plan." (T. I. 8-15). However, in the limiting instruction, which was drafted by the State and read to the jury by the trial judge over defense counsel's objection, (T. I. 15-17), the jury was instructed that they should consider the prior transaction testimony "as proof of intent, plan and/or identity of the defendant." (T. I. 16-17, 87) (emphasis added).

In fact, the only time that the word "identity" was even mentioned during the bench conference was by the prosecution's co-counsel after the judge had heard both sides' arguments regarding the common plan, and the judge had already moved on to the ***MRE 403*** balancing test. (T. I. 18). Immediately following this quick intervention by the prosecution's co-counsel, the judge ruled the prior transaction testimony admissible without allowing defense counsel to respond. (T. I. 18). Therefore, because there was absolutely no discussion regarding the use of prior transaction testimony for the purpose of establishing identity, and because there

were multiple other means of establishing identity, such as the Confidential Informant's testimony and the video and audio surveillance tapes, the CI's alleged prior transaction testimony should not have been admitted under ***MRE 404(b)*** to prove "identity." *See* ***Darby***, 538 So. 2d at 1173 ("[B]efore an exception to the general rule excluding evidence of other crimes from admission in criminal cases can be invoked, the trial court must be satisfied that . . . there is a substantial need for the probative value of the evidence.").

*E. "Intent" was irrelevant to the charge under the indictment; therefore, admission of prior transaction testimony to prove intent was clear error.*

While the State at least mentioned, albeit in passing, the use of prior transaction testimony to show identity, such evidence was never offered to show intent prior to the State's inclusion of the term in the jury instruction that it drafted. (T. I. 7-18). Therefore, because the record makes clear the fact that the State never gave any reasons why the testimony could properly be used to show "intent," and that the defense counsel's only chance to object to such use was after the State had drafted the limiting instruction, to which defense counsel did in fact object, (T. I. 17), it was error for the judge to admit the prior transaction testimony for the purpose of intent. *See* ***Houston v. State***, 513 So. 2d 598, 607-08 (Miss.1988) ("Before evidence may be received under the other bad acts exception to the primary relevancy rule, the proponent must articulate precisely the evidential hypothesis by which the consequential fact, i.e., . . . criminal intent, may be inferred from proffered evidence . . . .").

In addition, while there are numerous cases establishing an exception to ***MRE 404(b)*** that allows testimony of prior involvement in the drug trade to prove intent, this exception was intended to apply to cases in which the defendant is charged with possession of a controlled substance with the intent to distribute. *See, e.g.*, ***Swington v. State***, 742 So. 2d 1106, 1112

(Miss. 1999)("Evidence of prior involvement in the drug trade is admissible to prove intent to distribute.") (emphasis added). However, the charge here was not possession with intent to distribute; rather, the charge listed in the indictment was that the defendant "did unlawfully, willfully, and feloniously and without authority of law, sell, transfer or deliver a certain controlled substance, to wit: cocaine . . . ." (CP. 5, RE. __).

Therefore, because intent was not an element of the present charge, two relevant facts are immediately apparent. First, the exception to ***MRE 404(b)***, stated in ***Swington***, 742 So. 2d at 1112, did not apply to the facts of Ms. Liddell's case. Second, and more troublesome, is the fact that the jury was instructed that they should consider this testimony as proof of the defendant's intent - a topic that is completely irrelevant to the charge for which the defendant was on trial. *But see* ***MRE 402*** ("Evidence that is not relevant is not admissible."), *and* ***MRE 401*** (defining "relevant evidence.").

Based on the foregoing analysis, it appears that there was no proper exception under ***MRE 404(b)*** for which the prior transaction testimony could have been admitted; therefore, the trial judge abused his discretion in admitting the Confidential Informant's testimony on that subject.

2. Although the trial judge stated for the record that he found the probative value of the prior transaction testimony to outweigh the potential for prejudice under ***MRE 403***, the record makes clear that the trial judge abused his discretion by failing to actually weigh these factors with respect to the specific purposes for which the testimony was offered.

Even assuming there had been some proper purpose for which the biased Confidential Informant's testimony regarding alleged prior drug transactions with the defendant was admitted under ***MRE 404(b)***, the trial court was still required to "consider whether [the prior transaction testimony's] probative value on the issues of [identity, plan, and intent] was

substantially outweighed by the danger of unfair prejudice." ***Jenkins v. State***, 507 So. 2d 89, 93 (Miss. 1987). In other words, "Rule 403 is [the] ultimate filter through which all otherwise admissible evidence must pass." ***Id.*** At 93. Therefore, under ***MRE 403***, once the trial judge decided that the proffered testimony could be used for a proper purpose under ***MRE 404(b)***, he was required to weigh the probative value of the testimony in relation to the specific purposes for which it was offered against the potential for unfair prejudice to the Defendant. ***Jenkins***, 507 So. 2d at 93.

Turning to the record, it is clear that there was some discussion of the probative value of this testimony as compared to its potential for prejudice. (T. I. 11-18). Essentially, defense counsel argued that the prior transaction testimony had the potential to prejudice the Defendant by allowing the jury to reach the conclusion (which is expressly prohibited by ***MRE 403*** & ***404(b)***) that Ms. Liddell has sold crack before, so she probably sold crack on this date as well. (T. I. 14). On the other hand, the prosecutor seemed to argue that the prior transaction testimony was extremely probative, especially on the issue of Ms. Liddell's guilt for the present charge, as is shown through the following excerpt during the bench conference on the admissibility of the other "bad acts" testimony:

BY THE COURT: Are you saying that a similar plan used by her in this latest instance, in view of that, the jury can consider that as being evidence of guilt? Are you going that far?

BY MS. MUSSELWHITE: Not evidence of guilt, Your Honor. But to show that, well, yea, that's what, yes. That was part -

BY THE COURT: In other words, are you asking that I give a

limiting instruction?

(T. I. 12-13), *but see* ***Scruggs***, 756 So. 2d at 821 ("The evidence may not be used to show the Defendant acted in conformity with these bad acts."), *and* ***MRE 404(b)*** ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith.").

Based on the above colloquy, the trial judge was made explicitly aware of the fact that the prosecution intended to use the testimony of a convicted felon turned Confidential Informant as substantive proof of guilt. In responding to the prosecutor's assertion that the ***MRE 404(b)*** material was proposed to be used as substantive evidence of guilt, and not solely as credibility impeachment material, the trial judge appeared attempted to correct the State's misperception that propensity evidence is perfectly acceptable under the law by immediately interjecting the question, "In other words, are you asking that I give a limiting instruction?" (T. I. 12-13). Allowing this testimony would necessarily involve allegations of uncorroborated and unspecified prior drug transactions between the CI and the Defendant as a means of proving Ms. Liddell's guilt of the present charge. (T. I. 12-13, 71, 48). Despite the extreme risk of prejudice, however, the trial judge in ruling that the use of this testimony was to be allowed simply stated, "that the probative value outweigh[ed] the prejudicial affect [sic]." (T. I. 18).

Although the standard of review of a trial judge's balancing under ***MRE 403*** is generally very deferential, *see, e.g.*, ***Jones***, 904 So. 2d at 152 ("The task of an appellate court in reviewing . . . a determination [that the probative value outweighs the prejudicial affect] is not to conduct its own *de novo* ***MRE 403*** balancing, but simply determine whether the trial court abused its discretion in weighing the factors and in admitting or excluding the

evidence."), the trial judge's discretion is not without its bounds. *See, e.g.*,***Carter v. State***, 953 So. 2d 224, 233 (Miss. 2007) ("[W]hile a judge's on-the-record analysis is recommended as it serves to fortify the judge's position for purposes of review, the lack of such analysis is harmless unless we deem the evidence to be patently prejudicial.") (quoting ***Jones v. State***, 920 So. 2d 465, 476 (Miss. 2006)).

Based on the record in the present case, the Appellant respectfully submits that the trial judge did not make an on-the-record finding supported by a factual basis of why the probative value of the prior transaction testimony outweighed its probative value. (T. I. 18). However, in reaching that bare conclusion, considering the complete absence of probative value of the prior transaction testimony to establish the element of "intent," which was completely irrelevant to the charge in this case, as compared to the high potential for unfair prejudice, the Appellant contends that it is clear that the trial judge abused his discretion by failing to actually balance the probative value of the evidence, when used for the purposes offered, against the extreme potential for prejudice. ***Jenkins***, 507 So. 2d at 93.

Therefore, the trial judge abused his discretion by failing to perform a proper on-the-record balancing of interests as required by ***MRE 403***, and patently prejudicial testimony was improperly admitted. ***Jones***, 920 So. 2d at 476 ("[T]his Court certainly expects trial judges to have considered Rule 403 in making their evidentiary rulings.").

3. Although juries are generally deemed to have followed limiting instructions, it would be nothing more than a "legal fiction" to believe that the jury could ignore all of the highly prejudicial statements presented in this case, and the extreme rapidity by which the jury reached its verdict collaborates the likelihood of improper use of the evidence

The culmination of the error surrounding the admission of the Confidential Informant's alleged prior transaction testimony was that the trial judge, in a fruitless attempt to limit the

jury's consideration of the testimony to what the trial judge deemed to be appropriate purposes under ***MRE 404(b)***, gave a limiting instruction, drafted by the State, which read as follows:

> The witness Dustin Purser, who just left the witness stand, has testified concerning prior drug transactions with the defendant. This testimony is not to be considered by you as proof of guilty [sic]. Rather, this testimony should only be considered by you as proof of the defendant's intent, plan and/or identity of the defendant.

(T. I. 87) (emphasis added).

However, for the reasons set out hereinbelow, this limiting instruction was improper and/or ineffective, resulting in unfair prejudice to the Appellant and error by the trial court for which this honorable Court should reverse and remand this case with proper instructions for a new trial.

*A. The limiting instruction given in this case was improper because it allowed the jury to consider evidence for an improper purpose, and because this improper purpose necessarily created ambiguity.*

It is a well settled rule in Mississippi that "the law presumes the jury . . . follows instructions they are given." ***Wilson v. State***, No. 2007-KA-01532-COA, 2008 WL 5146148 (*decided* December 9, 2008) (*quoting* ***Curry v. State***, 939 So. 2d 785, 790 (Miss. 2006)). However, in some instances, such as the present case, applying the presumption that a jury followed an instruction leads to an entirely different and troubling question: what happens when a jury follows an instruction that tells them to consider highly prejudicial evidence for an improper, erroneous, and irrelevant purpose?

Discussing the necessity of a proper limiting instruction when dealing with evidence of prior "bad acts," the Mississippi Supreme Court stated that "the jury must be informed as to the limited purpose for which they are allowed to consider the other-crimes evidence. This cannot be accomplished if 'its probative value is substantially outweighed by the danger of

unfair prejudice, confusion of the issues, or misleading the jury.'" ***Flowers v. State***, 842 So. 2d 531, 540 (Miss. 2003) (emphasis added). Therefore, if a trial judge admits evidence that should have been excluded under the terms of ***MRE 403***, then any limiting instruction given will not be sufficient to "inform[ ] [the jury] as to the limited purpose for which they are allowed to consider the other crimes evidence." ***Flowers***, 842 So. 2d at 450. Alternatively, even if the evidence was properly admitted under ***MRE 403***, it is possible for a judge to abuse his discretion by giving an impermissibly broad jury instruction. *See, e.g.*, ***Scruggs***, 756 So. 2d 817, 822 (implying that a jury instruction listing all of the permissible uses of prior bad act testimony under ***MRE 404(b)*** could be improper given a timely objection).

In Ms. Liddell's case, defense counsel made a continuing objection to the admission of the prior bad act testimony, "including the limiting instruction . . . ." (T. I. 17). Therefore, a challenge to the propriety of the limiting instruction is properly raised on direct appeal. Applying the law to the facts of this case, if the Court finds that the prior bad act testimony should not have been admitted, either under ***MRE 404(b)*** or ***MRE 403***, then ***Flowers*** makes clear that the limiting instruction was *per se* ineffective. ***Flowers***, 842 So. 2d at 450.

Alternatively, however, even if the Court determines that the prior bad act testimony was properly admitted, because it necessarily confused the jury by instructing them to use the prejudicial evidence to prove a fact that played no substantive part in the present charge, and because the limiting instruction did not limit the jury's use of the evidence to the single purpose for which the State offered it - to show a common plan - the limiting instruction was improper. *See* ***Swington***, 742 So. 2d at 1112 (stating that prior bad act testimony admitted under ***MRE 404(b)*** must "pass[ ] muster under M.R.E 403 and [be] accompanied by a proper limiting instruction.") (quoting ***Smith v. State***, 656 So. 2d 95, 99 (Miss. 1995)). As such, the

jury was permitted to use highly prejudicial testimony for improper purposes, and, as a result, the Defendant was unfairly prejudiced.

*B. Even if the limiting instruction was proper, it is highly likely that the jury improperly used the prior transaction testimony as proof of the Defendant's guilt.*

Finally, even assuming that the Court finds all of the other alleged errors surrounding the Confidential Informant's testimony regarding alleged prior drug transactions with the Defendant to be without merit, it is still highly likely that the facts from the record surrounding the jury's verdict are sufficient to demonstrate that the jury did not follow the limiting instruction, but, rather, used the prior transaction testimony as proof of guilt.

As stated above, the general rule is that a jury is presumed to have followed the jury instructions. ***Wilson***, 2008 WL 5146148, at *5. However, as with most presumptions, there are times when the facts are sufficient to rebut the presumption. *Id.* ("Wilson presented no evidence to rebut this presumption or to suggest that the jury did not follow the given instruction . . . .").

In the present case, as is discussed, *infra*, in Issue Three, the weight of the evidence in support of a guilty verdict was nominal at best. However, even so, the twelve person jury was able to reach a unanimous verdict of guilty only four minutes after the jury recessed to deliberate. (T. II. 146-47).[3] Common sense suggests that, in order for twelve people to agree unanimously on guilt in less time than it would have taken a group that size to decide on what to eat for dinner, the evidence of guilt must have been overwhelming. However, because the evidence in this case, when used properly, was not so great that reasonable minds could not

[3]Although the record indicates that the jury recessed at 5:50 p.m. and returned with a verdict only four minutes later at 5:54 p.m. (T. II. 146-47), the Clerk's Papers state that the jury recessed at 5:59 p.m. and returned with a verdict eleven minutes later at 6:10 p.m. (CP. 70, RE. ___).

disagree as to the proper outcome, it is very likely that the jury considered the Confidential Informant's highly prejudicial prior transaction testimony as proof that the Defendant committed the crime charged. *Cf.* ***Weeks v. Angelone***, 528 U.S. 225, 235 (2000) (using the fact that the jury deliberated for two hours after asking the judge a question about the proper application of a jury instruction as evidence that the jury most likely complied with the instruction.).

Because ***Weeks*** provides a basis under which an appellate court can look at the length of jury deliberations as a means of determining the likelihood that the jury followed its instructions, the Appellant respectfully requests this honorable Court to consider the unbelievable brevity of the jury's deliberations, keeping in mind the comparative weakness and lack of overwhelming proof of guilt of the State's case-in-chief, as proof that the jury improperly convicted Ms. Liddell based on the biased Confidential Informant's improper testimony. Failure to do so would result in prejudice to the Appellant because it is nothing more than a "legal fiction" to presume that the jury could, and in fact did, ignore the onslaught of non-specific, self-serving statements by a biased Confidential Informant, such as "I'd run over there six, seven, eight times a day to buy dope from her every day for months," (T. I. 81) (emphasis added), when determining Ms. Liddell's guilt.

4. Conclusion.

In sum, the above analysis makes it clear that Ms. Liddell did not receive the fair trial to which she is entitled under the law. First, Ms. Liddell was unfairly prejudiced when the trial judge erroneously admitted prior transaction testimony by a biased Confidential Informant that, after an analysis under Mississippi law, could not have properly been admitted. Furthering the prejudice, the record makes clear that, regardless of the judge's determination of admissibility

under ***MRE 404(b)***, the judge still had an absolute duty to actually weigh the probative value of the proposed testimony against the clear danger of unfair prejudice. However, based on the record, the trial judge clearly failed to perform this duty, resulting in improper admission of prejudicial testimony. Finally, although a jury instruction is a generally accepted method for limiting harm caused by prior bad act testimony, in the present case, as the record substantiates, it would be no more than a "legal fiction" to believe that the jury did not use the improperly admitted prior transaction testimony as proof of Ms. Liddell's guilt on this charge.

Therefore, based on the foregoing arguments, the Appellant, Brenda Liddell, respectfully requests this honorable Court to reverse the jury's verdict and the sentence handed down by the lower court, and to remand with proper instructions for a new trial.

## ISSUE TWO:

## WHETHER THE APPELLANT WAS DENIED HER SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL DUE TO HER ATTORNEY'S FAILURE TO TIMELY RAISE OBJECTIONS TO IMPROPER STATEMENTS, HIS INSUFFICIENT ADVICE TO THE APPELLANT REGARDING WHETHER SHE SHOULD TESTIFY, AND THE CUMULATIVE PREJUDICIAL EFFECT OF DEFENSE COUNSEL'S DEFICIENT PERFORMANCE AT TRIAL.

The second issue presented to this honorable Court is whether Ms. Liddell was denied her constitutional right to effective assistance of counsel. The Sixth Amendment guarantees the assistance of counsel to frame a defense for the accused in all criminal proceedings. This right to counsel is enumerated in both the United States and Mississippi Constitutions. ***U.S. CONST. amend. VI; MISS. CONST. art. III, § 26.*** The right to counsel in a criminal prosecution is not an "illusional theory but a genuine positive command without which due process of law is impossible." ***Mid State Homes, Inc v. Zumbro,*** 229 So. 2d 53 (Miss. 1969) The appropriate standard of review for constitutional issues is *de novo*. ***Baker v.***

*State*, 802 So. 2d. 77, 80 (Miss. 2001).

In ***Strickland v. Washington***, the Supreme Court of the United States established a two-prong test for determining ineffective assistance of counsel. ***Strickland v. Washington***, 466 U.S. 668 (1984). The test to be applied is in cases involving alleged ineffectiveness of counsel is whether an appellant can show (1) deficient performance and, if so, (2) whether the deficient performance prejudiced the defendant. ***Leatherwood v. State***, 473 So. 2d 964, 968-69 (Miss. 1985). The burden is on the appellant to establish both prongs. ***Id.*** The Mississippi Supreme Court adopted the ***Strickland*** test in ***Stringer v. State***, 454 So. 2d 468 (Miss. 1984).

There is a strong but rebuttable presumption that counsel's conduct falls within the range of reasonable professional assistance. ***Gilliard v. State***, 462 So. 2d 710, 714 (Miss. 1985). An appellate court "must strongly presume that counsel's conduct falls within a wide range of reasonable professional assistance, and the challenged act or omission 'might be considered sound trial strategy.'" ***Bennett v. State***, 990 So. 2d 155, 158 (Miss. 2008). If an attorney's representation is within "the broad spectrum of reasonable professional assistance[,]" then the first prong of ***Strickland*** has been satisfied and the performance was not deficient. ***Stringer***, 454 So. 2d at 468. The second prong of ***Strickland*** requires a showing that there is a "'reasonable probability' that, but for counsel's unprofessional errors, the result of the proceedings would have been different." ***Mohr v. State***, 584 So. 2d 426, 430 (Miss. 1993).

The Constitution does not ensure an errorless trial, but it does guarantee a fair trial. ***Howell v. State***, 891 So. 2d 136 (Miss. 2004). Strategic decisions are presumed to be reasonable. ***Cabello v. State***, 989 So. 2d 372 (Miss. 1988). The reviewing court bases its decisions as to whether counsel's efforts were effective on the totality of the circumstances surrounding each case. ***Walker v. State***, 506 So. 2d 273, 275 (Miss. 1987).

In Ms. Liddell's case, counsel was deficient in three specific and related instances: First, there was continuous improper admission of references to prior acts of Ms. Liddell that did not fall under the intent exception. ***MRE 404(b)***.[4] Second, defense counsel did not object to vague and misleading jury limiting instructions, nor did defense propose any modification to the jury instructions. Third, defense counsel misstated a fact during sentencing that prejudiced the Defendant. The individual and certainly the cumulative effect of defense counsel's errors and omissions resulted in no challenge to the State's weak case against Ms. Liddell and ultimately prejudiced the defense.

1. Defense Counsel's performance was deficient.

*A. Improper testimony: failure to object or strike from record.*

Throughout Ms. Liddell's trial, defense counsel allowed improper testimony to be repeatedly presented to the jury. When this improper testimony was admitted, defense counsel failed to move the trial court for a limiting instruction to the jury, or to have the testimony struck from the record. Attorneys are afforded wide latitude in arguing their cases to the jury but are not allowed to employ tactics which are inflammatory, highly prejudicial, or reasonably calculated to unduly influence the jury. ***Sheppard v. State***, 777 So. 2d 659, 661 (Miss. 2000). In ***Seeling v. State***, 844 So. 2d 439, 445 (Miss. 2003), the court stated that "fundamental rights in serious criminal cases rise above mere rules of procedure." ***Id.*** (citing ***Brooks v. State***, 46 So. 2d 94, 97 (Miss. 1950)). In ***Brooks***, the appellant's conviction was reversed where defense counsel made no objection to "highly improper and prejudicial" tactics and questions of the

[4]***MRE 404(b)*** states: "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

State. The court noted "[i]f objections had been made on the questions pointed out above, and such objections had been overruled, a reversal would be obvious." ***Brooks v. State***, 46 So. 2d at 96.

As discussed at length in Issue One, *supra*, the prosecution's key witness's testimony was largely based on prior "bad acts." Defense counsel's failure to object to the most damaging piece of evidence presented against Ms. Liddell was a deficiency which contributed to the denial of a fair trial. In ***Holland v. State***, 656 So. 2d 1192 (Miss. 1995), the Defendant was convicted for possession of cocaine with the intent to distribute. The court held that evidence of past drug sales was insufficient to establish intent to distribute. Counsel was ineffective in failing to renew his motion for directed verdict on the grounds of insufficiency of evidence of intent to distribute. ***Id.*** Under the circumstances, counsel's inefficiency constituted prejudicial error. ***Id.*** The statement regarding Liddell's alleged prior transactions with the confidential informant were so egregious that they too rose to the level of prejudicial error. (T. I. 81).

Further improper testimony came from Agent Hawkins when he improperly assumed the role of an "expert witness" and testified to behavior "common to drug violators."

By Louis Hawkins: Now, based on my experience and training, that's very common for drug violators to do. They will commonly not take the money. They'll have the money given to somebody else or have - -

By Mr. Johnson: I have an objection, Your Honor, as to what he just testified as to whether he has personal knowledge of. He's not been certified an expert in this case . . . .

By the Court: Sustained. With his being a mere fact witness, he shall stick with the facts.

(T. I. 28) (emphasis added).

Despite defense counsel's objection having been sustained, he failed to have Agent Hawkins' statements stricken from the record, to request a limiting instruction to the jury to disregard this highly prejudicial testimony, or to move for a mistrial based on witness misconduct. (T. I. 28-9). In fact, Agent Hawkins continued with "expert-type" testimony regarding various narcotics. (T. I. 30) ("Xanax is a schedule IV depressant called Phazalone (typed as sounded) . . . . A drug called 'ecstasy,' which is methylenedioxymethamphetamine, and that is a hallucinogenic.").

The Mississippi Supreme Court has held that it is possible for an expert in a area of knowledge to give a lay opinion, but not if the witness is operating in his professional capacity. ***O'Neal v. State***, 977 So. 2d 1252, 1256 (Miss. Ct. App. 2008). Where a witness is to give testimony derived from specialized knowledge gained by education or experience, the testimony is not lay opinion testimony. ***Id.*** The Mississippi Supreme Court has stressed the importance that we not blur the line between ***MRE 701*** and ***MRE 702*** so that the responding party has sufficient notice and an opportunity to prepare a rebuttal. ***Id.*** (stating that an orthopedic surgeon should have been qualified as an expert witness and should not have given a lay opinion under ***MRE 701*** because he was acting in his professional capacity). In Ms. Liddell's case, Agent Hawkins' testimony regarding common behavior of drug dealers blurred the line between an expert and a fact witnesses. Defense counsel objected only once, did not attempt to pursue excluding this highly prejudicial evidence, did not attempt to move the trial court have the testimony stricken from the record, failed to move for a mistrial, and then

permitted the improper testimony to continue without nay further objection. (T. I. 28-30).

*B. The limiting instructions given to the jury before the sentencing phase were misleading and the sole work of the prosecution without input from defense counsel.*

Defense counsel was reasonable in objecting to the Confidential Informant's testimony regarding alleged prior transactions with Ms. Liddell (T. I 81), but defense counsel's reasonableness ended there. The judge asked the prosecution to create a limiting instruction for the jury regarding proper use of the CI's prior transaction testimony. (T. I. 15-16). Defense counsel failed to request language be added to the instructions and to object to the format of the jury instructions implicating the jury's use of this highly prejudicial, misleading, and inflammatory evidence. Defense counsel agreed for the trial judge to give only the following simplistic limiting instruction after the fact of the improper "propensity" testimony:

> By the Court: The witness Dustin Purser, who just left the witness stand, has testified concerning prior drug transactions with the defendant. This testimony is not to be considered by you as proof of guilty [sic]. Rather, this testimony should be only considered by you as proof of the of the defendant's intent, plan and/or identity of the defendant.

(T. I. 87).

While it is well-established in Mississippi case law that the jury is presumed to follow limiting instructions, the result in this case implies that these instructions were not followed, nor even taken seriously by the jury. The State presented a weak case containing very little direct or circumstantial evidence other than the Confidential Informant's improper testimony. The fact that the jury spent significantly less than ten minutes in "deliberations" before returning its verdict of guilt is evidence of the jury's disregard of the limiting instruction. (T.

II. 146-47). Additionally, the timing of the limiting instruction (after the entire line of testimony concerning these other "bad acts" evidence had been heard, believed, and arranged in the mind by the jury) was patently ineffective and is further evidence of the jury's total disregard of the trial judge's oversimplified limiting instruction. (T. I. 86-87).

*C. Defense counsel misstated fact during sentencing phase that legally prejudiced the Defendant.*

In a previous trial on October 25, 2007, Ms. Liddell was convicted of sale of cocaine and "sentenced to ten years in prison, with five suspended." ***Liddell v. State***, No. 2008-KA-00021-SCT (*decided* March 5, 2009) (emphasis added). In the instant case before this honorable Court, during the sentencing phase defense counsel misstated to the trial judge the actual length of Ms. Liddell's previous sentence. The colloquy at sentencing went as follows:

By the Court: An[d], again, the sentence for the one for which she was found guilty was what?

By Mr. Johnson: Five years, she's currently serving.

(T. II. 158) (emphasis added).

The trial court relied on defense counsel's statement of Ms. Liddell's previous sentence in deciding the amount of time given for the instant case, as no pre-sentence report was ordered by the trial court in the case at bar.

By the Court: The Court hereby, in light of the previous sentence given, the Court will make the sentence less. The sentence is three years, but it shall run consecutively to the sentence that has been previously imposed.

(T. II. 160) (emphasis added).

Because defense counsel misstated Ms. Liddell's sentence to the court, the trial judge

did not have the information to correctly consider an appropriate sentence under the true circumstances that existed at the time. The trial judge implied that he wanted to give a lighter sentence in congruence with the previous sentence, but defense counsel failed to correctly inform the trial judge of Ms. Liddell's previous sentence. (T. II. 158). Misstating such an important fact during the sentencing phase of trial was clearly deficient performance by the defense counsel.

2. Defense counsel's cumulative errors and omissions at trial constituted deficient performance, which prejudiced the Appellant.

Defense counsel committed errors and omissions that reached the ***Strickland*** standard of deficient performance. This Court must analyze the probable impact of the errors and omissions on the fairness of Ms. Liddell's trial. ***Waldrop v. State***, 506 So. 2d 273, 276 (Miss. 1987). This analysis should be based on the totality of the circumstances, ***Id.*** at 275. In ***Stewart v. State***, the court reversed a conviction where defense counsel failed to ask any questions, lodge any objections, call any witnesses, or request any instruction. ***Stewart v. State***, 229 So. 2d 53, 55 (Miss. 1969).

In the instant case, defense counsel's objections were merely a gloss over his deficient trial performance. Even when the judge sustained an objection, nothing was stricken from the record, and the prosecution continued the actions at which defense counsel's objection were directed. Decisions regarding which witness to call are within the gambit of trial strategy. ***Easter v. State***, 878 So. 2d 10 (Miss. 2004). Defense counsel's decision to call Ms. Bogan as the single witness for the defense may be viewed as "trial strategy"; however, looking through the lens of a reasonable attorney this was an unreasonable strategy that was contradictory and contrary to Ms. Liddell's best interests in defending the case. Ms. Bogan's testimony only

aided the prosecution's case, in that her testimony established that Ms. Bogan had previously been convicted as having acted as a "runner" in a drug transaction that took place at the same location as the alleged transaction for which Ms. Liddell was on trial. (T. II. 111-12).

Furthermore, defense counsel failed to adequately prepare Ms. Liddell for the rigors and choices of trial. The trial judge actually had to counsel Ms. Liddell during the trial about her choice of whether or not to testify. (T. II. 120-121). Whether this was due to lack of pre-trial preparation or complete lack of trial planning or strategy, defense counsel's deficient performance prejudiced the Appellant's defense of her case and the resulting sentence.

Both the improper testimony and the lack of preparation are clear examples of ineffective assistance of counsel. This evidence establishes multiple prejudicial deficiencies in counsel's performance that warrant reversal, under a properly applied totality of the circumstances test, of the guilt verdict for unconstitutionally ineffective assistance of counsel. ***Moore v. Johnson***, 194 F.3d 586 (5th Cir. 1999). Therefore, the Appellant submits that this case should be reversed and remanded to the lower court for a new trial.

## ISSUE THREE:

## WHETHER THE TRIAL COURT ERRED WHEN IT FAILED TO SUSTAIN APPELLANT'S MOTION TO SET ASIDE THE JURY'S VERDICT AS LEGALLY INSUFFICIENT, OR, IN THE ALTERNATIVE, FOR FAILING TO GRANT THE MOTION FOR A NEW TRIAL AS THE JURY'S VERDICT WAS CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE.

1. The evidence presented against Ms. Liddell by the State of Mississippi was legally insufficient and a directed verdict should have been granted by the trial court.

This is a case where the Appellant was denied a fair trial due to improper, contradictory, and biased testimony as well as ineffective defense counsel. The State did not provide credible evidence to prove the crime of selling a controlled substance beyond a

reasonable doubt. Brenda Liddell, the Appellant herein, was unjustly convicted on April 4, 2008, based solely on the contradictory and improper testimony of the Confidential Informant. The State failed to offer evidence at trial, which would prove that Brenda Liddell met the elements of selling, transferring, or delivering cocaine with the requisite elements of proof required by the law. In essence, the State failed to conclusively prove, beyond a reasonable doubt, the essential element of identity, through either direct or circumstantial evidence.

The standard of appellate review for challenges to the legal sufficiency of the evidence is articulated in ***Bush v. State,*** 895 So. 2d 836, 843 (Miss. 2005). In ***Bush***, the Court restated that "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ***Id.*** at 843 (citing ***Jackson v. Virginia***, 443 U.S. 307, 315 (1979)). The Court emphasized that:

> [s]hould the facts and inferences considered in a challenge to the sufficiency of the evidence "point in favor of the defendant on any element of the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty," the proper remedy is for the appellate court to reverse and render.

***Id.*** (citing ***May v. State***, 460 So. 2d 778, 781 (Miss. 1984)) (emphasis added).

Ms. Liddell was indicted, convicted, and sentenced under ***Miss. Code Ann. § 41-21-139(a)(1)***, which reads as follows:

> Except as authorized by this article, it is unlawful for any person knowingly or intentionally to sell, barter, transfer, manufacture, distribute, dispense or possess with intent to sell, barter, transfer, manufacture, distribute, or dispense a controlled substance.

***Miss. Code Ann. § 41-21-139(a)(1)*** (supp. 2006).

The language of the statute indicates that, for a person to be convicted of selling a schedule II controlled substance, three elements must be met. The elements are (1) that a felony has knowingly or intentionally been committed; (2) the person sold, bartered, transferred, manufactured, distributed, dispensed or possessed a controlled substance; and (3) that such action was carried out with the knowledge and intention to sell, barter, transfer, manufacture, distribute, or dispense a controlled substance. ***Miss. Code Ann. § 41-21-139(a)(1)***.

In the case at hand, there is no credible evidence that shows beyond a reasonable doubt, or even close to that standard, that Ms. Liddell met the second element of the crime and knowingly and intentionally sold cocaine to a Confidential Informant. Evidence of some act by the Appellant that she sold, transferred, or delivered a controlled substance must be presented to prove the element of selling cocaine. ***Clayton v. State***, 582 So. 2d 1019, 1022 (Court held that evidence of cocaine residue was too speculative to convict the defendant of intent to distribute). In the indictment, the State alleged that the elements of selling cocaine were met. (CP. 5, RE. __). However, at trial, there was no evidence presented by the State showing that the crime was actually committed by the Appellant.

In the trial court, the prosecution attempted to prove the second element of the crime through the testimony of Agent Hawkins and the Confidential Informant. First, the prosecution elicited expert type testimony from Agent Hawkins regarding drugs and drug transactions when he was not qualified as an expert. Second, through the testimony of the CI, the State implied that previous alleged drug transactions were proof of guilt for the act in question. (T. I. 52). Any attempt to use inferences of prior bad acts by the Appellant cannot be used by the prosecution as proof of guilt. *See* ***MRE 404(b)***. Through such evidence, the State cannot prove

that Ms. Liddell met the elements of selling, bartering, transferring, or delivering certain controlled substance to the CI. Because of the improper testimony of Agent Hawkins and the CI, the prosecution's assertions are simply legally insufficient to sustain the crime charged in the indictment in this case. Even taking the evidence presented by the State in the light most favorable to the prosecution's case, the weak testimony presented by the Confidential Informant did not, and does not, prove any element beyond a reasonable doubt of the allegation against the Appellant of selling a controlled substance that night. The State's failure to present any legally competent evidence that would prove that it was Ms. Liddell who allegedly sold a controlled substance beyond a reasonable doubt was error and the Appellant contends that the resulting conviction should be reversed.

The facts presented do not prove beyond a reasonable doubt that Ms. Liddell "knowingly and intentionally" sold cocaine on the date listed in the indictment, as aforesaid. As a result of this insufficiency in the evidence, the State failed to meet its burden in proving all three elements of the crime of selling cocaine. The Appellant's subsequent conviction was not proved by credible evidence beyond a reasonable doubt and without legally sufficient testimony, the State is unable to prove the elements of the crime of selling a controlled substance. In regards to the requirements of legal sufficiency under ***Bush***, no rational trier of fact could have found that the essential elements of the crime were met beyond a reasonable doubt in this case. ***Bush***, 895 So. 2d at 843. Due to the State's failure to prove, by legally competent and credible evidence, both the essential elements of selling a controlled substance statute, the Appellant herein respectfully requests that this Court reverse the verdict of the jury, render judgment on her behalf, and discharge her from custody.

2. The jury's verdict was against the overwhelming weight of the evidence, and, as such, the trial court should have granted the Appellant's motion for a new trial.

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

> A reversal on the grounds that the verdict was against the overwhelming weight of the evidence, unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict. Rather, as the "thirteenth juror," the court simply disagrees with the jury's resolution of the conflicting testimony. This difference of opinion does not signify acquittal any more than a disagreement among the jurors themselves. Instead, the proper remedy is to grant a new trial.

***Id.***

In the context of a defendant's motion for new trial, although the circumstances warranting disturbance of the jury's verdict are "exceedingly rare," such situations arise where, from the whole circumstances, the testimony is contradictory and unreasonable, and so highly

improbable that the truth of it becomes so extremely doubtful that it is repulsive to the reasoning of the ordinary mind. ***Thomas v. State***, 92 So. 225, 226 (1922). Though this standard of review is high, the appellate court does not hesitate to invoke its authority to order a new trial and allow a second jury to pass on the evidence where it considers the first jury's determination of guilt to be based on extremely weak or tenuous evidence, even "where that evidence is sufficient to withstand a motion for a directed verdict." ***Dilworth***, 909 So.2d at 737.

Applying the above standard to the case at bar, it would appear that this case is one in which the jury's verdict, whether tainted by improper evidence or not, was against the overwhelming weight of the evidence. The State presented evidence that an admittedly biased Confidential Informant, who needed the money that he would only receive if he was able to purchase drugs for the MBN, went to a neighborhood full of drug dealers and purchased some crack cocaine. (T. I. 69-71, 74-75). In addition, the prosecution presented evidence that the CI went to 1002 Clark Cove, that Ms. Liddell allegedly answered the door and let him in, that he placed $150 on the counter in the trailer, that the CI then left the trailer and waited in his vehicle until Catherine Bogan threw the crack cocaine out to him. (T. I. 50-53). Based on this evidence, there is at least some doubt as to whether Ms. Liddell, Ms. Bogan, or maybe even some other person had actually sold the drugs to the CI. In fact, the only person that the CI was able to affirmatively identify as having handled the drugs at all was Ms. Bogan; however, based solely on the unsubstantiated allegations of a CI who, based on testimony presented at trial, likely had a personal bias against Ms. Liddell for having allegedly sold him "bad dope" in the past. (T. I. 46-48).

Considering the weaknesses of the State's case, which the trial judge described as minimally presented a prima facie case (T. II. 100), there must be some other explanation to explain how a jury of twelve individuals could convict Ms. Liddell in only four minutes. (T. II. 146-47). Based on all of the testimony presented at trial, the most likely explanation for the short deliberations leading to a finding of guilt beyond a reasonable doubt, is that the jury must have been swayed by the Confidential Informant's unsubstantiated allegations of prior drug transactions, such as "I'd run over there six, seven, eight times a day to buy dope from [Ms. Liddell] every day for months." (T. I. 81). Thus, rather than having been convicted based on the evidence properly presented to the jury, Ms. Liddell was convicted based on an assumption by the jury that Ms. Liddell supposedly sold drugs in the past, so she must have sold drugs in this instance. The Court, sitting as the "thirteenth juror should reject the finding of guilt by the jury because viewing the evidence in the light most favorable to the verdict, it cannot be said that the verdict was a product of anything but bias, prejudice, and passion.

Based on the foregoing reasons, because the jury's verdict was against the overwhelming weight of the evidence, the Appellant respectfully requests this honorable Court to reverse the verdict of the jury and the sentence handed down by the lower court and remand this case with proper instructions for a new trial.

## CONCLUSION

The Appellant herein submits that based on the propositions cited and briefed hereinabove, together with any plain error noticed by the Court which has not been specifically raised, the judgment of the trial court and the Appellant's conviction and sentence should be reversed and vacated, respectively, and the matter remanded to the lower court for a new trial

on the merits of the indictment on a charge of murder, with instructions to the lower court. In the alternative, the Appellant herein would submit that the judgment of the trial court and the conviction and sentence as aforesaid should be vacated, this matter rendered, and the Appellant discharged from custody, as set out hereinabove. The claims of error in this issue is brought by the Appellant under ***Article 3, Sections 14, 23, and 26 of the Mississippi Constitution*** and the ***Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution***. The Appellant further states to the Court that the individual and cumulative errors as cited hereinabove are fundamental in nature, and, therefore, cannot be harmless.

Respectfully submitted,

**Brenda Liddell**, Appellant

**by:** _____

**Laurel Blue**, Esq., Law Student/Special Counsel
Criminal Appeals Clinic
The University of Mississippi School of Law
Lamar Law Center
Post Office Box 1848
University, MS 38677-1848
Telephone: 662.915.5560
Facsimile: 662.915.6842

_____

**E. Daniel Martin**, Esq., Law Student/Special Counsel
Criminal Appeals Clinic
The University of Mississippi School of Law
Lamar Law Center
Post Office Box 1848
University, MS 38677-1848
Telephone: 662.915.5560
Facsimile: 662.915.6842

_____

**Leslie S. Lee**, Esq., Director, MSB [redacted]
Mississippi Office of Indigent Appeals
301 N. Lamar Street, Suite 210
Jackson, MS 39201

and

_____

**Phillip W. Broadhead,** Esq., MSB [redacted]
Criminal Appeals Clinic
The University of Mississippi School of Law
520 Lamar Law Center
Post Office Box 1848
University, MS 38677-1848
Telephone: 662.915.5560
Facsimile: 662.915.6842

## CERTIFICATE OF SERVICE

I, Phillip W. Broadhead, Criminal Appeals Clinic Professor and attorney for the Appellant herein, do hereby certify that I have this day mailed postage fully pre-paid/hand delivered/faxed, a true and correct copy of the foregoing Brief of Appellant to the following interested persons:

**Honorable Kenneth L. Thomas**, Senior Circuit Court Judge
11th JUDICIAL DISTRICT
Post Office Box 548
Cleveland, Mississippi 38732;

**Laurence Y. Mellen, Esq.**, District Attorney
and
**Jennifer Musselwhite, Esq.**, Assistant District Attorney
and
Post Office Box 2514
Tunica, Mississippi 38676;

**Jim Hood, Esq.**
ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI
Post Office Box 220
Jackson, Mississippi 39205; and,

**Ms. Brenda Liddell**, Appellant
MISSISSIPPI DEPARTMENT OF CORRECTIONS
Pearl, Mississippi

This the 3RD day of APRIL, 2009.

**Phillip W. Broadhead**, MSB [redacted]
Certifying Attorney