NO. 2008-KA-00944

PATRICIA ANN BROWN

APPELLANT

VERSUS

STATE OF MISSISSIPPI

APPELLEE

CERTIFICATE OF INTERESTED PARTIES

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

1. Patricia Ann Brown, Appellant;

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

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

4. State of Mississippi, Appellee; and

This the 17 day of November, 2008.

Jim Waide

JIM WAIDE

State Cases:

Federal Cases:

State Cases:

Federal Cases:

1. The indictment was insufficient to alert Ms. Brown to the nature of the charge. Thus, the conviction violated her rights under the Sixth and Fourteenth Amendments to the United States Constitution, and under Mississippi Constitution, Art. 3, § 26.

2. Ms Brown's Fourteenth Amendment right to due process was violated and her trial was rendered fundamentally unfair by the prosecutor presenting the following inadmissible and prejudicial evidence to the jury:

   A. Evidence that Ms. Brown, who is white, had an illicit and immoral sexual relationship with her co-defendant, who is black;

   B. Evidence that Ms. Brown's co-defendant pled guilty to the charge for which they were both indicted; and

   C. Evidence that crack cocaine was found inside the residence and evidence from an officer that he believed Ms. Brown was in part responsible for the cocaine found in the residence.

3. The prosecutor's decision to treat Brown more harsh than her co-defendant because she refused to plead guilty violates her Fourteenth Amendment equal protection rights; and

4. Ms. Brown's mandatory life sentence is grossly disproportionate to her crime and a violation of the Eighth Amendment which forbids cruel and unusual punishment.

Patricia Ann Brown and Julius E. Holesome were jointly indicted by a Pontotoc County Grand jury. The indictment charged that

> ... on or about the 5th day of January, A.D., 2007 [Brown and Holesome], did wilfully, unlawfully and feloniously have in their possession a quantity of Cocaine, a schedule II Controlled Substance, said quantity being greater than .10 gram but less than 2 grams, in violation of Mississippi Code, Annotated, Section 41-29-139 and in violation of the Uniform Controlled Substance Act of the State of Mississippi;

R. 6.

Holesome was indicted as an habitual offender under Miss. Code Ann. § 99-19-83, which provides for a mandatory life sentence for those convicted of a third felony where one of the prior felonies was a crime of violence. R. 6-8. Ms. Brown was charged as an habitual offender under Miss. Code Ann. § 99-19-81, which provides for the statutory maximum term of imprisonment for those convicted of a third felony. R. 8-9.

On December 12, 2007, the indictment was amended "to delete the habitual offender enhancement language in the indictment as it relates to defendant Julius E. Holesome." R. 47. On that same day, Holesome entered a plea of guilty to the charge and was sentenced to serve a term of eight years imprisonment. R. 47-50; 62-64.[1]

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[1]The statutory maximum for possession of Schedule II Controlled Substance of more than

habitual statute against Brown from that of Miss. Code Ann. § 99-19-81 to that of Miss. Code Ann. § 99-19-83, in light of the fact that one of Brown's previous convictions was for a crime of violence. R. 53. This changed the sentence, in the event of conviction, from eight years to mandatory life without parole.

Unlike co-defendant Holesome, Ms. Brown refused to pled guilty and a Pontotoc County jury found her guilty on April 9, 2008. R. 116;121.

A hearing to determine her habitual offender status was held on April 10, 2008. TT. 362-90. The Court found that the elements of Miss. Code Ann. § 99-19-83 were met and that one of her prior convictions was a crime of violence. TT. 385-86. The Court then sentenced Ms. Brown to serve a term of life imprisonment in the custody of the Mississippi Department of Corrections without being eligible for parole, probation or any other form of sentence reduction. TT. 390; R. 122.

Ms. Brown's trial attorney filed a motion for judgment of acquittal or for a new trial on April 17, 2008. R. 127-38. On April 21, 2008, Ms. Brown filed a *pro se* motion for JNOV or for a new trial. R. 132. On April 30, 2008, the trial court denied the motion for a new trial or JNOV. R. 135.

On May 22, 2008, Ms. Brown's present attorney entered an appearance in the case. R. 137-38.

STATEMENT OF THE FACTS

A. Suppression Hearing

On April 8, 2008, a suppression hearing was held where defense counsel argued that the evidence logs and resulting crime lab reports should be excluded because of the confusion as to whether the evidence being tested related to a substance which had fallen out of Brown's pocket, or related to the substance found in the house where Brown was arrested. TT. 6-8. At this suppression hearing, Officer Mike Doss testified that he and Officer Kevin Rodgers had received information that Ms. Brown and co-defendant Holesome had an eight-ball of crack cocaine at a residence belonging to Jeff Pegues. When they arrived at the residence, Holesome and Ms. Brown came out on the porch. While Doss was patting Holeseome down, he heard Rodgers say "what's that?" He turned around and Rodgers showed him what appeared to be a crack cocaine rock, which Rodgers said "fell out of her pocket." TT. 10-11.

Ms. Brown was arrested and charged with possession of crack cocaine. TT. 13. The officers later searched the Pegues' house and found other apparent cocaine. Doss testified that the cocaine found in the house "had nothing to do with Patty Brown." TT. 14-15.

testimony at the suppression hearing, interpreted the indictment as charging Brown with the cocaine that allegedly fell out of her pocket, and not charging her with the cocaine found in Pegues' house:

> THE COURT: The Court is of the opinion and finds that, as explained by Officer Doss, an evidence log was stated and abandoned. The evidence log, which had some five items listed, was completed by Kevin Rodgers, and that the submission of those items, three of those items, is certainly reasonable. I don't know – they elected not to send paraphernalia identified on Kevin Rogers' evidence which is Exhibit A in the defendant's motion, A and B. Was an election on their part not really having anything to do with the case anyway.
>
> So the motion to suppress will be overruled.
>
> Now, there was two other submissions, both of which were alleged crack cocaine, and if I read the report correctly, the lab test determined that that is exactly what it was, none of which is related to the charge against Patricia Ann Brown.
>
> If I understand the testimony, the only rock attributed to her is the one that fell out of her pants pocket and was found on the ground. I see no reason for there to be evidence of other crack cocaine not connected to or attributed to her in any way.

TT. 25-27.

At trial, Diane Rippley testified that she spent the night of January 4th and 5th, 2007 with Julius Holesome at Jeff Pegues' residence in Pontotoc, Mississippi. Although Holesome was married, Rippley had a sexual relationship with him. Rippley knew Ms. Brown through Holesome. TT. 160-61.

Rippley testified that she and Holesome were in bed together when Ms. Brown knocked on the door at 4:00 a.m., and that Holesome then got up and started smoking crack cocaine with Ms. Brown. This made Rippley angry. TT. 162-63. (Rippley had been a crack addict for 15 years and she, herself, often smoked crack with Holesome. TT. 162.)

According to Rippley, Ms. Brown pulled money out of her pocket and asked Holesome to ride to Burelson Trailer Park with her so she could buy an "eight ball" of crack. Ms. Brown mentioned that she had just come from Tunica and had won some money. Holesome and Ms. Brown left together, which further angered Rippley. TT. 163-65.

When Holesome and Ms. Brown returned, Ms. Brown and Rippley got into a confrontation. Holesome asked Rippley to leave and she complied, still in a state of anger. Rippley began riding around aimlessly and saw Chief of Police Larry Poole. Rippley told Chief Poole that Ms. Brown had an eight ball of crack cocaine. TT.

Chief Poole called investigator Kevin Rodgers. He and Narcotics Agent Mike Doss begin an investigation of Ms. Brown. TT. 117. The two officers proceeded to Pegues' residence. Holesome and Ms. Brown came out on the porch, and Ms. Brown sat down on the porch. As Rodgers was walking up to the porch, Ms. Brown started taking things out of her left pant's pocket. Rodgers testified that he was about three feet away from Ms. Brown when he saw her drop a white object out of her left pant's pocket. It fell on the ground. Rodgers picked the object up and told Ms. Brown that it looked like crack cocaine. He advised Doss that the object looked like crack cocaine and gave the object to him. TT. 118; 180-186.

Rodgers then placed Brown under arrest for possession of crack cocaine. TT. 120.

Pegues was brought to the scene and he consented to the search of his house. TT. 124

Although the Court, in a suppression hearing, had ruled that the cocaine found in the house was not "evidence" against Brown and was "not connected to or attributed to her in an any way," TT. 26, the prosecutor, over defense's objection, TT. 125, solicited testimony from Rodgers showing that crack cocaine was found inside the house on a stand beside the couch in the Pegues living room, and that crack

On redirect examination of Rodgers, the prosecutor asked if Julius Holesome "had pled guilty to his role" in all this, and then informed the jury about a sexual relationship between Brown and Holesome as follows:

> Q. Okay. And you are correct, he [Holesome] in fact didn't want to do that [testify against Brown]. Were you aware – well, strike that. As far as his motivation behind there, are you aware of a past sexual relationship between Ms. Brown and him?
> MR. CORNELISON: Objection, Your Honor. The simple fact that we brought up Julius Holesome's name does not bring all this past history.
> THE COURT: The objection will be sustained. The jury will disregard the question.

TT. 153.

why? Relevance?

The prosecution also introduced photographs of Holesome and Ms. Brown. They show that Holesome is black and Ms. Brown is white. TT. 198-99; Exhibits S-14 and S-15.

During Doss's testimony, Exhibit S-8 was admitted into evidence. TT. 188. Exhibit 8 is a crime lab report listing the cocaine found in the Pegues' house and the cocaine which allegedly came from Ms. Brown's pocket. Exhibit S-8. Doss then testified at length and in detail about the crack cocaine found in the house. TT. 194-98.

Doss further testified that Holesome had claimed responsibility for the "dope" found in the house. TT. 224, but, in his opinion, the dope found in the house was also

Under questioning by Assistant District Attorney Joyner, the prosecution utilized Holesome's confession and his guilty plea against Ms. Brown:

BY MR. JOYNER:

Q. All right. Let me ask it this way, Mr. Doss, a different question. You were asked a lot of questions about you going to talk to Julius [Holesome] prior to his plea of guilty, correct?
A. (Witness nods affirmatively.)
Q. In truth, in Mr. Holesome's case, you had a confession from him for that dope inside the house, correct?
A. Correct.
Q. Okay. Well, I understand that, but did you feel sorry for him?
A. I felt sorry because he was fixing to get sent to the penitentiary for something I think he participated in, but if it hadn't been for Patty Brown he wouldn't be where he was at today.
MR. CORNELISON: Objection, Your Honor, that's pure speculation.
MR. JOYNER: No, sir, that's – he's telling exactly why he went and talked to him, Your Honor.
THE COURT: Well, the objection will be sustained. The jury will disregard the response.
MR. JOYNER: If we could pick up, I think that part of the response was allowable, Your Honor.

TT. 233-35.

Time and again, the prosecutor returned to the subject of the cocaine found in the house, and Doss's opinion that this cocaine was also attributable to Ms. Brown.

BY MR. JOYNER:

Q. In fact, to your knowledge was cocaine found at the house?
A. Yes, sir.

A. He's in prison.
Q. For the cocaine found at the house.
A. That she bought, yes, sir.
MR. CORNELISON: Your Honor, I'm going to object to that and ask that that be stricken from the record, she doesn't know that.
MR. JOYNER: Actually she was here the day he pled guilty, Your Honor.
THE WITNESS: Yes, sir.
MR CORNELISON: She doesn't know that –
THE COURT: Hold on. Objection overruled. All right.

TT. 175.

Ms. Brown testified on her own behalf. During her examination, she admitted that she was at the Pegues' residence, and admitted that Holesome was living at the residence, but Brown adamantly denied that a rock of crack cocaine had fallen out of her pocket while she was talking to Kevin Rodgers. TT. 269-73

During Brown's cross examination, the Assistant District Attorney once again returned to her sexual relationship with Defendant Holesome:

Q. How old were you when your sexual relationship with him started?
MR. CORNELISON: Objection, Your Honor.
THE COURT: Sustained.

TT. 277.

STANDARD OF REVIEW

Whether the indictment was sufficient to alert Ms. Brown to the nature of the

Whether the prosecutorial misconduct in this case was such that Ms. Brown was not afforded a fundamentally fair trial is a legal question.

Whether utilizing a co-defendant's confession and guilty plea against Ms. Brown violates the confrontation clause of the United States Constitution is a legal question.

Whether it was a denial of equal protection of the law for Ms. Brown to be sentenced to life in prison for exercising her right to a jury trial is a legal question.

Whether Ms. Brown's sentence violates the Eighth Amendment is a legal question.

Legal questions are reviewed *de novo*. *Sanders v. Chamblee*, 819 So.2d 1275, 1277 (Miss. 2002); *Roberts v. New Albany Separate School District*, 813 So.2d 729, 730-31 (Miss. 2002); and *Plummer v. State*, 966 So.2d 186, 189 (Miss. App. 2007).

SUMMARY OF THE ARGUMENTS

The State's proof at trial was that there were two different alleged possessions of cocaine on the same day. However, the indictment gave no notice as to which possession would be proved at trial. This deprived Ms. Brown of her constitutional right to notice of the specific charge against her in violation of United States Constitution Amendment Six.

evidence that Ms. Brown, who is white, had an illicit and immoral sexual relationship with her co-defendant, who is black. The prosecutor also introduced evidence on numerous occasions that Ms. Brown's co-defendant pled guilty to possession of cocaine for which they were both charged. Although the trial court had determined during the suppression hearing that the cocaine found in the residence was not "related" to the charge against Ms. Brown, the prosecutor introduced evidence of this cocaine on numerous occasions. This prosecutorial misconduct rendered Ms. Brown's trial fundamentally unfair in violation of United States Constitution Amendment Fourteen.

Although the circumstances of the two defendants were identical in regard to sentencing, Ms. Brown was treated differently because she exercised her right to a trial by jury and was sentenced to a much more severe sentence than her co-defendant, who pled guilty. This was a violation of the equal protection clause of the United States Constitution Amendment Fourteen.

Ms. Brown was convicted of possession of a very small amount – one rock of crack cocaine. She was sentenced under Miss. Code Ann. § 99-19-83, to serve a term of life imprisonment in the custody of the Mississippi Department of Corrections without being eligible for parole, probation or any other form of sentence reduction.

Eighth Amendment which forbids cruel and unusual punishment.

ARGUMENT I.

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

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

Moses v. State, 795 So.2d 569 (Miss. App. 2001), held:

> An indictment serves a valuable purpose in the criminal process. Its purpose is to inform the defendant with some measure of certainty as to the nature of the charges brought against him so that he may have a reasonable opportunity to prepare an effective defense and to enable him to effectively assert his constitutional right against double jeopardy in the event of a future prosecution for the same offense. *U.S. v. Gordon,* 780 F.2d 1165, 1169 (5th Cir.1986). In furtherance of that underlying purpose, Uniform Rules of Circuit and County Court Rule 7.06(5) requires, as an essential element of an indictment, a statement of "[t]he date and, if applicable, the time at which the offense was alleged to have been committed." URCCC 7.06(5). We have little doubt in determining that this indictment, in the form returned by the grand jury, did not adequately fulfill its purpose. Multiple accusations of crimes that are

argument provide the necessary information that a defendant is entitled to receive by way of the indictment.

Moses, 795 So.2d at 571.

Here, if the present case involved only one alleged possession of cocaine on January 5, 2007, then this indictment would have sufficed. However, as the hearing on the pretrial motion to suppress made clear, there were two totally different alleged possessions, both occurring on the same day. The indictment does not specify which alleged possession is being charged. The indictment does not state whether Ms. Brown is being charged with cocaine that allegedly fell out of her pocket, or the cocaine which was, in fact, found in Pegues' residence. Information on the nature of the charge was further confused, when, at the suppression hearing the day before the trial, the prosecutor advised defense counsel that the State was only alleging that Ms. Brown possessed the cocaine which had fallen from her pocket. TT. 26-27.

Before trial, the circuit judge stated that there was "no reason" for evidence of the crack cocaine found in the house to be presented to the jury because it "was not connected to or attributable to her in any way." TT. 26.

Nevertheless, and despite the prosecutor's pretrial statement, and the Court's pretrial ruling, the State introduced a wealth of evidence about the cocaine in the Pegues' home, and also solicited Doss's opinion attributing that cocaine to Brown.

In view of the evidence about the cocaine in the house which was introduced at trial, it is impossible to know for what crime the jury convicted Brown. Was Brown convicted for the cocaine rock that allegedly fell out of her pocket, or was she convicted for the crack cocaine that was found in Pegues' house, and which Doss attributed, in part, to her?

Quang Thanh Tran v. State, 962 So.2d 1237 (Miss. 2007) held:

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

Tran, 962 So.2d at 1241.

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

proceedings. To the contrary, pretrial proceedings further confused the matter, because Ms. Brown and her attorney were told during the suppression hearing that the prosecutor could not "envision" evidence of the crack cocaine found in the house being presented to the jury. The prosecutor told the Court that this would only be relevant if Holesome took the stand to "take credit" for all the cocaine. TT. 26-27. Before trial, the Ms. Brown was told that the cocaine found in the house "had nothing to do with Patty Brown." TT. 15.

Thus, Ms. Brown was misinformed of the fundamental nature of the charge. After assuring Ms. Brown before trial that the evidence of cocaine in the house would not be received at this trial, the prosecutor then turned right around and introduced a vast array of evidence about the cocaine found in the house. This deprived Brown of her fundamental right to be accurately told the nature of the charges. See, *Brawner v. State,* 947 So.2d 254, 265 (Miss. 2006) ("The purpose of the indictment is to provide the accused reasonable notice of the charges against him so that he may prepare an adequate defense"); *Evans v. State,* 916 So.2d 550, 551 (Miss. App. 2005) ("The primary purpose of an indictment is to notify a defendant of the charges against him so as to allow him to prepare an adequate defense"); *Brown v. State,* 890 So.2d 901, 918 (Miss. 2004) ("The major purpose of any indictment is to furnish the

prepared").

ARGUMENT II.

BROWN'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS WAS VIOLATED AND HER TRIAL WAS RENDERED FUNDAMENTALLY UNFAIR BY THE PROSECUTOR'S MISCONDUCT IN PRESENTING INADMISSIBLE AND PREJUDICIAL EVIDENCE TO THE JURY.

"A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). In determining claims involving prosecutorial misconduct, the question is whether the prosecutor's conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright,* 477 U.S. 168, 181 (1986). When a criminal defendant is "not afforded a fundamentally fair trial," a reversal is required. *Griffin v. State*, 557 So.2d 542, 553 (Miss. 1990); *Wilkins v. State*, 603 So.2d 309, 317-22 (Miss. 1992) (conviction reversed where prosecutor's tactics of introducing inadmissible evidence rendered trial fundamentally unfair); *Smith v. State,* 457 So.2d 327, 333-36 (Miss. 1984) (conviction reversed where prosecutor's conduct in questioning witnesses rendered trial fundamentally unfair); *Hosford v. State*, 525 So.2d 789, 793 (Miss. 1988) ("Regardless of the manner in which it comes about, prosecutorial misconduct which deprives an accused of a fair and impartial trial mandates reversal").

BY THE INTRODUCTION OF EVIDENCE THAT MS. BROWN, WHO IS WHITE, HAD AN ILLICIT AND IMMORAL SEXUAL RELATIONSHIP WITH HER CO-DEFENDANT, WHO IS BLACK.

During the direct examination of Mike Doss, the prosecutor asked if he was aware of a "past sexual relationship between Ms. Brown and her co-defendant, Julius Holesome." Defense counsel objected and the Court sustained the objection and directed the jury to disregard the question. TT. 153.

During the redirect examination of Doss, the prosecutor again asked about the relationship between Ms. Brown and Holesome. Again defense counsel's objection was sustained. TT. 133.

To leave no doubt that the prosecutor wanted the jury to know defendant Brown is white and co-defendant Holesome is black, the prosecutor introduced pictures of the two of them. TT. 198-99; Exhibits S-14 and S-15. To make sure the jury was aware of the sexual nature of their relationship, the prosecutor eventually asked Ms. Brown herself: "How old were you when your sexual relationship with him [Holesome] started?" TT. 277.

McDonald v. State, 285 So.2d 177 (Miss. 1973), held that:

> Expressing it another way, the question of guilt or innocence of the crime charged should be received by the jury unhampered by any suggestion or insinuation of any former crime or misconduct that would prejudice jurors.

Hughes v. State, 470 So.2d 1046 (Miss. 1985), condemned the prosecutor's line of questioning as to whether the defendant was "living with a woman." *Id.* at 1048; *Smith v. State*, 457 So.2d 327, 335 (Miss. 1984), reversed a conviction where the prosecutor questioned a defense witness about her engagement in prostitution; *Sumrall v. State,* 272 So.2d 917, 919 (Miss. 1973) held that the prosecutor's asking if defendant was "living with" a girl was reversible error; *Wood v. State,* 257 So.2d 193, 199 (Miss. 1972) held that it was improper to attack a witness about the sexual immorality of his life.

The prejudice to Ms. Brown by asking about her sexual immorality was compounded because of the question's racial nature. *See*, *United States v. Cabrera*, 222 F.3d 590, 594 (9th Cir. 2000) ("Appeals to racial, ethnic, or religious prejudice during the course of a trial violate a defendant's Fifth Amendment right to a fair trial"). *See also, United States v. Grey,* 422 F.2d 1043, 1045 (6th Cir. 1970), where the Court stated that "[a]t best, the entire question [about whether the black defendant was "running around with a white go-go dancer"] was a "magnificent irrelevance in a prosecution for bank robbery ..." and "[a]t worst, the gratuitous reference to the race of the go-go dancer may be read as a deliberate attempt to employ racial prejudice to strengthen the hand of the [prosecution]."

> ...it is the duty of the prosecuting attorney, who represents all the people and has no responsibility except fairly to discharge his duty, to hold himself under proper restraint and avoid violent partisanship, partiality, and misconduct which may tend to deprive the defendant of the fair trial to which he is entitled. ...

Adams, 30 So.2d at 596.

B. THE INTRODUCTION OF EVIDENCE THAT MS. BROWN'S CO-DEFENDANT PLED GUILTY TO THE CHARGE FOR WHICH THEY WERE BOTH INDICTED RENDERED HER TRIAL FUNDAMENTALLY UNFAIR.

Ms. Brown and her co-defendant, Julius Holesome, were jointly indicted for the possession of the same cocaine. TT. 6. Knowing this, the prosecutor asked witness Diane Rippley if "Julius is in jail now," and informed the jury that the defendant Rippley was "here the day that he [Holesome] pled guilty." TT. 175.

Just to make sure the jury did not miss the point that the co-defendant had pled guilty to the crime, the prosecutor asked Kevin Rodgers if Holesome had "pled guilty to his role in all of this." TT. 152.

The prosecutor then twice mentioned, on redirect examination of Mike Doss, that Holesome had pled guilty. TT. 234-35.

"The law is well settled in this state that where two or more persons are jointly indicted for the same offense but are separately tried, a judgment of conviction

McCray v. State, 293 So.2d 807, 808 (Miss. 1974) (citing *State v. Thornhill,* 251 Miss. 718, 171 So.2d 308 (Miss. 1965)). Introduction of evidence of a co-defendant's guilty plea denies a defendant the fundamental right to a fair trial, and rises to the level of reversible error. *See Buckley v. State,* 223 So.2d 524 (Miss. 1969); *McCray v. State,* 293 So.2d 807 (Miss. 1974); *Henderson v. State,* 403 So.2d 139 (Miss. 1981); *Johns v. State,* 592 So.2d 86 (Miss. 1991). The reasoning behind this rule has been stated as follows:

> [once a jury is apprized of the fact that a co-defendant has been tried and convicted for the same charge for which the defendant is now on trial, the jury's] ability to objectively reach a fair verdict on the merits of the competent evidence before it [is] necessarily impaired. The jury [is then] placed in the untenable position of pitting its prospective verdict against a guilty verdict previously entered by another jury carrying with it the court's approval by way of the judgment and sentence.

McCray, 293 So.2d at 809. See also, *Randall v. State,* 806 So.2d 185, 194 (Miss. 2001) (placing information concerning a judgment of conviction against a jointly indicted but separately tried co-defendant before a jury denies a defendant the fundamental right to a fair trial, and rises to the level of reversible error).

Besides infringing the defendant's right to a fair trial protected by the United States Constitution Amendment Fourteen, the evidence of a co-defendant's confession and evidence of a co-defendant's guilty plea violates the Confrontation

prohibits the use of out of court statements by a co-defendant of a defendant's guilt. *Hansen v. State,* 592 So.2d 114, 133 (Miss. 1991); *Crawford v. Washington,* 541 U.S. 36, 68 (2004); *Garrison v. State,* 726 So.2d 1144, 1148 (Miss. 1998); *Hillard v. State,* 950 So.2d 224, 229 (Miss. App. 2007).

Here, there was evidence not only that the co-defendant had confessed, but also that he had pled guilty, which is the very epitome of a confession by a co-defendant.

While defense counsel at trial did not object to this evidence, it was plain error. See Miss. Rule of Evid. 103(d) and Mississippi cases defining plain error, such as *Foster v. State,* 639 So.2d 1263, 1289 (Miss. 1994); *Williams v. State,* 794 So.2d 181, 187 (Miss. 2001); and *Grubb v. State,* 584 So.2d 786, 789 (Miss. 1991) ("Plain error" is that which results in a manifest miscarriage of justice").

C. MS BROWN'S TRIAL WAS RENDERED FUNDAMENTALLY UNFAIR BY THE INTRODUCTION OF EVIDENCE THAT CRACK COCAINE WAS FOUND INSIDE THE RESIDENCE AND EVIDENCE FROM AN OFFICER THAT HE BELIEVED MS. BROWN WAS IN PART RESPONSIBLE FOR THE COCAINE FOUND IN THE RESIDENCE.

During the suppression hearing, the trial court found that the cocaine in the Pegues' house was not "related to the charge against Patricia Ann Brown," that the only cocaine attributed to her "is the one that fell out of her pants pocket and was found on the ground," and that there was no reason for "there to be evidence of other

prosecutor even agreed that the "only way [he] could envision that coming in" would be if the defense called Holesome to the stand and tried to get him to "take credit" for all the cocaine. TT. 26-27.

At the trial, however, a bench conference was held outside the presence of the court reporter, and the court thereafter permitted the prosecution to present evidence that there was crack cocaine and paraphernalia found in the residence. TT. 125-138; 194-98.

Receipt of evidence about the cocaine found in the house is contrary to the rule that the prosecution should not be allowed to aid the proof against the defendant by showing he committed other offenses, especially those of a like nature. *Tucker v. State,* 403 So.2d 1274, 1275 (Miss. 1982), quoting *Sumrall v. State*, 257 So.2d 853 (Miss. 1972). More recently the Court of Appeals held that "[t]he interjection of evidence tending to show guilt of another crime, unrelated to the offense charged, is inadmissible." *Campbell v. State*, 750 So.2d 1280, 1283 (Miss. App. 1999).

As the Court stated in *King v. State,* 66 Miss. 502, 6 So. 188 (1889):

> The general rule is, that the issue on a criminal trial, shall be single, and that the testimony must be confined to the issue, and that on the trial of a person for one offense, the prosecution cannot aid the proof against him, by showing that he committed other offenses. Whart. Cr. Ev., § 104; 1 Bish. Cr. Pro., § 1120 *et seq.* The reason and justice of the rule

> minds of the jury from the true issue, and to prejudice and mislead them, and while the accused may be able to meet a specific charge, he cannot be prepared to defend against all other charges that may be brought against him.

King, 66 Miss at 506, 6 So at 189.

Furthermore, since the prosecutor had assured Ms. Brown before trial that he would not introduce evidence of the cocaine found in the house unless the defense called Holesome as a witness, and since the Court had expressly found before trial that the cocaine found in the house was not attributable to Ms. Brown, TT. 26-27, the prosecutor should have been judicially estopped from taking a contrary position at the trial by introducing evidence about the cocaine found in the house. In many cases, it is held that the principle of judicial estoppel prevents the State from taking inconsistent positions, and that it is a violation of the due process of law required by the Fourteenth Amendment of the United States Constitution, for the State to take such inconsistent positions. See *Scott v. Gammons*, 985 So.2d 872, 877 (Miss. App. 2008) ("Because of judicial estoppel, a party cannot assume a position at one stage of a proceeding and then take a contrary stand later in the same litigation"); *U.S. v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993) (judicial estoppel "prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken by him in the same or some earlier legal proceeding"). Compare *Nichols v.*

constitutionally estopped from obtaining a fact finding in one trial and seeking and obtaining an inconsistent fact finding in another trial").

ARGUMENT III.

THE PROSECUTOR'S DECISION TO TREAT BROWN MORE HARSH THAN HER CO-DEFENDANT BECAUSE SHE REFUSED TO PLEAD GUILTY VIOLATES HER FOURTEENTH AMENDMENT EQUAL PROTECTION RIGHTS.

The circumstances of the two defendants, Ms. Brown and Holesome, were identical. Each had been twice convicted previously of felonies, and one of these felonies was a violent crime.

Solely because Holesome was willing to plead guilty, his indictment was amended by the court upon motion by the prosecutor, to sentence him under the less harsh Miss. Code Ann. § 99-19-81. On the other hand, because Ms. Brown refused to plead guilty, and in retaliation for Ms. Brown's refusing to waive her constitutional right and plead guilty, Ms. Brown was re-indicted and her indictment was amended to charge under the harsher sentencing statute, Miss. Code Ann. § 99-19-83.

The end result of all of this was that Holesome, who pled guilty, received only the mandatory eight years. Ms. Brown, who chose to exercise her constitutional rights to plead not guilty and go to trial, received life in prison without parole.

Brown was treated differently from her co-defendant, solely because she

violation of equal protection of the law guaranteed by the Fourteenth Amendment of the United States Constitution.

In *McGilvery v. State*, 497 So.2d 67 (Miss. 1986), the Mississippi Supreme Court said:

> We wish to emphasize the absolute nature of the right of a person charged with a crime to trial by jury. This right is secured to every citizen by the Sixth and Fourteenth Amendments to the Constitution of the United States. It is secured to every Mississippian by Article 3, Section 26 of the Mississippi Constitution of 1890. As a right, it is an entitlement of every individual which he or she may claim no matter how inconvenient society or its members or its courts may deem it.
> It is absolutely impermissible that a trial judge imposing sentence enhance the sentence imposed because the defendant refused a plea bargain and put the state and the court to the trouble of trial by jury...we therefore must remand this case for a sentencing hearing by the circuit judge so that he can be given an opportunity to state for the record appropriate reasons for the disparity in the two sentences.

McGilvery v. State, 497 So.2d at 69 (Miss. 1986). See also, *United States v. Jackson*, 390 U.S. 570, 581 (1968) (penalizing those who choose to exercise constitutional rights, would be patently unconstitutional); *North Carolina v. Pearce,* 395 U.S. 711, 724-25 (1969) (to punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort); *Chaffin v. Stynchcombe*, 412 U.S. 17, 32-33, n. 20 (1973) (for an agent of the state to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is "patently

In this case, it was not the judge, but the prosecutor, who decided to punish Ms. Brown for going to trial. Nevertheless, this is state action, whether done by the prosecutor or the judge. Just as it is "absolutely impermissible" for a trial judge to punish a defendant because he chooses to go to trial, it is also absolutely impermissible that the prosecutor do so. In this case, the prosecutor chose to punish Ms. Brown, by indicting her under the more harsh sentencing statute, while rewarding her co-defendant for pleading guilty, by amending the indictment to charge him under the less harsh statute. The Fourteenth Amendment forbids making a distinction based upon one's exercise of their constitutional rights.[2] *See, e.g., Rolf v. City of Antonio*, 77 F.3d 823, 828 (5th Cir. 1996) ("Equal protection clause of Fourteenth Amendment is essentially mandate that all persons similarly situated must be treated alike."); *Hudson v. Palmer*, 468 U.S. 517, 523 (1984) (the equal protection clause of the Fourteenth Amendment requires inmates to be treated equally, unless unequal treatment bears a rational relation to a legitimate penal interest); *Thompson v. Gallagher*, 489 F.2d 443, 447 (5th Cir. 1973) ("A classification which serves no

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[2]Of course, a guilty plea is a waiver of numerous constitutional rights. See *Boykin v. Alabama,* 395 U.S. 238, 243 (1969) (A defendant who enters a guilty plea waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers).

them differently violates the equal protection clause."); *Stefanoff v. Hays County, Tex.*, 154 F.3d 523, 526 (5th Cir. 1998) ("Denial of good time credit because inmate had been sentenced by jury, and not by judge," violates equal protection).

ARGUMENT IV.

MS. BROWN'S MANDATORY LIFE SENTENCE IS GROSSLY DISPROPORTIONATE TO HER CRIME AND A VIOLATION OF THE EIGHTH AMENDMENT WHICH FORBIDS CRUEL AND UNUSUAL PUNISHMENT.

Ms. Brown was initially indicted under Miss. Code Ann. § 99-19-81 which provided that she would have been sentenced to eight years if convicted. R. 6–8. However, once her co-defendant pled guilty, and Ms. Brown refused to pled, her indictment was amended to so that she was charged under Miss. Code Ann. § 99-19-83 which provided that she would receive a mandatory life sentence. R. 53. Upon conviction, Ms. Brown was sentenced to serve a term of life imprisonment in the custody of the Mississippi Department of Corrections, without being eligible for parole, probation or any other form of sentence reduction. TT. 399; R. 122.

The Eighth Amendment to the United States Constitution is applicable to the states by virtue of the Fourteenth Amendment. *Robinson v. California,* 370 U.S. 660 (1962). The amendment forbids cruel and unusual punishments and has been held to contain a "narrow proportionality principle" that "applies to noncapital sentences."

957, 996-97 (1991) (Kennedy, J., concurring in part and concurring in judgment). Thus, under the United States Constitution, a state criminal sentence must be proportionate to the crime for which the defendant has been convicted. The Supreme Court has stated that "although a sentence may be within the range permitted by statute, it may nonetheless run afoul of the Eighth Amendment prohibition against cruel and usual punishment." *Solem v. Helm,* 463 U.S. 277, 290 (1983). Punishment will be grossly disproportionate to a crime only when an objective comparison of the gravity of the offense against the severity of the sentence reveals the sentence to be extreme. *Harmelin,* 501 U.S. at 1004-06.

In *Wilkerson v. State*, 731 So.2d 1173 (Miss. 1999), this Court stated that in light of *Harmelin*, "it appears that a guarantee of proportionality in the Eighth Amendment applies only when the comparison of the crime committed to the sentence imposed leads to an inference of gross disproportionality." *Wilkerson*, 731 at 1183. This Court has held that apart from a sentence of life in prison without the possibility of parole or a sentence which is manifestly disproportionate to the crime committed, an extended proportionality analysis is not required by the Eighth Amendment when there is an allegation of cruel and unusual punishment. *Wade v. State*, 802 So.2d 1023, 1030 (Miss. 2001). When this Court does perform a

Court. See *Gibson v. State*, 731 So.2d 1087, 1097 (Miss. 1998), citing *Solem v. Helm*, 463 U.S. 277, 292, 103 (1983). The first factor to be taken into consideration is "gravity of the offense and harshness of the penalty." *Gibson*, 731 So.2d at 1097. One means of evaluating the severity of the sentence is to consider it in relation to the maximum penalty for the same crime that is set out by statute; this Court will generally not grant a proportionality review for a sentence that is within the bounds established by the legislature. *Sullivan v. State,* 749 So.2d 983, 995 (Miss. 1999).

Although Ms. Brown's sentence is within the bounds established by the legislature, it is grossly and manifestly disproportionate to the crime for which she was convicted, possession of one small rock of crack cocaine.

CONCLUSION

Ms. Brown's conviction should, therefore, be reversed and this cause remanded to the Circuit Court of Pontotoc County for a new trial. Alternatively, the case should be remanded for re-sentencing to a term of eight years.

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

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Honorable Thomas J. Gardner, III
Circuit Court Judge
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Tupelo, MS 38802-1100

THIS the 17 day of November, 2008.

JIM WAIDE

MISSISSIPPI COURT OF APPEALS

NO. 2008-TS-00944

PATRICIA ANN BROWN

APPELLANT

VERSUS

STATE OF MISSISSIPPI

APPELLEE

CERTIFICATE OF COMPLIANCE

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

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

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This, the 17 day of November, 2008.

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