IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

RELIOUS DENSMORE — APPELLANT

V. — NO. 2008-KA-0981-SCT

STATE OF MISSISSIPPI — APPELLEE

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# BRIEF OF THE APPELLANT

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

Counsel for Relious Densmore

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

RELIOUS DENSMORE APPELLANT

V. NO. 2008-KA-0981-SCT

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**CERTIFICATE OF INTERESTED PERSONS**

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

1. State of Mississippi
2. Relious Densmore, Appellant
3. Honorable E.J. (Bilbo) Mitchell, District Attorney
4. Honorable Lester F. Williamson, Jr., Circuit Court Judge

This the 8th day of December, 2008.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

Hunter N Aikens
COUNSEL FOR APPELLANT

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

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# BRIEF OF THE APPELLANT

## STATEMENT OF THE ISSUES

I. THE TRIAL COURT ERRED IN REFUSING TO GRANT A CONTINUANCE FOR THE STATE'S FAILURE TO DISCLOSE THE IDENTITY OF A CONFIDENTIAL INFORMANT UNTIL THE MORNING OF TRIAL.

II. THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

## STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Lauderdale County, Mississippi, and a judgment of conviction for the sale of cocaine against Relious Densmore (Densmore) following a jury trial on March 19 through March 21, 2008, Honorable Lester F. Williamson, Jr., Circuit Judge, presiding. (C.P. 27-28, Tr. 341, R.E. 5-6). Densmore was sentenced to serve thirty (30) years as a habitual offender under Mississippi Code Annotated section 99-19-81, along with a fine of $5,000, as well as court costs of $295.50, a crime lab fee of $300, and a $300 appearance bond fee upon his release. (C.P. 30, Tr. 375, R.E. 7). The trial court denied Densmore's motion for a new trial and/or motion for judgment notwithstanding the verdict. (C.P. 31-33, R.E. 8-10). Densmore is presently

incarcerated under the supervision of the Mississippi Department of Corrections.

## STATEMENT OF THE FACTS

According to trial testimony, on August 15, 2007, police officers of the Meridian Police Department and the Lauderdale County Sheriff's Department met with a confidential informant by the name of Cecil Spraggins, who had previously informed police he could buy drugs from a woman by the name of Debra Nance at her house, located at 3110 27th Street in Meridian, Mississippi. (Tr. 97-98,185, 209, 218, 232). Spraggins frequently worked as a paid informant for police and had worked as an informant approximately twenty times previously. (Tr. 100, 243). Police searched Spraggins' person and vehicle and wired him with audio and video surveillance equipment. (Tr. 100-03, 186-87, 209, 218). Officer Karl Merchant testified that he gave Spraggins seventy dollars ($70) to be used in the buy. (Tr. 116-17).

Spraggins testified that he drove to Nance's house, where he was greeted by an unidentified white male who Spraggins had seen at Nance's house on prior occasions. (Tr. 240). Spraggins then walked in the house, and Nance yelled and told him that she was in the shower. (Tr. 241). Spraggins asked the white male what was going on, and the white male said "they're cutting it up." (Tr. 241). A few minutes later, "a black man came out and [Spraggins] asked him, you know, if he had the 60. And he said, yes sir I do." (Tr. 241). According to Spraggins, he then bought sixty dollars worth of cocaine from the black man and left to meet police. (Tr. 241). During the encounter, the audio in the surveillance cut in and out; the video did not show a transfer of drugs for money. (See. Ex. 2, Tr. 121).

Officer Joe Mercado testified that he met with Spraggins after the alleged purchase, and Spraggins gave him the suspected cocaine. (Tr. 218). Officer Mercado and Spraggins identified Exhibit 3 as the substance Officer Mercado recovered from Spraggins. (Tr. 219, 243). Spraggins

also returned the additional ten dollars ($10) to police. (Tr. 117). After the alleged buy, police again searched Spraggins' person and vehicle. (Tr. 223).

Spraggins later identified Densmore, in a photo lineup, as the black man that allegedly sold him the cocaine. (Tr. 113-14, 188-89, 242, Ex. 4). Keith McMahan, with the Mississippi Crime Laboratory, testified that he analyzed Exhibit 3 and confirmed that it was .7 grams of cocaine base. (Tr. 132).

Densmore decided not to testify. (Tr. 245-47). After deliberation, the jury found Densmore guilty of sale of cocaine. (Tr. 341, C.P. 27, R.E. 5-6). He was sentenced as a habitual offender under Mississippi Code Annotated section 99-19-81 to serve a term of thirty (30) years, and ordered to pay a fine of $5,000, as well as court costs of $295.50, a crime lab fee of $300, and a $300 appearance bond fee upon his release. (C.P. 30, Tr. 375, R.E. 6-7). The trial court denied Densmore's motion for a new trial and/or motion for judgment notwithstanding the verdict. (C.P. 31-33, R.E. 8-10).

## SUMMARY OF THE ARGUMENT

The trial court erred in refusing to grant a continuance, which was repeatedly requested by defense counsel because the State failed to disclose the name of the confidential informant (Spraggins) until the morning of trial. Spraggins eye-witnessed the events by making the alleged undercover buy, and he was a material witness in the State's case-in-chief. Therefore, the State committed a clear discovery violation, which prejudiced Densmore's case because defense counsel was denied a reasonable opportunity to interview Spraggins and prepare for trial. Consequently, Densmore is entitled to a new trial.

Additionally, the verdict was against the overwhelming weight of the evidence. The informant's testimony (Spraggins) was the only evidence that money was exchanged; the video did

not show money being transferred. Therefore, Spraggins' credibility/trustworthiness was of paramount importance to the case. As the record reflects, the Spraggins' testimony was impeached and unreliable. Further, among other things, his testimony revealed that he was a cocaine user at the time of the alleged purchase, he regularly worked for the police, and he was paid only if he successfully produced cocaine. Because no reasonable jury could put faith in Spraggins' testimony, it would sanction an unconscionable injustice to allow Densmore to be convicted on his word. Therefore, the trial court erred in denying Densmore's motion for a new trial.

## ARGUMENT

### I. THE TRIAL COURT ERRED IN REFUSING TO GRANT A CONTINUANCE FOR THE STATE'S FAILURE TO DISCLOSE THE IDENTITY OF A CONFIDENTIAL INFORMANT UNTIL THE MORNING OF TRIAL.

On the morning of trial, plea negotiations were concluded, and Densmore decided not to accept the State's plea bargain. (Tr. 6-13). Thereafter, the State first informed defense counsel of the confidential informant's name, Cecil Spraggins. (Tr. 13). Spraggins' identity was not provided to defense counsel in the State's discovery (on January 9, 2008). (Tr. 19). According to the prosecutor, the State withheld Spraggins' identity until the morning of trial because "it was a policy of our office not to reveal the name of a confidential informant until plea negotiations were concluded and it was certain the case was going to trial." (Tr. 21).[1]

Thereafter, defense counsel moved for a continuance in order to prepare for the case in light of the newly disclosed witness and the serious nature of the charges. (Tr. 19-21). However, the trial court overruled the motion as "not meritorious" and stated: "The jury is present, and I'm ready to

[1] The State also informed defense counsel, for the first time, of an alleged confession. The State agreed not to use the confession at trial, and defense counsel was allowed to review the tape for possible exculpatory evidence.

begin trial." (Tr. 20). Although the trial judge was ready to begin trial, defense counsel was not, as he had only moments before learned the identity of the State's star witness.

As explained below, the State's failure to disclose Spraggins' information until the morning of trial constituted a clear discovery violation which unfairly surprised the defense, and the trial court erred in refusing to grant a continuance to allow defense counsel a reasonable opportunity to interview the informant and prepare for trial.

"The decision to grant or deny a continuance is left to the sound discretion of the trial court." *Fuller v. State*, 910 So. 2d 674, 678 (10) (Miss. Ct. App. 2005) (citation omitted); *Shelton v. State*, 853 So. 2d 1171, 1181 (¶35) (Miss. 2003). To warrant reversal, "the denial of a continuance [must] have resulted in manifest injustice." *Hudderson v. State*, 941 So. 2d 221, 223 (¶6) (Miss. Ct. App. 2006) (citing *Smiley v. State*, 815 So. 2d 1140, 1143-44 (Miss. 2002)). "Before there will be manifest injustice in the denial of a continuance, an accused must have suffered unfair surprise or prejudice." *Id.* (citing *Blanton v. State*, 727 So. 2d 748, 751 (Miss. Ct. App.1998)).

As a preliminary matter and in the interests of candor, it is acknowledged that this issue was not specifically raised in Densmore's motion for a new trial. (C.P. 31-32, R.E. 8-9). It is also acknowledged that prior Mississippi cases have held that the failure to grant a continuance must be included in a motion for new trial to preserve the issue for appellate review. *See, e.g., Shelton v. State*, 853 So. 2d 1171, 1182 (¶38) (Miss. 2003) (citing *Crawford v. State*, 787 So. 2d 1236, 1242 (¶25) (Miss. 2001)); *Johnson v. State*, 926 So. 2d 246, 251 (¶14) (Miss. Ct. App. 2005) (citing *Crawford*, 787 So. 2d at1242 (¶25)).

However, this Court has previously addressed the denial of a continuance even though the issue was not specifically raised in a motion for new trial. *See, Gowdy v. State*, 592 So. 2d 29, 32-34 (Miss. 1991). In *Gowdy*, this Court, in deciding to address the issue, reasoned in part as follows:

> *The apparent purpose of the rule [requiring that the failure to grant a continuance be raised in a motion for new trial] is twofold: to assure an adequate record for considering the issue and to give the trial judge, who is so much closer to the scene than we, every opportunity to act prior to the expensive and time-consuming process of appellate review.*

*Gowdy*, 592 So. 2d at 33. There, the court found significant (among other things) that defense counsel made repeated complaint's about the State's failure to disclose the informant's whereabouts, and defense counsel's motion for continuance was heard on the morning of trial. *Id.* at 33-34.

As in *Gowdy*, defense counsel in the instant case repeatedly requested a continuance during the pre-trial hearing; he also filed a motion for continuance, which was heard and ruled on by the trial court on the morning of trial. (Tr. 13-22, C.P. 11-12, R.E. 3-4). Further, the dual purposes identified in *Gowdy* were satisfied in the instant case when the trial judge heard the motion on the morning of trial, thus eliminating the practical necessity for the issue to be again raised in a motion for new trial.

To this end, there is an adequate record for this Court to review the issue. The record makes abundantly clear that Spraggins was an eyewitness of, and a participant in the alleged drug sale. He was also a material witness called by the State. Accordingly, (as explained below) the State was required to disclose Spraggins' identity, and its failure to do so constituted unfair surprise. Therefore, defense counsel was entitled to a continuance to provide a reasonable opportunity to interview Spraggins and prepare for trial. Because the State's star witness was not identified until the morning of trial, the need for a continuance was imminent and obvious, and a post-trial opportunity for the trial judge to re-examine the ruling would be futile; the need to interview Spraggins and thoroughly investigate his proposed testimony was essential *before* trial, and it is unreasonable (and likely impossible) to say, even in retrospect, that no prejudice was caused by the failure to grant a continuance because we cannot know what adequate investigation and preparation

might have brought.

Accordingly, Densmore respectfully submits that the interests of justice require that this issue be addressed notwithstanding defense counsel's failure to specifically raise the issue in the motion for new trial.

This Court has stated that "justice is more nearly achieved when, well in advance of trial, each side has reasonable access to the evidence of the other." *Moore v. State*, 536 So. 2d 909, 911 (Miss. 1988) (citation omitted). To this end, Uniform Circuit and County Court Rule 904(A)(1) requires the prosecution to disclose the "[n]ames and addresses of all witnesses in chief proposed to be offered by the prosecution at trial." URCCC 904(A)(1). When the trial court is informed that the State has failed to disclose a witness, defense counsel is entitled to "a reasonable opportunity to interview the newly discovered witness." URCCC 904(I)(1). The record does not indicate that defense counsel was allowed to interview Spraggins.

Also, Rule 904(B)(2) requires (more specifically) that the identity of a confidential informant be disclosed if:

> [1]the confidential informant is to be produced at a hearing or trial or [2] a failure to disclose his/her identity will infringe the constitutional rights of the accused or [3] [if] the informant was or depicts himself/herself as an eyewitness to the event or events constituting the charge against the defendant.

URCCC 904(B)(2). This rule has been interpreted to require the disclosure of an informant where he or she is a "material witness." *Graves v. State*, 767 So. 2d 1049, 1052 (¶10) (Miss. Ct. App. 2000) (citing *Read v. State*, 430 So. 2d 832, 836 (Miss.1983)). This Court has also clearly explained: "where the informer is an actual participant in the alleged crime, the accused is entitled to know who he is." *Corry v. State*, 710 So. 2d 853, 858 (¶17) (Miss. 1998) (quoting *Young v. State*, 245 So. 2d 26 (Miss.1971)).

In the instant case, Spraggins eye witnessed the events by participating in the alleged

undercover buy. Moreover, he was a material witness for the State at trial. Therefore, his identity was discoverable, and the State should have disclosed this information in a timely manner to allow defense counsel a reasonable opportunity to examine his testimony. *See, e.g., Gowdy*, 592 So. 2d at 34-37 ("The whole idea behind discovery is that the discovering party ordinarily does not know how the witness will testify."); *Graves*, 767 So. 2d at 1053 (¶14) ("[T]he confidential informant should have been disclosed to [defense counsel] to allow him to examine the informant's testimony.").

The State's failure to make this disclosure until the morning of trial entitled the defense to a continuance. *See, e.g., Dowbak v. State*, 666 So. 2d 1377, 1385 (Miss. 1996) ("[A]n accused's remedy for tardy disclosure of that to which he is entitled in pre-trial discovery is a continuance under the circumstances.") (quotation omitted). And the trial court's failure to grant a continuance was reversible error. *See, e.g., Gowdy*, 592 So. 2d at 34-37; *Graves*, 767 So. 2d at 1053 (¶14).

Accordingly, this Court should reverse the judgment of conviction entered in the trial court and remand this case for a new trial.

## II. THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

In Densmore's motion for a new trial, it was specifically argues that the verdict was against the overwhelming weight of the evidence. (C.P. 31-32, R.E. 8-9). The trial court denied this motion. (C.P. 33, R.E. 10). In so doing, the trial court erred because Spraggins' testimony was the only evidence that a drugs-for-money exchange took place, and his testimony was unreliable.

The trial court's decision to deny a motion for a new trial is reviewed under the abuse of discretion standard of review. *Simpson v. State*, 993 So. 2d 400, 410 (¶35) (Miss. Ct. App. 2008) (citation omitted). In reviewing a challenge to the weight of the evidence, the verdict will be only be disturbed "when it is so contrary to the overwhelming weight of the evidence that to allow it to

stand would sanction an unconscionable injustice." *Bush v. State*, 895 So. 2d 836, 844 (¶18) (Miss. 2005). The evidence is viewed in the light most favorable to the verdict. *Id.* (citing *Herring v. State*, 691 So. 2d 948, 957 (Miss.1997)). This Court "sits as a hypothetical thirteenth juror." *Lamar v. State*, 983 So. 2d 364, 367 (¶5) (Miss. Ct. App. 2008) (citing *Bush*, 895 So. 2d at 844 (¶18)). "If, in this position, the Court disagrees with the verdict of the jury, 'the proper remedy is to grant a new trial.'" *Id.*

In the instant case, Spraggins' testimony was the only evidence that an money was exchanged for drugs. The video did not show a transfer. (See Ex. 2). Therefore, Spraggins' truthfulness was absolutely essential to this case. As the record reflects, Spraggins' testimony was contradictory and unreliable.

Spraggins admitted that he was a cocaine user. (Tr. 232). Several months before the incident at issue, Spraggins was arrested for possession of cocaine. (Tr. 232). To avoid prosecution, Spraggins agreed to work as informant for police, and he signed an agreement to this effect. (Tr. 233-34, Ex. 6). Officer Merchant testified that he did not trust Spraggins. (Tr. 150). Spraggins worked off the charge and continued working as a paid informant; he was paid only if he brought back narcotics. (Tr. 99, 117, 267). At the time of the incident at issue, Spraggins had worked as an informant approximately twenty (20) times. (Tr. 100, 243). Consequently, Spraggins knew where and how the police was search his person and his car. (Tr. 154, 267-68). Officer Merchant testified: "we've had incidents in the past where an informant had drugs on him and were going to go buy some and they had them already on him." (Tr. 151).

On direct examination, Spraggins stated that he was arrested only once for public drunkenness. (Tr. 235). However, on cross-examination it was revealed that Spraggins was also arrested for possession of crack paraphernalia. (Tr. 256). Also, on cross-examination Spraggins

stated that he had only been arrested for one serious charge, apparently an assault in Pennsylvania. (Tr. 253-58). However, he was again impeached with a prior conviction for aggravated battery with a dangerous weapon. (Tr. 256-58).

In light of Spraggins' inconsistent and unreliable testimony, no reasonable jury could put faith in his word. As set forth in the indictment, the State was required to prove that Densmore did "sell, barter, transfer, distribute or dispense approximately 0.7 grams of cocaine . . . to a confidential source, in exchange for sixty dollars ($60.00). . . ." (C.P. 2). The video did not show a transfer. Spraggins knew that he would only be paid if he produced drugs, and he knew how the police would conduct the search of his person and his vehicle. Further, due to his inconsistent testimony (lying and/or half-truths), a reasonable doubt arises as to whether Spraggins carried drugs with him in order to ensure payment. Accordingly, it would sanction an unconscionable injustice to allow Densmore to be convicted on Spraggins' word, and Densmore respectfully submits that he is entitled to a new trial.

## CONCLUSION

The trial court erred in refusing to grant a continuance for the State's failure to disclose Spraggins' identity until the morning of trial. This resulted in an unfair surprise, and a continuance was warranted in order to allow defense counsel a reasonable opportunity to interview Spraggins and prepare for trial. Accordingly, Densmore respectfully submits that he is entitled to a new trial. Also, in light of the evidence presented at trial, Densmore is entitled to a new trial, as the verdict is against the overwhelming weight of the evidence.

Respectfully Submitted,
MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

Hunter N Aikens
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39205

## CERTIFICATE OF SERVICE

I, Hunter N Aikens, Counsel for Relious Densmore, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

Honorable Lester F. Williamson, Jr.
Circuit Court Judge
2104 8th Street
Meridian, MS 39302

Honorable E.J. (Bilbo) Mitchell
District Attorney, District 10
Post Office Box 5172
Meridian, MS 39302

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

This the 8th day of December, 2008.

Hunter N Aikens
COUNSEL FOR APPELLANT

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