

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JOEY DANTE JOHNSON

APPELLANT

VS.

NO. 2008-KA-1077

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

- I. The trial court correctly denied Johnson's Motion for New Trial. The evidence was sufficient to support the jury's verdict and the trial court correctly denied Johnson's Motion for JNOV.
- II. The mandatory sentencing provision of the Mississippi Habitual Offender statute is constitutional and does not violate the principle of separation of powers or the Sixth or Fourteenth Amendments.
- III. Johnson is not entitled to be sentenced by a jury.
- IV. There was no violation of Johnson's right to counsel under *Strickland* or *Cronic*.
- V. Johnson's assertion he is entitled to relief because a deaf person was on his jury is without merit.
- VI. Johnson's assertion that his due process rights were violated because he was not informed of the habitual offender sentencing requirements at the time of his prior guilty plea is procedurally barred.
- VII. Johnson's argument that the gun was admitted into evidence erroneously is procedurally barred.

STATEMENT OF THE CASE

On June 27, 2007, Joey Dante Johnson was indicted by the Leake County Grand Jury on three counts of armed robbery as an habitual offender (C.P. 6) On May 13, 2008, Johnson was tried and found guilty on all three counts and Judgment was entered on May 14, 2008. (C.P. 36-38) He was adjudged to be an habitual offender pursuant to § 99-19-81, Mississippi Code Ann., and was sentenced to 41 years in the custody of the Mississippi Department of Corrections for each of the three counts of armed robbery, with the three sentences to run concurrently. (C.P. 37-38) On or about May 15, 2007, Johnson filed his Motion for Judgment Notwithstanding the Verdict or, in the Alternative, Motion for a New Trial. (C.P. 39) On June 3, 2008, the trial court entered its Order denying Johnson's Motion for New Trial and JNOV. (C.P. 42) The instant appeal ensued. (C.P. 43)

STATEMENT OF THE FACTS

The Trial

Eddie Vivians testified that after watching the Superbowl, he and Joey Johnson went to the Harmony Community Center to get together with other people. (Tr. 92-92) Vivians testified that he heard two shots and saw an argument between Larry Bernard Green and Joey Johnson. He testified that Larry Green came around the car with a pistol pointed at Johnson. The two scuffled and Johnson took the pistol from Green. (Tr. 96) Vivians testified that he hit Green in order to restrain him. (Tr. 103) Johnson took Andrew Whittington's pants off. Johnson hit Marcus McKee with the gun. (Tr. 99) Johnson demanded money from McKee. (Tr. 100)

Kendrick Green testified that after watching the Superbowl, he went to the Harmony

Community Center with Larry Green, Andrew Whittington and Ronald Lightsey. (Tr. 108) They met Eddie Vivians and Joey Johnson there. (Tr. 108) He testified that they back in and got out and that Joey and Eddie pulled up in a car. Joey got out with two pistols and asked Larry Green, "Man, where is the money? You lost the bet." (Tr. 108-109) Kendrick Green gave Johnson \$20 in an effort to calm him. Johnson began shooting both guns. Johnson said "Get him." and a scuffle ensued. (Tr. 109) Vivians then hit Larry Bernard. (Tr. 110) Johnson then had Kendrick Green at gunpoint and demanded all his money. He took over \$100 that was in Green's money clip and tore a chain off Green's neck. (Tr. 111) Johnson joined in with Vivians and Green attempted to break them up. Kendrick Green ended up with a pistol during the struggle. (Tr. 113-14) Green put the pistol in his pocket and ran around the community center and through the woods in order to get away from the danger. (Tr. 114) He ran to Deputy Sheriff Johnny Nealy's house. Kendrick Green testified that he gave the pistol to Nealy who then put the pistol in an evidence bag. (Tr. 115) When he ran, Green left Andrew Whittington behind at the community center and Marcus McKee had not arrived yet. (Tr. 117)

Larry Bernard Green testified after watching the Superbowl he went to the Harmony Community Center with Kendrick Green, Andrew Whittington and Ronald Lindsey. (Tr. 132-33) After they arrived at the community center, Johnson and Vivians arrived. Johnson got out of the car and asked Larry Green about the bet they had made on the Superbowl. Johnson had two guns and began shooting and saying he wanted his money. Larry Green testified that he told Johnson that he did not have any money. Larry's brother, Kendrick, gave Johnson \$20 to cover the bet. Johnson then told Kendrick Green, "Give me all your money," and took Kendrick Green's money. Johnson snatched a chain off Kendrick Green's neck. (Tr. 134) Larry Green

then took his own gun and shot once into the ground. (Tr. 135-36) Eddie Vivians then attacked him and they wrestled on the ground. (Tr. 136) His gun was lost in the struggle. (Tr. 136) Larry Green got a chance to get up and run and ran across the baseball field. He was still being shot at. (Tr. 140)

Johnny Nealy testified that at the time of the armed robberies he was the Chief Deputy of the Leake County Sheriff's Office. (Tr. 145) He testified that after he watched the Superbowl on Sunday, February 4, 2007, Kendrick Green came to his home. (Tr. 145) Kendrick Green related to him some events that had just happened at the Harmony Community Center. Green turned over to him a Rossi .357 Magnum pistol. (Tr. 146) Officer Nealy opened the cylinder and found six empty shells in the cylinder. (Tr. 147)

Willie Griffin testified that after the Superbowl he went to the Harmony Community Center with Brion Boley and Ryan King. The three were seated in Ryan's car. When they pulled up, Johnson charged at their car before they got a chance to put the car in park. (Tr. 155-56) Griffin told Johnson who he was but Johnson said that he did not care and the three then got out of the car. They moved over in front of Kendrick Green's car. Johnson began asking where his gun was and stating that one of them had it. (Tr. 156) Johnson had two guns. He demanded to know where his other gun was. (Tr. 166) Neither Bernard or Kendrick Green was present at this time, but Kendrick's car was still there. (Tr. 157) Johnson reached in the car and got a bottle to liquor, threw it at Whittington. It hit Whittington in the chest. (Tr. 164) Johnson then went over to Andrew Whittington and demanded something of him. Johnson hit Whittington in the jaw with a gun and Whittington fell back. Johnson then stripped off Whittington's pants. (Tr. 158, 162) Something fell out of Whittington's pants and Johnson put it in his pocket. (Tr. 159, 163)

Eddie Vivians told Griffin, Boley and King to leave. They came back later and an officer was present getting information. (Tr. 159)

Andrew Whittington testified that on February 4, 2007, after watching the Superbowl, he went to the Harmony Community with Larry Green, Kendrick Green and Ronald Lindsey. At the community center, Johnson approached him with two guns, one in each hand. Johnson told Whittington to get out of the car. Whittington got out of the car and Johnson hit him on the side of the head and jaw and in the ribs. Johnson struck him with a gun. (Tr. 168-69) Johnson ripped Whittington's pants off of him. Whittington testified that he had a wallet with \$55.00 in it and that when he got up, the wallet was gone. There was nothing else in his pants that could have fallen out. (Tr. 171) Whittington testified that Johnson took his wallet. (Tr. 172)

Marcus McKee testified that on February 4, 2007, after watching the Superbowl, he went to the Harmony Community Center with Michael. Eddie Vivians and Johnson were at the community center when he arrived. (Tr. 177) McKee went to talk to Vivians and Johnson came up and pulled a pistol on him. McKee testified that Johnson hit him on the head. They tussled and Micheal got the gun from Johnson and attempted to calm him down. Johnson went and got two more guns and came back towards McKee. (Tr. 178) Johnson hit him on the head again. Johnson told McKee to give him his money, which was \$250.00. (Tr. 179, 181) McKee gave Johnson his money because Johnson had a pistol on him. (Tr. 179) McKee was bleeding and his friend took him to the hospital.

The Sentencing Hearing

After the jury returned guilty verdicts on each of the three counts of armed robbery, the court held a bifurcated hearing. The first matter was whether Johnson was subject to the

provisions of § 99-19-81 governing habitual offenders. The State entered into evidence two convictions, (1) a judgment on guilty plea for the crime of taking away a motor vehicle, entered on January 12, 2001 in Leake County Circuit Court for which Johnson was sentenced to served a term of three years in the Mississippi Department of Corrections and (2) a Judgment of Conviction and Sentence on a plea for guilty for the crime of possession of more than one-tenth of a gram but less than two grams of cocaine, entered November 14, 2006, in the Circuit Court of Rankin County for which Johnson was ordered to serve a term of eight years in the custody of the Mississippi Department of Corrections, with five of those eight years suspended.

A copy of the National Vital Statistics Report showing that Johnson had a life expectancy of 41.7 years was entered into evidence.

The trial court, having received proof that Johnson was eligible for sentencing as an habitual offender, determined that pursuant to statute, he was required to sentence Johnson to the maximum penalty for armed robbery. The trial court then reviewed the armed robbery statute which provides that “in cases where the jury fails to fix the penalty at imprisonment for life, the Court shall fix the penalty at imprisonment in the State Penitentiary for any term not less than three years.” Miss. Code Ann. § 97-3-79 (1972, as amended). The trial court sentenced Johnson to a term of 41 years for each count, with all three sentences to run concurrently. (Tr. 269) Johnson was sentenced pursuant to Miss. Code Ann. § 99-19-81 (1972, amended), and must serve his sentence day for day. (Tr. 270)

SUMMARY OF THE ARGUMENT

The trial court correctly denied Johnson’s Motion for New Trial. The evidence was sufficient to support the jury’s verdict and the trial court correctly denied Johnson’s Motion for

JNOV. The mandatory sentencing provision of the Mississippi Habitual Offender statute is constitutional and does not violate the principle of separation of powers or the Sixth or Fourteenth Amendments. Johnson is not entitled to have his sentence pursuant to the habitual offender statute submitted to a jury. There was no violation of Johnson's right to counsel under *Strickland* or *Cronic*. Johnson's assertion he is entitled to relief because a deaf person was on his jury is without merit and is procedurally barred since it was never presented to the trial court for review. Johnson's assertion that his due process rights were violated because he was not informed of the habitual offender sentencing requirements at the time of his prior guilty plea is procedurally barred as it was never presented to the trial court for review. Johnson's argument that the gun was admitted into evidence erroneously is procedurally barred.

ARGUMENT

I. The trial court correctly denied Johnson's Motion for New Trial. The evidence was sufficient to support the jury's verdict and the trial court correctly denied Johnson's Motion for JNOV.

A trial court's denial of a motion for a new trial will not be disturbed unless the verdict 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 (Miss. 2005) (citing *Herring v. State*, 691 So.2d 948, 957 (Miss.1997)). Upon review, the appellate court must accept as true the evidence that supports the verdict, and the trial court's decision will only be reversed if the court abused its discretion in refusing to grant a new trial. *Wooten*, 752 So.2d at 1108. Such a 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.” Denman v. State, 964 So.2d 620, 624

(Miss.Ct.App.2007). The evidence should be weighed in the light most favorable to the verdict.

Herring, 691 So.2d at 957.

An evaluation of the evidence supporting all three guilty verdicts clearly establishes that the verdicts are not against the overwhelming weight of the evidence. Allowing them to stand would not result in an unconscionable injustice. Therefore, the circuit court did not abuse its discretion in refusing to grant Johnson a new trial. This issue is without merit and the judgment of the trial court should be affirmed.

Johnson claims the circuit court should have granted his motion for a JNOV. A motion for a JNOV challenges the legal sufficiency of the evidence. Terrell v. State, 952 So.2d 998, 1004 (Miss.Ct.App. 2006). “Appellate review is limited to whether the evidence shows beyond a reasonable doubt that [the] accused committed the act charged, and that he did so under such circumstances that every element of the offense existed, and where the evidence fails to meet this test it is insufficient to support a conviction.” Id. “After viewing the evidence in the light most favorable to the State, the evidence is sufficient if any rational trier of fact could have found the defendant committed each element of the crime beyond a reasonable doubt.” Id.

“Matters regarding the credibility and weight to be accorded the evidence are to be resolved by the jury.” Verner v. State, 812 So.2d 1147 (Miss.Ct.App.2002). “Where there is conflicting testimony, the jury is the judge of the credibility of the witnesses.” Bessent v. State, 808 So.2d 979 (Miss.Ct.App.2001). Even the testimony of a single uncorroborated witness can sustain a conviction even if more than one witness testifies to the contrary. Verner, 812 So.2d at ¶ 7).

Further, the reviewing court does not have the task of re-weighing the facts in each case to, in effect, go behind the jury to detect whether the testimony and evidence they chose to believe was or was not the most credible.” *Smith*, 868 So.2d at (¶ 11). Rather, the reviewing court “must consider all the evidence, not just that supporting the case for the prosecution, in the light most consistent with the verdict, and give the State all favorable inferences which may be drawn from that evidence.” *Fleming*, 732 So.2d.at (¶ 38). Considering the evidence in the light most consistent with the verdict, that the circuit court did not abuse its discretion when it overruled Johnson's motion for a new trial.

II. The mandatory sentencing provision of the Mississippi Habitual Offender statute is constitutional and does not violate the principle of separation of powers or the Sixth or Fourteenth Amendments.

The Mississippi Supreme Court has already “spelled it out”, there is no violation of the separation of powers doctrine by statutorily mandated penalties for crimes. *Fisher v. State*, 690 So.2d 268 (Miss. 1996) Fisher argued that the capital rape statute which requires the imposition of a death sentence or life imprisonment is a violation of the separation of powers doctrine. Specifically, he maintained that, although the legislature has the power to determine the potential penalty for a crime, it does not have the authority to remove the power of the judiciary to exercise discretion in sentencing. Fisher argued that 1) the prosecutor's actions in using the statute did not amount to the power to sentence, and 2) that a prosecutor always has some selectivity in his or her approach to a case, whereas the judge does not under the capital rape statute. *Washington v. State*, 478 So.2d 1028 (Miss.1985). The Mississippi Supreme Court held that Fisher's argument was without merit, opining:

The power to determine appropriate punishment for criminal acts

lies in the legislative branch. In *Washington*, the Court stated that the fixing of punishment in criminal cases is a question of legislative policy. *Washington*, 478 So.2d at 1031. See also *Jackson v. State*, 551 So.2d 132, 149 (Miss.1989) (where the Court stated that the imposition of a sentence upon conviction is a matter within the discretion of the circuit court, subject only to statutory and constitutional limitations.).

The U.S. Supreme Court has ruled similarly on this issue finding no inherent power of judicial discretion in sentencing. *Mistretta v. United States*, 488 U.S. 361, 364, 109 S.Ct. 647, 650-51, 102 L.Ed.2d 714 (1989). In so ruling, the Supreme Court stated, “[h]istorically federal sentencing-the function of determining the scope and extent of punishment-never has been thought to be assigned by the Constitution to the exclusive jurisdiction of any one of the three Branches of Government.” *Id.* In *Mistretta*, the Supreme Court also recognized that Congress has the power to fix the sentence for a federal crime and the scope of judicial discretion with respect to a sentence is subject to congressional control. *Id.* (citing *United States v. Willberger*, 5 Wheat. 76, 5 L.Ed. 37 (1820) and Ex parte *United States*, 242 U.S. 27, 37 S.Ct. 72, 61 L.Ed. 129 (1916)).

Article 1, section 1 of the Mississippi Constitution distributes the governmental powers in similar fashion to Articles I-III of the U.S. Constitution. Thus, using the *Mistretta* reasoning, the legislature has complete control over sentencing, including judicial discretion in sentencing. In addition, we note that other states have found no violation of separation of powers in statutes that mandate certain sentences. See *State v. Waits*, 163 Ariz. 216, 786 P.2d 1067, 1071 (1989); *State v. Lowe*, 661 S.W.2d 701, 703 (Tenn.1983).

Clearly, there is no violation of the separation of powers doctrine by the mandate of the statute. This Court has already recognized in *Washington* that the determination of punishments in criminal cases is a question of legislative policy. In light of the instant case, it has become necessary to “spell it out”; there is no violation of the separation of powers doctrine by statutorily mandated penalties for crimes.

According to the principles of *Mistretta* the trial court’s discretion exists within the a statutory range. Further, it is well-settled in Mississippi that the imposition of a sentence upon a

criminal conviction belongs within the sound discretion of the trial court (not the prosecutor) and generally is not subject to appellate review if it is within the limits prescribed by the applicable statute. Reynolds v. State, 585 So.2d 753, 756 (Miss.1991); Reed v. State, 536 So.2d 1336, 1339 (Miss.1988); Boyington v. State, 389 So.2d 485 (Miss.1980); Ainsworth v. State, 304 So.2d 656, 658 (Miss.1974).

The Mississippi Court of Appeals has held that Miss. Code Ann. § 99-19-81 (1972, as amended) does not violate a defendant's constitutional rights to due process or equal protection and does not violate the constitutional requirements relating to separation of powers. In Magee v. State, 759 so.2d 464 (Miss.Ct.App.2000), the Mississippi Court of Appeals opined:

Magee attacks the ground on three fronts: due process, equal protection, and separation of powers. All of Magee's argument are devoid of any merit and each is overruled. Mississippi's habitual offender statute has weathered state and federal constitutional challenges on more than one occasion, and each time the statute's constitutional firmness has prevailed. McGruder v. Puckett, 954 F.2d 313 (5th Cir.1992); Handley v. State, 574 So.2d 671, 680 (Miss.1990) (citing Perkins v. Cabana, 794 F.2d 168 (5th Cir.1986)); Sutherland v. State, 537 So.2d 1360, 1362 (Miss.1989)).

This issue is without merit and the jury's verdict and the ruling's of the trial court should be upheld.

Further, the trial court did not err in sentencing Johnson to three terms of 41 years to be served consecutively after the jury returned guilty verdicts on each of the three counts of armed robbery, the court held a bifurcated hearing. The first matter was whether Johnson was subject to the provisions of § 99-19-81 governing habitual offenders. The State entered into evidence two convictions, (1) a judgment on guilty plea for the crime of taking away a motor vehicle, entered

on January 12, 2001 in Leake County Circuit Court for which Johnson was sentenced to served a term of three years in the Mississippi Department of Corrections and (2) a Judgment of Conviction and Sentence on a plea for guilty for the crime of possession of more than one-tenth of a gram but less than two grams of cocaine, entered November 14, 2006, in the Circuit Court of Rankin County for which Johnson was ordered to serve a term of eight years in the custody of the Mississippi Department of Corrections, with five of those eight years suspended.

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Johnson argues that his sentence should be subject to a proportionality review pursuant to *Clowers*. *Clowers v. State*, 522 So. 2d 762 (Miss. 1988) There is no apparent gross disproportionality in the Johnson’s sentence of 41 years where the crime is armed robbery. As the Court in *Clowers* notes, *Clowers* is the exception rather than the rule. Further, after the jury declined to sentence Johnson to life, the trial court sentenced him to a term less than life for each

count. His life expectancy according to the actuarial tables was 41.7 years. The trial court sentenced him to 41 years on each count, with the three sentences to run concurrently. This sentence was clearly within the judge's discretion.

In Huntley v. State, 524 So.2d 572 (Miss.1988), the Mississippi Supreme Court stated, “[t]his is not the first time that Mississippi's habitual offender statute has been challenged as cruel and unusual punishment. This Court has consistently held that sentences under Mississippi Code Annotated section 99-19-83 do not constitute cruel and unusual punishment.” Id. at 575 (citing Jackson v. State, 483 So.2d 1353 (Miss.1986); Adams v. State, 410 So.2d 1332 (Miss.1982); Pace v. State, 407 So.2d 530 (Miss.1981); Baker v. State, 394 So.2d 1376 (Miss.1981); Hayden v. Foryt, 407 So.2d 535 (Miss.1981); White v. State, 374 So.2d 843 (Miss.1979); Bell v. State, 355 So.2d 1106 (Miss.1978)).

These issues are without merit and the jury's verdict and the rulings of the trial court should be upheld.

III. Johnson is not entitled to be sentenced by a jury.

Elliott argues that he was entitled to a jury determination of his habitual offender statute and that he is serving an illegally enhanced sentence in violation of his constitutional rights. In Apprendi v. New Jersey, the primary issue was under which set of circumstances an increase in a defendant's sentencing beyond the statutory maximum must be submitted to a jury. The Supreme Court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)

Johnson is clearly not entitled to relief since his sentence was increased precisely because of a prior conviction for the same offense. Johnson's argument on this issue to be without merit.

IV. There was no violation of Johnson's right to counsel under *Strickland* or *Cronic*.

In *Strickland*, the United States Supreme Court held the defendant must first show that counsel's performance was deficient, and the deficient performance prejudiced the defense. Brown acknowledges that this standard has been refined further in *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. See also *Williams*, 529 U.S. 362, 120 S.Ct. 1495.

The Supreme Court has recognized a limited exception to the prejudice requirement when (1) assistance of counsel has been denied completely, (2) "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," or (3) counsel is denied during a critical stage of the proceedings. *Cronic*, 466 U.S. at 658-59, 104 S.Ct. 2039; see *Mickens v. Taylor*, 535 U.S. 162, 122 S.Ct. 1237, 1240-41, 152 L.Ed.2d 291 (2002).

A review of the record establishes that Johnson's counsel exercised sound trial strategy during the guilt-innocence phase of trial. In *Cronic*, 466 U.S. at 657, 104 S.Ct. at 2046, the United States Supreme Court held that "the Sixth Amendment does not require that counsel do what is impossible or unethical.... If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." *Id.* at n. 19.

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When applying *Strickland* or *Cronic*, the distinction between counsel's failure to oppose the prosecution entirely and the failure of counsel to do so at specific points during the trial is a “difference ... not of degree but of kind.” [Bell, 122 S.Ct. at 1851 (quoting *Cronic*, 466 U.S. at 659, 104 S.Ct. 2039)]. Under this rationale, when counsel fails to oppose the prosecution's case at specific points or concedes certain elements of a case to focus on others, he has made a tactical decision. Id. at 1851-52. By making such choices, defense counsel has not abandoned his or her client by entirely failing to challenge the prosecution's case. Such strategic decisions do not result in an abandonment of counsel, as when an attorney completely fails to challenge the prosecution's case. Therefore, *Cronic* is reserved only for those extreme cases in which counsel fails to present any defense. Appellate courts presume prejudice in such cases because it is as if the defendant had no representation at all. In contrast, strategic or tactical decisions are evaluated under *Strickland*'s traditional two-pronged test for deficiency and prejudice. Haynes v. Cain, 298 F.3d 375, 381 (5th Cir.2002).

A defendant is not entitled to errorless counsel. Hansen v. State, 649 So.2d 1256, 1259 (Miss.1994), Johnson v. State, 511 So.2d 1333, 1339-40 (Miss.1987). This Court must look to the entire performance of counsel to determine whether he or she was competent and

conscientiously fulfilled the role as advocate. Branch, 882 So.2d at 65-66. Johnson's trial counsel challenged the State's case, vigorously cross examining all of the State's witnesses, and there was no violation under *Cronic*. Further, as Johnson has not suggested any new evidence or testimony which should have been offered by his trial counsel. Clearly, there was no violation of Johnson's right to counsel under *Cronic* or *Strickland*. This issue is without merit and the jury's verdict and the rulings of the trial court should be affirmed.

V. Johnson's assertion he is entitled to relief because a deaf person was on his jury is without merit.

Johnson states in his brief that after the trial it was discovered that a juror receives a disability check for being deaf. There is nothing in the record to substantiate the accusation. Further, this issue was not presented to the trial court for review and is therefore barred on appeal. In Jackson v. State, 962 So.2d 649 (Miss.Ct.App.2007), the defendant was not entitled to appellate review of affidavit submitted by an alternate juror alleging that white jurors had discussed defendant's case amongst themselves prior to presentation of case and decided that defendant was guilty. In his post trial motion Jackson presented no evidence in support of allegation of jury misconduct, the juror's affidavit was never presented to trial court, and the affidavit was not inserted into record until after defendant filed notice of appeal. Id.

As in *Jackson*, this issue was never presented to the trial court and Johnson offers no evidence to support his claim. This issue is without merit and the jury's verdicts and the rulings of the trial court should be affirmed.

VI. Johnson's assertion that his due process rights were violated because he was not informed of the habitual offender sentencing requirements at the time of his prior

guilty plea is procedurally barred.

This issue was never presented to the trial court and is therefore procedurally barred.

“Generally, issues not presented to the trial court are procedurally barred on appeal.” Debrow v. State, 972 So.2d 550, 553 (Miss. 2007). This issue is without merit and the verdict of the jury and the decision of the trial court should be affirmed.

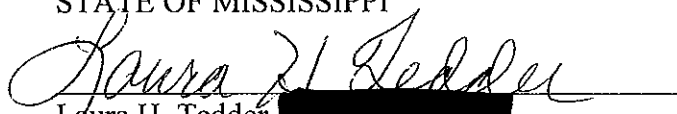

VII. Johnson’s argument that the gun was admitted into evidence erroneously is procedurally barred.

This issue is barred as there was no objection at trial. “Generally, issues not presented to the trial court are procedurally barred on appeal.” Debrow v. State, 972 So.2d 550, 553 (Miss. 2007). Typically, the failure to voice a contemporaneous objection to the State's closing argument constitutes a procedural bar to raising the issue on appeal. Dampier v. State, 973 So.2d 221, 236 (Miss.2008) (citing Ross v. State, 954 So.2d 968, 1001 (Miss.2007)).

CONCLUSION

Johnson’s assignments of error are without merit and the jury’s verdicts and the rulings of the trial court should be upheld.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Laura H. Tedder, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Vernon R. Cotten
Circuit Court Judge
205 Main Street
Carthage, MS 39051

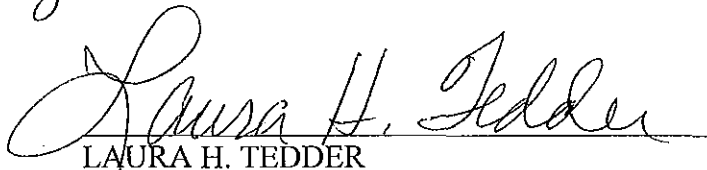
Honorable Mark Duncan
District Attorney
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Philadelphia, MS 39350

Jerry L. Bustin, Esquire
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and

Todd W. Sorey, Esquire
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This the 1st day of May, 2009.



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