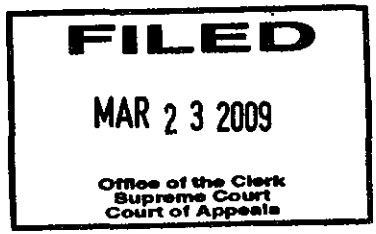
TAMECA DRUMMER APPELLANT

V. NO. 2008-KA-1225-COA



STATE OF MISSISSIPPI APPELLEE

BRIEF OF THE APPELLANT

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TAMECA DRUMMER **APPELLANT**

V. **NO. 2008-KA-1225-COA**

STATE OF MISSISSIPPI **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

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

1. State of Mississippi
2. Tameca Drummer, Appellant
3. Honorable John R Young, District Attorney
4. Honorable James L Roberts, Jr, Circuit Court Judge

This the 23rd day of March, 2009.

Respectfully Submitted,
MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____
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STATE CASES

UNITED STATES CONSTITUTION

STATE STATUTES

OTHER AUTHORITIES

TAMECA DRUMMER APPELLANT

V. NO. 2008-KA-1225-COA

STATE OF MISSISSIPPI APPELLEE

BRIEF OF THE APPELLANT

STATEMENT OF THE ISSUES

ISSUE ONE:

WHETHER THE APPELLANT'S RIGHTS UNDER THE UNITED STATES AND MISSISSIPPI CONSTITUTIONS WERE VIOLATED WHEN LAW ENFORCEMENT UNLAWFULLY SEIZED HER.

ISSUE TWO:

WHETHER THE APPELLANT'S SENTENCE IS IN VIOLATION OF HER EIGHTH AMENDMENT RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT.

STATEMENT OF INCARCERATION

Tameca Drummer, the Appellant in this case, is presently incarcerated in the Mississippi Department of Corrections.

Mississippi Constitution and **Miss. Code Ann. 99-35-101.**

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Alcorn County, Mississippi, and a judgment of conviction on one count of possession of marijuana against Tameca Drummer, following a trial on April 14-18, 2008, the honorable Jim Roberts, Circuit Judge, presiding. Drummer was subsequently sentenced to life without parole in the custody of the Mississippi Department of Corrections under **Mississippi Code Annotated §99-19-83**.

FACTS

On August 3, 2006, Officer Shannon Hester of the Corinth Police Department, made a traffic stop. (T. 179-80). According to her testimony, both at trial and during the suppression hearing, Officer Hester's attention was initially drawn to the vehicle when she noticed an improperly displayed license plate. (T. 181). Upon following the vehicle, Officer Hester noticed the vehicle touch the double yellow line separating the two lanes. (T. 181). Other than touching the yellow line, the Appellant apparently made no other mistakes driving.

The Appellant made a complete stop at a stop sign in "normal fashion." (T. 190). Officer Hester testified that she did not remember the Appellant driving over the speed limit that night either. (T. 192). Officer Hester further testified that the Appellant never went into the other lane of traffic. (T. 195). Furthermore, there was no indication that Drummer was impaired during the stop. (T. 202).

Nevertheless, Officer Hester pulled the vehicle over, and asked the driver, Tameca Drummer,

State of Tennessee. (T. 182). Accordingly, Officer Hester radioed to dispatch, and dispatch verified that Drummer's license had been suspended. (T. 183).[1]

At that time, additional officers arrived on the scene. (T. 185). Officer Hester returned to Drummer's vehicle, asked her to exit the car, and placed her under arrest for driving with a suspended license. (T. 186). At that point, according to her testimony, Officer Hester asked the Appellant if she could search her vehicle, and Appellant allowed. (T. 186).

Officer Jerry Mayhall (Officer Mayhall) testified that when he approached the vehicle he smelled what he believed to be marijuana. (T. 221). Mayall subsequently searched vehicle and found what he believed to be marijuana underneath the dash in the steering column. (T. 186-87, T. 222).

Detective Ben Calwell (Detective Calwell) questioned the Appellant regarding what the officers believed to be marijuana. (T. 242). Detective Calwell, over objection by defense counsel, testified that Appellant told him that she was in Corinth to sleep with a man for money, and, when the man would not pay her, she took the marijuana from him. (T. 249). Alecia Waldrup (Waldrup), a forensic scientist for the Tupelo Crime Lab, testified that the substance she was given by Corinth Police Officers tested positive for marijuana. (T. 270-74).

After the close of the State's case, the defense made a motion for a directed verdict, which was subsequently denied by the trial court. (T. 282-84). After being informed of her rights, the Appellant took the stand in her own defense. Drummer testified that Ernest Banks (Banks), the man

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1. Ultimately, it was determined that the Appellant's driver's license was not, in fact, suspended. (T. 200).

21. The Appellant further testified that she was never asked for and never gave consent to search the vehicle. (T. 322). Drummer, according to her testimony, was never shown the marijuana by any officers either. (T. 322). Drummer further denied ever telling Detective Calwell that the marijuana found in the car was hers. (T. 324-26).

As a rebuttal witness, the State called Officer Mayhall, who again testified that he heard the Appellant consent to officers searching the vehicle. (T. 353).

After deliberation, the Jury returned a verdict of guilty of possession of marijuana against the Appellant. (T. 392). Prior to sentencing, the State moved to amend the indictment to carge the Appellant as a habitual offender under **Mississippi Code Annotated §99-19-83.** (T.396). The State then presented evidence of the Appellant's prior felony convictions.

During the course of argument, defense counsel noted that the State did not prove that the Appellant had served a year imprisonment on each count as required by law. (T. 400-13). The trial court ultimately continued the sentencing hearing to allow the State to prove that the Appellant's sentences warranted enhancement under **§99-19-83**. Subsequently, the State provided evidence as to the Appellant's time-served and the Appellant was sentenced to life without the eligibility of parole under **§99-19-83.** (T. 436-443).[2]

On April 30, 2008, Drummer filed a Motion for Judgment of Acquittal Notwithstanding the

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2. The evidence provided by the state shows that Tameca Drummer was convicted of the crime of voluntary manslaughter in Shelby County, Tennessee. (T. 436). She served over two years on that sentence. (T. 436). Drummer was also convicted of aggravated assault in Shelby County and served over two years on that conviction. (T. 437).

of the jury and the sentence of the trial court, Drummer filed a notice of appeal. (C.P. 208, R.E. 14).

SUMMARY OF THE ARGUMENT

The seizure of the Appellant's vehicle by Officer Hester violated her rights under both the United States and Mississippi constitutions. Officer Hester had neither reasonable suspicion mor probable cause to make the stop. Because there was no probable cause, the evidence obtained from the search of the Appellant's vehicle is inadmissible as fruit of the poisonous tree.

Additional, the Appellant's sentence of life without parole for a crime which could have been charged as a misdemeanor violated her Eight Amendment right to be free from cruel and unusual punishment. Under the factors outlined in ***Solem v. Helm***, the sentence imposed by the trial court is vastly disproportional to the nature of the crime and not proportional with sentences handed down in the same and other jurisdictions.

ARGUMENT

ISSUE ONE:

WHETHER THE APPELLANT'S RIGHTS UNDER THE UNITED STATES AND MISSISSIPPI CONSTITUTIONS WERE VIOLATED WHEN LAW ENFORCEMENT UNLAWFULLY SEIZED HER.

i. Standard of Review

The analysis of whether there has been an unlawful seizure is guided under a mixed standard of review in that "determination of reasonable suspicion and probable cause should be reviewed de novo." ***Dies v. State***, 926 So. 2d 910, 917 (Miss. 2006) (citing ***Ornelas v. United States***, 517 U.S.

standards." ***Dies***, 926 So. 2d at 918.

"The Fourth Amendment to the United States constitution and Article 3, Section 23 of the Mississippi Constitution of 1890 Prohibit unreasonable searches and seizures made without probable cause, except under limited exceptions." ***Rainer v. State***, 944 So. 2d 115, 118 (Miss. Ct. App. 2006)(citing ***United States v. Ross***, 456 U.S. 798, 825 (1982)); ***Walker v. State***, 881 So. 2d 820, 827 (Miss. 2004).[3]

For Fourth Amendment purposes, a seizure occurs when an officer, "by means of physical force or show of authority," restrains one's ability to move. ***Florida v. Bostick***, 501 U.S. 429, 434 (1991). Stated differently, a seizure requires the application of some physical force or a show of authority to which the subject yields. ***California v. Hodari D.***, 499 U.S. 621, 625-26 (1991)

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3. The Fourth Amendment to the United States Constitution provides;

> the right of people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

Similarly, the Mississippi Constitution provides;

> The people shall be secure in their persons, houses, and possessions, from unreasonable seizure or search; and no warrant shall be issued without probable cause, supported by oath or affirmation, specially designating the place to be searched and the person or thing to be seized.

MS Const. Art. 3, § 23

2400, 2406 (2007) (citing ***Delaware v. Prouse***, 440 U.S. 648, 653 (1979)). Such traffic stops are allowed when the officer has probable cause to believe that a traffic violation has occurred. ***Whren v. U.S.***, 517 U.S. 806, 809-10 (1996) (see also ***California v. Acevedo***, 500 U.S. 565, 569-70 (1991). If supported by reasonable suspicion, it is also permissible for an officer to make an investigatory stop. ***Terry v. Ohio***, 392 U.S. 1, 19 (1968). However, the stop may become unlawful under the Fourth Amendment if the purpose of the detention was to issue a warning ticket and the stop is prolonged beyond the time reasonably required to do so. ***Illinois v. Caballes***, 543 U.S. 405, 407-8 (2005).

ii. Tameca Drummer's Fourth Amendment rights were violated because police lacked probable cause.

The stated reason that Officer Shannon Hester pulled Drummer's car over was that she drove from the "right side of her lane to the inside yellow lines more than once." (T. 10) Such driving hardly constitutes "careless driving," that Officer Hester made the stop for. (T. 194) The Mississippi Code defines careless driving as follows: "Any person who drives any vehicle in a careless or imprudent manner without due regard for the width, grade, curves, corner, traffic and use of the streets and highways and all other attendant circumstances is guilty of careless driving." **Miss. Code Ann. § 63-3-1213.**

Prior Mississippi cases in which probable cause was found to a stop a car for careless driving, involved far more evidence of carelessness. In ***Saucier v. City of Poplarville***, the Court found probable cause to stop a car for repeatedly crossing over the center line of the highway without due

of the road. ***Adams v. City of Booneville***, 910 So.2d 720, 724 (Miss. Ct. App. 2005).

In this case, Officer Hester did not observe Drummer completely cross any lines or drive in the middle of the road or even weave; she specifically says so in her testimony. (T. 194) All that she observed was Drummer drive from the right to left side of her lane and touch to the yellow lines. (T. 10) Officer Hester's only observations of careless driving was that Drummer came close to the yellow line "more than once" during the mile that Officer Hester follow her; there was no crossing of any lines or hitting any curbs. (T. 194) As Appellant's trial counsel asked the officer at trial: "is driving within your lane of travel a crime?" (T. 195) That is the dispositive question here as there seem to be no circumstances of Drummer's driving that would amount to probable cause to pull her over for a careless driving ticket. Officer Hester's report provides no valid reason (probable cause) to pull the Appellant's car over for careless driving; Therefore, Drummer's seizure was invalid.

iii. Drummer's Fourth Amendment rights were violated because Officer Hester had no reasonable suspicion to believe that she was about to commit a crime.

Reasonable suspicion has been judicially defined as a "particularized and objective basis" for suspecting the person stopped of criminal activity. ***Ornelas v. U.S.***, 517 U.S. 690, 696 (1996) (citing ***U.S. v. Cortez***, 449 U.S. 411, 417-18 (1981)). The United States Supreme Court has stated that, "this demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." ***Terry v. Ohio***, 392 U.S. 1, 21 (1968). ***Terry*** says, "when the facts apparent to the officer raise suspicions, the officer is permitted to make a brief stop to determine his identity or maintain the status quo momentarily." ***Id.*** at 21-22.

police report filed at the time makes no such claims. (T. 193)

The determination of whether an officer possessed a reasonable suspicion is made by considering all the circumstances. ***U.S. v. Cortez***, 449 U.S. 411, 418 (1981). In this case, the Appellant was driving the speed limit, was able to properly negotiate a stop sign while being followed by the officer, came to a proper stop when pulled over by Officer Hester and never left her lane of traffic during the mile she was followed. Officer Hester had no reason to suspect that she was engaged in wrongdoing. (T. 193-197)

Accordingly, Officer Hester possessed no reasonable suspicion that a crime was being committed and therefore the Appellant's seizure violated her Fourth Amendment rights. Consequently, the evidence obtained during the search of Drummer's car is inadmissible, as it was the result of an illegal seizure. *See* ***Mapp v. Ohio***, 367 U.S. 643, 654-55 (1961)(All evidence obtained by a search and seizure that violates the Constitution is not admissible in state court).

iv. Conclusion.

Because Officer Hester had neither probable cause nor reasonable suspicion, Drummer's seizure violated her Fourth Amendment rights. Therefore, the evidence obtained as a result was inadmissible.

ISSUE TWO:

WHETHER THE APPELLANT'S SENTENCE IS IN VIOLATION OF HER EIGHTH

Normally, sentencing within the statutory limits is within the discretion of the trail court not subject to appellate review. ***Tate v. State***, 921 SO. 2d 919 (Miss. 2005). Notwithstanding, if a sentence is "grossly disproportionate" to the criminal offense, "the sentence is subject to attack on the grounds that it violates the Eight Amendment prohibition of cruel and unusual punishment." ***Hoops v. State***, 681 So. 2d 521, 537 (Miss. 1996).

ii. Solem v. Helms.

The United States Supreme court has held that a criminal sentence must not be disproportionate to the crime for which the accused is charged or the prison term may be unconstitutional according to the terms against cruel and unusual punishment. ***Solem v. Helm***, 463 U.S. 277, 292 (1983). The ***Solem*** Court applied a three-prong test to determine whether a punishment was constitutionally disproportionate:

> A. The gravity of the offense and the harshness of the penalty;
>
> B. A comparison of the sentence imposed with sentences imposed on other criminals in the same jurisdiction.
>
> C. A comparison of the sentence imposed with sentences imposed for the

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4. The Appellant is aware that the Appellant's sentence is based on an enhancement arising out of prior criminal convictions. While statutorily, the sentence may be legal, the Appellant contends that the simple fact that it falls within the statutory guidelines does not free the Appellant's sentence from a proper Eighth Amendment Analysis. Furthermore, it should be noted that the Appellant's prior convictions resulted in relatively short sentences. The sentencing court in Tennessee even saw fit to designate these crimes non-violent crimes. Because the Appellant is aware that such crimes, if committed in the state of Mississippi, would be deemed crimes of violence. However, the Tennessee sentencing court's determination as it relates to the percentage of sentence to be served by the Appellant on those prior crimes should be seen as illustrative of her culpability and the severity of said prior-convictions.

The United States Supreme Court has further held that the Eight Amendment does not require a rigid proportionality between the accused crime and the prison term enforced, but forbids only circumstances that involve "grossly disproportionate" sentences compared to the crime. ***Harmelin v. Michigan***, 501 U.S. 957, 1001 (1991).

iii. The gravity of the offense and the harshness of the penalty.

In ***Solem***, a South Dakota trial court convicted the defendant for uttering a check for one-hundred (100) dollars. ***Solem***, 463 U.S. at 277. The defendant also had three prior convictions for burglary, one prior conviction for obtaining money under false pretenses, one prior conviction of grand larceny, and one prior conviction of third-offense driving while intoxicated. ***Id.*** As a result, the trial court sentenced the defendant to life imprisonment without possibility of parole. ***Id.***

On appeal, the United States Supreme Court determined that the prison term was significantly disproportionate to the crime and was forbidden by the Eighth Amendment, because uttering a forgery was a nonviolent crime and the sentence was the most severe that a state could impose on any criminal. *Id.* at 300-303.

In the case *sub judice*, the Appellant was sentenced to life without parole for possession of marijuana. The criminal act charged was one of simple possession, not one of action. In fact, there was absolutely no evidence or testimony that the Appellant had used, intended to use, or attempted to use the marijuana. Given the non-violent nature of this crime, the sentence imposed by the trial court is disturbing. In addition, it is grossly disproportionate to the crime of which the Appellant was convicted.

eligible for release or parole. The Appellant will die in the custody of the State of Mississippi unless this honorable Court acts by reversing her sentence. This facts stands in stark contrast with the facts of ***Solem*** where the defendant was eligible for parole after serving only twelve years of his life sentence. It is abundantly clear that the gravity of the offense and the harshness of the penalty imposed upon the Appellant necessitate further analysis of the last two prongs of the ***Solem*** test.

iv. Compared to sentences imposed on other criminals within the same jurisdictions.

The second prong of the ***Solem*** test requires the Court to compare the accused's sentence with the sentence imposed on other defendants charged with the same offense in the same jurisdiction. ***Harmelin v. Michigan*** further defined the analysis to be used. In ***Harmelin***, the defendant was convicted of possessing over six hundred and fifty (650) grams of cocaine and was sentenced to life imprisonment without the possibility of parole. ***Harmelin*** at 957. The Court conduced that a sentence of life without possibility of parole, absent any consideration of other mitigating factors present did not constitute cruel and unusual punishment *per se*. ***Id.*** at 1027. The Court held: "Only if we infer that the sentence is grossly disproportionate to the offense will we then consider the remaining factors of the ***Solem*** test and compare the sentence received to (1) sentences for 'similar' crimes in the same jurisdiction and (2) sentences for the 'same' crime in other jurisdictions." ***Id.*** (emphasis added).

Although the ***Harmelin*** Court ultimately upheld the sentence in its case, the Court stressed the importance of conducting this proportionality analysis. ***Id.*** At 1025-27. In the instant case, the

Mills v. State, 763 So. 2d 924 (Miss. Ct. App. 2000)	Possession of marijuana with intent to sell - Defendant had over 200 grams	15 years
Grayson v. State, 850 So. 2d 196 (Miss. Ct. App. 2003)	Conspiracy to possess marijuana - Defendant had twenty-one bricks of marijuana	20 years
Ratliff v. State, 753 So. 2d 416 (Miss. Ct. App. 1999).	Sale of marijuana within 1500 feet of a church	6 years
Boches v. State, 506 So. 2d 254 (Miss. 1987)	Possession of marijuana with intent to sell – defendant had three large bales of marijuana	12 years
Williams v. State, 871 So. 2d 571 (Miss. 2007)	Manufacture of marijuana	15 years
Cockerham v. State, 752 So. 2d 431 (Miss. Ct. App. 1999)	Sale of marijuana	3 years (1 year suspended)
Stephens v. State, 592 So. 2d 990 (Miss 1991)	Sale of marijuana	3 years
Swindle v. State, 502 So. 2d 652 (Miss 1987)	possession of more than one kilogram of marijuana with intent to distribute	12 and 16 years (two defendants)
Vanderlin v. State, 267 So. 2d 311 (Miss. 1972)	possession of marijuana - 105 grams	3 years
Mills v. State, 304 So. 2d 651 (Miss. 1974)	delivery of marijuana	4 years

5. The First Circuit Court District includes Alcorn, Tishomingo, Prentiss, Lee, Pontotoc, Itawamba and Monroe Counties.

sentencing. In ***Davis***, the defendant who had prior convictions, was convicted of the sale of a small amount of cocaine within fifteen hundred (1500) feet of a church. ***Davis***, 724 So. 2d at 342. Davis was subsequently sentenced to sixty (60) years imprisonment. ***Id.***

The Mississippi Supreme Court remanded to the lower court for a determination of whether the sentence was excessive and in violation of the Eight Amendment by holding:

> Even as to those circumstances for which the statutes provide mandatory sentences, the punishment must be weighed against the prohibition imposed in the Eight Amendment to the United States Constitution against cruel and unusual punishment. In ***Clowers v. State***, 522 So. 2d 762 (Miss. 1988), the defendant was convicted of uttering a forged $250 check, and although finding that he was an habitual offender, the trial court sentenced Clowers to a term of five years, in spite of the controlling statute which mandated a sentence of fifteen years without possibility of parole. In doing so, the trial judge found that the mandated sentence would be cruel and unusual under the facts. The State objected and cross-appealed, and we upheld the trial judge's sentence, relying in part on ***Solem v. Helm***. . . and its declaration that a criminal sentence must not be disproportionate to the crime for which the defendant is being sentenced.
>
> In summary, under the facts of this case and given the lack of justification for the sentence on the face of the record on appeal, it is appropriate that the case be remanded for further consideration of the sentence imposed, consistent with those principles declared in ***Presley***, ***McGilvery***, and ***Clowers*** and in the spirit of ***Solem***.

Davis, 724 So. 2d at 345 (emphasis added).

Also worthy of note is that the habitual offender status is not an actual offense but is merely a statutory provision that allows enhancement of the sentence imposed for the principal crime. ***Gray v. State***, 605 So. 2d 791, 793 (Miss. 1992).

According to **Miss. Code Ann. § 41-29-139**, the prosecution had the discretion to charge the offense in this case as a misdemeanor. It can be reasonably inferred that other judicial districts

parole.

Essentially, should the Appellant's conviction stand, she will spend the rest of her natural life in prison, based on the charging discretion of the prosecution, where should could have been facing, were she charged with a misdemeanor, a maximum of one year in the county jail. Such an outcome must truly run afoul of the Eight Amendment right to be free from cruel and unusual punishment.

v. A comparison of the sentence imposed with sentences imposed for the commission of the game crime in other jurisdictions.

In the case *sub judice*, the trial court's sentence is at the harshest end of the sentencing spectrum, especially considering the sentence is a punishment for a crime which could have been charged and prosecuted as a misdemeanor.

Many states treat possession of marijuana as simply a misdemeanor. *See* **Mich. Comp. Laws § 333.7403**; **Ohio Rev. Code Ann.§ 2925.11**; **La. Rev. Stat. Ann. § 40:966** (containing a six (6) month sentence for first offense possession of marijuana, with escalating penalties for second offenses).

The Appellant respectfully contends that the fact that many jurisdiction treat possession of marijuana as a misdemeanor is illustrative of the unconstitutional proportionality of the Appellant's sentence.

vi. Conclusion.

Because all ***Solem*** factors way in favor of the Appellant, the Appellant's conviction should be reversed because of is violation of the Appellant's right to be free from cruel and unusual

CONCLUSION

The Appellant herein submits that based on the propositions cited and briefed hereinabove, together with any plain error noticed by the Court which has not been specifically raised, the judgment of the trial court and the Appellant's conviction and sentence should be reversed and vacated, respectively, and the matter remanded to the lower court for a new trial on the merits of the indictment on one charge of possession of marijuana, with instructions to the lower court. In the alternative, the Appellant herein would submit that the sentence of the trial be reversed and the Appellant sentenced in accordance with the demands of the United States Constitution.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

Justin T Cook
COUNSEL FOR APPELLANT

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:

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This the 23rd day of March, 2009.

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