IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI

HENRY LINDSEY — APPELLANT

VS.

NO. 2008-KA-1717

STATE OF MISSISSIPPI — APPELLEE

ON APPEAL FROM JUDGMENT OF CONVICTION BY THE CIRCUIT COURT
LEAKE COUNTY, MISSISSIPPI, CAUSE NUMBERED 08-CR-044-LE-G

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI

HENRY LINDSEY	APPELLANT
VERSUS	NO. 2008-TS-1717
STATE OF MISSISSIPPI	APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel fo 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 the judges of the Court of Appeals may evaluate possible disqualification or recusal.

Henry D. Lindsey — Appellant

Thomas A. Pritchard
Attorney of Record for Henry D. Lindsey

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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STATE OF MISSISSIPPI	APPELLEE

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STATEMENT OF THE CASE

Henry D. Lindsey presents this Appeal as of Right from a judgment of conviction for Possession of Contraband in a Private Correctional Facility, contrary to the provisions of section 47-5-193, Mississippi Code Annotated of 1972, entered September 11, 2008, by the presiding judge of the Circuit Court of Leake County, Mississippi. (rec. p. 20).

Mr. Lindsey stands accused of said charge by virtue of an indictment returned by the Leake County Grand Jury (rec. p.2). The indictment accuses Mr. Lindsey of willfully, unlawfully, and feloniously possessing a contraband item-a sharpened instrument-while confined at the Walnut Grove Correctional Facility on the 21st day of February, 2008 (rec. p. 2). He was so incarcerated at the time (rec. p. 39), serving a sentence for a conviction of Armed Robbery (rec. p. 41).

At a jury trial held the morning of September 9, 2008 (rec. p.1), Mr. Lindsey was convicted of

the charge by the trial jury whose deliberations consumed less than fifteen minutes (rec. p. 52). Being aggrieved by certain comments made by the trial judge during the jury selection process, and to the failure of the trial court to instruct this jury following his sustaining of an objection certain aspects of cross examination conducted by an attorney representing the Leake County District Attorney's office, Mr. Lindsey timely filed his Notice of Appeal (rec. p. 27).

Specifically, Mr. Lindsey appeals from comments made by the trial judge appearing at pages 3 and 4 of the record, and to the omission of any instruction admonishing the jurors to disregard any of Mr. Lindsey's testimony wherein he stated he was incarcerated on a charge of Armed Robbery (rec. p. 41), that he had been the subject of a rule violation report and was being served with papers regarding that violation the morning the weapon was found in his cell (rec. p. 41), and that he was already in trouble when those papers were to have been served upon him by a corrections officer (rec. p. 41, p. 42, lines 1-3). At that point defense counsel interposed an objection to this particular line of questioning (rec. p. 42, lines 3-7), which was sustained by the trial court (rec. p. 42, lines 8-15). However, after the objection was sustained, the jury was not instructed by the court at any time to disregard that testimony.

Feeling aggrieved at the course of proceedings and outcome within the court below, Mr. Lindsey now presents his appeal to this tribunal.

I. THE TRIAL COURT ERRED WHEN IT FAILED TO RECOGNIZE THE PREJUDICE WHICH WOULD RESULT TO APPELLANT BY PRESIDING AT TRIAL OF THE CASE, AND REMOVE ITSELF *SUA SPONTE.*

SUMMARY OF ARGUMENT

Central to our administration of justice is the proposition that all trials be presided over by a neutral and detached magistrate, free of bias, prejudiced or interest in any particular cause to such

an extent that a litigant is deprived of a fair trial. Judicial conduct is proscribed in our state by constitutional, statutory, case law and Canon 3 of the Code of Judicial Conduct, which is to be applied rigorously notwithstanding the fact that a party may have failed to lodge a specific challenge to the authority of the court. Canon 3 E, formerly Canon 3 C, on its face does not limit its application only to those instances specifically delineated therein. Disqualification is mandated when a trial judge, in open court, evinces bias expressed in the form of personal opinions about particular aspects of the law, followed by rulings on the reception or exclusion of evidence which affect the substantial rights of one of the parties. In the case before this Court, the record supports the conclusion the sitting judge should have disqualified himself. His remarks to the jury during the opening phases of this trial effectively removed from the defendant the presumption of innocence with which he is clothed in a criminal proceeding. Coupled with the court's failure to instruct the jurors to disregard evidence which impermissibly attacked his character and allowed a jury to infer guilt, on the basis of evidence unrelated to the accusation contained in the indictment, the present court is amply warranted in concluding the bias of the trial judge denied Mr. Lindsey of a fair trial. Reversal and retrial is in order.

ARGUMENT

The requirement that all cases and controversies be heard and determined by a neutral and detached judicial officer is fundamental to our system of justice. This thesis has been recognized and found expression in decisions such as *Black v. State*, 187 So.2d 815 (Miss. 1966), wherein our Mississippi Supreme Court declared:

> "We agree with the Supreme Court of Kentucky. Our courts should go to great lengths to avoid the **appearance of favoritism**, and where there is a reasonable doubt in the mind of the trial judge as to whether or not he should recuse himself, he should promptly

withdraw from the trial of the case to avoid undue criticism of the courts of this state." *Black v. State*, 187 So.2d 815, 819 (Miss. 1966) [emphasis, the writer].

Finding their genesis in our state constitution, Miss. Const., art.6, sec. 165 (1890), code, sec. 9-1-11, MCA (Rev. 2002), and canons of judicial ethics having the force and effect of law; *Hill v. State,* 919 So.2d 142, 144, 145 (Miss. App. 2005); *Green v. State*, 631 So.2d 167, 177 (Miss. 1994) and *Jenkins v. State*, 570 So.2d 1191, 1192 ((Miss. 1990), these principles are applied in the face of a presumption that a trial judge is qualified and unbiased; *Bredemeier v. Jackson*, 689 So.2d 770, 774 (Miss. 1997) and *Baldwin v. State*, 923 So.2d 218 (Miss. App. 2005). A challenge to that presumption must be based upon the fact that a trial judge is related to one of the parties to a particular case by affinity or consanguinity (Miss. Const. of 1890, sec. 165 and sec. 9-1-11, MCA (Rev. 2002); the magistrate has an interest in the outcome of the controversy (sec. 9-1-11, MCA [Rev. 2002] or his conduct is found not to be in conformity to one of the precepts finding their expression in Canon 3 C of the Code of Judicial Conduct, *including but not limited to* personal bias or prejudice towards one of the parties; personal knowledge of evidentiary facts concerning the proceeding; having served as an attorney on the matter in controversy or associated with other representative counsel with whom he had previously practiced law; or the judge or a lawyer is a material witness concerning it. *Green v. State*, 631 So.2d 167 (Miss. 1994) and *Hill v. State*, 919 So.2d 142, 145 (Miss. App. 2005).

It is submitted the question presented for resolution in this case turns upon the application of the Code of Judicial Conduct and its Canon 3.

When faced with the question of whether or not the sitting judge should step down from presiding over a case or controversy a trial court, as well as this tribunal is guided by several well

established principles:

a. Canon 3 E, formerly Canon 3 C, is to be applied rigorously, notwithstanding the fact a particular litigant has failed to lodge a specific challenge to the authority of the court; *Green v. State*, 631 So.2d 167, 177 (Miss. 1994), citing *Collins v. Dixie Transport, Inc.*, 543 So. 2d 160, 166 (Miss. 1989); and *Jenkins v. State*, 570 So.2d 1191, 1192 (Miss. 1990).

b. Would a reasonable person, knowing all the circumstances, harbor doubts about his impartiality? *Green v. State, supra.*, at 177; accord, *Jenkins v. State*, 570 So.2d 1191, 1192 (Miss. 1990). This standard is an objective one; *Jenkins, supra.*, at 1192.

c. The presumption of qualification and lack of bias is overcome by bringing forth **some** reasonable doubt about its validity; *Baldwin v. State*, 923 So. 2d 218, 222-223, paragraph 16 (Miss. App. 2005). The doubt must be a reasonable one; *Brent v. State,* 929 So.2d 952 (Miss. App. 2005), and *Turner v. State*, 573 So.2d 657, 678 (Miss. 1990).[emphasis, the writer]

d. A litigant should present **some** facts which would raise **some reasonable doubt** about the validity of the presumption of impartiality; *Baldwin v. State,* 923 So.2d 218, 222-223, paragraph 16 (Miss. App. 2005); again, emphasis, the writer.

Moreover and even, in the mind of the writer, more importantly, if a reasonable doubt about the impartiality of the trial court is shown to exist, a judge is *required* to disqualify himself; *Brent v. State, supra.*, paragraphs 3, 4, 5, and 6; *Jenkins v. State*, 570 So.2d 1191, 1192 (Miss. 1990), and *Rutland v. Pridgen*, 493 So.2d 952 (Miss. 1986).

The record establishes the existence of some fact by which a reasonable person would have harbored doubts about the continued impartiality of the trial judge. Before a jury was ever selected, sworn and seated and, with the appellant-a prisoner dressed in yellow prisoner's garb

(rec. p.5)-present in the courtroom and presumably seated at counsel table, the trial judge made remarks explicitly establishing his bias against lenient treatment of criminals, perceived lenient attitudes towards "criminals" in the justice system, and his open disagreement with the Mississippi Department of Corrections in its review of sentences meted out by local trial judges of this State, and a prisoner's eligibility for parole:

> "It involves situations, and you as jurors, you understand of course, that depending upon your verdict, a person's liberty could be taken from them. You should never be concerned with that, because I know that you will read in the paper and I know that you hear it on news, and if you'll listen to me sometimes, I'm very, very critical of the Department of Corrections system in releasing prisoners when they've not served the times that the Judge has pronounced." (rec. p. 3).

And again:

> "–you read about people who were convicted and later on, through DNA and other reasons, there is an overturn of that decision. Yes, it does happen. It happens when jurors make mistakes in finding a person guilty when they are really innocent. That's true. But also, there's many a person– and more people who are guilty that are never convicted than there are innocent people who are convicted." (rec. page 4).

Every potential juror in the courtroom that day heard those remarks, and then later on were examined by counsel as to their ability to be fair and impartial!

The writer is mindful of the fact that the remarks of the sitting trial judge evidence personal opinions and bias about and towards aspects of the laws pertaining to the criminal justice system, as opposed to personal bias towards a party-in this case-the appellant. Moreover, the undersigned is aware of past decisions in which our appellate courts have not found an abuse of discretion for failure of a trial judge to disqualify himself where a judge has merely expressed personal opinions; *eg., Green v. State,* 631 So.2d 167 (Miss. 1994) and *Gaddy v. State*, 2009-MS-0429.149. However, those cases do not foreclose inquiry into this issue for two reasons:

1. The language of Canon 3 (both the version existing as of the time of the *Green* decision and present Canon 3 E)of the Code of Judicial Conduct is not so limiting. Specific instances supporting trial and appellate court's justification for a finding disqualification are preceded by the language ". . . including but not limited to. . . " *Green v. State,* 631 So.2d 167, 177 (Miss. 1994); and *Gaddy v. State,* 2009-MS-0429.149. Such an interpretation is in line with longstanding authority wherein it was recommended that a certain Jackson County Circuit Judge disqualify himself on retrial of a particular case in which the Mississippi Supreme Court found reversible error; *Clark v. State,* 409 So.2d 1325, 1330 (Miss. 1982).

2. Both *Green, supra.,* and *Gaddy, supra.,* specifically point toward consideration of another result had each appellant been able to demonstrate any improper admission or exclusion of evidence by the trial judge, as a result of any alleged bias (see *Green, supra.,* "Green has cited no instances where the judge improperly admitted or excluded evidence as a result of his alleged bias, nor has he provided any other evidence of bias." page 177. and *Gaddy, supra.,* paragraph 9).

Pages 41 and 42 of the record demonstrate such error committed by the trial court. Appellant Lindsey was questioned several times by the State about why he was an inmate at the Walnut Grove Correctional Facility, and what led to the discovery of the "weapon" allegedly willingly possessed by him (He had testified previously, not only as to lack of any knowledge of the existence of any such weapon being in his cell until a Mr. Dotson found one by the toilet in that cell-rec. p. 40 and p. 41, lines 1-5, but denied that the weapon introduced into evidence as Exhibit "A"- rec. p. 24- was THE weapon that was found and connected to him):

"Q. Armed Robbery? How long have you been there?

A. Since 2006.

Q. So you've been down there quite a while?

A. Yes, sir.

Q. And Mr. Dotson was coming around to serve paperwork on you. You said it was a RVR. What does that mean?

A. A. rule violation report.

Q. So you were in trouble when he came to serve you some papers, weren't you?

A. Yes, Sir." Rec. p. 41

Continuing:

"Q. It had something to do with something else you have been in trouble for besides having that shank.

BY MR. SMITH: Your Honor, I would object to this line as irrelevant. He's here about whether or not he had that shank in that cell and it was his and not anything else.

BY THE COURT: It's just like in a trial of a case, you cannot mention that a person has committed another crime. He has testified it was an RVR report, rule violation report, which is the same principle as not being allowed to introduce evidence of a subsequent crime. So your objection is sustained." Rec. p. 42, lines 1-15.

Having sustained the objection, the trial court committed error when it failed to instruct the jury to disregard this evidence of prior bad acts. The jury had already heard-from the lips of appellant as solicited by the State and without objection from his counsel- that he was imprisoned and serving time for an unrelated crime (armed robbery); that Lindsey was about to be served paperwork for a rule violation report-again without objection-and that he was in trouble for something unrelated to the offense for which he was then being tried (possession of a

sharpened instrument while incarcerated, a section 47-5-193, Miss. Code Ann. of 1972 offense)- again without objection from his attorney. Thus the jury had already received evidence of three unrelated instances of a KNOWN PRISONER'S previous, irrelevant, and unrelated bad conduct before any objection was interposed and any ruling made by the trial judge. As will be explained and argued later, all such evidence should not have been admitted. The failure of any trial judge to instruct a jury to disregard such evidence is, under these circumstances, error.

It is submitted the personal opinions and biases of the trial judge toward aspects of the criminal justice system, coupled with a failure to instruct this trial jury to disregard clearly inflammatory, unduly prejudicial, and irrelevant evidence solicited by the State with belated objection by defense counsel, in a trial where the trier of fact knew instantaneously that Lindsey had already been incarcerated for another unrelated offense, is the sort of coupling the *Green* and *Gaddy* panels would find persuasive of bias and reverse a trial judge for abusing his discretion; *Brent v. State,* 929 So.2d 952, 955 (Miss. App. 2005). Such should be the result obtained here; *Clark v. State, 409 So. 2d 1325.*

II. FAILURE OF THE TRIAL COURT TO INSTRUCT THE JURY TO DISREGARD EVIDENCE OF OTHER CRIMES, WRONGS OR ACTS, WHERE NO FOUNDATION FOR THEIR ADMISSIBILITY HAD BEEN LAID BY THE STATE, AND WHERE NO DEMONSTRATION WAS MADE TO SHOW THEIR PROBATIVE VALUE OUTWEIGHED THEIR PREJUDICIAL EFFECTS, WAS SUBSTANTIVE ERROR.

SUMMARY OF ARGUMENT

During its cross examination of Mr. Lindsey, the State impermissibly brought out evidence of other crimes, wrongs or acts associated with Appellant. Such evidence, notwithstanding ultimate objection by defense counsel and the sustaining of such objection by the trial court, permitted jurors to conclude the accused was guilty of the crime charged because he had been engaged in

other wrongful, sometimes criminal behavior while incarcerated at the Walnut Grove Correctional Facility. The trial court should have, in the face of an objection to the reception of such evidence, admonished the jury to disregard such evidence. Its failure to do so constitutes reversible error.

ARGUMENT

Within his first assignment of error, Mr. Lindsey set forth the scope of some of the cross examination surrounding his incarceration for armed robbery, his visit by Mr. Dotson to serve him with a rule violation report, and Lindsey's propensity to be in trouble with prison authorities on matters other than for which he was standing trial, to wit: knowing possession of a shank or weapon while incarcerated at the Walnut Grove Correctional Facility (rec. pp. 41 and 42). Aside from the armed robbery conviction, none of the other acts had resulted in a conviction of anything. None of the conduct inquired about had any bearing upon the charge for which Lindsey stood indicted. All of it was an attack on his character and a barely disguised effort by the prosecution to tell the jury that Mr. Lindsey surely must have been guilty of the possession charge. Though the record does not demonstrate any effort on the part of the State to illustrate the probative features of such evidence, and even though the record is silent regarding any consideration by the trial court as to which standards it should have employed when weighing its admissibility, the court did exclude the majority of such evidence (save the armed robbery conviction) when trial counsel ultimately lodged his objection to such line of questioning.

The admissibility vel non of this sort of evidence has been addressed *ad nauseum* by both the Court of Appeals and the Mississippi Supreme Court. The interplay among Mississippi Rules of

Evidence 403, 404(b) and 609(a) has been the subject of continual analysis by our appellate courts. Indeed, cases educating the bar and illustrating the required showing a proponent of such evidence must make, the balancing test to be employed by the trial court before the considered evidence can be admitted, and the duties placed upon the opponent and the court at and after the time of its consideration, are legion and need not be repeated or recited here. The thrust of the present argument serves to illustrate the fatal error committed by the trial court when it did not instruct the jury regarding same after proper objection was lodged and sustained by the court.

In *Smith v. State*, 656 So.2d 95 (Miss. 1995), the Supreme Court determined that when evidence of such character has been admitted over objection, the trial court is to give a limiting instruction unless objected to by counsel opposite (*Smith, supra.*, 99-100, for analysis of such evidence under the Mississippi Rules of Evidence and duty of the trial court). See also, *Bounds v. State*, 688 So.2d 1362 , 1372 (Miss.1997.)-invocation of objection imposes duty upon trial court to give a limiting instruction, sua sponte. And see, *Moss v. State, 727 So.2d 720 at 725; Webster v. State, 754* So2d. 1232, 1239 (Miss. 2000)- *Smith* interpreted not only to require such an instruction; failure to give it sua sponte constitutes reversible error; *Smith v. State, 656 So. 2d 95 (Miss. 1995).* Such was the approved procedure and remedy through the decision of *Brown v. State*, 890 So.2d 901 (Miss. 2002), and has again been cited with approval by our Supreme Court in *Easter v. State*, 878 So.2d 10, 21 (Miss. 2004).

As the trial record demonstrates, defense counsel eventually objected to the line of questioning posed by the prosecution (rec. p. 42), and the trial judge did sustain the objection (rec. p. 42). However, after that exchange the record is silent as to anything the jury should have been told regarding the exclusion of such evidence, in a case where it already knew the person

being tried was a convicted felon.

The correct procedure to have been employed has been demonstrated in *King v. State*, 857 So.2d 702, 722-723, paragraphs 53 through 62 (Miss. 2003), citing with approval *Day v. State*, 589 So.2d 637, 644 (Miss. 1991). To furnish such a cautionary instruction by the Court, even in the absence of a request by counsel, works no harm upon the court in a case where so substantial a right as the guilt or innocence of a defendant is at stake. Indeed, counsel has NOT FOUND any case criticizing or condemning such sua sponte instructions in those instances where the court has agreed with defense counsel's objection and excluded substantially prejudicial and inflammatory evidence. Neither has counsel found any decision wherein the requesting of a like instruction in the face of such a favorable ruling has been made mandatory upon the objector.

In summary, the trial court should have, of its own volition, instructed the trial jury to disregard inflammatory and prejudicial evidence solicited from Mr. Lindsey by the State during the course of cross examination. The sole purposes behind eliciting such testimony were to engage in an attack upon his character and to persuade the trier of fact that because he had engaged in behavior deemed criminal in the past he was, without more, guilty of the present accusation. The jury heard all of this evidence and the exchange among court and counsel without being told not to consider it. Such omission constitutes reversible error.

CONCLUSION

The judgment of conviction should be reversed and this case reversed for a new trial, before a different trial judge. Mr. Lindsey has, through the cumulative action of the court, been deprived of a fair trial; *Jenkins v. State*, 570 So.2D1191 (Miss. 1990); *Brent v. State*, 929 So.2d 952 (Miss. App. 2005).

Respectfully submitted,
Henry D. Lindsey

By: Thomas A. Pritchard

THOMAS A. PRITCHARD, ESQ.
COUNSEL

CERTIFICATE OF SERVICE

I, Thomas A. Pritchard, one of the attorneys of record for Henry Lindsey in the above styled and numbered cause, do hereby certify that in compliance with Rule 25, M.R.A.P., I have this day deposited in the United States mail, first class postage prepaid, an original and three copies of the above and foregoing brief of appellant to the Clerk, Mississippi Court of Appeals, P.O. Box 22847, Jackson, Mississippi 39205.

I further certify that I have this day mailed via United States mail, first class postage prepaid, a true and correct copy of the above and foregoing brief of appellant to:

a. Mr. Jim Hood, Esq., Mississippi Attorney General, P.O. Box 220, Jackson, Mississippi 39205,

b. Hon. Marcus D. Gordon, Circuit Court Judge, Leake County, P.O. Box 220, Decatur, Mississippi 39327-0220, and

c. Mr. B. Jackson Thames, Jr., Esq., Office of the District Attorney, P.O. Box 603, Philadelphia, Mississippi 39350-0603,

their usual and customary mailing addresses.

SO CERTIFIED, this the 12th day of May, 2009.

PREPARED AND PRESENTED TO THE COURT BY:

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