IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2008-KA-01722-COA

KIRK VINCENT MAYERS — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
George T. Holmes, MSB No. [redacted]
301 N. Lamar St., Ste 210
Jackson MS 39201
601 576-4200

Counsel for Appellant

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2008-KA-01722-COA

KIRK VINCENT MAYERS — APPELLANT

V.

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. Kirk Vincent Mayers

THIS 17th day of March, 2009.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Kirk Vincent Mayers

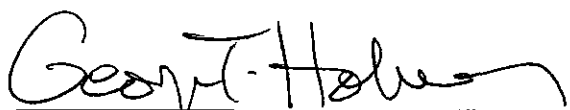
By: 
George T. Holmes, Staff Attorney

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF ISSUES	1
STATEMENT OF THE CASE	1
FACTS	2
SUMMARY OF THE ARGUMENT	4
ARGUMENT	4
ISSUE # 1	4
ISSUE # 2	10
ISSUE # 3	11
ISSUE # 4	13
ISSUE # 5	15
ISSUE # 6	15
ISSUE # 7	17
ISSUE # 8	20
ISSUE # 9	24
CONCLUSION	32
CERTIFICATE OF SERVICE	33

TABLE OF AUTHORITIES

CASES:

Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000) 23, 28, 29

Beckham v. State, 556 So.2d 342 (Miss.1990) 8

Bell v. State, 726 So.2d 93 (Miss.1998) 29

Berry v. State, 703 So.2d 269 (Miss. 1997) 15, 16

Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 2536 (2004) 28, 29

Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932) . . 26

Bogan v. State, 176 Miss. 655, 170 So. 282 (1936) 7

Boyd v. State, 977 So.2d 329 (Miss. 2008) 26, 27

Brown v. State, 995 So.2d 698 (Miss. 2008) 28, 29

Brown v. State, 252 So.2d 885 (Miss.1971) 13

Brown v. State, 731 So.2d 595 (Miss.1999) 26

Brown v. State, 890 So.2d 901 (Miss., 2004) 14

Cal. Dep't of Corr. v. Morales, 514 U.S. 499, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995) 29

Carter v. State, 941 So.2d 846 (Miss. Ct. App. 2006) 17

Caston v. State, 949 So.2d 852 (Miss. Ct. App. 2007) 8

Chisolm v. State, 529 So.2d 635 (Miss.1988) 15

Clubb v. State, 672 So.2d 1201 (Miss. 1996) 24

Cotton v. State, 675 So. 2d 308 (Miss. 1996) 21

Dotson v. State, 358 So. 2d 1321 (Miss. 1978) 10

Duckworth v. State, 989 So.2d 917 (Miss. Ct. App., 2007) 15

Durr v. State, 446 So.2d 1016 (Miss.1984) 5

Edmonds v. State, 955 So.2d 787 (Miss.2007) 23

Ellett v. State, 364 So. 2d 669 (Miss. 1978) 12

Farris v. State, 764 So.2d 411 (Miss. 2000) 6

Franklin v. State, 766 So.2d 16 (Miss. Ct. App. 2000) 25

Garner v. State, 944 So.2d 934 (Miss. Ct. App. 2006) 6, 7

Goodson v. State, 566 So. 2d 1142 (Miss. 1990) 22

Graves v. State, 969 So.2d 845 (Miss.2007) 27

Green v. State, 884 So.2d 733 (Miss. 2004) 14

Harmelin v. Michigan, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) 30

Hatten v. State, 938 So.2d 365 (Miss. Ct. App. 2006) 12

Hoops v. State, 681 So.2d 521 (Miss.1996) 30

Houston v. State, 887 So.2d 808 (Miss. Ct. App.2004) 26

Interest of W.B., 515 So.2d 1175 (Miss.1987) 12

Irwin v. Dowd, 366 U. S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961) 16

Johnson v. State, 247 So.2d 697 (Miss.1971) 12

Lacy v. State, 629 So.2d 591(Miss.1993) 25

Leatherwood v. State, 473 So.2d 964 (Miss. 1985) 1

Lenard v. State, 828 So.2d 232 (Miss. Ct. App.2002). 12

Long v. State, 933 So.2d 1056 (Miss. App. 2006.) 12

Mhoon v State, 464 So. 2d 77 (Miss. 1985) 16

Osborne v. State, 404 So.2d 545 (Miss. 1981) 26

Greenwood v. State, 744 So.2d 767 (Miss.1999) 26

Mosley v. State, 930 So.2d 459 (Miss. Ct. App. 2006) 26

Neal v. State, 936 So.2d 463 (Miss. Ct. App. 2006) 7

Old Chief v. United States, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997) 17

Palmer v. Volkswagen of America, Inc. 904 So.2d 1077 (Miss. 2005) 20

Palmer v. Volkswagen of America, Inc., 905 So.2d 564 (Miss. Ct. App. 2003) 20

Parisie v. State, 848 So.2d 880 (Miss. Ct. App.2002) 6

Peterson v. State, 671 So.2d 647 (Miss.1996) 5

Quick v. State, 569 So.2d 1197 (Miss.1990) 8, 9

Rigby v. State, 826 So.2d 694 (Miss.2002) 17, 18

Ruffin v. State, 992 So.2d 1165 (Miss. 2008) 13

Rushing v. State, 753 So.2d 1136 (Miss. App.,2000) 6, 8, 9

Sample v. State, 643 So.2d 524 (Miss.1994) 21

Sawyer v. State, 2007-KA-00136 (Miss 2008) 19

Smith v. State, 82 Miss. 793, 35 So. 178 (1903) 6

Smith v. State, 948 So.2d 474, (Miss. Ct. App. 2007) 13

Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637(1983) 30, 31

Spears v. State, 942 So.2d 772 (Miss.2006) 8

Stewart v. State 372 So.2d 257 (Miss. 1979) 28

Tate v. State, 912 So.2d 919 (Miss. 2005) 26

Taylor v. State, 656 So. 2d 104 (Miss. 1995) 16

Thompson v. State, 457 So.2d 953 (Miss. 1984) 12

Torrey v. State, 816 So.2d 452 (Miss. Ct. App. 2002). 8

Williams v. State, 991 So.2d 593 (Miss. 2008) 15, 17-18

Williams v. State, 784 So.2d 230 (Miss. Ct. App.2000) 30

STATUTES

Miss. Code Ann. § 41-29-142 (Rev. 2005) 30

Miss Code Ann. § 97-3-7. (Supp. 2008) 5, 6, 25

Miss. Code Ann. §97-37-35 (Supp. 2006) 11, 12

Miss. Code Ann. §97-37-37 (Supp. 2008) 2, 24-32

Miss. Code Ann. § 99-19-81 (1972) 24

Miss. Code Ann. § 99-19-83 (1972) 24

OTHER AUTHORITIES

Miss. Const. 1890 Art. 3 §14 13

Miss. Const. 1890 Art. 3 §16 31

Miss. Const. 1890 Art. 3 §22 27

Miss. Const. 1890 Art. 3 §26 . . . . . 7, 13, 17

Miss. Const. 1890 Art. 3 §28 31

Miss. R. Evid. Rule 103 23

Miss. R. Evid. Rule 105 15

Miss. R. Evid. Rule 701 20

Miss. R. Evid. Rule 702 21

Unif. Cir. Co. Ct. Prac. Rule 7.06 . . . . . 6, 8

Unif. Cir. Co. Ct. Prac. Rule 11.03 26

U.S. Const., Amend. V 13, 27

U.S. Const., Amend. VI 7, 13, 17

U. S. Const., Amend VIII 31-32

U. S. Const., Amend. XIV 12, 17, 27

U. S. Const. Art. 1, §10 30

STATEMENT OF THE ISSUES

ISSUE NO. 1: DID THE INDICTMENT CHARGE AGGRAVATED OR SIMPLE ASSAULTS IN COUNTS 1 AND 2?

ISSUE NO. 2 WHETHER THE STATE PROVED "KNOWING ASSAULT" OF LAW ENFORCEMENT OFFICERS UNDER COUNTS 1 AND 2 ?

ISSUE NO. 3 DID THE STATE PROVE SCIENTER UNDER COUNT 3?

ISSUE NO. 4: DID THE TRIAL COURT ERRONEOUSLY REFUSE A SELF-DEFENSE INSTRUCTION?

ISSUE NO. 5: WAS MAYERS ENTITLED TO A CAUTIONARY INSTRUCTION CONCERNING HIS PRIOR CONVICTIONS?

ISSUE NO. 6: WHETHER JUROR 18 SHOULD HAVE BEEN STRICKEN FOR CAUSE?

ISSUE NO. 7: SHOULD THE STATE HAVE BEEN REQUIRED TO STIPULATE TO MAYER'S PRIOR CONVICTIONS UNDER THE FELON IN POSSESSION COUNT?

ISSUE NO. 8: WHETHER THE TRIAL COURT ALLOWED IMPROPER OPINION EVIDENCE?

ISSUE NO. 9: WHETHER MAYER'S SENTENCE WAS ILLEGAL?

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Rankin County, Mississippi where Kirk Vincent Mayers was convicted of two counts of aggravated assault of law enforcement officers, one count of being in possession of stolen firearms and in a fourth count of being a felon in possession of a firearm. A jury trial was conducted August 26-

27, 2008, with Honorable Samac Richardson, Circuit Judge, presiding. Mayers was sentenced to thirty (30) years each for the two aggravated assaults, five (5) years for the possession of a stolen gun, and three (3) years for the felon in possession, all consecutive. Mayers was sentenced to two (2) additional ten (10) year terms under MCA §97-37-37 (2) (Supp. 2008) for the use of a firearm in the commission of a felony. All together the sentences totaled eighty-eight (88) mandatory years. Mayers is presently incarcerated with the Mississippi Department of Corrections.

FACTS

On May 4, 2006, Bernard Gunter, a Simpson County Sheriff's investigator, was following a lead on a Simpson County burglary which lead him to contact the Pearl Police Department in Rankin County for assistance in locating a suspect, Jonathan Shelly. [T. 235-238]. Shelly was located and questioned at the Pearl Police Department the next day May 5, 2006. [*Id.*, 43-46, 247-50].

Shelly confessed to the Simpson County burglary and also told Simpson and Pearl authorities that he traded stolen items, which included a television and some firearms, for drugs at apartments K-77 and K-78 in the Crestview Apartment complex in Pearl.[*Id.* 266]. Shelly took Pearl Police Detective Archie Bennett to the Crestview Apartments and showed Bennett where he said he traded the stolen goods. [*Id.*, 48-49].

Before they actually arrived at the Crestview Apartments Bennett testified that

Shelly spotted an automobile and advised that stolen goods would be found in it. [T. 48-49]. Bennett called in for a marked Pearl police unit to stop this car. *Id.* They did, and stolen goods were found in it which matched information from the Simpson County burglary investigation. *Id.* The victim of the Simpson County burglary, Les Kershner, had provided investigators with serial numbers and descriptions. [T. 236, 502-06].

Two warrants were obtained for apartments K-77 and K-78 and two SWAT teams assembled for execution of the warrants since "weapons were involved." [T. 50-52]. The SWAT teams knocked and announced and made forceful entry into Apartments K-77 and K-78, one after the other. [T. 57-60, 270-78, 308-10, 324-31, 337-40, 350-57, 388-92, 418-22, 428-36, 445-47, 508-22]. K-77 was secured quickly. *Id.*

As soon as the SWAT team members knocked open the door of K-78, they said gunshots came from inside. [T. 60-61, 238-40, 275-78, 310-16, 324-31, 341-44, 357-67, 394-95, 424, 437-39, 446-47, 551-52, 627]. There was a single male shooter. *Id.* Two officers were hit, Jake Windham received a gunshot wound to the left knee area and Philip Arrant was hit in the right hand. [T. 60, 276, 316-17, 344, 359, 367, 393, 424, 446-47, 552-56].

The Appellant, Kirk Mayers, was arrested in Apartment K-78 near a jammed .22 pistol which lay on the kitchen floor and which appeared to have been stolen in the Simpson County burglary. [T. 61, 278, 280, 342, 363, 394-96, 426, 438, 462, 528; Exs. 7, 9]. A purported stolen television was also found in K-78. [T. 462, 601, 634; Ex. 6].

SUMMARY OF THE ARGUMENT

The indictment only charged simple assault of law enforcement officers under counts 1 and 2 rather than aggravated assault. The state failed to prove that Mayers knew he was shooting at police officers under Counts 1 and 2 and failed to prove scienter under count 3. The trial court erred in refusing a self-defense jury instruction and erred in refusing a cautionary instruction regarding prior convictions. The state should have been required to stipulate to prior Mayers' prior convictions for the felon in possession charge. The trial court erred in not striking a potential jury who was distracted by personal problems and the trial court allowed improper opinion evidence. Mayer's sentence is illegal.

ARGUMENT

ISSUE NO. 1: DID THE INDICTMENT CHARGE AGGRAVATED OR SIMPLE ASSAULTS IN COUNTS 1 AND 2?

It was argued during the jury instruction selection process that the indictment in this case charged simple, not aggravated, assault, as there was nothing pled about the use of a "deadly weapon". [T. 653]. Counts 1 and 2 of the indictment describe two assaults by the use of "a gun". [R. 12-14].[1] It is suggested that Mayers was not charged with

---

1

Operative language from indictment:
Count 1: Kirk Vincent Mayers, ...did unlawfully, feloniously, purposely and knowingly, cause or attempt to cause bodily injury to Officer Jake Windham, a law enforcement officer..., by shooting the officer in the leg with a gun, ...

aggravated assault and his convictions under Counts 1 and 2 should be reversed with remand for new trial or resentencing for the lesser felony of simple assault on law enforcement officers.

Under Miss Code Ann. § 97-3-7. (Rev. 2008):

> (1) A person is guilty of simple assault if he (a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or (b) negligently causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm.
>
> (2) A person is guilty of aggravated assault if he (a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or (b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm.

Mayers' request that simple assault be submitted to the jury was denied and the jury was instructed on aggravated assault with "deadly weapon" added in to the jury instructions. [T. 653; R. 131, 132, 138]. In fact the trial court ruled that Mayers' had waived the right to claim the indictment pled simple assault. *Id.* It is suggested that the learned trial judge was wrong on this point, as jurisdictional defects in indictments are not subject to waiver and failure to object or demur to an indictment is no bar to the issue being raised on appeal. *Durr v. State*, 446 So.2d 1016, 1017 (Miss.1984).

Appellate review of indictment claims are *de novo*. *Peterson v. State*, 671 So.2d 647, 652 (Miss.1996). Appellant's argument is that the indictment was misread by the

---

Count 2: Kirk Vincent Mayers ... did unlawfully, feloniously, purposely and knowingly, cause or attempt to cause bodily injury to Officer Phillip Arrant, a saw enforcement officer ... by shooting the officer with a gun ...

trial court resulting in improper instructions to the jury under counts 1 and 2.

The indictment references aggravated assault at the top of the page with the code section "Miss. Code Ann. 97-3-7", but fails to list any subsections to indicte simple or aggravated assault. At best for the state, the indictment was ambiguous.

Appellant is aware that the use of the word "handgun" has been treated as sufficient for missing "deadly weapon" in an indictment. *Parisie v. State*, 848 So.2d 880, 886 (¶22) (Miss. Ct. App. 2002). However, "a gun" is not synonymous with "handgun". There are many types of "guns" that are not necessarily deadly weapons, for example, paint gun, staple gun, toy gun, squirt gun, grease gun, *et cetera*. In *Parisie* there is no doubt as to what a "handgun" is, but, the indictment in this case is nevertheless ambiguous as to what kind of "a gun" is referenced. "Unless an item is inherently dangerous and deadly, it may not, as a matter of law, be declared a deadly weapon." *Rushing v. State*, 753 So. 2d 1136, 1146 (¶48) (Miss. App. 2000).

Under URCCC 7.06, "[a]n indictment must be a plain, concise, and definite written statement of the essential facts constituting the offense charged. It must fully notify the defendant of the nature of the charge and the cause of the accusation." *Garner v. State,* 944 So.2d 934, 940-41 (Miss. Ct. App. 2006). See also *Farris v. State*, 764 So.2d 411 (Miss. 2000). [2]

2

Under former authority, the state's failure to plead a statutory element was fatal to the prosecution of the case. *Smith v. State*, 82 Miss. 793, 35 So. 178 (1903).

In *Garner v. State, supra*, the Court reiterated that the purpose of a criminal indictment under U.S. Const. Amend. VI and Miss. Const. Art. 3, § 26, is, *inter alia*, "to furnish the accused such a description of the charge against him as will enable him to make his defense" and "to inform the court of the facts alleged so that it may decide whether they are sufficient in law to support a conviction." 944 So. 2d 940-41.

In *Garner, supra*, Garner was charged with multiple armed robberies and alleged that one of his indictments failed to charge an essential element of armed robbery, namely, the exhibition of a deadly weapon. *Id.* The claimed error in *Garner* was that one of the indictments charged the crime was committed by putting the victim "in fear of immediate injury to her person 'by representing that he had a pistol when in fact he was pointing a finger concealed by a coat at the cashier and demanded the cash from the store cash register ....'" *Id.*

The *Garner* court ruled that, "because the indictment omitted the "exhibition of a deadly weapon" element, Garner was not placed on notice that the State would attempt to prove that he had exhibited a deadly weapon", thus the indictment, factually pled, only charged simple robbery. *Id.* The effect was that, "the circuit court lacked subject matter jurisdiction over the offense of armed robbery [but not] ...the crime of simple robbery. See also *Neal v. State*, 936 So.2d 463 (Miss. Ct. App.2006).

It is Mayer's position here that, as in *Garner, supra,* since his indictment did not formally state nor plead facts sufficient to conclude that "a gun" as pled was a deadly

weapon the indictment fails to conform to URCCC 7.06 to charge the crime of aggravated assault under Counts 1 and 2. The failure to plead the material facts leaves the indictment vague and equally descriptive of the crime of simple assault. *Bogan v. State,* 176 Miss. 655, 170 So. 282 (1936).

The current standard of the Court of Appeals for indictment pleading "requires only that the indictment include the seven enumerated items of Rule 7.06 and provide the defendant with actual notice of the crime charged so that 'from a fair reading of the indictment taken as a whole the nature of the charges against the accused are clear.'" *Caston v. State,* 949 So.2d 852 (Miss. Ct. App. 2007). "Formal and technical words are not necessary ... *if the offense can be substantially described without them.*" [emphasis added]. *Id.* See also *Spears v. State*, 942 So.2d 772, 774(¶ 9) (Miss.2006).

Ambiguity in charging language is required to be resolved by yielding to the lesser offense. *Torrey v. State*, 816 So.2d 452, 454(¶ 4) (Miss. Ct. App. 2002). In *Torrey* the Court reiterated that, when "a defendant's conduct can be classified under two different statutes, the defendant is entitled to sentencing under the statute providing the lesser penalty if, and only if, the indictment, itself, is ambiguous as to which the defendant is charged under." [Citations omitted]. *Id.*

The *Torrey* court pointed out that, "when the specific code section under which the defendant is charged appears in the indictment, the indictment is not ambiguous." In the present case, the particular *subsection* of MCA §97-7-3 (Rev. 2008) was not revealed. [R.

12-14]. See also, *Beckham v. State*, 556 So.2d 342, 343 (Miss.1990).

The facts of the present case are also like those in *Rushing v. State*, 753 So.2d 1136, 1145-47 (¶ 42-43) (Miss. Ct. App.2000), the indictment charged Rushing with aggravated assault, but excluded the words "with a deadly weapon". Rushing argued on appeal that jury instructions purported to amend the indictment to correct indictment defects. The *Rushing* court, relying on *Quick v. State*, 569 So.2d 1197, 1199 (Miss.1990), held to the rule that "the state can prosecute only on the indictment returned by the grand jury and ... the court has no authority to modify or amend the indictment in any material respect." *Rushing,* 753 So.2d at 1145 (¶42).

The court in *Quick* reversed and remanded the case on the ruling that the jury instructions added a "new element which was not contained in the original indictment" *Quick*, 569 So. 2d at 1200. This is what the trial court did here as well. [R. 131-32, 138].

The *Rushing* court reversed the conviction in that case finding that, by the giving of jury instructions, "the trial court indirectly amended the indictment, by adding "the deadly weapon element of §97-3-7(2)(b)." *Rushing*, 753 So.2d at 1147 (¶ 49).

Here, after comparing jury instruction S-1-I, S-1-II, and S-3 [R. 131-32, 138] to the indictment, the Court is respectfully requested to do the same as in *Rushing* and *Quick* and reverse and render Mayers' two simple assault convictions or grant a new trial.

ISSUE NO. 2: WHETHER THE STATE PROVED "KNOWING ASSAULT" OF LAW ENFORCEMENT OFFICERS UNDER COUNTS 1 AND 2 ?

The Pearl Police SWAT team made entry to apartment K-78 some time after 11:51 p. m. on the night of May 5, 2006. [T. 333]. The apartment belonged to Mayers girlfriend Serfina Martin. [T. 40, 608]. Martin and Myers were asleep and neither said they heard the police make any announcement. [T. 608- 610, 627]. Mayers said he had obtained the .22 pistol because Serfina's previous boyfriend was getting out of jail soon and had made serious threats against Mayers. [T. 630, 632]. This was confirmed by Martin. [T. 612-614]. When Mayers heard the commotion of the SWAT team coming into the apartment, he said he thought it was a burglar or perhaps Serfina's old boyfriend coming to do harm. [T. 627-31].

Some thought should be afforded to the possibility that the Pearl Police Department grossly over-reacted and created the situation which resulted in two of its officers being shot. Was it really necessary to have such a large show of force? Was it really necessary to go to the extent of scaring everyone in the apartment complex to the point that at least one felt the need to defend himself? Would it not have been safer to wait and let the occupants, or at least Mayers, exit the apartment? The SWAT team knew that children might be present. [T. 532, 537]. There was no immediate risk of harm that something might have happened to Mr. Kershner's stolen television.

For an assault case against a law enforcement officer, knowledge that the victim is

an on duty officer must be established. *Dotson v. State,* 358 So. 2d 1321, 1323 (Miss. 1978). Here all agreed that as soon as the door to K-78 opened gunshots erupted from inside, before the shooter would have had time to see who it was. [T. 60-61, 238-40, 275-78, 310-16, 324-31, 341-44, 357-67, 394-95, 424, 437-39, 446-47, 551-52, 627]. Mayers said he thought someone was breaking in and he fired in self-defense. [T. 627-31].

Not only did the state not prove any opportunity to know that the people coming into K-78 were law enforcement officers, one of the officers was hit through a wall by gun-fire. [T. 360]. Officer Arrant was still outside when his right hand was hit by fragments and debris from a round fired from inside the apartment. *Id.* Mayers could not have known Arrant was an officer, because Mayers never saw Arrant. *Id.*

Therefore, the state did not establish proof sufficient enough for a jury to find, or with enough weight to support a verdict for, the knowingly shooting of two police officers. Mayers respectfully request reversals and renderings of the convictions of Counts 1 and 2.

ISSUE NO. 3 DID THE STATE PROVE SCIENTER UNDER COUNT 3?

Count 3 of the indictment was prosecuted under the authority of Subsection (1) of Miss. Code Ann. §97-37-35(2006 Supp.).[3] The appellant suggests that the state did not

---

[3]Miss. Code Ann. §97-37-35. Stolen firearms.

(1) It is unlawful for any person knowingly or intentionally to possess, receive, retain, acquire or obtain possession or dispose of a stolen firearm or attempt to possess, receive, retain, acquire or obtain

prove the element of scienter.

Joseph Young, the occupant of K-77, admitted trading the stolen .22 to Mayers. [T. 601]. Mayers admitted buying the pistol from Young. [T. 632]. Neither Young nor Mayers indicated any knowledge that the pistol was stolen. The state did not put on proof that Mayers or Young knew, or should have known, the pistol was stolen. The circumstances of the trade lent no proof either as to the weapon's provenance.

Scienter or "guilty knowledge is the very gist" of the offense of receiving stolen property and must be "both alleged and proved." *Johnson v. State*, 247 So.2d 697 (Miss.1971). Unexplained possession of stolen property shortly after the commission of a larceny does not create any inference "that the one in possession of the property received it from another knowing that it had been stolen." *Id.* See also *In Interest of W.B.*, 515 So.2d 1175 (Miss.1987), *Thompson v. State*, 457 So.2d 953 (Miss. 1984), [both cases involve reversals because of lack of proof of knowledge.]

Scienter may be proved by evidence that a defendant "received the property under circumstances that would lead a reasonable man to believe it to be stolen." *Ellett v. State*, 364 So. 2d 669, 670 (Miss. 1978). See also *Long v. State*, 933 So.2d 1056 (Miss. App.

---

possession or dispose of a stolen firearm.

(2) It is unlawful for any person knowingly or intentionally to sell, deliver or transfer a stolen firearm or attempt to sell, deliver or transfer a stolen firearm.

(3) Any person convicted of violating this section shall be guilty of a felony and shall be punished as follows: (a) For the first conviction, punishment by commitment to the Department of Corrections for five (5) years; sentence of incarceration.

2006.)

Here, the burglary victim said his High Standard "Sport King".22 pistol was seventy-five years old. [T. 504-06]. No witness testified that Mayers paid too little. From the circumstances it is just a likely he paid too much.

The Court is requested to reverse and render an acquittal under Count 3.

ISSUE NO. 4: DID THE TRIAL COURT ERRONEOUSLY REFUSE A SELF-DEFENSE INSTRUCTION?

A defendant is entitled to claim self-defense as a defense to the crime of being a felon in possession of a firearm. *Lenard v. State*, 828 So.2d 232, 237 (¶¶ 24-25) (Miss. Ct. App. 2002). See also, *Hatten v. State*, 938 So.2d 365, 369 (Miss. Ct. App. 2006). Therefore, it was error for the trial court here to refuse D-11[4]. [T. 654]. A criminal defendant's right to present a full defense is secured by the Fifth, Sixth and Fourteenth Amendments to the U. S. Constitution and Articles 3 §§14 and 26 of the Mississippi Constitution of 1890.

In *Lenard,* a self-defense instruction had been denied which the Court found to be harmless because the important factors were covered by other instructions. Here, in the

---

4

D-11: If you find from the evidence in this case beyond a reasonable doubt that: 1. the defendant, Kirk Mayers, has been previously convicted of a felony; and 2. the defendant had in his possession a pistol; 3. Not in necessary self-defense; then you shall find the
defendant guilty of possession of a firearm by a convicted felon. Should the state fail to prove any one or more of these elements beyond a reasonable doubt then you shall find the defendant, Kirk Mayers, not guilty. [R. 155; R. E. 38]

present case, Mayers was granted a self-defense instruction D-13 pertaining to the assault charges only, but no instruction explained defenses to the felon in possession count. [R. 146; R. E. 39].

In the case *Ruffin v. State*, 992 So.2d 1165, 1177-78 (Miss. 2008), the court explained that, "where a person reasonably believes that he is in danger of physical harm he may be excused for some conduct which ordinarily would be criminal" if

> (1) the defendant was under an unlawful and present, imminent, and impending threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury; (2) that he had not recklessly or negligently placed himself in the situation; (3) that he had no reasonable legal alternative to violating the law; (4) that a direct causal relationship may be reasonably anticipated between the criminal action and the avoidance of harm. [Citations omitted.]

See also *Smith v. State*, 948 So.2d 474, (Miss. Ct. App. 2007) and *Brown v. State*, 252 So.2d 885 (Miss.1971), such necessity defense is "a question for the jury to determine."

Since D-11 properly stated the law and was not covered by other instructions, Mayers is entitled to a new trial on Count 3. *Green v. State*, 884 So.2d 733, 735-38 (Miss. 2004). The state's element instruction S1-IV could have stated not in necessary self-defense, but it did not. [R. 134].

ISSUE NO. 5: WAS MAYERS ENTITLED TO A CAUTIONARY INSTRUCTION CONCERNING HIS PRIOR CONVICTIONS?

Since Mayers was charged with other offenses in addition to that of being a felon in possession, he was entitled to a cautionary instruction that the prior conviction was not proof of commission of the present offense. *Brown v. State,* 890 So.2d 901, 913 (¶36) (Miss., 2004). It was, therefore, reversible error for the trial court to refuse D-8.[5] [T. 657-60], which is the relief requested under this issue for all Counts.

This is issue is whether the trial court has the discretion to refuse a cautionary instruction when properly requested. According to *Brown, supra*, the answer is clear and rudimentary, "in accord with Rule 105 of the Mississippi Rules of Evidence ... "[w]hen evidence which is admissible ... for one purpose but not admissible ... for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." See also, *Williams v. State*, 991 So.2d 593 (Miss. 2008).

ISSUE NO.6: WHETHER JUROR 18 SHOULD HAVE BEEN STRICKEN FOR CAUSE?

Mr. Charles Tucker , juror 18, said, he had work related matters which would distract him from focusing on Mayers' case. [T. 157-58]. Mayers challenged Tucker for

---

5

D-8: The Court instructs the Jury that any prior convictions of Kirk Mayers are not evidence that the defendant committed the crime alleged in the indictment. A prior conviction is merely one element of the crime charged in the indictment. You should only use that evidence, if any, in determining whether the state has met their burden of proof that Kirk Mayers is a convicted felon. You should not consider this element as evidence that Kirk Mayers possessed the firearm in question. [R. 152; R. E. 37].

cause. [T. 186]. The court refused, expressing that Tucker never responded to any of the court's questions about conflicts. *Id.* Mayer used all six strikes, was thus forced to accept Taylor. [T. 189].

In *Duckworth v. State*, 989 So.2d 917, 918-19 (Miss. Ct. App., 2007), the court pointed out prerequisites to "presenting a claim on appeal that a juror should have been struck for cause" one being "that the challenging party had exhausted all of his peremptory challenges and that the incompetent juror was forced upon him by the trial court's erroneous ruling." [Citing *Chisolm v. State,* 529 So.2d 635, 639 (Miss.1988).] This clearly occurred here.

In *Berry v. State*, 703 So.2d 269, 292-93 (¶85-86) (Miss. 1997) the court said "[e]xcusing jurors for cause is in the complete discretion of the trial court;" but, "this Court will reverse when a trial court fails to strike an incompetent juror."

In *Berry* the trial court and parties noticed that a potential juror had "obvious 'disability' that would hinder her performance as a juror." *Id.* The trial court in *Berry* stated the juror in question "never responded to anything"; and the record showed the juror gave "an inappropriate response to a question during voir dire." *Id.* This is similar to the situation here in Mayers' case. [*Id.*, and T. 186].

The *Berry* court stated that the incompetency of the juror in question was obviously a judgment call within the trial court's discretion. What is different about the present case is that here there is no ambiguity. Mr. Tucker said he could not pay attention

to the evidence. There was no judging that. To disregard the jurors express inattentiveness amounts to an abuse of discretion and as such constituted reversible error effecting the fair trial standards Mayers should have been afforded.

A defendant is entitled to a fair and impartial jury pursuant to the 6th and 14th amendments to the U. S. Constitution and Art. 3 §26 of the Mississippi Constitution. *Irwin v. Dowd*, 366 U. S. 717, 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961), *Mhoon v State*, 464 So. 2d 77, 79 (Miss. 1985) and *Taylor v. State*, 656 So. 2d 104, 110-11 (Miss. 1995). Accordingly, Mayers requests a new trial.

ISSUE NO. 7: SHOULD THE STATE HAVE BEEN REQUIRED TO STIPULATE TO MAYER'S PRIOR CONVICTIONS UNDER THE FELON IN POSSESSION COUNT?

Mayers, being charged with being a felon in possession, offered to stipulate to the existence of his prior convictions so as to avoid the potential prejudice such a revelation to the jury might create; but, the state wanted to use the prior convictions and Mayers' probationary status as proof of a motive to at shoot law enforcement. [T. 104, 117, 121, 572].[6] The state wanted it to look like Mayers intended to go out with a blaze of glory like James Cagney's character in *White Heat* instead of someone who was awaken from a deep sleep, scared to death in his underwear with a seventy-five (75) year old pea shooter.

6

Mayers two prior convictions were from October 2000 and were for house burglary and auto burglary, from separate instances for which he received prison sentences, partially suspended with probation. [R. 15; T. 578-81; Ex. 21-22].

In *Williams v. State*, 991 So.2d 593, 602-606 (Miss. 2008), the defendant was charged with armed robbery and kidnapping and of being a felon in possession of a firearm. Williams wanted to stipulate to the existence of his prior armed robbery conviction and argued "that introduction of his prior armed robbery ... would unfairly prejudice the jury to convict him on the current armed robbery charge." Williams' offer like Mayers' was rebuffed. *Id.*

The *Williams* court first looked to the authority of *Old Chief v. United States*, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997). In *Old Chief*, the United States Supreme Court ruled that, in some instances, a criminal defendant is entitled to stipulate to prior convictions so as to avoid undue prejudice. *Id.*

The State in *Williams* argued that, "where a prior conviction is an element of the crime, the State is authorized to introduce evidence of the conviction and is not limited in its method of proof," citing, *inter alia*, *Carter v. State*, 941 So.2d 846, 854 (Miss. Ct. App.2006).

Next, the *Williams* court considered *Rigby v. State*, 826 So.2d 694 (Miss.2002), also decided with deference to *Old Chief*. In *Rigby* the Court held that "[p]rior DUI convictions are elements of a felony DUI charge and are required to be submitted to a jury", so it was not reversible error not to force the state to accept a defendants stipulation to prior DUI convictions. *Rigby*, 826 So.2d at 702-03.

Nevertheless, the *Rigby* court recognized that:

> certain procedural safeguards are warranted if a defendant offers to stipulate to previous DUI convictions. The trial court should accept such stipulations, and they should be submitted to the jury with a proper limiting instruction. The instruction should explain to the jury that the prior DUI convictions should be considered for the sole purpose of determining whether the defendant is guilty of felony DUI and that such evidence should not be considered in determining whether the defendant acted in conformity with such convictions in the presently charged offense. *Id.*

So, the *Williams* court concluded that:

> Where evidence of a prior conviction is a necessary element of the crime for which the defendant is on trial (i.e., possession of firearm by a convicted felon), but evidence of the specific nature of the crime for which the defendant was previously convicted (i.e., armed robbery), is not an essential element of the crime for which the defendant is on trial, as it is in DUI cases, the trial court should accept a defendant's offer to stipulate and grant a limiting instruction. *Williams*, 991 So. 2d 605-06

Contrary to the facts of the present case, Williams was granted a cautionary instruction even though the trial court did not require the acceptance of the stipulation offered by Williams. *Id. at* 606. The Supreme Court found the denial of the stipulation to be erroneous, but not grounds for reversal, stating, "[i]t is especially important to allow a stipulation when a defendant is being prosecuted on multiple offenses", unless a prosecution can "articulate a reason to justify denying a defendant's offer to stipulate" which establishes that the probative value of the prior conviction evidence is not substantially outweighed by potential prejudice. *Id.* at ¶¶42-43.

Recently, the Mississippi Supreme Court concluded that a even limiting instruction could not cure the error in admitting a defendant's prior-felony in spite of an offer of

passed through solid objects. [T. 469-73]. This testimony was used to suggest that bullets found in apartment 77 were fired by Mayers from apartment 78, without any coordinated ballistic findings or opinion.

It is the appellant's position that Ellis was erroneously allowed to slip through the fence between Miss. R. Evid. Rules 701 and 702 thus allowing a non-expert witness to posit "expert" opinions disguised as "lay" opinions.[7] Mayers was prejudiced by this.

In *Palmer v. Volkswagen of America, Inc.*, 905 So.2d 564, 588 (Miss. Ct. App. 2003), there was objection to a lay opinion about an air bag equipped automobile, the Court of Appeals said in reversing:

> 'where, in order to express the opinion, the witness must possess some experience or expertise beyond that of the average, randomly selected adult, it is a Rule 702 opinion and not a Rule 701 opinion'.

On *certiorari*, in *Palmer v. Volkswagen of America, Inc.* 904 So.2d 1077, 1092 (Miss. 2005), the supreme court concurred with the court of appeals, finding the plaintiff was prejudiced by improper opinion testimony and stating:

> To be clear, the test for expert testimony is not whether it is fact or opinion. The test is whether it requires "scientific, technical, or other

---

7

RULE 701. OPINION TESTIMONY BY LAY WITNESSES: If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness,(b) helpful to the clear understanding of the testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

RULE 702. TESTIMONY BY EXPERTS: If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

> specialized knowledge" beyond that of the "randomly selected adult." If so, the testimony is expert in nature, and must be treated in discovery, and at trial, as such.
>
> * * *
>
> The trial court abused it discretion by allowing [Volkswagen's expert] testimony to stray into the realm of scientific, technical and specialized knowledge that only could be admitted as expert testimony after assessment pursuant to Rule 702.

Mayers' position here is that the bullet path opinion testimony, at least in this case, is an area requiring expert testimony under Miss. R. Evid. Rule 702; because, ballistics investigation is scientific and technical so that a jury of lay persons would need assistance. An average lay person would not know the characteristics of such things as bullet paths in an apartment setting and the changes occurring as a projectile passes through, fragments, hits or bounces off solid objects.

In *Cotton v. State*, 675 So. 2d 308, 312 (Miss. 1996), the case turned on whether a weapon fired accidently or not and the witness at issue testified that certain safety characteristics of a semi-automatic pistol used in that case would only allow the gun to fire in certain circumstances. The *Cotton* court ruled that such evidence required the witness to testify from particularly specialized knowledge of the weapon which would "constituted expert opinion"; and, since the witness was never qualified as an expert, it was reversible error. *Id.* See also, *Sample v. State*, 643 So.2d 524, 530 (Miss.1994).

Here, Inv. Ellis was not testifying merely as to what he observed; he told the jury what he *concluded* based on his observations. These opinions concerned a topic in which

the jury needed expert help, not a communication of lay opinions.

The case of *Goodson v. State*, 566 So. 2d 1142, 1153 (Miss. 1990) is authority for the proposition here that Mayers was prejudiced by the admission of Ellis' opinions. The defendant in *Goodson* was charged with rape of a female under the age of fourteen and the trial court allowed testimony about "child sexual abuse profiles" an area which had been determined to be not an area of expertise. *Id.* at 1142-46.

There were two reasons the *Goodson* court reversed, first the physician who testified for the state did not have expertise to give an opinion with the reliability required by Rule 702; and, secondly, the state did not establish proof that behavioral science has developed to the point where even the most knowledgeable experts in the field may give opinion that sexual abuse has occurred or not with the required level of reliability. *Id.* at 1147.

The *Goodson* court stated that "[t]here was a substantial probability that the jury would be mislead by [the doctor's] opinion", and letting [the doctor] testify about profiles denied Goodson the right to a fair trial Rule 103(a) MRE *Id.* at 1148.

Here in Mayers' case, as in *Goodson*, even though the court instructed the jury that Inv. Ellis was not an expert, the jury would have been influenced by his improper lay opinions. It would follow that Mayers, as Goodson, did not, therefore, receive a fair trial, and convictions under all Counts should be reversed.

The opinion in *Edmonds v. State*, 955 So.2d 787, 792 (Miss.2007), suggests that,

even with admissions of guilt, improperly admitted opinion evidence is most definitely harmful because of the undue influence a so-called expert has on a jury's deliberation. According to *Edmonds,* this undue influence directly impacts on, and irreparably prejudices, a defendant's fundamental right to a fair trial and due process.

A new trial is respectfully requested on all counts.

ISSUE NO. 9: WHETHER MAYER'S SENTENCE WAS ILLEGAL?

Mayers was penalized an additional 20 years under MCA §97-37-37 (2) (Supp. 2008) tacked on to the 68 years he was already to serve.[8] There are at least five reasons why this additional sentence was wrong. First, a plain reading of the statute shows it does not apply in this case. Secondly, the sentence constituted double jeopardy, actually triple jeopardy. Thirdly, the enhancement was not in the indictment and the jury did not make findings in accordance therewith as required by *Apprendi v. New Jersey,* 530 U.S. 466, 120 S. Ct. 2348 (2000). Fourthly, the sentence violated the prohibition against

---

8

§ 97-37-37 (Supp. 2008). Enhancement for use of firearm during commission of felony.
(1) Except to the extent that a greater minimum sentence is otherwise provided by any other provision of law, any person who uses or displays a firearm during the commission of any felony shall, in addition to the punishment provided for such felony, be sentenced to an additional term of imprisonment in the custody of the Department of Corrections of five (5) years, which sentence shall not be reduced or suspended.
(2) Except to the extent that a greater minimum sentence is otherwise provided by any other provision of law, any convicted felon who uses or displays a firearm during the commission of any felony shall, in addition to the punishment provided for such felony, be sentenced to an additional term of imprisonment in the custody of the Department of Corrections of ten (10) years, to run consecutively, not concurrently, which sentence shall not be reduced or suspended.

Sources: Laws, 2004, ch. 392, § 1; Laws, 2007, ch. 323, § 1, eff. from and after July 1, 2007.

expost facto application of criminal penalties. Fifthly, the additional times renders the sentence unconstitutionally disproportionate.

Plain Reading

The legislature did not intend this statute to be applied in conjunction with our habitual offender statute. Each subsection of §97-37-37 states that, "except to the extent that a greater minimum sentence is otherwise provided". Mississippi's habitual offender statutes set out the minimum sentences for defendants with prior two prior convictions, under Miss. Code Ann. § 99-19-81 (1972) the minimum sentence is the maximum for the third offense, and under Miss. Code Ann. § 99-19-83 (1972), when one of the prior convictions is a crime of violence, the minimum sentence is life without parole.

The mandatory sentences are the minimum sentences, and in Mayers case, his minimum sentence for the two aggravated assault charges, which are the offenses he is alleged to have used a weapon, is twenty (20) years under MCA§97-3-7 (2) (Supp. 2008), and as such is "greater" than that provided in §97-37-37. So, on its face, §97-37-37 does not apply under a plain reading of the statute. *Clubb v. State*, 672 So.2d 1201, 1204-05 (Miss. 1996). ["When the facts which constitute a criminal offense may fall under either of two statutes, or when there is a substantial doubt as to which one of the two is to be applied, the case will be referred to the statute which impresses the lesser punishment."]

No Notice

Mayers' indictment was silent as to the possibility of a third enhancement to his sentence. [R. 15-18]. As such, the extra 10 years sentence was not the product of due process in compliance with the rules of criminal pleading. UCCCR, Rule 11.03 for enhancement of punishment provides:

> In cases involving enhanced punishment for subsequent offenses under state statutes:
> 1. The indictment must include both the principal charge and a charge of previous convictions. The indictment must allege with particularity the nature or description of the offense constituting the previous convictions, the state or federal jurisdiction of any previous conviction, and the date of judgment.

A defendant is entitled to fair notice in the indictment of sentencing enhancements and the basis thereof. See, *Lacy v. State*, 629 So.2d 591, 595 (Miss.1993) and *Franklin v. State,* 766 So.2d 16, 18-19 (Miss. Ct. App. 2000). If a factor is not pled, it is not fair game for sentencing. *Id.*

Double Jeopardy

Mayers is being punished for being a felon in possession of a firearm; he is being punished for assaulting someone with a "deadly weapon"; he is being punished for being an habitual offender, and he is being punished for using a firearm in commission of a felony. That is four punishments, two by enhancement, for one pistol.

Mayers acknowledges that sentencing enhancements like habitual offender statues

do not normally trigger double jeopardy violations. However, it is not clear whether the subject statute creates new offenses or operates as an enhancement; and, double jeopardy would apply if there was no legislative intent for application. Moreover, there has to be a reasonable limit to multiplicity of punishments. *Tate v. State*, 912 So.2d 919, 933 (¶51) (Miss. 2005), *Osborne v. State*, 404 So.2d 545, 547 (Miss. 1981), and *Mosley v. State*, 930 So.2d 459, 464-65 (Miss. Ct. App. 2006).

Constitutional prohibitions against double jeopardy protect criminal defendants against "multiple punishments for the same offense." *Houston v. State*, 887 So.2d 808, 814 (¶23) (Miss. Ct. App. 2004) and *Greenwood v. State*, 744 So.2d 767, 770 (¶14) (Miss.1999).[9] A "same elements test" will determine whether or not double jeopardy exists. *Id.* [See, *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932)]. If the offenses for which a defendant is punished have the same elements, "they are the 'same offense' and double jeopardy bars additional punishment and successive prosecution." *Id.* A *de novo* standard of appellate review is used. *Brown v. State*, 731 So.2d 595, 598 (Miss.1999).

In *Boyd v. State,* 977 So.2d 329, 334 (¶16) (Miss. 2008), Boyd argued that being convicted of murder and shooting into an occupied dwelling violated protections against double jeopardy. Boyd had failed to raise double jeopardy at the trial court level, but the

---

9

"[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb...." U.S. Const. amend. V and XIV. See also, Miss. Const. Art. III § 22 (1890).

Supreme Court considered the arguments under the exception "for claims of significant violations of fundamental rights." [See., *e. g., Graves v. State*, 969 So.2d 845, 847 (Miss.2007).]. *Id.*

The *Boyd* court applying the same elements test, *supra*, said although criminal defendants may be prosecuted and punished for violating "two separate statutes", the court will consider whether the different statutes require "proof of a fact which the other does not," because, "a conviction can withstand double-jeopardy analysis only if each offense contains an element not contained in the other." *Id.* If no additional elements are to be proved, "the two offenses are, for double-jeopardy purposes, considered the same offense, barring prosecution and punishment for both". However, "where each offense includes an element not included in the other, 'an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.'" *Id.*

Boyd was convicted of capital murder with the underlying crime of drive-by shooting. Boyd's second offense, shooting into an occupied dwelling, did not include the elements from the capital murder charge, particularly those of causing death or injury by shooting from a vehicle so the court found no double jeopardy violation, each crime includes a necessary element not found in the other. *Id.* at 335 (¶¶17-21).

Under Mayers' situation, the "use" of the firearm was contained in the aggravated assault offenses, and possession of the firearm was contained in the felon in possession

count. Hence there were no additional elements to be proven. Application of §97-37-37 in this case does not survive the same elements test.

Apprendi

In this case §97-37-37 was applied without due process, without notice of the enhancement in the indictment and more importantly without a jury finding of all of the statutory elements as required by *Apprendi v. New Jersey,* 530 U.S. 466 , 120 S. Ct. 2348 (2000) and *Blakely v. Washington*, 542 U.S. 296, 301, 124 S.Ct. 2531, 2536 (2004).

Following *Apprendi*, the Court in *Blakely* held a criminal defendant's fundamental right to have a jury deliberate and find, beyond a reasonable doubt, the existence of "any particular fact " essential to punishment. 542 U.S., at 301, 124 S.Ct., at 2536. The Court held that right is absolute whenever a judge seeks to impose a sentence that is not solely based on "facts reflected in the jury verdict or admitted by the defendant". *Id.*

The United States Supreme Court of *Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) prohibits a trial court from sentencing a criminal defendant based on facts not found to exists by a jury. The sentence in this case is illegal because there was no particular jury finding of the elements of §97-37-37. A sentence that exceeds statutory authority is illegal. *Stewart v. State* 372 So.2d 257 (Miss. 1979).

These rulings were properly applied in *Brown v. State*, 995 So.2d 698, 702-03 (Miss. 2008), decided after Mayers' trial. Brown was convicted of selling drugs, and his sentence was doubled because the sentencing court found the offense to have been

committed within 1500 feet of a church. [See MCA§ 41-29-142 (Rev.2005)]. Brown argued that the trial court did not "allow a jury to consider his sentence enhancement violated his right to a jury trial under the Sixth Amendment." *Id.* at ¶17.

In vacating Brown's enhancement, the Court said, "[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." [Citing *Apprendi*, 530 U.S. at 490, 120 S.Ct. 2348]. *Id.* at ¶18.

It is Mayers' position that the enhancements visited upon him under §97-37-37 violated the rule of *Brown, supra.*

Ex Post Facto

The two ten year enhancements under §97-37-37(b) were illegally applied *ex post facto* to Mayers. The offense in this case occurred May 5, 2006, the statute authorizing the ten year enhancement was effective July 1, 2007. Before 2007, there was only a five (5) year enhancement.

Pursuant to Article I, §10, of the United States Constitution, states are prohibited from passing *ex post facto* laws. *Cal. Dep't of Corr. v. Morales*, 514 U.S. 499, 504, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995). The Mississippi Constitution of 1890 makes similar proscription under Article 3, §16 thereof.

"[A]n *ex post facto* law is one which creates a new offense or changes the

punishment, to the detriment of the accused, after the commission of a crime." *Bell v. State*, 726 So.2d 93, 94(¶ 7) (Miss.1998). Bell was sentenced as an habitual offender for an offense occurring prior to the passage of the habitual offender statute and the court considered that ex post facto violation and remanded the case for determination as to whether there was some valid waiver of the violation.

Mayers' situation is exactly the same as Bell's with no waiver as to the application of §97-37-37(b).

Disproportionate

A sentence of eighty-eight years is grossly disproportionate and, thus constitutes cruel and unusual punishment under the 8th Amendment of the Constitution of the United States and Article 3 §28 of the Mississippi Constitution of 1890.

According to *Williams v. State*, 784 So.2d 230, 236(¶ 16) (Miss. Ct. App.2000), even though the Eighth Amendment does not guarantee proportionate sentences, appellate courts in Mississippi nevertheless will first decide "whether an inference of disproportionality may be drawn from a comparison of the crime committed to the sentence meted out" then determine whether the sentence is unconstitutional applying the three part test set out in *Solem v. Helm*, 463 U.S. 277, 292, 103 S.Ct. 3001, 77 L.Ed.2d 637(1983). The three-part test is only applicable "when a threshold comparison of the crime committed to the sentence imposed leads to an inference of 'gross

disproportionality.' " *Williams* 784 So.2d at 236(¶ 16). See also *Harmelin v. Michigan*, 501 U.S. 957, 965, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991); *Hoops v. State*, 681 So.2d 521, 538 (Miss.1996). The three-part test of *Solem* analyzes "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Solem,* 463 U.S. at 292, 103 S.Ct. 3001. Here the gravity of the offense was moderately high, but the sentence was extreme and greater that sentences imposed in the same jurisdiction and others.

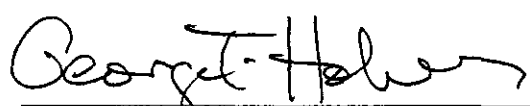
Mayers respectfully requests to be resentenced.

CONCLUSION

Kirk Vincent Mayers is entitled to have his convictions reversed with remand for a new trial, or to be resentenced.

Respectfully submitted,

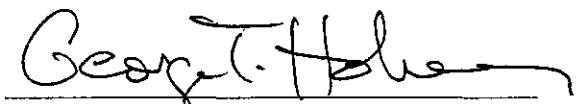
MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Kirk Vincent Mayers, Appellant

By: 

George T. Holmes, Staff Attorney

CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 17th day of March, 2009, mailed a true and correct copy of the above and foregoing Brief Of Appellant to Hon. Samac Richardson, Circuit Judge, P. O. Box 1885, Brandon MS 39043-1885, and to Hon. Michael Guest, Dist. Atty., P. O. Box 68, Brandon MS 39043-0068, and to Hon. Charles Maris, Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid.



George T. Holmes

MISSISSIPPI OFFICE OF INDIGENT APPEALS
George T. Holmes, MSB No[redacted]
301 N. Lamar St., Ste 210
Jackson MS 39201
601 576-4200