IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

WILLIAM HARRIS, SR.	APPELLANT
VS.	CASE NO. 2008-KA-01731-COA
STATE OF MISSISSIPPI	APPELLEE

BRIEF OF APPELLANT

FROM THE CIRCUIT COURT OF SHARKEY COUNTY, MISSISSIPPI

Oral Argument is Not Requested

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WILLIAM HARRIS, SR.	**APPELLANT**
VS.	**CASE NO. 2008-KA-01731-COA**
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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following have an interest in this action. These representations are made so that the Justices of this Court may evaluate possible disqualification or recusal.

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Respectfully submitted,

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II. THAT TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO CONTEMPORANEOUSLY AND TIMELY OBJECT TO THE "SEND A MESSAGE" AND THE "LINK IN THE CHAIN" ARGUMENTS USED BY THE STATE IN THEIR CLOSING.

III. THE PROSECUTION COMMITTED DISCOVERY VIOLATIONS AND THE TRIAL COURT ERRED IN NOT GRANTING A CONTINUANCE AS REQUESTED UNDER THE *BOX* DECISION BY TRIAL COUNSEL.

STATEMENT OF THE CASE

This case arose out of an undercover narcotics operation in Sharkey County, Mississippi, on or about the 2nd day of March, 2007, wherein a confidential informant working with the Mississippi Bureau of Narcotics allegedly made a purchase of a substance alleged to be crack cocaine from Bill Harris, also known as William Harris, Sr. At trial the State called the confidential informant live to testify. Mr. Harris also testified in his own defense.

SUMMARY OF THE ARGUMENT

In the State's closing argument the Assistant District Attorney and the District Attorney split the closing argument with Angela Carpenter, the Assistant District Attorney, making the first argument in which she made the argument that the jury was a link in the chain of prosecution. This argument has been prohibited in the past. Specifically, she said "We've all done our part, law enforcement has done its part here today, the State has done its part. We have

ARGUMENT

I. THAT IT IS PLAIN ERROR FOR THE TRIAL JUDGE NOT TO HAVE MADE A *SUA SPONTE* OBJECTION OR MOTION FOR MISTRIAL AFTER THE DISTRICT ATTORNEY AND THE ASSISTANT DISTRICT ATTORNEY MADE IMPERMISSIBLE CLOSING ARGUMENTS, "SEND A MESSAGE" AND "LINK IN A CHAIN."

The Assistant District Attorney in her closing argument said, "We've all done our part. Law enforcement has done its part here today. The State has done its part. We have all done our part. And now it is time, ladies and gentlemen, for your to do your part. It is now time for you to help get the drugs off the street of your community. And its time for you to help get a drug dealer off the streets of your community." (T. pg. 327-328) This argument has been labeled the "link in the chain." The District Attorney, Richard Smith, Jr., addressed the jury in final closing argument and stated that "But of (sic) that is the type of activity that they wanted going on in Anguilla, Sharkey County, Mississippi." (T. pg. 339) He then went on to determine that "when you go back to the jury room you make a decision as a community. You make a decision as a jury if that's the type of activity you want to be done. This is your community. After you consider that after you see what the evidence is beyond a reasonable doubt don't let your decision be based on bias, on sympathy, you make your decision on the matter." (T. pg. 339-340)

Baskin v. State of Mississippi, 991 So.2d 179 (Ms Ct. App. 2008) sets out the standard for review when there is no objection by defense counsel. Quoting *Baskin*:

> Again, defense counsel failed to make any objection to the State's remarks. "[F]ailure to object to an allegedly improper statement made during closing arguments will bar appellate review of the issues unless it constitutes plain error."

The Defendant submits that the use of these arguments so prejudiced him in the minds of the jury that no reasonable juror could find him not guilty. Trial counsel make failed to make a contemporaneous objection nor did the trial Court make a *sua sponte* objection or direction for mistrial. The use of not one, but two previously condemned arguments by the State so prejudiced the defendant that he could not receive a fair trial. This rises to the level of plain error on the part of the trial Court.

In Payton v. State, 785 So2d 267, (Miss 1999) the Court said The Supreme Court of the State of Mississippi has repeatedly condemned the "send a message" argument and warned prosecutors accordingly.

> See *Evans v. State,* 725 So.2d 613, 675 (Miss.1997); *Chase v. State,* 699 So.2d 521, 537 (Miss.1997); *Wilcher v. State,* 697 So.2d 1123, 1139 (Miss.1997); *Wilcher v. State,* 697 So.2d 1087, 1112 (Miss.1997); *Hunter v. State,* 684 So.2d 625, 637 (Miss.1996); *Williams v. State,* 522 So.2d 201, 209 (Miss.1988). Although we approved use of the "send a message" argument in *Carleton v. State,* 425 So.2d 1036, 1039 (Miss.1983), we impliedly rejected the *Carleton* position in *Williams* and *Hunter. Hunter,* 684 So.2d at 637; *Williams,* 522 So.2d at 209. To clear up any remaining confusion on this issue, we hereby overrule *Carleton* to the extent that it condoned use of the "send a message" argument.
>
> We aptly explained the problem with the "send a message" argument in our opinion in *Williams:*
>
> The jurors are representatives of the community in one sense, but they are not to vote in a representative capacity. Each juror is to apply the law to the evidence and vote accordingly. The issue which each juror must resolve is not whether or not he or she wishes to "send a message" but whether or not he or she believes that the evidence showed the defendant to be guilty of the crime charged. The jury is an arm of the State but it is not an arm of the prosecution. The State includes both the prosecution and the accused. The function of the jury is to weigh the evidence and *271 determine the facts. When the prosecution wishes to send a message they should employ Western Union. Mississippi jurors are not messenger boys.
>
> *Williams,* 522 So.2d at 209.
>
> We have not previously held use of the "send a message" language standing alone to warrant reversal. However, in *Alexander v. State,* 736 So.2d 1058 (Miss.Ct.App.1999),

the Court of Appeals noted that our warnings against use of the "send a message" argument have gone unheeded, as prosecutors continue the practice. Alexander, 736 So.2d at 1064. The Court held, "Today, by order of this opinion, we condemn the use of the 'send a message' argument by prosecutors and state that in the future the 'send a message' remark used expressly or impliedly will alone constitute reversible error." *Id.* Judge Southwick, (joined by Chief Judge Bridges, Presiding Judge McMillin, and Judge Payne), wrote a concurring opinion, taking the position that there is no need to create a per se rule requiring automatic reversal in every case in which the "send a message" argument is used. *Id.* at 1065. Instead, the dissenters promulgated use of appellate review "to determine whether error affected a trial in such a way as to bring its fairness into question." *Id.* Judge Southwick also pointed out that trial and appellate courts should take advantage of the tools currently available for deterring "conscious ignoring of trial rules"- contempt hearings and assessing costs of retrials. *Id.* at 1065.

We agree with the position taken by Judge Southwick and decline to adopt the per se reversible error rule on this issue. However, **we agree with the Court of Appeals majority in *Alexander* insofar as we find that use of the "send a message" argument may, depending upon the surrounding circumstances, constitute reversible error on its own.** As Justice Banks stated in his separate opinion in Wells v. State, 698 So.2d 497, 519 (Miss.1997), "it is high time that the bench and bar take seriously our admonitions about such improprieties. Harmless error analysis should not be considered as a license to transgress the rules of fair argument that are repeatedly promulgated by this Court." Wells, 698 So.2d at 519 (Banks, J., concurring in part and dissenting in part). In his dissenting opinion in *Wells,* Justice McRae also recommended sanctions for the district attorney's continued misconduct:

... While no defendant is guaranteed a perfect trial, each defendant is guaranteed a fair trial. In addition, as the majority notes, the prosecutor's actions flew in the face of well-established court rules, as well as previous warnings from this Court.

If a prosecuting attorney, who is presumed to know better, persists in making erroneous and prejudicial remarks in his argument before the jury, then the trial court should deal harshly with him to the extent of sanctions, reprimands and contempt. This Court will not look for some reason to excuse such action of a prosecuting attorney, even though a new trial would be expensive to the people of the county. Such expenses, fault and blame should be placed at the door of the person who is responsible for it.

Livingston v. State, 525 So.2d 1300, 1308 (Miss.1988) (footnote and citations omitted). Further,

[i]t is not beyond the authority of this Court to assess the entire costs of a new trial to the attorney whose conduct made the trial necessary in those cases where [a reversal for unprofessional conduct] occurs. Personal liability for this cost may well be imposed*272 by this Court in the future and it will be done with an even hand, applied both to the private attorney and the attorney representing the State.

Stringer v. State, 627 So.2d 326, 330 (Miss.1993). Accordingly, as a sanction, the costs of the appeal and preparation of the record should be assessed against the prosecuting attorney....

Wells, 698 So.2d at 520-21 (McRae, J., dissenting). In the future, where sufficient evidence exists to show that a prosecutor is persistently ignoring our admonitions against use of the "send a message" argument, we will not hesitate to sanction him with the costs of a new trial where necessary.

Standing alone, the district attorney's use of the "send a message" argument in this case would be reversible error because of the prejudice against Payton evidenced by his more severe sentence. Combined with the prejudice resulting from the trial court's failure to sever, the improper argument resulted in an unfair trial in this case. Fundamental fairness principles dictate that Payton's convictions and sentences resulting from the apparent prejudice be reversed and this case remanded for a new trial. Payton v. State 785 So. 2d (Miss 1999)

In addition to the "send a message" argument, the Assistant District Attorney made the "Link in the Chain"argument that was condemned in Turner v. State 721 So. 2d 642 (Miss 1998).

In

Fulgham v. State, 386 So.2d 1099 (Miss.1980), this Court considered a lengthy argument by the prosecution that the jury was the final link in the chain of law enforcement. *Fulgham v. State*, 386 So.2d 1099, 1101 (Miss.1980). Although *Fulgham* was reversed on other grounds, the Court stated, "We do not think that this assignment of error, standing alone, would require a reversal." *Fulgham*, 386 So.2d at 1101.

In *Williams,* this Court was presented with the lack of an appropriate record for appellate review and refused to reverse the appellant's conviction due to the following remark by the prosecutor: "By your vote, you can make the statement clearly, steadfastly, and unequivocally that law or order exists for everyone in Harrison County." *Williams*, 522 So.2d at 208.

In *Evans,* the prosecutor made the following remark during closing argument: *647 "You are a part of the criminal justice system, the final step, and it is by your vote that this decision will be made." *Evans*, 1997 WL 562044, at *59, 725 So.2d at ----. No objection was made to this statement, and although the remarks were extremely close to

being improper, this Court, following the reasoning in *Fulgham* and *Williams,* held that "these comments alone do not appear to require reversal." *Id.* at *60, at ----.

The remarks in the case sub judice are similar to those made by the prosecutors in *Fulgham, Williams,* and *Evans,* and likewise, these comments alone do not require reversal. However, the remarks constitute a "link in the chain" argument and are hereby condemned. Prosecutors should refrain from use of such arguments.

In this case defense counsel failed to make any objection the State's remarks. The Court also failed to Sua Sponte order a mistrial. This allowed the case to go to the jury with the State's closing arguments which are highly inflammatory, highly prejudicial and calculated to unduly influence the jury. Again, this is not new ground that the State is plowing. The use of this language is calculated to inflame the jury and prejudice the defendant, regardless of the facts of the case. Allowing the State to do so rises to the level of plain error.

II. THAT TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO CONTEMPORANEOUSLY AND TIMELY OBJECT TO THE "SEND A MESSAGE" AND "LINK IN THE CHAIN" ARGUMENTS USED BY THE STATE IN THEIR CLOSING ARGUMENTS

The legal test to determine whether a Defendant received effective assistance of counsel was set forth by the United States Supreme Court in *Strickland vs. Washington*, 466 U. S. 668 at 687 (1984), the party complaining of ineffective assistance of counsel must show that the (1) counsel's performance was deficient and (2) that the deficiency prejudiced the defense, *id.* Review of counsel's performance is highly deferential and therein exists a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id at 689.* This two-part test was applied in Mississippi in *Leatherwood vs. State*, 473 So.2d 968

(Miss. 1985) "only where it is reasonably probable that but for the attorney's error the outcome of the trial would have been different were this Court find that counsel's performance was deficient." *Smiley vs. State*, 815 So. 2d 1140 at 1147 P. 25 (Miss. 2002) quoting *Gary vs. State*, 760 So.2d 743 at 753 P. 31 (Miss. 2000). In the instant case, it is abundantly clear that the arguments made by both the District Attorney and the Assistant District Attorney are objectionable and are arguments that have been routinely condemned by this Court. Therefore, had counsel for the Defendant at trial made a contemporaneous objection and preserved the record, the standard of review not only would be different, but it would have been incumbent upon the Judge at that time to enter an order for mistrial. This failure to object has clearly prejudiced the Defendant in that the case was presented to the same jury that had been unduly prejudiced by the comments made from the State, and in fact upon deliberation, they ultimately found the Defendant guilty. As previously stated by this Court in *Payton v. State*, 785 So.2d 267 (Miss. 1999), no Defendant is entitled to a perfect trial, but every Defendant is entitled to a fair trial. This failure to object by the trial counsel for the defense in a timely fashion not only prejudiced the Defendant by failing to preserve the record, it also unduly prejudiced him in the minds of all of the jurors.

It is easy to understand fully why those arguments are made because they are hugely influential with a jury. This is also why the Supreme Court has routinely condemned these arguments. It is clear that the natural and probable effect of this improper argument is to create prejudice against the accused so as to result in a decision influenced by the prejudice to convict him. Based on the Defendant's trial counsel's failure to object at the time that these arguments were made, the standard of review is plain error under *Baskin vs. State*, 991 So.2d 179(Ms Ct.

App. 2008).

> Again, defense counsel failed to make any objection to the State's remarks. "[F]ailure to object to an allegedly improper statement made during closing arguments will bar appellate review of the issue unless it constitutes plain error."
>
> *Baskin v. State*, 991 So.2d 179, 183(¶ 18) (Miss.Ct.App.2008) (citation omitted).
>
> this Court gives deference to a trial court's determination of whether a mistrial is warranted based upon any error in the proceedings that resulted in any "substantial and irreparable prejudice to the defendant's case."
>
> *Sipp v. State*, 936 So.2d 326, 331(¶ 7) (Miss.2006). Although...[they] are not permitted to use tactics which are inflammatory, highly prejudicial, or reasonably calculated to unduly influence the jury."
>
> *Bailey v. State*, 952 So.2d 225, 231(¶ 7) (Miss.Ct.App.2006) (citing *Sheppard v. State*, 777 So.2d 659, 661(¶ 7) (Miss.2000)). We review any comments made in opening statements or closing arguments to determine "whether the natural and probable effect of the improper argument [creates] unjust prejudice against the accused so as to result in a decision influenced by the prejudice so created." *Id.* Counsel may not state facts in a closing argument "which are not in evidence, and which the court does not judicially know, in aid of his evidence." *Id.*

It is clear that the comments and arguments of the State were inflammatory, and reasonably calculated to unduly influence the jury. Indeed, the absence of objection, by Counsel or the Court, makes it seem a violation of civic duty to allow the defendant to be acquitted. This case must be sent back for a new trial based on the failure to object to the prejudicial comments by the State's attorneys. Both prongs of the Strickland require remand for a new trial.

III. THE PROSECUTION COMMITTED DISCOVERY VIOLATIONS AND THE TRIAL COURT ERRED IN NOT GRANTING A CONTINUANCE AS REQUESTED UNDER THE *BOX* DECISION BY TRIAL COUNSEL.

Counsel for William Harris Sr. moved to suppress the testimony of Willie Cooper, the confidential informant in this case, as not having been provided to him in good time (T. pg. 31)

after the trial court Judge denied his motion for continuance. The Court then (T. pg. 167) ruled that the audio tapes that had been proffered that afternoon, after the jury had been picked, were admissible and could be played before the jury. Again, it is the position of the Defendant that this relevant discoverable evidence which should have been provided and the failure of the State's attorney to provide it to the Defendant upon request should have rendered these audio tapes inadmissible not only in the State's case in chief but on rebuttal as well under Uniform Circuit and County Court Rule 4.06. In *Turner vs. State of Mississippi*, 501 So.2d 350 (Miss. 1987) a similar situation occurred when the prosecution failed to disclose to defense counsel the name of the confidential informant who was a witness to the alleged transaction and further failed to grant a mid-trial continuance to the Defendant to attempt to locate, interview and obtain testimony of the eyewitness was deemed to be reversible error. In the instant case it is the contention of William Harris, Sr., that the trial Court must grant a meaningful opportunity for defense counsel to interview the witness and in this instance the interview took place in the presence of law enforcement after the beginning of trial. This failure to provide this information in a timely manner was discussed in *Turner* where the Court determined that Turner became entitled to disclosure reasonably in advance of trial of the name of any confidential informant who witnessed all or part of the transactions constituting the crime charged. *Tuner, id.* p. 352.

> We have addressed this point on numerous occasions, *see, e.g.,*
> *Ray v. State*, 503 So.2d 222, 224 (Miss.1986); *Breckenridge v. State*, 472 So.2d 373, 377 (Miss.1985); *Wilson v. State*, 433 So.2d 1142, 1144-45 (Miss.1983); *Daniels v. State*, 422 So.2d 289, 292 (Miss.1982); *Sims v. State*, 313 So.2d 27 (Miss.1975); *Hemphill v. State*, 313 So.2d 25 (Miss.1975). *Barrett v. State*, 482 So.2d 239 (Miss.1986) is our most recent decision on facts quite close to the case at bar. *Barrett* held that it was error for the trial court to deny the defendant's motion for a continuance where the prosecution had failed to disclose the identity of a confidential informant who had witnessed a purchase of marijuana, the subject of the trial.

> We hold, upon these facts and in this procedural context, that upon receipt of the discovery request from defense counsel, the prosecution became further obligated to disclose the identity of Cathy Johnson and whatever information the prosecution had regarding her whereabouts. The prosecution was obligated to make this disclosure sufficiently far enough in advance of trial so that Turner and his counsel would have had a meaningful opportunity to locate Johnson and interview her and, if necessary, make arrangements for her presence at trial. It matters not that the prosecution had lost track of Johnson. The accused and his counsel were entitled to a reasonable opportunity to employ their own resources to locate Johnson.
>
> Because the prosecution failed to make the disclosure required under Rule *353 4.06(2) and because the trial judge refused to grant the continuance, although same was timely and properly requested by the accused, the judgment of conviction and sentence imposed thereupon must be reversed, and this case must be restored to the active docket of the Circuit Court of Harrison County, Mississippi, for a new trial.

The procedure for dealing with a discovery violation is set out in *Box v. State,* 437 So.2d 19 (Miss. 1983):

> First the court should allow the defense an opportunity to review the evidence. Unif. Crim. R. Cir. Ct. Practice 4.06(i)(1). Second, if the defense "claims unfair surprise or undue prejudice and seeks a continuance or mistrial," the court should exclude evidence, grant the continuance, or grant a mistrial. Unif. R. Cir. Ct. Practice 4.06(i)(2). And, finally, the court will not be required to grant a continuance or mistrial if the State withdraws the evidence or ceases to attempt to have it admitted. Unif. R. Cir. Ct. Practice 4.06(i)(3).

The trial Court' failure to offer a meaningful opportunity to interview the witness, or even know the identity of the witness until after the trial began was highly prejudicial to the Defendant. The defense counsel was forced to begin *VOIR DIRE* without benefit of all the discoverable facts; facts which were always available to the State. He preserved the record, but did not have the ability to voir dire the prospective panel concerning the confidential informant. This is literally trial by ambush, and counsel for the defense had no way to prepare; this inability to prepare for trial means that he was unable to provided an informed, adequate and fair trial to

the Defendant. The matter should be retried with all the discoverable facts presented to both sides prior to trial.

CONCLUSION

The errors committed by the State Attorneys in making the "link in a chain" and "send a message" arguments were clearly prejudicial to William Harris, Sr. There was no contemporaneous objection by the Defendant's trial counsel. This failure to object to the above arguments failed both prongs of the Strickland test, and lowered the appellate standard of review to that of plain error. The trial Court's failure to *sua sponte* declare a mistrial after such arguments, however, does rise to the level of plain error. Allowing the jury to render a verdict after hearing a combination of condemned arguments is clearly plain error.

Discovery violations by the State left the defense counsel with no ability to prepare for a crucial witness. The failure to grant a continuance, and requiring him to begin trial and voir dire the panel without that information so prejudiced the Defendant that he was unable to have a fair trial. For these reasons the defendant must be granted a new trial.

Respectfully submitted,

WILLIAM HARRIS, SR.

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CERTIFICATE OF SERVICE

We, Michael R. Bonner and Travis T. Vance, Jr., attorneys for Appellant, do hereby certify that I have this day served a true and correct copy of the above and foregoing Brief of Appellant, by mailing, by United States Mail, postage prepaid, to the following:

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William Harris, Sr.

THIS the 28 day of September, 2009.

MICHAEL R. BONNER

TRAVIS T. VANCE, JR.