2008-KA-01946-COAT

BRIEF OF APPELLANT

CERTIFICATE OF INTERESTED PARTIES

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 refusal:

1. David Bernard Thompson, Defendant in the trial and Appellant in this case.
2. Joseph A. Fernald, Jr., counsel for Appellant on appeal, P.O. Box 542, Brookhaven, MS 39602.
3. Honorable David Strong, Circuit Court Judge, P.O. Box 1387, McComb, MS 39649
4. Dewitt Bates, District Attorney, 284East Bay Street, Magnolia, MS 39652.
5. Timothy Jones, Assistant District Attorney, 284 East Bay Street, Magnolia, MS 39652.
6. Nelson Estess, P.O. Box 472, Magnolia, MS 39652.

This the 26th day of August 2009.

Counsel for Appellant

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STATEMENT OF THE CASE:

1. COURSE OF THE PROCEEDINGS AND DISPOSITION IN THE COURT BELOW.

David Thompson was indicted on March 27, 2007 by the Pike County Grand Jury in Cause Number 07-222-PKS on the charge of unlawful possession of at least five hundred grams but less than one kilogram of marihuana with the intent to distribute within 1500 feet of a church and the unlawful possession of at least ten but less than thirty grams of cocaine with the intent to distribute within 1500 feet of a church. He waived arraignment and pled not guilty on May 7, 2007 RE: On August n1, 2007, by and through Counsel, the Honorable William Goodwin, the Omnibus Hearing was held

before Circuit Judge David Strong. The Omnibus Order was entered on August 1, 2007. RE The Defense listed no specific motions to be filed on behalf of the Defendant.

On August 14, 2007, a Motion Hearing was held before Judge Strong to request a reduction of bond and to suppress the search warrant that was the gravamen of the issue of possession of the controlled substances. The warrant was based on evidence secured in a controlled buy. The Attorney for Mr. Thompson stated that Mr. Thompson did not have standing to attack the warrant since he neither owned of lived in the premises searched. The evidence seized, however, was the contraband that he was indicted for. The Court also 07-21-PKS and denied a reduction in the bond

Counsel then addressed the issue of potential conflict of interest due the Assistant District Attorney Timothy Jones alleged involvement in the search of the premises. Mr. Thompson was charged with a sale based on the conduct of a confidential informant. He was indicted separately for the sale case but the statements and actions of the Informant constituted the basis for the affidavit in support of the search warrant.

On September 17, 2007, another Motion Hearing was held in Pike County Cause Numbers 07-21-PKS and 07-222-PKS. The first Motion concerned the recusal of ADA Timothy Jones due to an alleged conflict of interest due to Mr. Jones involvement in the search. The Motion was made pursuant to Rule 3.7 of the Mississippi Rules of Professional Responsibility. The Court found that Mr. Jones was not a necessary witness and the Motion was denied. The second Motion was a Motion To Sever Evidence. In Cause No. 07-221-PKS to-wit: the sale of a controlled substance Counsel sought to prevent the admission into evidence of the sale to prove possession with intent at trial and Counsel argued that under 404(b) the evidence should be excluded. The State argued

that they could use the sale conducted by the confidential informant in the Sale Indictment to prove intent in the Indictment for Possession With Intent to Distribute. The Court held that under Palmer v. State at 939 So. 2d 792 that the prior bad act was admissible if it passed muster under the balancing test found in Rule 403 of the Mississippi Rules of Evidence.

Finally, Mr. Goodwin raised the issue of withdrawal as counsel for Mr. Thompson based on Mr. Thompson's allegation that Mr. Goodwin had not done a good job for him. After a short hearing, the court allowed Mr. Goodwin to withdraw.

On October 2, 2007 a Motion Hearing was held before the Court to determine the counsel for Mr. Thompson. The Defendant was not able to secure counsel and he requested the opportunity to represent himself. The Court, without further admonition, granted the Defendant his request and appointed the Honorable Nelson Estess as a "technical advisor". Mr. Estess referred to his standing as a "hybrid" advisor and the need for time to prepare. Upon discussion, the Court allowed a continuance upon the request of the Defendant for sixteen additional days to prepare.

On October 25, 2007, one day before trial, another Motion Hearing was held before Judge Strong. In a rambling hearing, Mr. Thompson discussed confusion over the charges, the need for clothes and his desire to call the prosecutor, the Honorable Timothy Jones, as a defense witness. The hybrid counsel discussed confusion over his role. Once again, the Court did not proceed to advised the Defendant of the risk of self-representation or inquire if he was aware of the risks. There was no clear waiver of counsel. The Court then, upon discussion, found that Mr. Jones was not a necessary witness and could not be called. The Court also refused to disqualify Mr. Jones from the

trial. During this hearing, the only statement that approaches the requisite for a knowing and intelligent waiver of counsel occurs when hybrid counsel advises Mr. Thompson of the difficulty of self-representation. The Court was silent. Once again, the State announced their intent to try Mr. Thompson on the possession with intent charge and to use the evidence of a sale earlier that day as the basis for the search. The Court reaffirmed their previous ruling under Rule 403 and Rule 404(b) favoring admissibility. The Court did take a moment to advise Mr. Thompson of the potential sentences that Mr. Thompson would face upon conviction. At no time did the Court go into a full scale inquiry as to Mr. Thompson's understanding of the difficulty, risks and problems with self representation so that Mr. Thompson could make a knowing and intelligent waiver of his right to counsel as required under the Constitution and applicable case law.

The trial was held on October 30, 2007. The State called two witnesses: Officer Deska Varnado of the narcotics task force and Paige Mills of the Mississippi Crime Laboratory.

Officer Varnado testified that the information used to substantiate probable cause for the search warrant came from a confidential informant, one Logan Griffin, through a controlled buy. The State utilized testimony about Logan's criminal activity and his involvement in the purchase of drugs from "Head" to support their probable cause for the search warrant.

The State also called Paige Mills to testify as to the nature and character of the contraband. Upon this testimony, the State rested. The State did not call Logan Griffin or any officers from the McComb Police Department who participated in the arrest of Logan Griffin.

Mr. Thompson then requested a directed verdict, which the Court denied.

At the commencement of the Defendant's case, the Court made an in depth inquiry as to Mr. Thompson's right to testify. At the conclusion of the Court's inquiry, Mr. Thompson announced he would not testify. The Defense then rested and renewed the motion for directed verdict. The Court denied the Motion once again.

The case went to the jury and after deliberation the jury sent a message to the Court with a series of questions that went to the nature of the evidence and fate of parties in the case. The Court after discussing the matter with the counsel ruled that the matters were evidentiary in nature and could not be answered. Eventually, the jury found Mr. Thompson guilty of the charge

At sentencing, the Court sentenced Mr. Thompson in Count One (possession of at least five hundred grams but less than one kilogram of marihuana with intent to distribute within 1500 feet of a church) to 20 years in the custody of the Mississippi Department of Corrections with the last five years suspended for 5 years of post release supervision As the Count Two, (unlawful possession of at least ten but less that thirty grams of cocaine with intent to distribute within 1500 feet of a church) the Court sentenced Mr. Thompson to 15 years in the custody of the Mississippi Department of Corrections with the last five years suspended for five years post release supervision. The Court further ruled that the sentences would run consecutively with a total sentence of 25 years to serve with 10 years suspended, a total fine of $10,000.00, $300 restitution to Southwest Narcotics, $300.00 to the State Crime Lab and court costs.

On November 13, 2007, Mr. Thompson filed, through counsel, his Motion For New Trial and Judgment Non Obstante Verdicto. The Court denied the Motion on September

15, 2008. Notice of Appeal was filed on September 18, 2008. On December 29, 2008, Designation of Record was filed. On January 8, 2008, the Certificate of Compliance with Rule 11(b)(1) and a Motion to Vacate Dismissal in the Supreme Court due to failure to advance costs. On January 13, 2009 vacated to order of dismissal and reinstated the appeal.

2. STATEMENT OF FACTS:

On January 10, 2007, Officer Deska Varnado, relying on a tip from a confidential informant, one Logan Griffin, arranged a controlled buy from an alleged drug dealer named "Head".

Officer Varnado had arrested Mr. Griffin on a drug possession charge and Mr. Griffin volunteered to "help" the State. Officer Varnado believed "Head" was David Thompson. On January 10, 2007, Mr. Griffin went to purchase narcotics from "Head" and made an audio/video record of the sale. The video sound quality was poor and the video portion did not show faces, exchange of money or drugs.

Upon completing the transaction, Mr. Griffin returned to the location where Officer Varnado was located and gave a statement. Upon receiving a search warrant from the County Court the officer searched the house located at 1119 Nelson Avenue in McComb, the residence of Katrina Johnson. The search revealed a large amount of narcotics. As a result, David Thompson was arrested for sale of narcotics and possession of narcotics with intent to deliver.

Ms. Johnson was at one point represented by the Honorable William Goodwin. Motion to Sever evidence, reduction of bond and Recusal of the District Attorney were presented and denied by the Court.

Finally, Mr. Goodwin moved to withdraw due to a dispute with his client. Mr. Thompson's inability to hire another attorney represented himself *pro se*. The Court never made an inquiry or on the record determination of Mr. Thompson's waiver of counsel as required by Rule 8.05 of the Uniform County and Circuit Court Rules. Further, the State, at trial, did not call the informant or the owner/operator of the house at 1119 Nelson Avenue to provide testimony to corroborate the hearsay testimony of Officer Deska Varnado. The State never provided proof of ownership of the house, the narcotics, or the exchange of the narcotics trough any corroborating testimony. Mr. Thompson, with the assistance of Hybrid Counsel, the Honorable Nelson Estess, called no witness. The Jury found him guilty of the possession with intent and he was ordered by the Court to serve a total of twenty (20) years on Count 1 and fifteen (15) years to serve on Count II to run consecutively with the Defendant serving twenty five (25) years with five (5) years suspended.

It is from this Judgment that Defendant David Thompson appeals.

SUMMARY OF THE ARGUMENT:

David Thompson contends that the verdict of the Pike County Circuit Court Jury is against the overwhelming weight of the credible evidence. In support of this position, the Appellant would first contend that the Court allowed the State of Mississippi to offer 'testimonial hearsay" at trial through the testimony of Officer Deska Varnado. His testimony sought to present evidence of a prior bad act of the Defendant which was the product of a controlled buy by a confidential informant. This testimony was offered to provide the necessary predicate for the probable cause of the search warrant that was executed to search the house where the contraband was found. The problem with this

testimony focuses on the State's use of hearsay testimony of the confidential informant to justify the warrant. The statements were the result of a custodial arrest of the informant. They further employed statements of the informant to describe the narcotics and their location in the house. The State never called the informant as a witness and the use of these testimonial hearsay statements violates the Confrontation Clause of the Constitution of the United States.

On a more fundamental level, the Court failed to take the requisite steps required under Constitutional standards to insure that Mr. Thompson made a knowing and intelligent waiver of his right to Counsel. The record is totally devoid of any attempt by the Court to make an on the record finding as required by FARETTA V CALIFORNIA, DAVIS V. STATE, VON MOLTKE V. GILLIES and Rule 8.05 of the Mississippi Uniform Circuit and County Courts. These authorities require an on the record inquiry to confirm that the Defendant has made his election to waive his right to counsel and proceed pro se in a knowing, intelligent and voluntary manner. The case law and Rule 8.05 set out the questions that the Court SHALL (emphasis ours) make on the record. The case law sets out the care that must be taken to make sure that the waiver is proper. There was no on the record determination made in this case. Absent a valid waiver of his right to counsel, if an unrepresented person is sent to prison, the conviction is unconstitutional. U.S. V FOLLIN, 979 F2d 369, 376 (5th Cir. 1997)

The Court also denied the Defendant his constitutional right to call witnesses when it denied him the right to call Assistant District Attorney Timothy Jones as a defense witness in order to impeach the conduct of the search of the house in question. Mr. Jones was present at the search and at a minimum he made statements to officers during the

course of the search. Mr. Thompson's observations of the conduct of the search and the statements made were, in his mind, of importance. The Court dismissed the request out of hand ruling that Mr. Jones was not a "necessary" witness and therefore could not be called. The true question of Mr. Jones value was for the jury to decide and based upon questions the jury sent to the Court during deliberations, Mr. Thompson's examination of the witness, his conduct and actions in the search and any statements he made could have called into question the validity and motive of the State. If counsel chooses to put themselves in the middle of a situation that is a fulcrum to the case, they run the risk of being called as witnesses and the Courts action in prohibiting the calling of the witness denied Mr. Thompson his constitutional right to confront fact witnesses in his case.

Finally, the verdict of the jury is against the weight of credible evidence in this case. The failure of the State to call the informant and the improper use of hearsay testimony calls into question the substance of the States case. When that testimony is left out at trial, as is should have been, the jury would have been under a duty to find Mr. Thompson not guilty.

ARGUMENT;

ISSUE 1:

THE TRIAL COURT ERRED WHEN IT DID NOT INSURE THAT DAVID THOMPSON MADE A VALID INTELLIGENT AND KNOWING WAIVER OF HIS RIGHT TO COUNSEL PURSUANT TO FARETTA V. CALIFORNIA, 422 U.S. 806, 819, 95 S. CT. 2525; 45 L ED. 562 (1975), VON MOLTKE V. GILLIES, 332 U.S. 708, 68 S. CT. 316, 92 L. ED. 309 (1984), DAVIS V. STATE, 811 SO 2D 346 (MISS CT OF APP. 2001), HOWARD V STATE, 701 SO 2D 274 (MISS. 1997) AND RULE 8.05, MISS UNIFORM CIRCUIT AND COUNTY COURT RULES.

The Waiver of a defendant's right to counsel can be waived at any time before or during a trial. But it must be made with full understanding of its consequences and disadvantages. Faretta v. California, 422 U.S. 806, 95 S Ct. 2525, 45 L.Ed 562 (1975) Prior to the Supreme Courts opinion in Faretta, the Court issued their opinion in Von Moltke v. Gillies. 332 US 708, 68 S Ct 316, 92 L Ed 309 (1948) In Von Moltke, Justice Black maintained that the trial court was constitutionally obligated to undertake a through inquiry ensuring that the accused has made an informed decision to represent themselves at trial and waive the right to counsel. The Court must discharge this duty properly in light of the strong presumption against waiver. The Court must investigate thoroughly as the circumstances of the case before him demand. To be valid, a waiver of counsel must be made with apprehension of the nature of the charges before him, the statutory offenses included within them, the range of allowable punishment thereunder, possible defenses to the charges and circumstances in mitigation thereof and all other facts essential to a broad understanding of the whole matter. The inquiry must be a penetrating and comprehensive of all the circumstances.

This test was further amplified in Faretta v. California, 422 US 806, 95 S Ct 2525, 45 L Ed 2d 562 (1975) The Court set out a preferred procedure for inquiry to determine that a defendant who elects to represent themselves makes a knowing and intelligent waiver of the right to counsel. The Court should first inquire as to inform the defendant of the information set out in Von Moltke. The Court should then advise the defendant of the pitfalls of self-representation.

It is important to note that Von Moltke dealt with a waiver of counsel to enter a plea while Faretta dealt with waiver of counsel in a trial and pro se representation.

Absent a valid waiver of his right to assistance of counsel, if an uncounseled defendant is sentenced to prison, the conviction is unconstitutional. U S v Follin, 979 F 2d 369,376 (5th Cir 1997)

In Mississippi, the Von Moltke - Faretta Standard is followed. When a defendant elects to waive his right to counsel at trial, the trial court must make an on the record determination as to the defendants competency to stand trial. Howard v State, 701 So 2d 274, 280 (Miss 1997) Once competency to stand trial has been confirmed the Court should then address factors to advise and inquire as to the defendant's knowledge of the circumstances, risks inherent in self representation. Davis v State, 811 So. 2d 346 (Ms Ct App, 2001)

Various appellate opinions have suggested that the defendant should be, at least the following:

1. Presenting a defense is not a simple matter of telling one's story but requires adherence to various technical rules governing conduct of a trial. Maynard v. Meachum 545 F 2d 273 (1st Cir, 1976)
2. A lawyer has substantial experience and training in trial procedure and the prosecution will be represented by an experienced attorney. People v. Lopez, 71 Cal. App. 3d 568, 138 Cal Rptr 36 (1977)
3. Persons unfamiliar with the legal procedure may allow the prosecution an advantage by failing to make objections to inadmissible evidence, may not make effective use of such rights as the voir dire of jurors and may make tactical decisions that produce unintended consequences. Privett v. State, 635 S. W. 2d 746 (Tex App 1982); Logan v. State, 690 S.W. 2d 311 (Tex App, 1985)

4. There may be possible defenses and other rights of which counsel would be aware and if those are not timely asserted, they may be lost permanently. Logan v. State, 690 S.W. 2d 311 (Tex App, 1985)
5. A defendant proceeding pro se will not be allowed to complain in appeal about the capacity of his representation. Peters v. Gunn, 33 F 3d 1190 (9th Cir., 1994)
6. That the effectiveness of his defense may well be diminished by his dual role as counsel and accused. U.S. Welty (674 F 2d. 185, (3d Cir. 1983)

In Iowa v. Tovar, 541 U.S. 77, 158 L Ed 2d 209, 124 S Ct 1379 (2004) the Supreme Court reviewed the effect of a waiver of counsel by a defendant. Tovar concerned a guilty plea by a defendant who waived the right to counsel at a plea hearing. The Court went to great lengths to state that if the defendant is advised of the nature of the charges, his right to counsel and the range of punishment attendant upon entry of a guilty plea. The Sixth Amendment does not require notice of the risks attendant to proceeding without counsel to wit: possibility that a viable defense could be overlooked and an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty. In her opinion, Justice Ginsberg wrote that the Iowa Supreme Court's order of those two admonitions are not required if the defendant made a knowing and intelligent waiver, sufficiently aware that they understand the nature of the right and how it would likely apply in general in the circumstances. In the unanimous opinion, Justice Ginsberg advises that states are free to adopt by statute, rules or decisions any guide for the process of waiver if they so choose.

That is the current state of the law in Mississippi concerning waiver of one's right to counsel in representing one's self in a criminal trial. Pursuant to Rule 8.05 of the

Mississippi Uniform Circuit and County Court Rules, the Court, upon learning that a defendant desires to act as his own attorney, SHALL (emphasis ours) conduct an on the record examination of the defendant to determine if the defendant knowingly and voluntarily desires to act as his own attorney. The court SHALL (emphasis ours) inform the defendant of the following:

1. The defendant has the right to an attorney, and if the defendant cannot afford an attorney, the State will appoint one free of charge to the defendant to defend or assist the defendant in his defense.
2. The defendant has the right to conduct the defense and that the defendant may elect to conduct the defense and allow whatever role they desire to their attorney.
3. The court will not relax or disregard the rules of evidence, procedure or courtroom protocol for the same rules as an attorney, that these rules are not simple and that without legal advice their ability to defend themselves will be hampered.
4. The right to proceed *pro se* usually increases the likelihood of a trial outcome unfavorable to the defendant.
5. Other matters as the court deems appropriate.

After instructing the defendant and ascertaining that the defendant understands these matters, the court will ascertain if the defendant still wishes to proceed *pro se* or if he wishes to have an attorney to help them in their case. If the defendant still desires to proceed *pro se*, the court should determine if the defendant has exercised this right knowingly and voluntarily, and if so, make a finding a matter of the record.

The record in this case is totally devoid of any on the record examination of Mr. Thompson by the Court concerning the questions and findings required under Rule 8,05.

Further the Court's failure to do so not only runs contrary to the Rule but it also runs contrary to the ruling of the Mississippi Supreme Court as set out in Davis when it adopted the Faretta standard as the proper admonition to give a defendant. It is important to note that in adopting the admonition as set out in Rule 8.05, the Mississippi Supreme Court is adopting the questions set out in Von Moltke and the standard care the court must meet to insure that a waiver is knowing, intelligent and voluntary. It is also important to note that this was not a plea hearing but a full trial where the consequences of a conviction would result in considerable jail time.

When we look at the record in this case it becomes clear that Mr. Thompson did not have a clue about the information set out in Rule 8.05. At motion hearings on September 17, 2007 (TR 27-39), October 2, 2007 (TR 40-53) and October 29, 2007 (TR 53-72) there are rambling discussions between the Court and Mr. Thompson concerning his representation but at no time does the Court stop the proceedings to comply with Rule 8.05 as required. There is no on the record finding that his waiver of the right to counsel was exercised knowingly and voluntarily. As further evidence of the confusion, at the September 17, 2007, motion hearing Counsel for Mr. Thompson is present to argue for Assistant Timothy Jones as a defense witness and to sever or limit any testimony as to another indictment covering a controlled buy of narcotics earlier in the day of Mr. Thompson's arrest. At the conclusion of the second motion argument, the hearing immediately morphs into an on the record debate over Mr. Goodwin's representation. At this point, a discussion occurs before the Court that should have occurred between counsel and defendant in private. During this "hearing" it becomes evident that Mr. Thompson does not have sufficient knowledge to understand the severity of lack of

counsel and the Court is presented with statements that may well be privileged. This entire exchange should put the trier of fact on notice that an in depth inquiry is required before Mr. Thompson can proceed *pro se*.

However at subsequent hearings, no Rule 8.05 admonition or on the record finding is made. The Court does make the necessary on the record findings concerning Mr. Thompson's right to testify at the close of the State's case but at no time does the Court satisfy the constitutional standard set out in Von Moltke, Farretta, and adopted by Mississippi in Davis, Howard and detailed in Rule 8.05.

It is clear from the record before us in this case that there was not a valid waiver of Mr. Thompson's Sixth Amendment right to counsel. Absent a valid waiver of his right to assistance of counsel, if an uncounseled defendant is convicted and sentenced to jail, his conviction is unconstitutional. U.S. Follin 979 F 2d 369, 376 (5th Cir 1997) The conviction of Mr. David Thompson is unconstitutional and should be reversed.

ISSUE 2:

THE TRIAL COURT ERRED WHEN IT ALLOWED IMPROPER "TESTIMONIAL HEARSAY" IN VIOLATION OF THE RULE SET OUT IN CRAWFORD V. WASHINGTON 541 U S 36, 124 S Ct 1354, 158 L Ed 2d 848 (2004)

David Thompson asserts that the trial court improperly allowed "testimonial hearsay" to be admitted at trial during the testimony of Officer Deska Varnado. The testimony that Officer Varnado offered concerned the sale of narcotics earlier in the day which provided the probable cause for the search warrant to search the home.

In 2004, the Supreme Court rendered it's opinion in Crawford v. Washington, 541 US 36, 124 S Ct 1354, 138 L Ed 177 (2004). In a unanimous decision authored by

Justice Scalia the Court addressed the application of the Confrontation Clause to testimonial hearsay. In Crawford, the Court held that the State cannot at trial enter a "Testimonial Hearsay" statement made to a policeman in circumstances where the accused cannot confront their accuser. When a prosecutor attempts to introduce a testimonial statement made by a person who is not a witness at trial, the State cannot argue that the statement should be admitted because it is reliable. Unless the Defendant has the opportunity to cross-examine the declarant or has forfeited the right to confront them, the statement cannot be admitted.

The Court defined testimonial hearsay statements as follows:

1. Exparte in court testimony or its functional equivalent such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross examine or similar pre-trial statements that the declarant would reasonably expect to be used prosecutorially.
2. Extra-judicial statements contained in formalized testimonial materials such as affidavits, depositions, prior testimony or confessions, and
3. Statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later date. Crawford at 541 US 51-52

"Where testimonial statements are at issue, the only evidence of reliability sufficient to satisfy constitutional demands is the one the Constitution actually presents: confrontation." Crawford 541 US at 68-69

When this test is applied to the record in the case, the result is disturbing at best. The State lists Logan Griffin as a witness (RE 1) in advance of trial but they did not call him

to testify where his credibility would be under the scrutiny of the jury and subject to cross-examination by Mr. Thompson. Instead they resort to entering his testimony by hearsay statements offered under the mantle of Officer Deska Varnado's testimony. (TR 139-168) The statements are clearly testimonial in nature as defined under Crawford. Logan Griffin 's statements are offered as the underlying basis for the controlled buy and the search warrant when he offers to assist the police in return for "help" from the state. He tells the officers that he knows "Head" and he could buy drugs from him (TR 139-140, RE 2,3) Mr. Thompson does interpose an objection to the testimony on the ultimate basis of relevance but it was overruled by the Court on Rule 404(b) grounds of prior bad acts to prove intent. At that point, the State offers Officer Varnado's testimony on how a controlled buy is set up and how the one in question went down (TR 140-146) As the testimony continues, the state attempts to introduce information as to the weight of the contraband seized in the original sale. Mr. Thompson's objection to the testimony, although poorly stated obviously is made to the relevance of the testimony. The Court then makes note of the fact outside the jury's presence when they state, "This is a totally different offense, and I do find that, I mean, his objection wasn't well stated. But how is what he bought the first time for which the man is not on trial today relevant." But it's too late, the cat is out of the bag. (TR 146-147, RE 4-5)

The State has crossed the line on their 404(b) argument to offer intent through a prior bad act and have, instead placed Mr. Thompson on trial for the sale, which is a separate indictment, and the possession charge, for which he is on trial, at the same trial. The vehicle for the tactic is the introduction of testimonial hearsay statements of Logan Griffin concerning his desire to help and his knowledge of the opportunity to buy from

"Head". By these tactics, the State is also imputing the criminal conduct of Logan Griffin on the Defendant with scrutiny of the jury.

The statements clearly fall within the ambit of Scalia's definitions of testimonial hearsay and are therefore inadmissible at trial. Their use in this trial have a particular damaging effect because of their use by Officer Varnado to support the bridge between mere suspicion and probable cause. It is Logan Griffin who provides the critical information.....and the State does not call him to testify where his credibility would be subject to examination and Mr. Thompson could confront his accuser. This fact is amplified when the Jury, in the midst of deliberations, sends a series of questions to the Court (TR 202, RE 6) The questions focus of the facts of the case but one question sticks out like a sore thumb: "Why didn't the informant testify?" When one examines the questions the Jury poses it is clear that the damage done by the State's proffer of improper testimonial statement of Logan Griffin is devastating.

Later in closing argument, Mr. Thompson questions the fact of why the State did not call Logan Griffin as a witness. In response, Assistant District Attorney Timothy Jones asserts that the witnesses were under subpoena and Mr. Thompson was free to call them. Mr. Griffin was on that list. However, Mr. Jones statement is further evidence of a disturbing ploy in this trial. It is the State's burden to prove their case. Mr. Griffin was a critical witness under their 404(b) argument of evidence of intent. His testimony if offered would have, if it was as Deska Varnado says it was, provided sufficient reliability and credibility for the Jury to weigh. But, he would have been subject to cross examination at that point and the possible dangers of impeachment. Mr. Jones suggestion that Mr. Thompson could call any of the witnesses under subpoena in his case in chief is

nothing but a cheap prosecution trick. It is not Mr. Thompson's burden of proof. It is the State's burden. At the close of the State's case in chief they chose not to call Logan Griffin for whatever reason. But the "testimonial hearsay " offered by Officer Deska Varnado of Griffins statements concerning motive and the conduct of "Head" fall within the ambit of Scalia's definition and must be stricken. Without this testimonial hearsay, the State does not get to intent under 404(b) and the basis for the probable cause for the search warrant which authorized the search. The effect on Mr. Thompson is devastating. Mr. Thompson can, as Mr. Jones suggests, call the witness himself but that is not his burden. It is the State's and they did not meet it. These statements cannot be cloaked under the guise of harmless error because without them, the State's case lacks a foundation and their admission as "testimonial hearsay" offers no possibility of challenge. One has to wonder why didn't Mr. Jones call Mr. Griffin. They did not announce him as unavailable. Quite the opposite. Mr. Jones all but dared Mr. Thompson to call them although he stated that in the safe harbor of closing argument long after the opportunity to hear his testimony was gone. Maybe Mr. Griffin's testimony was different from that offered by Deska Varnado and he was coerced to act. Maybe Mr. Griffin's testimony would imply some other violation of the law by either the police or Mr. Griffin. Maybe Mr. Griffin was given special consideration that would offend the Jury's sensibilities. Maybe the State's conduct in selective prosecution would cause problems for their case. We will never know now because he didn't testify and the "testimonial" statements of Logan Griffin must be stricken under Crawford. As Justice Scalia reminds us "When testimonial statements are at issue, the only indicia of reliability sufficient to

satisfy constitutional demands is the one the Constitution actually prescribes: confrontation".

David Thompson asserts the improper use by the State of Testimonial Hearsay constitutes reversible error and justifies reversal of the Jury verdict.

ISSUE 3:

THE TRIAL COURT ERRED WHEN IT DENIED DAVID THOMPSON THE RIGHT TO CALL AND CONFRONT THE HONORABLE TIMOTHY JONES AS A WITNESS IN DIRECT VIOLATION OF HIS CONSTITUTIONAL RIGHT TO CALL AND CONFRONT WITNESSES.

The right for a criminal defendant to call witnesses in his trial and confront them is constitutionally guaranteed under the Sixth Amendment. David Thompson asserts that the Court's denial of his request to call Assistant District Attorney Timothy Jones was in violation of his right to confront witnesses. The Court visited this issue twice. (TR 27-40, 56-59)

On September 17, 2009, the issue was raised by Mr. Goodwin under Rule 3.7 of the Rules of Professional Responsibility in stating that Mr. Jones, as a participant in the search, could also by a fact witness, and thereby forcing the recusal of the District Attorney's office from the trial. There was no denial of the information by the State.

The Court, based on the States announcement that Mr. Jones would not be a witness in their case in chief, held that Mr. Jones would not be a witness. He was not necessary to the case and this would be the basis for denial of the recusal of the District Attorney's Office from prosecution. However, the Courts rational did not offer a basis to deny Mr. Thompson from calling Mr. Jones as a witness at trial. On October 29, 2007, the Court formally denied Mr. Thompson the right to call Mr. Jones as a witness in the trial. (TR 53-72)

The Court's rational for the denial, Rule 3.7 of the Rules of Professional Responsibility, sets out the standard for recusal of an attorney and a firm. However it is important to note that the rule has to be applied in the civil and criminal context. It may be appropriate for a judge in a civil matter to rule, outright, that a lawyer cannot be called as a witness but the constitutional guarantees set out by the Sixth Amendment in criminal trials cannot be overlooked and dismissed so lightly.

Mr. Jones admitted on the record that he was there at the search. His statements concerning peripheral involvement should be subject to scrutiny. Was he wearing a weapon? Was he wearing narcotics unit garb? When did he arrive and what was his conduct during the search? There were other witnesses to the search who were listed on the State's witness list including the party who lived in the house. It is, in hindsight, strange to see that the State did not call the owner to testify and she was not even charged in the crime. The State chose to present their case through Deska Varnado and testimonial hearsay, which effectively cut off testimony on Mr. Jones involvement in the search.

If the State's Attorneys choose to participate in on the ground law enforcement activities, they place themselves in a position where they can be called as witnesses in the resulting trial. While Counsel agrees with the Court on the danger of this course of action, that is for the defendant to decide. Surely it is a double-edged sword since on cross-examination the attorney can score points. But that is before the Jury and for them to decide on the attorney's credibility and demeanor. The Defendant has the right to call any witness they deem necessary to their defense and a flat denial of the right to confront

by the Court in a criminal action is a violation of Mr. Thompson's 6th Amendment right to confront witnesses.

In the matter of the recusal of the District Attorney's Office, the "necessary" standard applies because there are more than one Assistant District Attorneys that could prepare the case without involvement of Mr. Jones. He could in fact be sequestered for the period of trial preparation and the trial itself.

While Mr. Thompson's request is a dangerous one to make, it is his right to do so and a blanket denial without some cross-examination is error. If the State's Attorneys continue the practice of on the scene participation in searches and other law enforcement activity they place themselves in the position of being called as a witness at trial. And, as such, the Defendant has a right to call them in his trial.

The Court committed error by the absolute denial of Mr. Thompson's constitutional right to call Mr. Jones as a witness.

ISSUE 4:

THE VERDICT OF THE JURY IS CONTRARY TO THE WEIGHT OF CREDIBLE EVIDENCE.

Appellant David Thompson contends the jury verdict in his case is contrary to the overwhelming weight of evidence presented at trial and should be reversed.

The State of Mississippi failed in their obligation to present sufficient credible evidence at trial to support a guilty verdict. As previously detailed in Issue One of this brief, the State utilized impermissible "testimonial hearsay" in the testimony of Deska Varnado. The State's strategy in trial leads to the inescapable conclusion that they failed to present enough evidence to support the verdict.

Officer Varnado attempts, in his testimony, to offer all the necessary evidence to support the State's case. However the State did not call Logan Griffin, the informant, to make an eyewitness identification of who "Head " was and if Mr. Thompson was in fact that person. The witness list filed in the Circuit Clerk's Office indicates that a subpoena was "issued to DA" (RE 1) However he never testified and the subpoena was never returned. His testimony was critical to identification and other evidence to support the charge against Mr. Thompson. The State chose, however, to use impermissible hearsay to make their case. Varnado's testimony is uncorroborated due to Griffin's absence. The video is not sufficient for identification due to poor quality.

The State issued a subpoena on October 25, 2007, for Katrina Johnson however it was never returned to the file as served either. She was not called at trial by the State and her testimony as an eyewitness to the search. Officer Varnado's conduct in the search and, more importantly, Mr. Jones conduct in the search was of paramount importance to the Defendant's case. Of course, in closing argument Mr. Jones stated that David Thompson could call any witnesses he wanted and that is true. However this self-serving statement ignores one important fact: the burden of proof rests on the State to prove beyond a reasonable doubt that Mr. Thompson was the owner of the drugs. The State did not prove he had dominion and control over what was present in the house of another person . The resident in the house was not tried and did not testify on behalf of the State. Given the close proximity of the search with the sale, there was no testimony or evidence that the SMINEU funds were found on Mr. Thompson.

There were other people at the house but the State has no statements or evidence that they were searched for narcotics or the money. The State made no offer of proof as

to the exact distance of the house to the Church which is critical to the charge and enhanced sentence. It is an accepted fact that Mr. Thompson had no right to contest the search of the House (TR 23-25), and this leads to the inescapable conclusion that the State would have to prove that he did exercise dominion and control over those drugs in order to prove possession.

The questions posed by the Jury during deliberations point to the State's failure to provide sufficient evidence to support the conviction. Their case rests on impermissible hearsay testimony, objected to at trial, (TR 139-144, RE 2-3) noted as irrelevant by the Judge (TR 146-147, RE 4-5) but never stricken by the Court. The State's case seems to be predicated on the fact that Logan Griffin was a drug criminal and his credibility is beyond reproach. If he said Mr. Thompson was "Head" who can contradict him. But we will never know about Mr. Griffin because he was not called to tell what happened.

The State of Mississippi failed in its obligation to provide evidence sufficient to support conviction beyond a reasonable doubt and the conviction of David Thompson should be reversed.

CONCLUSION:

Defendant, David Thompson, requests this Honorable Court to reverse his conviction due to the Court's Constitutional and Procedural errors in the trial.

CERTIFICATE OF SERVICE

I Joseph A. Fernald, Jr., attorney for Appellant, David Bernard Thompson, certify that I have this day served a copy of the Brief of Appellant via United States Postal Service, postage prepaid, to the following:

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This the 26th day of August 2009.

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