2008-KA-02060-SCT

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 the Mississippi Supreme Court and/or the judges of the Mississippi Court of Appeals may evaluate possible disqualification or recusal.

Frank Sanders Tipton
Appellant

Ross Parker Simons
Attorney for Appellant

Donald J. Rafferty
Trial Counsel

Wm. T. "Dale" Harkey
Judge, 19th District

Jean Smith Vaughan
Brandon Lee Ogburn
Office of the Attorney General
Prosecutors

This, the 14th day of August, 2009.

Ross Parker Simons

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STATEMENT OF ISSUES

Issue I

The trial court—through Instruction C-2—granted the state a peremptory instruction on two elements of the crime by defining Court Programs, Inc., as a "contractor providing incarceration services" for the City of Gulfport.

The jury was confused because it recognized that in Instruction C-2 the trial court itself had defined Court Programs, Inc., as "a contractor providing incarceration services to the City of Gulfport". When the jury questioned the court about how to proceed (Exhibit C-2), the court did not clarify the confusion or correct the instruction (Exhibit C-4).

The jury alone was to make the decision on whether or not Court Programs, Inc., was a contractor that provided incarceration services, and this was a hotly contested point at trial. When the trial court took the decision out of the jurors' hands, it committed reversible error.

Issue II

In ruling on Mr. Tipton's Motion for a Directed Verdict, the trial court construed the statute in favor of the state rather than strictly in favor of Mr. Tipton as it was required to do.

Issue III

The indictment is fatally and facially defective in that it failed to allege the required elements that Court Programs, Inc., was "a contractor" and that it provided "incarceration services" to the City of Gulfport.

Further, the indictment failed to contain a plain, concise, and definite written statement of the essential facts constituting the offense charged and did not fully notify Mr. Tipton of the nature and cause of the accusation. Instead, it charged that Mr. Tipton both "demanded" and "asked" Ms. Rayborn to allow him to watch her shower, the terms being polar opposites and the latter of which, even if proven, did not constitute a crime. Additionally, the indictment failed to clearly state what constituted the "reward" element required by the statute.

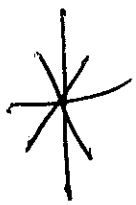
Issue IV

The state produced insufficient evidence to support Mr. Tipton's conviction. Furthermore, the verdict was contrary to the weight of the evidence. Thus, the trial court erred in denying Mr. Tipton's request for a peremptory instruction, his Motion for a Directed Verdict, and his Motion for a New Trial. After applying the standards by which it tests the sufficiency and the weight and credibility of the evidence, this Court should reverse and render Mr. Tipton's conviction and sentence.

from October 2003 to December 2005, and Mr. Tipton was an employee at that time. (Tr. 83-84). He had been told that Mr. Tipton supervised Dorothy Lakay Rayborn during that time, though he had no actual recollection of it. (Tr. 85).

In his first appearance as a witness for the state, Mr. Langenbacker, in response to the leading question, "And Court Programs, Inc., had an agreement with the City of Gulfport to administer probation services for the Court?" he answered "Yes." (Tr. 88). He was not asked if Court Programs, Inc., administered "incarceration services" for the City of Gulfport.

Additionally, Mr Langenbacker, during this first call to the witness stand, testified that Mr. Tipton had told him, in the evening of April 14, 2004, that he had "messed up with a client to do something to help with her probation." That something, Mr. Langenbacker recalled, had something to do with "nude bathing. Something to that effect." (Tr. 88).



On cross-examination, Mr. Langenbacker testified that Court Programs, Inc., did not provide incarceration services, rather it provided alternatives to incarceration. (Tr. 90).

Joe Langenbacker (second appearance)

Mr. Langenbacker was recalled by the state (Tr. 187) after the state had put on all its proof but not yet rested. Before Mr. Langenbacker took the stand, trial counsel challenged the state's right to recall him, both as a violation of the rule of sequestration because Mr. Langenbacker had had a conversation with Joey Turnage after Turnage left the witness stand (and before Mr. Langenbacker re-took the stand) and a violation of the rule controlling the manner and order in which witnesses are presented and interrogated.

After a defense objection, the trial court held an inquiry outside the presence of the jury to determine if Mr. Langenbacker and/or Mr. Turnage had violated the rule of sequestration. (Tr. 186-197). Mr. Langenbacker testified that he had a conversation with Mr. Turnage before his

second appearance on the witness stand. While being examined by defense counsel, Mr. Langenbacker responded that he had asked Mr. Turnage if he (Mr. Langenbacker) would take the stand. (Tr. 188). Then he responded "Yes, sir" to the question of whether he and Mr. Turnage were talking about Mr. Tipton's case. (Tr. 189, ln. 1-5). Then immediately thereafter in response to the prosecutor's question of whether he spoke "specifically about the case" to Mr. Turnage, Mr. Langenbacker testified that he did not. (Tr. 189, ln. 11-13).

The trial court took over questioning at this time and elicited that along with fishing stories, some of Mr. Langenbacker's conversation with Mr. Turnage included "a portion as far as his understanding as to what Court Programs did, also as far as administrative things—warrants, basic questions as far as how we handled warrants and things like that" and that Mr. Turnage was asking Mr. Langenbacker questions. (Tr. 189-190).

Counsel made a further objection to the fact that the state had realized it had not presented proof that Court Programs, Inc., provided "incarceration services" or that it had a contract with the City of Gulfport, and without such proof the state's case could not survive a motion for a directed verdict. (Tr. 192). The objections were overruled, and Mr. Langenbacker again took the stand.

During this appearance on the witness stand the state asked Mr. Langenbacker if Court Programs, Inc., "h[ad] a contract with, or an agreement with the City of Gulfport to provide incarceration, I mean probation services." [1]

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[1] The jury was as confused as the prosecutor on this issue, and sent a note to the trial judge (Exhibit C-2, RE 9), asking the court if Instruction C-2 (CP 49, RE 8) contained "a typographical error" that should be corrected by replacing "incarceration services" with "probation services". (Tr. 326-327). The state's failure to prove that Court Programs, Inc., provided incarceration services, is, of course, central to most of the arguments in this brief.

The answer to the question—corrected from incarceration to probation—was "Yes." (Tr. 198).

Mr. Langenbacker went on to testify that:

> The City of Gulfport did not have a financial agreement with Court Programs. The actual payment for probation services was paid by the defendant. The defendant we titled as clients. The client actually had to pay for the services out of their pocket, so there was no monetary reimbursement from the City of Gulfport.
>
> (Tr. 199)

Finally, Mr. Langenbacker testified that Court Programs, Inc., had an "administrative function to inform the court . . . that the person on probation was in violation by not doing the actual orders of the judge." (Tr. 200).

On cross-examination of his recalled testimony, Mr. Langenbacker testified that employees of Court Programs, Inc., were not certified law enforcement officers or department of corrections officers and that they were only private employees (Tr. 202) and, finally, Mr. Langenbacker answered "That is correct" to the question: "Is it true that your company did not provide incarceration services. It provided alternatives to incarceration services?" (Tr.202-203).

Joseph Turnage

Mr. Turnage, an investigator for the office of the state Attorney General, testified immediately following Joe Langenbacker's initial testimony. As noted by the trial judge at Tr. 195, Mr. Turnage had heard Mr. Langenbacker's testimony due to a late invocation of the rule of sequestration. [2] (Tr. 92, 195).

[2] As noted above, Mr. Turnage also had a conversation with Mr. Langenbacker about the procedures of Court Programs, Inc., just before Mr. Langenbacker's second testimony.

Mr. Turnage testified that he received a call from an associate in law enforcement who relayed to him Lakay Rayborn's allegations about Mr. Tipton, her probation officer. Mr. Turnage then directed Ms. Rayborn to make contact with Mr. Tipton and monitored the telephone conversation that ensued. (Tr.94-96). Mr. Turnage also testified as to the nature of Lakay Rayborn's complaint about Mr. Tipton, and after the phone call arranged for Lakay Rayborn to have Mr. Tipton meet her at her aunt's trailer, where officers would monitor and audiotape the meeting from inside and outside the trailer. (Tr. 105-106). The audiotape of Lakay Rayborn and Mr. Tipton's conversation was introduced through Mr. Turnage's testimony as State's Exhibit No. 1. (Tr. 112).

Mr. Turnage also testified to what he heard on the tape and that he and another investigator from the Office of the Attorney General, Kyle Wilson, had, the same day as the audiotape was made, gone to Mr. Tipton's home and confronted him about the event they had taped. (Tr. 123). There, Mr. Tipton told Turnage and Wilson that he had gone to Lakay Rayborn's trailer that day to give her a drug test and scold her for not paying her fines.

On cross-examination, Mr. Turnage testified that he had heard Mr. Langenbacker's testimony on the previous day that Court Programs, Inc., did not provide incarceration services. (Tr. 143). [3] After some back-and-forth with defense counsel about whether Mr. Tipton was an officer contemplated by the statute or a private employee of a private company, Mr. Turnage testified regarding Mr. Langenbacker's testimony, which he had heard because of the late invocation of the rule of sequestration:

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[3] He also stated, though it was stricken after objection, that this was different from what Mr. Tipton's "boss" had told him. This person, David Rothbart, would have been competent to testify to the services provided by Court Programs, Inc., to Gulfport, but the state did not call him.

> I don't even know that he was asked those questions about whether or not he, whether or not there was ever a document that Mr. Tipton signed, signed an affidavit about a probation client that he had under his control.
>
> (Tr. 148)

Further questions involved whether or not Mr. Tipton had told Mr. Turnage that he had told his boss (David Rothbart, who was not called as a witness) that Ms. Rayborn had made "advances" on him. Mr. Turnage denied this, stating that he had asked Mr. Tipton whether or not that had occurred and he had said no, but he agreed that Mr. Tipton had told his boss about the allegation. (Tr. 150-151). When defense counsel asked Mr. Turnage whether or not Mr. Tipton had told him that he had helped Ms. Rayborn get a job at Rite-Aid, where his wife was assistant manager, he acknowledged that encouraging probationers in seeking employment is a fundamental duty of probation officers but also stated, over an objection, "But not to the extent of trying to get her to take a shower in front of him." (Tr. 151-152). Mr. Turnage also acknowledged that Mr. Tipton had told him that Ms. Rayborn had problems at the job he had helped her secure and that she was fired and she "had made some complaints about him and his wife." (Tr. 152-153). He also testified that Mr. Tipton had not told him of any threats of retaliation from Ms. Rayborn. (Tr. 152). He further testified that Ms. Rayborn had told him about being accused by Rite-Aid management of having money missing from her cash register. (Tr. 155).

On redirect, the state asked Mr. Turnage about the services that Court Programs, Inc., offered and did not offer. This was followed by an objection which was sustained and the state asked no further questions of Mr. Turnage. (Tr. 157).

Kyle Wilson

The state's questioning of Mr. Wilson, an investigator for the Attorney General's Office, developed that he had been secreted in Ms. Rayborn's aunt's trailer and had aurally monitored the conversation between Mr. Tipton and Ms. Rayborn. There was no cross-examination.

Dorothy Lakay Rayborn

In pertinent part, Ms. Rayborn testified that she was convicted of shoplifting from a Wal-Mart in Gulfport and had been fined $300.00 and ordered to pay restitution and court costs. She was also placed on probation and ordered to pay supervision fees. Frank Tipton was her probation officer. (Tr. 167). During her six-month probation period, Mr. Tipton visited her at her aunt's house in Ocean Springs, although she did not recall how many times he visited. (Tr. 168).

(Jackson County)

Ms. Rayborn testified that she was put in contact with the Attorney General's Office after she contacted a friend in law enforcement because Mr. Tipton "was going to sign a warrant for me to go to jail if I didn't pay the fine or do something like take a shower. And I didn't want to go to jail, so I called Mike because I didn't know what else to do." (Tr. 169). When asked if Mr. Tipton ever "ask[ed] you to do anything or did he make inappropriate comments to you?", Ms. Rayborn testified "Yes". (Tr. 171). "He asked me, he told me that if I took a shower and let him watch me, then he would pay my fine and give me a receipt every time." (Tr. 172). She testified that Mr. Tipton helped her get a job at Rite-Aid and that a cash register till for which she had co-responsibility was missing some money, although she wasn't certain that was the reason she left Rite-Aid. (Tr. 174). She identified the audiotape as the one that was recorded on the day she met with Mr. Tipton at her aunt's trailer. (Tr. 176-177).

At one point, in a question about the tape, the prosecutor characterized part of Mr. Tipton's conversation as a "demand", but after an objection was sustained the state modified its

see jury instruction - also uses the word demand

Threatening to have her imprisoned

questioning to "Who asked you to take a shower?" and "Who asked you to model?" Ms. Rayborn responded that Mr. Tipton had. The state also characterized Mr. Tipton's statement as a proposition and Ms. Rayborn affirmed that she refused it and did not accept it. (Tr. 180). Ms. Rayborn went on to testify that Mr. Tipton "said that he's got a warrant and he could—all he has to do is take it over and get the judge to sign it to violate my probation." (Tr. 180). Mr. Tipton also, according to Ms. Rayborn's testimony, kept reminding her that she had fines to pay and an incident in Ocean Springs she had to resolve. "It's like giving me an ultimatum. Either I have to do it or I go back to jail." (Tr. 181). This testimony is contradicted by the audiotape introduced as State's Exhibit 1 and the transcript of the tape which is in the record as State's Exhibit 2, for identification.

On cross-examination, Ms. Rayborn testified that the ultimatum she described on direct—that she would have to shower for Mr. Tipton or go back to jail—did not appear on the audiotape introduced as State's Exhibit 1. (Tr. 183).

Mr. Tipton's Proof

Dorothy Lakay Rayborn (first defense testimony)

Mr. Tipton's counsel called Ms. Rayborn as his first witness. She testified that Frank Tipton and his wife Diane had helped her get a job at Rite-Aid. Although she recalled that she had been terminated, she was not sure if it had been about April 1, 2004. (Tr. 223). She replied, "I don't think so" to the question that she had been terminated by Rite-Aid and had returned to the store about April 8, 2004, to pick up her last check. (Tr. 223). She testified that she was not banned from going back into the store and that she had not had a discussion with Mrs. Tipton at that time. Her responses were "No" to the questions of 1) whether or not she made any

statements to Mrs. Tipton toward Frank, 2) if while working at Rite-Aid she was instructed about her conduct by a supervisor, and 3) if she went to the store under the influence of drugs or alcohol. (Tr. 224). Ms. Rayborn was not cross-examined by the state.

Jacqueline Kluender

Ms. Kluender testified that she had worked for Rite-Aid in Ocean Springs for four (4) years and that she had been assigned to supervise Ms. Rayborn as her "buddy trainer", a system set up by Rite-Aid to allow more experienced employees to break in new employees, because she had seniority as a Rite-Aid cashier. She also knew both Mr. and Mrs. Tipton, as Mrs. Tipton was her assistant manager. (Tr. 225-227). She testified that Ms. Rayborn came to work for Rite-Aid in March 2004 and had been separated soon thereafter. (Tr. 226). She trained Ms. Rayborn on her cash register and the register came up $40.00 short. (Tr. 227-228). Ms. Kluender had ultimate responsibility for the register and had never been short before, but she had given Ms. Rayborn her code when she went on a break. She deemed this to be a mistake. (Tr. 228). On the day that Ms. Rayborn was suspended from Rite-Aid, Ms. Kluender heard her threaten Mrs. Tipton, telling her that "she would be sorry" and "you're going to pay for this." "Because...[i]f I lose my job, I'll go back to jail, and I'm not going back." (Tr. 230).

Ms. Kluender later witnessed another threat Ms. Rayborn made to Mrs. Tipton when Ms. Rayborn came back on the premises to pick up her terminal check after being told she was forbidden to enter the Rite-Aid. The threat was "You know, you're going to be sorry for this, because if I go down, I'm taking Frank and you with me." (Tr. 231). Ms. Kluender further testified that in her opinion Ms. Rayborn was "not truthful." (Tr. 233).

On cross-examination, Ms. Kluender reiterated that she was Ms. Rayborn's buddy trainer and that she (Ms. Kluender) was in charge of the till that came up $40.00 short but that Ms.

Rayborn was working out of the same till. (Tr. 235). On re-direct, she again explained that Ms. Rayborn used her till when she was training her. (Tr. 235).

Kimberly Kline

Ms. Kline was Ms. Rayborn's roommate from mid-January 2004 to early April of that year. (Tr. 237). She described Ms. Rayborn as untruthful and a "manipulator" and "con artist." (Tr.237, 238, 239). She was aware that Ms. Rayborn had been fired from Rite-Aid. (Tr. 239). On cross-examination, Ms. Kline testified that she had a dispute with Ms. Rayborn over a man and that she had once filed charges on her in Ocean Springs. (Tr. 240). On re-direct, she testified that the dispute began because Ms. Rayborn had started sleeping with Ms. Kline's ex-boyfriend. (Tr. 240).

Diane Tipton

Diane Tipton testified that she married Frank Tipton in 2002, that Frank had started working for Court Programs, Inc., in 2003, and that she worked during the time in question at Rite-Aid as an assistant manager. (Tr. 241-242). She described Frank as a people person who often helped out those in need, and gave examples of how he had offered food, lodging, employment, and transportation. (Tr. 242).

Mrs. Tipton testified that she knew Dorothy Lakay Rayborn because Frank had asked her about hiring Ms. Rayborn at Rite-Aid, after which Ms. Rayborn passed certain required tests and was hired, although she did not qualify to work in the pharmacy because she refused to take a drug test. She was hired in March 2004 and worked there not more than three weeks, being terminated on April 3 or 4, 2004. (Tr. 243-244). Mrs. Tipton described Ms. Rayborn's work ethic as "appalling" and testified that she was suspended after her third cash shortage. When

Mrs. Tipton confronted Ms. Rayborn about the shortages, Ms. Rayborn blamed it on her inability to count. (Tr. 244).

Mrs. Tipton sent Ms. Rayborn home one day for improper dress, and on the day that Mrs. Tipton notified her that she was suspended Ms. Rayborn "screamed at me and said that I was going to be sorry, I would pay for it." (Tr. 246). After Ms. Rayborn had been fired, she came back to the store on about April 8, 2004, to pick up her final check, after having been told not to come on the premises. (Tr. 246). Ms. Rayborn threatened Mrs. Tipton on this occasion, screaming at her, "If I go down, you go down, Frank goes down. I'm not going back to jail." (Tr. 247).

Mrs. Tipton also testified that on or about April 12 or 13, Frank came to her upset and told her that he believed Ms. Rayborn had propositioned him, but he was not certain because his hearing aids (he had worn two since Mrs. Tipton met him) were not working properly that day. She further testified that he was going to ask that Ms. Rayborn's case be turned over to a female. (Tr. 247-248). Mrs. Tipton described Ms. Rayborn's general reputation in the community as "untruthful and conniving" and that she did not find Ms. Rayborn to be a truthful person. (Tr. 249).

On cross-examination, Mrs. Tipton testified that Ms. Rayborn never came to her house and that Frank assisted others, not just Ms. Rayborn, in finding jobs, including trying to place other people at Rite-Aid. She testified that she was not jealous of Ms. Rayborn and replied "No" to the state's question: "Isn't it true that you'd say anything to keep your husband from going to jail?" (Tr. 251).

Frank Tipton

Mr. Tipton testified that he was hearing impaired and that he wore hearing aids and read lips to assist him. He had a hard time hearing telephone conversation. (Tr. 253). He had been in the military, had served as a police officer, and had worked for a casino before working for Court Programs, Inc., where he supervised up to 300 probationers. He enjoyed his work because he liked to help people. (Tr. 254).

He had supervised Ms. Rayborn as part of his job and helped her and others with transportation. He helped her get a job with Rite-Aid by asking his wife, although Ms. Rayborn did not qualify to work in the pharmacy because she would not take a drug test. (Tr. 256). He spoke to Ms. Rayborn on the night of April 8, the day she was fired, because she called him about eight or nine times wanting to meet with him. He met with her outside her apartment on April 9 and did not see her again until April 15. (Tr. 258).

When he went to the apartment on April 9, he had his wife with him in the car. He was greeted by Ms. Rayborn, who came out on the balcony and greeted him in a red or maroon shirt but went into the house while Frank climbed the stairs and re-appeared in only a towel by the time he reached the balcony. He told her to put some clothes on and she complied, and she came back and they had a conversation on the balcony for about ten or fifteen minutes, discussing the drugs she was on and her being fired from Rite-Aid. (Tr. 260). (At this point, an objection was made to Mr. Tipton's testifying that Ms. Rayborn had propositioned him on or about April 9, 2004, and defense counsel was allowed to re-call Ms. Rayborn regarding this.)

Dorothy Lakay Rayborn (recalled)

During this segment of her testimony, Ms. Rayborn testified that she did have telephone conversations with Mr. Tipton after she was fired from Rite-Aid. She testified that he came over

some time around the time in question in the morning, but denied that he had come in the afternoon or evening or that she told him he could come to her apartment in Ocean Springs or that he came over with his wife. (Tr. 269-270). She denied greeting him in a towel, but affirmed that the apartment where she lived with Kim Kline had a balcony from which you could see the parking area. She further denied that she had made any statement to him indicating that she would do "whatever it would take to avoid going to jail" at that particular time. She admitted making that statement at the meeting between her and Mr. Tipton that was taped and was introduced as State's Exhibit 1, and again denied that she tried to proposition Mr. Tipton. (Tr. 271). (At this point, Mr. Tipton's direct examination continued.)

Frank Tipton (continuing testimony)

Mr. Tipton again described the meeting of April 9, 2004, on the balcony of Ms. Rayborn's apartment. He did not go into the apartment. He testified that after she came back out on the balcony with her clothes on they had a relaxed conversation about her probation and his medical conditions, and "At one point she made the comment that she'd do anything." She started coming close to him and he told her that he did not cheat on his wife and that the wife in question was down at the bottom of the stairs. He was not certain that this was a proposition—because of his hearing deficits—but he "felt that she was actually propositioning to me." (Tr. 273).

After this encounter, Mr. Tipton told his boss at Court Programs, Inc., who told him to get more information and follow up on it because he wanted more information before he would transfer the case off Mr. Tipton's work load. (Tr. 274).

Ms. Rayborn continued to call Mr. Tipton, to the point that he told her to stop calling because he was going through health and family problems. Mr. Tipton testified that she called

him at least seven or eight times between April 12 and April 15, asking him to meet with her, telling him that she really needed to talk to [him] and that "she'd do anything in order to just make everything go away." (Tr. 274-275). He finally agreed to meet with her on April 15, 2004, after she called him while he was undergoing tests at the hospital and she "was almost frantic". (Tr. 275).

Mr. Tipton went to Ms. Rayborn's house the day after the call and brought a drug test with him as he had told her on April 9 that he was going to test her. While he was administering the test they talked about her getting back on the right track. He wished her luck after he administered the test and told her that he was going to have someone else assigned to her case. Then he turned in the drug test and went to Books-a-Million where Ms. Rayborn contacted him again and he came back to her place. (Tr. 275-276).

Mr. Tipton testified that he initially did not want to go into the trailer but did so because it was hot outside. Ms. Rayborn "brought up the issue about the shower". (Tr. 277). He felt that Ms. Rayborn wanted to have sex with him and that when he proved reluctant she made other suggestions: "I wouldn't do that, so she was coming up with an alternative to that. And she said, well, how about this? And see how you feel about that." (Tr. 278). He testified that his intent that day was to gather more information, and he denied that he ever made any demand on her. When he brought up counseling and other alternatives, "she'd bring up the shower". She also did some type of a modeling walk in front of him. (Tr. 278).

Mr. Tipton testified that he told Ms. Rayborn that he had no control over what happened to her in Gulfport and Ocean Springs relating to her legal troubles and that this showed up on the tape introduced as State's Exhibit 1. He again testified that he did not demand anything of Ms. Rayborn or threaten her with having warrants issued. (Tr. 279-280).

On cross-examination, Mr. Tipton reiterated that Ms. Rayborn had called him several times between April 9 and April 15, 2004. He agreed that on the tape he said he wanted to be Ms. Rayborn's sugar daddy but said he was only joking, and also confirmed a point in the tape where he, in the prosecutor's words, stated, "You can think about it and let me know or you can let me know right now, I don't care." (Tr.282-283). He agreed with the prosecutor that he said to Ms. Rayborn, "It's your life, your body, your everything. I'm just offering a trade-off," and that he told her that she could model for him if she wasn't "comfortable with the shower thing." He testified that he did not try to hold any criminal charges over Ms. Rayborn's head. (Tr. 285-286). When asked if he had said everything that was on the tape, he replied that "It was the same, but not the meaning." (Tr. 288).

On re-direct, Mr. Tipton testified that he did not make any ultimatums or demands on Ms. Rayborn. (Tr. 288).

Non-testimonial proceedings

Both sides rested immediately following Mr. Tipton's testimony. After a renewed motion for a directed verdict, instructions were argued, with only four being given: C-1, the trial court's boilerplate regarding evidence, burdens, and other procedures; C-2, the instruction that was submitted initially as S-1 (the state's elements instruction) and which was modified by the trial court and became C-2; D-7, the lesser offense instruction showing the elements of attempted indecent exposure; and S-3A, the form of the verdict instruction including the offense charged and the lesser offense. (These were respectively numbered as Instructions 1, 2, 3, and 4.)

The Exhibits

State's Exhibit 1 is the audiotape recording made by Joe Turnage while Kyle Wilson monitored activities from inside the trailer. State's Exhibit 2, for identification, is the transcript of this audiotape, which was given to the jury while the tape was played but which was not submitted into evidence.

SUMMARY OF THE ARGUMENT

Legal

The legal defects in Mr. Tipton's case began with an incomplete and ambiguous indictment that failed to state all the elements of the extortion charge he was tried on and which did not set out an intelligible statement of the crime. To compound these problems, Mr. Tipton was tried and convicted under a statute which did not apply to the facts presented at his trial. This caused several interrelated problems for the trial court, the prosecutors, and the jury.

The jury showed its confusion regarding the facts and its role in the proceedings by sending the court two questions about Instruction C-2, the elements instruction (CP 49, RE 8). The first sought dictionary and legal definitions of extortion. (Exhibit C-1, RE 11). The second recognized that the state had not proven that Court Programs, Inc., was "a contractor that provided *incarceration* services" as required by the statute and asked the trial court to correct the instruction so it would fit the proof that Court Programs, Inc., provided "*probation* services". (Exhibit C-2, RE 9).

The trial court drafted the elements instruction for the state because it found the state's instruction to be inadequate. When the court instructed the jury with C-2, it relieved the state of proving two elements by defining Court Programs, Inc., for the jury as a "contractor providing

incarceration services for the City of Gulfport", thereby directing a verdict on two elements. The second jury note should have set off alarms on this issue as it made clear that the jury recognized the judge had already "defined" [4] Court Programs, Inc., as "a contractor providing incarceration services", and that it had been relieved of making the required finding on those elements. Neither of the trial court's responses to the jury's questions provided clarification for the jury or removed the offending language that directed a verdict on the elements. (Exhibit C-3, RE 12; Exhibit C-4, RE 10).

In another forbidden assist to the state, the trial court strained its interpretation of the statute to find that "incarceration services" were the same as "probation services". This is contrary to the rule that penal statutes are to be liberally construed in favor of the accused and not to be viewed through a prism that assists the state where its proof falls short of what the statute requires.

Because the state failed to prove all elements of the crime there is insufficient evidence to support Mr. Tipton's conviction. Also, the evidence the state did present was lacking in weight and credibility to the extent that to let the verdict stand would be an injustice.

Finally, Mr. Tipton's jury was not sworn with any type of petit jurors' oath. As such the verdict is illegal and unconstitutional according to this Court's precedent.

Fact-Related

The allegation in the indictment was that during his employment Mr. Tipton made some type of "demand" of Dorothy Lakay Rayborn that she let him watch her as she showered or

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[4] This was the jury's choice of terms. See Exhibit C-2 (RE 9).

conduct some type of modeling for him, for which he would pay her overdue fines and thus alleviate the risk of the court's revoking her probation and sentencing her to jail time. Neither of these events—the showering or the modeling—took place. Nor was any overt act engaged in toward their accomplishment. Nor does any demand of any kind appear anywhere in the testimonial or documentary record. Whatever behavior occurred, none of it matched the intent or the letter of the extortion statute which was the foundation of the charge for which Mr. Tipton was tried. At the best reading of the state's proof there was never any demand made of Ms. Rayborn, as required by the statute.

For the reasons set out in this brief this Court should reverse and render Mr. Tipton's conviction, or reverse and remand for a trial where these errors will not again occur.

ARGUMENT

Issue I

The trial court—through Instruction C-2—granted the state a peremptory instruction on two elements of the crime by defining Court Programs, Inc., as a "contractor providing incarceration services" for the City of Gulfport.

The jury was confused because it recognized that in Instruction C-2 the trial court itself had defined Court Programs, Inc., as "a contractor providing incarceration services to the City of Gulfport". When the jury questioned the court about how to proceed (Exhibit C-2), the court did not clarify the confusion or correct the instruction (Exhibit C-4).

The jury alone was to make the decision on whether or not Court Programs was a contractor that provided incarceration services, and this was a hotly contested point at trial. When the trial court took the decision out of the jurors' hands, it committed reversible error.

Instruction C-2 (CP 49, RE 8) relieved the jury of its duty to determine if the state had proven all of the elements of the crime charged against Mr. Tipton. This issue was the key legal argument in Mr. Tipton's case, with trial counsel arguing throughout that Court Programs, Inc.,

elements requiring proof that Court Programs, Inc., 1) was a contractor with the City of Gulfport, and 2) that it provided incarceration services to the city. The clarity afforded by this separation of the two elements would have permitted the jury to make a finding of each of the elements and would have avoided the juror confusion which is documented in Exhibits C-2 and C-4.

The jury was confused by the wording of the instruction and documented its confusion in notes to the trial court.

Here is the second question the jury sent to the trial judge in its entirety, with underscoring provided by the juror who wrote out the note and italics provided by Appellant's counsel:

> The program Court Programs, Inc. *is defined* as "a contractor providing incarceration services for the City of Gulfport, Mississippi, and under the color of said office;
>
> In document C-2 number 2.
> Is this a typographical error in definition, and we are only to gather that the defendant worked for this company, *or are we to also deliberate about the nature of the services provided by Court Programs, Inc.*?
>
> In other words, should the statement read
>
> "Court Programs, Inc., a contractor providing probation services for the City of Gulfport?
>
> Exhibit C-2 (RE 9)

The jury's question actually evidences two problems with the instruction. First, as noted above, to the jury's thinking the trial court had already "defined" Court Programs, Inc., as a contractor that provided incarceration services to the City of Gulfport.

Next, the jury showed that it questioned whether or not Court Programs, Inc., actually provided "incarceration services", suggesting this might be a "typographical error" and asking

the trial judge if it should read "incarceration" as "probation", or if it should "deliberate about the nature of the services provided by Court Programs, Inc."

When the trial court answered the jury, it simply told the members that "[Instruction C-2] is proper as worded, and contains all the essential elements that must be proven beyond a reasonable doubt. Please continue your deliberations." (Exhibit C-4, court's response to jury note 2; RE 10). This response left intact the jury's impression that the trial court had "defined" Court Programs, Inc., as a contractor that provided incarceration services and that the state was relieved of the burden to prove this.

The granting of a directed verdict as to an element of a crime has always been prohibited.

The law does not permit the state a directed verdict or a peremptory instruction on the finding of any element of a crime. No such procedure exists in our jurisprudence, and any peremptory instruction on an element is error. In *Russell v. State*, 832 So.2d 551 (Miss. App. 2002) [relying on this Court's decision in *Hall v. State*, 644 So. 2d 1223, 1229 (Miss. 1994) for the black-letter premise that the state is responsible for proving each element of a crime beyond a reasonable doubt] the Mississippi Court of Appeals reversed a conviction for aggravated assault when the state was given peremptory language in an instruction that directed the jury to find that the stun gun in question was a deadly weapon. In reversing Russell's conviction, the Court held that "The instruction . . . is a peremptory instruction since it instructs the jury that a stun gun is indeed a deadly weapon. We find that the judge erred in giving this instruction, and for this reason we reverse and remand." *Russell, supra,* at para. 34.

Miss. Code Ann. 97-11-33 (RE 13), the statute under which the state prosecuted Mr. Tipton, prohibits a distinct type of conduct by an employee of a distinct type of business entity.

It sets out as an element that the person charged must be 1) an employee of a certain type of business entity, a contractor, and 2) that the entity must be a "contractor providing incarceration services." The court's instruction gave the state a pass on proving the second of these elements to the jury by its language declaring that Court Programs, Inc., was "a contractor providing incarceration services for the City of Gulfport, Mississippi." This is what occurred in Russell's case when the trial judge granted an instruction that the stun gun purported to have been used in the assault was, in fact, a deadly weapon. Like the instruction in *Russell, supra*, Instruction C-2 in Mr. Tipton's case does not give the jury a choice in the matter. It simply tells the jury that an element is true.

The objection to the error is preserved.

There was a *sua sponte* objection to this instruction when the state submitted it initially as S-1 (CP 53) before it became C-2 (CP 49, RE 8). The trial court recognized a flaw in the instruction as submitted and was concerned that it did not set out as an element to be proven the type of services provided by Court Programs, Inc. However, the trial court's modification of the instruction only exacerbated the problem and "defined" (to use the jury's word, as shown in the note it sent to the judge (Exhibit C-2)) Court Programs, Inc., as an entity that provided incarceration services. (RE 9).

The trial court's attempt to cure the instruction failed both grammatically and in a common-sense-reading context. By adding and setting off with commas the participial phrase, "a contractor providing incarceration services for the city of Gulfport, Mississippi," and by placing it directly after "Court Programs, Inc.", which it modified, the court foreclosed with the second phrase the idea that Court Programs did not provide incarceration services and thus directed a verdict that Court Programs, Inc., was a "provider of incarceration services."

Trial counsel also made a related objection, although that objection centered on the fact that the state had not put on any proof that Court Programs, Inc., provided incarceration services, rather than on the language chosen by the court that held the element as already proven. (Tr. 289-290).

The record was made on the objection to this instruction. The trial court was admittedly aware of the elements problem and that it was forbidden by law to give the state a pass on an element regarding the services provided by Court Programs, Inc.: "Not that I'll make my own objection here, but I believe Paragraph 1 should read that the defendant was employed, was an employee of a contractor providing incarceration services as required by the statute" (Tr. 289), and later, again regarding the incarceration services language that was absent from the state's version of the instruction: "[T]here is no way I can direct a verdict in favor of the State on any particular elements." (Tr. 289-290). This shows the issue was squarely before the trial judge and that he had an opportunity to rule on it, the absence of such opportunity being a cause for arguments of procedural bar and waiver. That the trial court's modification of the state's instruction at minimum left the fatal flaw intact and, arguably, made it worse was no doubt as unintentional as it was unfortunate, but the trial court's recognition of the problem allows this Court to review the error.

Even if this Court finds that the error was not preserved, it has found such errors to be fundamental and therefore reviewable as plain error.

Nevertheless, experience teaches that a procedural bar argument is as likely to be raised as the sun is likely to rise, and this writer here, prophylactically, addresses the expected argument with a summary of plain error and elements law.

Elemental errors in instructions have been found to be plain error because they affect fundamental rights and are therefore subject to plain error analysis. *Sanders v. State*, 678 So.2d 663, 670 (Miss. 1996). "[P]roviding proper jury instructions and correctly weighing evidence affect fundamental rights." *Williams v. State*, 794 So.2d 181, para. 28 (Miss. 2001). Consequently, this Court can recognize this error even though trial counsel made no objection or made the wrong objection at the time Instruction C-2 was given.

Additionally, in *Lester v. State*, 744 So.2d 757 (Miss. 1999), the Mississippi Supreme Court recognized as plain error the granting of a flawed aiding and abetting instruction although no objection was made to it during jury instruction arguments. As the instruction given here violated a fundamental right and as critically flawed instructions have been examined as plain error by our reviewing courts, so should be the case here if this Court finds the issue was not properly preserved.

It is clear that Mr. Tipton's jury was improperly instructed because the state was given a peremptory instruction that Court Programs, Inc., provided incarceration services. There is also evidence in the record that the instruction confused the jury on the critical element that is the subject of this argument. It is also clear that an error this fundamental and of such magnitude is plain error and can be reviewed by this Court even if not directly brought to the trial court's attention by defense counsel.

The instruction is not saved when read with other instructions as a whole as no other instruction addresses this element.

Some time and space should be used here to address the other shopworn argument which will no doubt be trotted out in an attempt to prop up Mr. Tipton's conviction despite the fatal flaw in C-2. That argument is the old saw that when all instructions are read together and

properly communicate the correct statement of the law to a jury, then the jury can be said to have been correctly instructed. However, in Mr. Tipton's case, no other instruction was given on the elements. The only instructions offered to the jury were C-1, containing general information about evidence, burdens, and deliberations; C-2, the erroneous instruction challenged here; S-3A, a form of the verdict instruction featuring no elements; and D-7, a lesser offense/theory of the case instruction. No other instruction countered the devastating impact of the court's finding as proved an element that was the focus of the legal argument in this case: whether or not Court Programs, Inc., provided "incarceration services" for the City of Gulfport.

Even if Instruction C-1 tells the jury that the state must prove all elements of the crime, there is still a fatal conflict with Instruction C-2, which directs the jury that a finding has already been made that 1) Court Programs, Inc., was "a contractor" and 2) that it "provid[ed] incarceration services to the City of Gulfport". "We held in *McHale v. Daniel*, 233 So.2d 764 (Miss. 1970) that an erroneous instruction on a material issue cannot be cured by a proper instruction. A prejudicial instruction cannot be cured by a correct instruction which does not call the jury's attention to the prejudicial instruction." *Bell v. State*, 360 So.2d 1206 (Miss. 1978).

Finally, this has been said regarding the proper instruction of a jury: "[U]ltimately, the responsibility for properly instructing the jury lies with the trial court." *Edwards v. State*, 97-KA-00434-COA, at para. 13 (Miss. App. 1999, Rhrg. Denied 4/20/99, Cert. Denied 2/2/99) (finding plain and reversible error in the granting of deficient instructions, and citing *Newell v. State*, 308 So.2d 71, 78 (Miss. 1975)). The trial court in Mr. Tipton's case did not discharge this duty—rather it modified a faulty instruction featuring an error of omission into a faulty instruction containing an error of commission, in that it relieved the state of proving and the jury

of finding a critical element. For these reasons, this Court should reverse and render Mr. Tipton's conviction and discharge him from any further obligations of his sentence.

Issue II

In ruling on Mr. Tipton's Motion for a Directed Verdict, the trial court construed the statute in favor of the state rather than liberally in favor of Mr. Tipton as it was required to do.

The trial court denied Mr. Tipton's Motion for a Directed Verdict, relying on Mr. Langenbacker's testimony that one of the services provided to the City of Gulfport by Court Programs, Inc., was house arrest, or intensive supervision. Because it found those services to be equivalent to incarceration, the court found that Court Programs, Inc., provided "incarceration services." (Tr. 218-219). This finding expanded the wording of the statute, allowing the court to hold that the status and function of Court Programs, Inc., fit within the statute and placing the behavior alleged of Mr. Tipton under its purview.

This Court has held for decades that criminal statutes are to be construed liberally in favor of an accused citizen and correspondingly are not to be interpreted in favor of the state to encourage conviction. In *Ratcliff v. State*, 234 Miss. 724, 107 So.2d 728 (1958) this Court held that it is "settled law that penal statutes must be strictly construed. We must enforce the statute as written, not as we think the legislature might have intended to write it; for the question is not what the legislature intended to enact, but what is the meaning of that which it did enact." "Criminal statutes in derogation of the common law must be strictly construed in favor of the accused." *McInnis v. State*, 97 Miss. 280, 52 So. 634 (1910).

The trial court's ruling was contrary to this in that it stated as follows:

> Quite frankly, if the Legislature had intended to only include prison, employee of a private contractor providing prison facilities, it could have easily said so. Instead it used the term "incarceration services."
>
> (Tr. 218)

Additionally, the trial court—relying on Mr. Langenbacker's testimony that Court Programs, Inc., sometimes supervised people on house arrest in felony cases (Tr. 201)—tried to fit the square peg of the state's proof into the round hole of the statute. The court enhanced house arrest to "intensive supervision" and determined that this was equivalent to incarceration. (Tr. 218-219). This is contrary to the fair reading of Miss. Code Ann. 47-5-1003(1), which permits the establishment of intensive supervision programs and declares that "An intensive supervision program may be used as an *alternative* to incarceration" (emphasis added).

In neither of these analyses did the trial court employ the actual language of the statute or construe it liberally in favor of Mr. Tipton. The court's focus should have been on what the legislature actually wrote, not on what it "could have easily said", and the trial court should not have conflated the concepts of house arrest and intensive supervision to create "incarceration services." By the trial court's statement, it recognized that it was within the purview of the legislature to control and narrow the proscriptions of the statute. At the same time, the court itself expanded the statute to cover entities which offered not incarceration but probation services, something not included in the statute by the legislature. In so doing the trial court actually stood in the shoes of the legislature, expanding the scope of the statute and allowing it to cover the type of company—one which provided only probation services rather than "incarceration services"—which employed Mr. Tipton and satisfying an element of the crime charged. This is certainly not a narrow construction of the statute in favor of the accused as mandated by *McInnis, supra,* and *Ratcliff, supra.*

Federal law also mandates that courts construe statutes in favor of the accused. "Statutes creating crimes are to be strictly construed in favor of the accused. They may not be held to extend to cases not covered by the words used." *Fasulo v. United States*, 272 U.S. 620; 71 L. Ed. 442 (1926) and *United States v. Resnick*, 229 U.S. 207, 81 L. Ed. 127 (1936) citing *United States v. Wiltberger*, 5 Wheat 76, 95 (1820). Clearly, when the trial court found that Court Programs, Inc., could be considered a company which offered "incarceration services" it stretched the statute to apply to Mr. Tipton's case, despite the absence of the word "probation" in the statute.

For these reasons, this Court should reverse and render Mr. Tipton's conviction and sentence.

Issue III

The indictment is fatally and facially defective in that it failed to allege the required elements that Court Programs, Inc., was "a contractor" and that it provided "incarceration services" to the City of Gulfport.

Further, the indictment failed to contain a plain, concise, and definite written statement of the essential facts constituting the offense charged and did not fully notify Mr. Tipton of the nature and cause of the accusation. Instead, it charged that Mr. Tipton both "demanded" and "asked" Ms. Rayborn to allow him to watch her shower, the terms being polar opposites and the latter of which, even if proven, did not constitute a crime. Additionally, the indictment failed to clearly state what constituted the "reward" element required by the statute.

This Court has recognized the requirement that an indictment must set out all elements of the crime charged, and the resulting inadequacy of one that does not.

> It is fundamental, of course, that an indictment, to be effective as such, must set forth the constituent elements of a criminal offense; if the facts alleged do not constitute such an offense within the terms and meaning of the law or laws on which the accusation is based, or if the facts alleged may all be true and yet constitute no offense, the indictment is insufficient.

> Every material fact and essential ingredient of the offense—every essential element of the offense—must be alleged with precision and certainty, or, as has been stated, every fact which is an element in a prima facie case of guilt must be stated in the indictment.
>
> *Love v. State*, 52 So.2d 470 (Miss. 1951)

The indictment in Mr. Tipton's case failed to allege two required elements. The statute required that the business that concededly employed Mr. Tipton be 1) a contractor and, more specifically, 2) a contractor which provides incarceration services.[5] The indictment refers only to Mr. Tipton's employment with Court Programs, Inc., giving no further description of the status and duties of that business entity. It fails to allege that Court Programs, Inc., was a "contractor" (or to describe what type of contract it was a party to and with what entity it contracted) and also fails to set out that Court Programs, Inc., contracted with such an entity to provide "incarceration services". In the absence of these elemental allegations, the indictment failed to allege a crime and was defective on its face.

Beyond the requirement that all elements be included, the state is required to draw its indictments in a manner that sets out the essential facts of the crime charged in language that is concise and definite to the degree that it fully informs the accused citizen of what charges he or she must face.

URCCC 7.06 states that indictments:

> . . . shall be a plain, concise and definite written statement of the essential facts constituting the offense charged and shall fully notify the defendant of the nature and cause of the accusation.

Case law supports the rule and points out the rationale for the plain, concise, definite, and full notice requirements:

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[5] The trial court, however, directed the jury that these elements had been proven. See Issue I.

> . . . an indictment, of course, constitutes a "pleading" in a criminal case. Its office is to apprise the defendant of the charge against him in fair and intelligible language (1) in order that he may be able to prepare his defense, and (2) the charge must be laid with sufficient particularity of detail that it may form the basis of a plea of former jeopardy in any subsequent proceedings.
>
> *Westmoreland v. State*, 246 So.2d 487 (Miss. 1971)

Mr. Tipton's indictment did not set out the charge against him in any intelligible manner, as a reading of the indictment (CP 5-6, RE 14-15) shows. At one point the document characterizes a statement attributed to Mr. Tipton as a "demand." At another point it characterizes the same statement as a request, alleging that Mr. Tipton "asked" Ms. Rayborn "to allow him to watch her take a shower." The allegation of the "reward" sought by Mr. Tipton (as required by the statute) is either that he be allowed to see her take a shower or that he be allowed to pay her fines, or, perhaps, both. The imprecise language in the indictment combined with its equally confusing syntax rendered the document useless as a clear and concise charging instrument.

It was plain error for Mr. Tipton to be tried on an indictment which failed to set out all the elements required by the statute and which did not adequately inform him of what charges he faced. (Cf. plain error argument at pp. 25-26.) For these reasons, this Court should reverse and render Mr. Tipton's conviction.

Issue IV

The state produced insufficient evidence to support Mr. Tipton's conviction. Furthermore, the verdict was contrary to the weight of the evidence. Thus, the trial court erred in denying Mr. Tipton's request for a peremptory instruction, his Motion for a Directed Verdict, and his Motion for a New Trial. After applying the standards by which it tests the sufficiency and the weight and credibility of the evidence, this Court should reverse and render Mr. Tipton's conviction and sentence.

The statute that the state chose to use in prosecuting Mr. Tipton was Miss. Code Ann. 97-11-33 (RE 13), an extortion statute designed by the legislature to prohibit the conduct set out as follows:

> **Section 97-11-33. Extortion; collecting unauthorized fees and fees for services not actually rendered**
>
> If any judge, justice court judge, sheriff, deputy sheriff, sheriff's employee, constable, assessor, collector, clerk, county medical examiner investigator, employee of the Mississippi Department of Corrections, employee of any contractor providing incarceration services or any other officer, shall knowingly demand, take or collect under color of his office, any money fee or reward whatever, not authorized by law, or shall demand and receive, knowingly, any fee for service not actually performed, such officer, so offending, shall be guilty of extortion, and, on conviction, shall be punished by fine not exceeding Five Thousand Dollars ($5,000.00) or imprisonment for not more than five (5) years, or both, and shall be removed from office.

Sufficiency of the Evidence

The issue of whether or not the state's proof supported the elements of this statute was the source of stout argument during this trial. The question also confused the jury, as evidenced by its first question to the judge asking for the "legal and dictionary definition" of extortion (Exhibit C-1, RE 11) and by its second question to the trial judge which, *inter alia*, asked if the court had made a "typographical error" in the elements instruction by incorrectly referring to the services that Court Programs, Inc., provided to the City of Gulfport as "incarceration services" rather than

"probation services". [6] (Exhibit C-2, RE 9). Although it responded to these notes, the trial court, of course, could not and did not answer the questions posed. (RE 12; RE 10).

Trial counsel tested the sufficiency of the state's proof of the elements in his Motion for a Directed Verdict (Tr. 203-219); in his renewal of that Motion (made and denied at Tr. 289); through the submission of a peremptory instruction, D-1 (CP 54), which was objected to by both prosecutors and was refused (Tr. 291); and finally in his Motion for New Trial, or in the Alternative, Judgment Notwithstanding the Verdict (CP 103-105; denied at CP 109, RE 7). The argument centered on the state's failure to prove that Mr. Tipton was a law enforcement officer (with which the trial court agreed) and its failure to prove that Court Programs, Inc., provided "incarceration services" as required by the statute (regarding which the court found the state had made a *prima facie* showing). The motion was denied. (Tr. 219).

The standard of review for a challenge to a trial court's denial of a motion for a directed verdict and for a judgment notwithstanding the verdict is the same. *Jefferson v. State,* 818 So.2d 1099 (Miss. 2002). Each challenges the legal sufficiency of the evidence presented at trial. Under this standard, this Court considers all of the evidence in the light most favorable to the state and gives the state the benefit of all favorable inferences that may be drawn from the evidence. *Seeling v. State*, 844 So.2d 439 (Miss. 2003).

It is axiomatic that if the state fails to prove even one element of the crime charged, there is insufficient evidence to support a conviction and reversal is required.

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[6] The second question is argued in Issue I.

> [I]f the facts and inferences "point in favor of the defendant on any element of the offense with sufficient force that reasonable [jurors] could not have found beyond a reasonable doubt that the defendant was guilty," the proper remedy is for the appellate court to reverse and render.
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> *Edwards v. State*, 469 So.2d 68,70 (Miss. 1985).

There was clearly no proof that Court Programs, Inc., provided "incarceration services". The jury was confused about the issue to the extent it wanted to modify Instruction C-2 to fit what it saw as the proof in this case. (Exhibit C-2 regarding Instruction C-2, RE 9). When the jury received no assistance from the trial court, it nevertheless convicted on what it clearly considered a lack of proof that Court Programs, Inc., offered "incarceration services".

Furthermore, the state put on no proof that Court Programs, Inc., was a "contractor" which provided any type of services to the City of Gulfport. No contract was admitted as an exhibit. No witness testified that a contract existed or described any contractual relationship between Court Programs, Inc., and the City of Gulfport, whether written or oral. Quite to the contrary, Mr. Langenbacker, the only witness who had worked for Court Programs, Inc., testified that there was no contractual relationship between Court Programs, Inc., and the City of Gulfport:

> The City of Gulfport did not have a financial agreement with Court Programs. The actual payment for probation services was paid by the defendant. The defendant we titled as clients.
>
> (Tr. 199)

Additionally, the state produced no proof that Mr. Tipton made a "demand" on Ms. Rayborn, another element of the statute. Nowhere in the record—in Ms. Rayborn's testimony, in the taped statement of State's Exhibit 1—can a demand be found. The tape shows only a long back-and-forth set of negotiations for Mr. Tipton to pay Ms. Rayborn's fines in exchange for allowing him to view her in the nude. Repugnant as this behavior may seem, this Court should

not ignore the fact that the proof fails to support that Mr. Tipton made a demand. There is also no proof—when one reviews the tape objectively—that Mr. Tipton threatened to put Ms. Rayborn in jail. However dismaying Mr. Tipton's behavior on the tape may be, that dismay—or disgust—should not obscure the fact that this critical element was not proven.

Finally, the trial court stretched the legislative intent of the statute to allow the state's proof to fit the elements of the crime. When it did so, it violated the rules of statutory construction. (See Issue II.) It is clear that Mr. Tipton was convicted on insufficient evidence to support the charge and this Court should reverse and render his conviction.

Weight of the Evidence

Mr. Tipton also tested the weight of the evidence in his Motion for a New Trial, asserting that his verdict was against the overwhelming weight of the evidence. (CP 103-106; denied at CP 109, RE 7).

The standard of review for denial of a motion for new trial tests the weight of the evidence, not the sufficiency. In determining whether or not the trial court abused its discretion in denying the motion, a reviewing court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial. Where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice, then this Court will reverse. *Baker v. State*, 802 So.2d 77 (Miss. 2001); *Dudley v. State*, 719 So.2d 180 (Miss. 1998).

The state failed to marshal enough credible evidence for Mr. Tipton's conviction to stand. The testimony of the state's witnesses is set out in detail in the Statement of the Facts, *supra* (pp.

3-18) and it will be briefly summarized as it relates to credibly supporting the evidence with enough weight to withstand a motion for a new trial.

Mr. Langenbacker's testimony did not support that Court Programs, Inc., was in fact a contractor with the city of Gulfport. In fact, his testimony—even when the state called him a second time to try to prove its elements—was contrary to such a finding, as he testified that the only contract Court Programs, Inc., had was with its clients, not with the city (Tr.199) and that Court Programs did not provide incarceration services. [7] Even though this testimony was tainted by Joe Turnage's discussion with Mr. Langenbacker, it still did not support the state's proof of the type of services provided by Court Programs, Inc. (Tr. 189-190).

Mr. Turnage's testimony also failed to credibly support the state's evidence and the jury's verdict. He added no information about whether a contract existed, although on cross-examination, he attempted to offer incompetent testimony about the business operations of Court Programs, Inc., in an effort to supply the state's proof. (Tr. 146-148). Neither his testimony nor Mr. Langenbacker's showed that Court Programs, Inc. offered any type of "incarceration services."

Lakay Rayborn's testimony was also lacking in credibility and did not support the state's allegation that Mr. Tipton made a demand of any kind on her. On cross-examination—contradicting her direct testimony—she agreed that the transcript of State's Exhibit 1 showed no demand by Mr. Tipton nor any threat to put her in jail. (Tr. 183). Additionally, Ms. Rayborn was shown to be a thief (Tr. 227-228), a liar (Tr. 232-233), a

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[7] Nor did the state produce a contract or call a representative of Court Programs, Inc., to testify as to what business relationship existed, although David Rothbart's name was mentioned as a "boss" at Court Programs.

manipulator (Tr. 238), and, at least by inference, a drug user (Tr. 243-244), further diminishing the credibility of her testimony.

As shown by the reasons set out above, the state failed to present evidence to the jury that was both legally sufficient and of such weight and credibility that it would support the conviction of Mr. Tipton. Consequently, this Court should reverse and render his conviction and discharge him from his sentence.

Issue V

Mr. Tipton's jury was not sworn with an oath announcing and solemnizing its function and directing its members how to carry out their duties, as is statutorily and constitutionally required for all juries. Thus, Mr. Tipton's jury was not a legally valid one according to Mississippi Supreme Court case law, and its verdict is a nullity.

When a reviewing court finds that a jury has been sworn despite the event's absence from the record, the court not only creates a fiction by adding to the record a required event which did not occur but also legislates from the bench by nullifying the intent and mandate of the legislature that all juries be sworn.

Mr. Tipton's jury was not sworn with the oath mandated by statute to be administered to petit juries as set out in Miss. Code Ann. 13-5-71. The verdict returned by his jury was thus not arrived at with the solemnity which it requires and, under Mississippi Supreme Court case law, is a non-legal verdict and a nullity.

An electronic search of the record and the paper transcript reveals that at no point in the transcript is an oath administered to the twelve petit jurors who were selected to try Mr. Tipton's case. (Tr. 1-350). The petit jury was selected and seated (Tr. 59), then immediately excused from the courtroom for lunch and to allow the court to take up other proceedings. It was returned to the courtroom and seated in the jury box, and opening statements began. (Tr. 73-74). Had the petit jurors been sworn after their selection, the event would have appeared at these points in the

record. Earlier, there is a reference to some type of oath given to the entire venire at the time it reported for jury duty, but this oath does not appear in the record either and would not be the required petit jury oath that tells the selected individuals their duties as petit jurors, rather than the generic oath that may have been administered to them as potential venire members.

It is conceded that a court order titled "Jury Trial-Guilty Verdict, Continued for Sentence" (CP 64) contains the boilerplate language that the jury members were "duly sworn". However, this is simply a form order and does not reflect what actually occurred in the record, and what appears or does not appear in the record should control. This was made clear by this Court in *Gaskin v. State*, 2001-CT-01153-SCT (Miss. 2003), where the Court examined a conflict between a court order (which stated that a jury had been sworn) and the actual record (which nowhere showed that such swearing had occurred) and ruled that the record controlled. Incidentally, the choice of the transcript over the order—unseen in other cases where reversal has been sought due to the trial court's failure to swear the jury—gutted Mr. Gaskin's double jeopardy claim:

> A form order, erroneously reflecting that the jury had been sworn, was signed and entered; however, the entire jury selection process from the record clearly indicates that the seated jury was never administered the oath. Therefore, we hold that because the jury was not sworn in the first proceeding, Gaskin was not subjected to double jeopardy in the subsequent proceeding.
>
> *Gaskin, supra*, at para. 12.

Oaths appear in Mr. Tipton's record where witnesses are sworn prior to giving their testimony, but that is the only type of oath apparent in the record.

In *Miller v. State*, 122 Miss. 19, 84 So.2d 161 (Miss. 1920), the Mississippi Supreme Court reversed a murder conviction and a life sentence, holding that jurors hearing a criminal case without first being subject to the oath required for petit jurors were "but little more than

mere spectators." *Miller, supra,* at 162. It held that Miller was entitled to a legal and constitutional jury, and one that was not sworn was not such a jury. The *Miller* Court also rejected the state's argument that this error was harmless and caused no substantial injury to Miller. Instead, the Court found that a jury which had not embraced the solemn influence of the oath would not give the required degree of consideration to the evidence.

The *Miller* Court also rejected the argument that the statutes controlling the administration of the oath were merely directory and not mandatory. The *Miller* Court found that the error in not administering the oath violated Miller's right to a "legal" jury, as for there to be a "legal" jury in a capital case it must be "impaneled and sworn to try the issue joined between the state and the prisoner and a true verdict render according to the law and the evidence." *Miller, supra,* at 162-163.

Additionally, the Court's holding in *Miller* requires reviewing courts to address the failure to swear a jury in a capital case as plain error, finding that allowing an unsworn jury to hear and convict on such a case "deprive[s] the prisoner of his *fundamental and substantial right* to have the jury hear, consider and try his case under the solemn oath to try the issue joined" (*Miller, supra,* at 162, emphasis added). The Mississippi Supreme Court held in *Foster v. State*, 716 So.2d 538 (Miss. 1998), that "plain error occurs when it is established that an error not raised previously affects *fundamental rights*" (emphasis added). According to *Miller* (which has not been overruled in its eighty-nine-year existence) and *Foster* the error is plain, and failure to object to the trial court's failure to swear the jury is reviewable as such. [8]

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[8] This error is also structural as it undermines the very framework of a fair trial, as has been found in other Sixth Amendment cases. *McKaskle v. Wiggins,* 465 U.S. 168 (1984); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

Though Mr. Tipton's case is non-capital, the trial court's failure to administer an oath still invalidates the verdict. Although there is case law that states that a capital oath can serve as a substitute for a non-capital oath and that a non-capital oath can sometimes substitute for a capital oath, there is no case that accepts as valid a verdict rendered by a jury which was not sworn in any way.

It had long been an immutable rule of all appellate courts in Mississippi that a trial event not appearing in the record would not have its existence recognized by, be examined by, or be ruled on by the reviewing court. If defense counsel missed an objection, it did not legally exist for appellate review. If a motion were filed but not argued, its merits could not be argued on appeal. If an exhibit was not introduced or an argument not made, neither could be added after the fact to the immutable record considered by a reviewing court. This is in keeping with decades of Mississippi jurisprudence recognizing the sanctity of the appeal record and the concept that only evidence or arguments appearing in that record can be considered on direct appeal.

Some jurists have registered concern regarding rulings that have forgiven the absence of a jury swearing in the record:

> We have often strained credulity in finding harmless error when the record is devoid of the jurors oath. See *Bell v. State*, 360 So.2d 1206 (Miss. 1978); *Young v. State*, 425 So.2d 1022 (Miss. 1983). We have scoured the record to find some evidence that the oath was taken. *Acreman v. State*, 907 So.2d 1005 [para. 9] (Miss. App. 2005). We have created a rebuttable presumption that the trial judge performed his duty. *Id.* at [para. 8].
>
> *Allen v. State*, 2005-KA-00755-COA (Miss. App. 2006), special concurrence by Roberts, joined by Lee, Myers, Chandler, Griffis and Barnes.

It is certainly recognized as a dubious practice to conjure into the record a trial event that did not occur.

The swearing of Mr. Tipton's jury is not shown anywhere in the transcribed record and appears only in a boilerplate order that amounts to a legal fiction and which, according to the holding in *Gaskin, supra*, does not control. It is also a usurpation of the legislative branch which promulgated the statute to ignore it. Or to find that a trial court's failure to swear in a jury is harmless, rather than plain, error. Or to create a presumption that the oath has been given when it clearly has not.

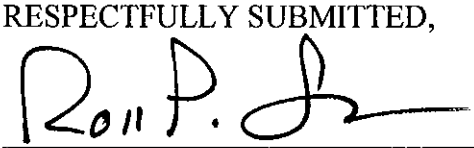
It is a bedrock tenet of jurisprudence that courts may not legislate. Courts can promulgate rules but they cannot write, revise, or amend statutes. As recognized by this Court, "If the Legislature should determine it is appropriate to amend [a particular statute to modify its original intent], the Legislature no doubt possesses the prerogative to do so. We are not about the business of legislating". *Champluvier v. State*, 942 So.2d 1087 (Miss. 2006). To judicially eliminate the legislative mandate that all petit juries be sworn before they hear the evidence and render a verdict in a criminal case is to legislate the oath out of existence.

For these reasons, this Court should reverse Mr. Tipton's conviction and remand his case for a new trial at which Mr. Tipton's jury will be legally sworn.

CONCLUSION

As to Issues I and II and III and IV this Court should reverse and render Mr. Tipton's conviction and discharge him from any further obligations of his sentence. As to Issue V this Court should reverse and render or reverse and remand.

RESPECTFULLY SUBMITTED,



Ross Parker Simons

CERTIFICATE OF SERVICE

I, Ross Parker Simons, hereby certify that I have this day, delivered via posting in the United States Mail or by a comparable delivery method a true and correct copy of the foregoing Appellant's Brief to the Office of the Attorney General, the Prosecuting Attorneys, and the trial judge in this case.

This the 14th day of August, 2009, A.D.

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CERTIFICATE OF SERVICE

I, Ross Parker Simons, hereby Certify that I have this date filed via U.S. Mail or FedEx, the original and three (3) copies of the foregoing Appellant's Brief, as well as four (4) copies of Appellant's Record Excerpts, in *Frank Sanders Tipton v. State of Mississippi*, 2008-KA-02060-SCT, with the Clerk of the Mississippi Supreme Court, and that I have provided to Jean Smith Vaughn and Brandon Lee Ogborn, Office of the Attorney General P.O. Box 220, Jackson, Mississippi 39205 and trial judge Wm. T. Dale Harkey, P.O. Box 998, Pascagoula, Mississippi, 39568 copies of the same via U.S. Mail, FedEx or hand-delivery at their usual addresses.

This, the 14th day of August, 2009, A.D.

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ROSS PARKER SIMONS, MSB [redacted]