

COPY

IN THE SUPREME COURT OF MISSISSIPPI

MARVIN BERRY

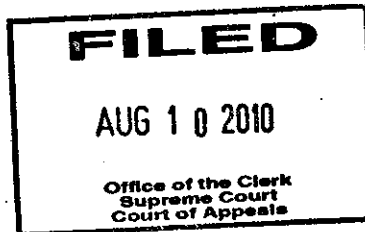
APPELLANT

VS.

NO. 2008-KA-02092-SCT

STATE OF MISSISSIPPI

APPELLEE



APPEAL FROM THE FIRST JUDICIAL DISTRICT OF
HINDS COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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REQUEST FOR ORAL ARGUMENT

Appellant requests oral argument because the state and the defendant substantially disagree on the facts, and oral argument would be helpful in alleviating any confusion caused by any confusion arising from the differing interpretations of the parties on the record.

Moreover, oral argument would be helpful because the issues are complicated and argument might be helpful.

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REPLY BRIEF OF APPELLANT

STATEMENT OF ISSUES

1. THE TRIAL COURT DENIED BERRY HIS CONSTITUTIONAL RIGHTS TO CONFRONTATION AND TO PRESENT A DEFENSE WHEN IT PRECLUDED THE HIM FROM MENTIONING THAT THE STATE HAD NOT PROVIDED THE DEFENSE WITH THE NAME OF THE CONFIDENTIAL INFORMANT AND/OR REFERRING TO THE STATE'S FAILURE TO CALL HER AS A WITNESS.
2. THE COURT DEPRIVED BERRY OF HIS CONSTITUTIONAL RIGHTS TO CONFRONTATION AND CROSS-EXAMINATION WHEN HE OVERRULED BERRY'S OBJECTION TO THE ADMISSION OF HEARSAY TESTIMONY FROM THE INFORMANT.
3. THE TRIAL COURT ERRED IN DENYING BERRY'S MOTION FOR CONTINUANCE SO THAT HE COULD SECURE NEW COUNSEL OF CHOICE.
4. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOWING TESTIMONY OF TAMMY GAINES AS TO POLICE DEPARTMENT RECORDS WITHOUT PROPER AUTHENTICATION.
5. THE EVIDENCE IS INSUFFICIENT TO SHOW THAT BERRY WAS AN HABITUAL BECAUSE IT FAILED TO SHOW THAT HE HAD SERVED MORE THAN A YEAR ON TWO PRIOR CONVICTIONS.
6. THE PROSECUTION COMMITTED REVERSIBLE ERROR IN ASKING QUESTIONS WHICH REQUIRED BERRY AND HIS WITNESS TO CALL THE POLICE OFFICERS LIARS AND THEN IN MISSTATING THE BURDEN OF PROOF IN CLOSING ARGUMENT BY CLAIMING THAT IN ORDER TO FIND BERRY "NOT GUILTY," JURORS WOULD HAVE TO FIND THAT THE POLICE OFFICERS WERE LIARS.
7. THE PROSECUTOR COMMITTED REVERSIBLE ERROR IN QUESTIONING THOMPSON ABOUT PRIOR INCONSISTENT STATEMENTS HE ALLEGEDLY MADE TO THE PROSECUTOR WITHOUT ADDUCING PROOF OF THE ALLEGED STATEMENTS.

SUMMARY OF THE ARGUMENT

The state contends it was not error for the court to keep Berry from cross-examining prosecution witnesses about the absence of the confidential informant at trial or from arguing that the failure to call her created reasonable doubt. The state misconstrues Berry's argument as one involving a denial of cross-examination of the CI. That, however, is not the argument Berry

made as Berry will discuss in detail in Proposition I. Likewise, the state misconstrues Berry's argument regarding the denial of counsel of choice.

The prosecutor relied on inadmissible hearsay to convict Berry. The state, however, argues that the testimony was not hearsay. Plainly, it was as Berry will show. In addition, the prosecutor relied on evidence outside the record, specifically his own testimony, and made other errors in argument which deprived Berry of a fair trial.

ARGUMENT

I. THE TRIAL COURT DENIED BERRY HIS CONSTITUTIONAL RIGHTS TO CONFRONTATION AND TO PRESENT A DEFENSE WHEN IT PRECLUDED THE HIM FROM MENTIONING THAT THE STATE HAD NOT PROVIDED THE DEFENSE WITH THE NAME OF THE CONFIDENTIAL INFORMANT AND/OR REFERRING TO THE STATE'S FAILURE TO CALL HER AS A WITNESS.

A. Standard of Review:

Although the admissibility of evidence generally rests within the discretion of the trial court, a trial court abuses its discretion where its decision to admit evidence results from legal error. In that case, a *de novo* standard of review applies. *Jones v. State*, 856 So.2d 389, 393-94 (Miss.App. 2003). In this case, the trial court's decision not to admit cross-examination about the CI and that the jury should hold this against the state was based on an error of law, one which the state continues to make in its brief.

B. The Merits:

The state contends that defendant's right to cross-examine the CI was not infringed. Berry, however, did not argue that his right to cross-examine the CI was violated. He argued that his right to confront and cross-examine the officers about the CI was violated. The issue, therefore, is not as the state and the trial court perceived it one involving the right to know the identity of the CI. The issue is whether or not Berry had a right to cross-examine the state's

witnesses about the CI and why she was not called to testify at trial. The decision about whether to admit such evidence has nothing whatsoever to do with Mississippi Uniform Rules of Circuit and County Court Practice, Rule 9.04(B)(2) which was relied on by the trial court and which deal with when the identity of confidential informants must be disclosed. Tr. 120, RE/13, 30-31. As Berry pointed out in his initial brief, that rule does not speak to anything other than the disclosure of the identity of the confidential informant and has nothing to do with what evidence a defendant can introduce at trial.

Because the trial court's decision was based on an error of law, this Court reviews the error *de novo*, not for an abuse of discretion as the state argues. *Jones v. State, supra*.

Berry denied that he went to meet the confidential informant for the purpose of selling her drugs. The prosecution was allowed to elicit testimony from officers that the CI called Berry and asked him to deliver drugs. No officer was present when this alleged conversation occurred; and therefore, this testimony was hearsay which the state argued showed that Berry was lying when he claimed he went to the hotel for sex.

The state cites the case of *Smothers v. State*, 738 So.2d 242 (Miss. App. 1998) that Berry was not deprived of his constitutional right to cross-examine witnesses. That case, however, does not address the issue presented by Berry. In *Smothers*, the defendant argued that he was deprived of his right to cross-examine the CI when the state failed to call her. Berry is arguing that he was denied the right to cross-examine the witnesses who did testify and to argue the state's failure to produce more definitive evidence than the second hand evidence it did present.

II. THE COURT DEPRIVED BERRY OF HIS CONSTITUTIONAL RIGHTS TO CONFRONTATION AND CROSS-EXAMINATION WHEN HE OVERRULED BERRY'S OBJECTION TO THE ADMISSION OF HEARSAY TESTIMONY FROM THE INFORMANT.

As Berry discussed in Proposition I, the trial judge, over Berry's objection, allowed the prosecution to introduce hearsay testimony from Officer Barner that Berry was supposed to

deliver cocaine to the hotel. Tr. 122-123. Barner at first testified that, “I made a phone call to Mr. Berry. Informed him what we wanted. He said he’d be there in approximately ten minutes [emphasis added].” Tr. 123. He subsequently admitted that **he** did not make the phone call, the CI did. There is no testimony that Barner himself actually overheard the conversation. Tr. 123.

Subsequently, without objection Officer Spooner testified that he was “asked by Investigator Ricky Barner to assist him in a narcotics operation he had going on. He advised me that he had information that a subject would be delivering cocaine to a hotel room and asked for my assistance.” Tr. 182. Subsequently, he repeated: “He advised me he had information of a subject who would be delivering cocaine.” Tr. 192.

As Berry argued in Proposition I, evidence of what the CI allegedly told Investigator Barner and Officer Spooner was clearly hearsay. As such, it was inadmissible. That the statements were inadmissible hearsay requires no extended discussion.

The state, however, argues that the testimony was not hearsay because it was merely “background” testimony and, therefore, admissible. The state relies on the case of *Thompson v. State*, 33 So3d 542 (Miss. App. 2010) for the proposition that the testimony was admissible and harmless. In that case, however, the defendant failed to object to the testimony, and the error was reviewed under the “plain error” doctrine. In that case, the drugs were found in Thompson’s house, and there was no substantial issue involving his guilt. Here, there is a credibility issue involving the credibility of the prosecution’s witnesses.

Moreover, there is no evidence that in the *Thompson* case, the prosecution relied on the testimony of what the officer had learned from the informant to argue Thompson’s guilt. Here, the argument was that Berry went to the hotel, not for sex, as he said, but to deliver drugs, as the officers said. According to the state, the issue was whether Berry or the officers were telling the truth.

The problem with the state's argument that information from an officer about why he took certain actions may be admissible is that it makes a very limited exception to the hearsay rule the general rule instead of merely an exception. The rule is that where **necessary** to tell a coherent story, the state may sometimes introduce what would otherwise be hearsay, but only if the testimony is not introduced for its truth but as background. *Bridgeforth v. State*, 498 So.2d 796, 800 -801 (Miss. 1986).

Here, the state requested no limiting instruction, so the jury likely used it for its truth. It is disingenuous of the state to introduce the testimony under those circumstances and then to argue it was not introduced for its truth. In fact, the issue before the jury was whether Berry was telling the truth when he said the CI called and asked for sex and did not have drugs, or whether the officers were telling the truth that the CI was calling for drugs and Berry arrived with drugs. That is not background, it is **the** issue in the case.

In *Bridgeforth v. State, supra*, the Court rejected the argument that statements from two officers that the defendant committed a robbery were not introduced for the truth. In so doing, the Court pointed out the numerous times that it had condemned the use of such tactics by the state:

We have repeatedly condemned the use of hearsay testimony by officers obtained by way of investigation. *Agee v. State*, 185 So.2d 671 (Miss.1966).

In *Robertson v. State*, 185 So.2d 667 (Miss.1966), a conviction of attempted arson was reversed and remanded because of evidentiary problems, one of which was erroneously admitted hearsay testimony. There we said:

Primarily, hearsay testimony obtained by an officer in conducting an investigation is inadmissible. In *Shipp v. State*, 215 Miss. 541, 551, 61 So.2d 329, 332 (1952), we pointed out:

Certain evidence of the officers wherein they testified to the results of their investigations and as to what other people told them and pointed out to them in the course of their investigations was objected to, but the objections were overruled. This evidence was hearsay and inadmissible.

Also, in *Bester v. State*, 212 Miss. 641, 645, 55 So.2d 379, 380 (1951), we stated:

Appellant, on this appeal, presents two assignments of error. He contends, first, that the court erred in permitting the sheriff to testify over appellant's objections that his investigation based on information derived from talking to the people showed that the deceased did not have a crowbar at the time of the difficulty or at any time. This testimony of the sheriff was, of course, based on hearsay and was clearly incompetent.

Appellant's objection to Sheriff Ainsworth's testimony regarding the mysterious car without lights which he had learned about from discussions with witnesses, Clark and Sullivan, should have been sustained. (Emphasis added.)

Roberson at 668.

In *Ratcliff v. State*, 308 So.2d 225 (Miss.1975), this Court held that testimony by officers of what an informant told them in the course of their investigation was hearsay and inadmissible to the jury. "Investigators cannot be permitted to relate to the jury hearsay which is incriminating in its effect as to a defendant on trial for a crime." 308 So.2d at 227. Also in *McVeay v. State*, 355 So.2d 1389 (Miss.1978), this Court held that testimony of an undercover narcotics agent as to what he was told by the defendant's companion was hearsay, incompetent, highly prejudicial, and should have been excluded.

Bridgeforth v. State, 498 So.2d at 800-801. As in *Bridgeforth*, the evidence plainly was not introduced merely as background, it was introduced to show that Berry went to the hotel to sell drugs.

III. THE TRIAL COURT ERRED IN DENYING BERRY'S MOTION FOR CONTINUANCE SO THAT HE COULD SECURE NEW COUNSEL OF CHOICE.

The state claims that Berry had a "change of heart" when he decided to proceed with his attorneys. Berry, however, did not have much of a choice. The trial judge, without considering specific evidence of why Berry wanted to discharge his attorneys, gave Berry the option of representing himself or going to trial with his attorneys. Berry chose the lesser of two evils.

Needless to say, arguments such as the state's "change of heart" argument have been repeatedly rejected by the courts. As one court put it, for "a waiver of counsel to be voluntary, th[e] court must be confident the defendant is not forced to make a 'choice' between incompetent

counsel or appearing pro se.” *United States v. Taylor*, 113 F.3d 1136, 1140 (10th Cir. 1997). In other words, “for the waiver to be voluntary, the trial court must inquire into the reasons for the defendant's dissatisfaction with his counsel to ensure that the defendant is not exercising a choice between incompetent or unprepared counsel and appearing *pro se*. *United States v. Silkwood*, 893 F.2d 245, 248 (10th Cir. 1989); *United States v. Morrissey* 461 F.2d 666, 669 (2nd Cir. 1972)] [must made inquiry about reasons for wanting to discharge counsel].

As Berry pointed out in his initial brief, a court abuses its discretion when it denies a request to substitute counsel without knowing all the facts. Before denying a defendant’s right to be represented by counsel of his choice, the lower court must “carefully balance” the defendant’s right to counsel against the court’s interest in the orderly administration of justice and provide written or oral findings for the benefit of the defendant and the reviewing court. *United States v. Gonzalez-Lopez*, 399 F.3d 924, 929 (8th Cir. 2005), *aff’d* *United States v. Gonzalez-Lopez*, 126 S.Ct. 2557 (2007);

Here, the trial court did not exercise his discretion because he neither obtained the facts to perform the balancing test, and then he failed to do so. A court abuses its discretion where it fails to consider relevant factors in determining counsel of choice issues. *State v. Henley*, 855 N.E. 2d 1018, 1026 (Ind. 2007). Here the court failed to exercise informed discretion.

That failure is reversible error. Contrary to what the state claims, the defendant is not required to show “manifest injustice” or “particular prejudice” where he has been erroneously denied counsel of choice. In *United States v. Gonzalez-Lopez*, 126 S.Ct. 2557 (2007), the Supreme Court expressly rejected the notion that a defendant had to show prejudice for a violation to occur. The prejudice is in the denial of counsel.

IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOWING TESTIMONY OF TAMMY GAINES AS TO POLICE DEPARTMENT RECORDS WITHOUT PROPER AUTHENTICATION.

At trial and in this appeal, the state argues that it was only required to disclose evidence which it planned to use in his case in chief and that the prosecutor could not have known of any need to introduce the mug shot until Berry testified that he had been beaten. Tr. 217, 251-52. The trial court ruled that the state did not have to disclose the evidence because it was impeachment and in any event was harmless. RE/28-29.

As Berry argued in his initial brief, the state's excuse is not well-taken. First of all, the evidence does not show that the prosecutor was surprised. On September 26, 2007, Berry filed a "Motion for Discovery" in which he requested, among other things, a "copy of the criminal record of the Defendant", "[a]ny physical evidence including but not limited to photographs . . . relevant to the case or which may be offered in evidence", and "[m]emoranda or reports made by investigating and/or arresting officers concerning this cause." Tr. 6. In other words, Berry made a specific discovery request for exactly the same evidence which the prosecutor failed to provide.

Moreover, on Thursday of the week prior to trial, the defense informed the prosecution that Gregory Thompson would testify and gave the prosecution his contact information. Tr. 252. The prosecution interviewed Mr. Thompson and was aware that he intended to testify Berry was beaten prior to the attempted impeachment of Berry with the photograph. The prosecution, however, never showed counsel the photograph until Berry was on the stand. Tr. 217, 248-52. Plainly then, the prosecutor was not surprised.

In addition, the defendant's attorney plainly did object to the photograph, so the state's argument that he did not is simply wrong. The defendant specifically objected when the photograph was first offered that he had not seen the photograph before. Tr. 217. Apparently, the defendant fleshed out his argument at a bench conference. Tr. 218. Later, at the close of the testimony, the

defense attorney put it on record that he had previously objected and that he did not believe his complete objection had been made at a time when it would have been on the record. At that time, the state did not dispute counsel's contention that he had previously objected, and both sides rehearsed their respective arguments. Tr. 248. To quote one of the state's favorite maxims, it is now procedurally barred from making that objection for the first time on appeal. In any event, the objection is belied by defense counsel's on the record statement which was not contradicted by the trial judge or the prosecutor. Saying at the time the photograph was first shown to Berry,¹ "I object to this. This is the first time we've ever seen this photograph" is plainly sufficient to constitute an objection to the prosecution's failure to provide the photograph in discovery. Tr. 217. The state's attempt to rely on a procedural bar is seriously misleading and misplaced.

Furthermore, even the prosecution appears to concede that at times rebuttal evidence is subject to the rules of discovery. In any event, it would be difficult for the state to contend otherwise. In *McGilberry v. State*, 741 So.2d 894, 917-18 (Miss. 1999), this Court rejected the state's argument that it was not required to disclose or otherwise notify the defense of its intention to introduce rebuttal evidence. In finding the State's argument unpersuasive, this Court held that:

We have effectively dispatched the "rebuttal witness" ruse for non-disclosure of witnesses in the context of criminal cases. . . . In an effort to eliminate the time-honored practice of "trial by ambush," this Court has championed the practice of full disclosure by the State's district attorneys. It bears reiterating that, unless a party is truly surprised by a witness's testimony, the better, and required practice, is one of full disclosure of all witnesses. (citations omitted).

See, cases cited in *McGilberry v. State*, 741 So.2d at 917-18. The photographs in this case were clearly evidence that should have been disclosed. *Id.* The state had notice that Berry intended to call a witness to testify he had been beaten. In order to refute this testimony, the state obtained

¹ To clarify so that there will be no misunderstanding, the objection was made when the state first attempted to introduce any evidence through any witness of the photograph. The state's

the photograph, but did not disclose it to the defense until Berry was on the stand. This was reversible error. The closing argument of the state shows that one of the state's primary arguments for disbelieving Berry about whether or not he had the drugs or they were planted was that Berry had lied about being beaten up. The error was hardly harmless.

V. THE EVIDENCE IS INSUFFICIENT TO SHOW THAT BERRY WAS AN HABITUAL BECAUSE IT FAILED TO SHOW THAT HE HAD SERVED MORE THAN A YEAR ON TWO PRIOR CONVICTIONS.

The prosecution was required to show that Berry had served more than a year on two prior convictions. Berry argued that the state failed to prove he served a year on the sentence on his armed robbery conviction, the offense the state claimed constituted the crime of violence. The state conclusory argues that the exhibits show that he served a year; however, the state points to no specific exhibit in support of that claim.

At Berry's sentencing hearing, the state introduced testimony that on April 5, 1979, Berry was convicted of armed robbery. Rather than introduce records showing that Berry was continuously incarcerated for more than a year, the state introduced an offense report showing that while incarcerated in the Hinds County Detention Center on July 9, 1980, Berry started a fire. However, the state introduced no evidence that at the time of the fire, Berry was in jail for the armed robbery as opposed to a misdemeanor; nor did the state introduce any evidence that Berry was continuously incarcerated on the armed robbery charge from April 5, 1979, until the fire. Since the exhibits introduced by the state to support the notion that Berry had been continuously incarcerated on the armed robbery charge were incomplete (Exhibits 1-4) and do not reflect the dates of service on the armed robbery, the state failed to prove continuous incarceration either because it failed to prove that he was incarcerated in a state penitentiary² or

attempt to suggest otherwise is wrong.

² Berry was in the county jail.

because it failed to prove the incarceration was continuous. The state offers no argument otherwise other than to say that the exhibits show incarceration for more than one year.

Instead, the state focuses on Berry's argument that he was in the county jail on this and other convictions rather than in the penitentiary. Regardless, however, of whether or not Berry can be charged with time served in county jail, he cannot be charged as an habitual where the incarceration is not shown to have been for a year or more on the armed robbery and not pursuant to some other charge.

Berry also discussed in his initial brief why the state's proof was deficient on other convictions. The evidence shows that he served only 241 days on the Hinds County burglary charge. Two hundred and forty-one days is less than a year. The state makes no counter argument. Similarly deficient is Berry's incarceration for possession of cocaine. He served only 7 months, 28 days. Exhibit 7, sentencing. Again, the fails to provide a counter argument.

In addition, the state failed to show that Berry served more than one year in a state or federal penitentiary for his conviction for receiving federal bank larceny proceeds. Exhibit 8 (sentencing). Berry served only 162 days. Again, the state does not counter.

In short, the state proved one felony conviction where Berry served a year and that was for his conviction for conspiracy to utter a forgery from Harrison County. Exhibit 6 (sentencing). In that case, Berry received 923 days for pre-sentence jail time. Exhibit 6 (Sentencing). This is insufficient proof that Berry was an habitual or that his sentence should be doubled.

VI. THE PROSECUTION COMMITTED REVERSIBLE ERROR IN ASKING QUESTIONS WHICH REQUIRED BERRY AND HIS WITNESS TO CALL THE POLICE OFFICERS LIARS AND THEN IN MISSTATING THE BURDEN OF PROOF IN CLOSING ARGUMENT BY CLAIMING THAT IN ORDER TO FIND BERRY "NOT GUILTY," JURORS WOULD HAVE TO FIND THAT THE POLICE OFFICERS WERE LIARS.

The state argues that “looking to the record off [sic] this trial, there appears to be only a brief time when the State asked one witness (and not defendant as averred in the brief) if he though the officers were lying. Appellee’s Brief, p. 17. The state is not looking at the same record as the defendant. Throughout Berry’s testimony, the state repeatedly called upon Berry to call the police liars.

Specifically,

Q. . . . You heard that, didn’t you?

A. Yes.

Q. Okay. So they’re lying?

A. That’s not true what they said.

Q. Okay. So either you’re telling the truth or they are, correct?

A. Correct.

Q. So those two officers, according to you, are lying?

A. Well, I saw more than two officers come out of the room.

Q. Twenty-five. Okay. So now you heard the testimony earlier of every police officer that’s testified and they said that there was five or six at the most. You remember them testifying to that, don’t you?

A. Yes.

Q. Okay. So every one of those police officers under oath lied, according to you; is that right?

A. I’m not trying to call anybody a liar. I’m just stating what happened.

Q. Okay. Well, let’s put it this way: Either you’re right or they are right?

A. Right.

Q. Either you’re telling the truth that there was 25- 20—maybe 25 of them or they are; is that right?

A. I don’t know it, but I know it was more than five or six police officers.

Q. Okay. And then the – well, you said 24. Let's be honest. You said – you said five or six – more than five or six. Now, that's different from saying 25.

A. I said there was more than five or six, sir. I'm not sure how many there was.

Tr. 214-216.

The state is clearly incorrect in its reading of the record. Berry was repeatedly asked to testify that either he or the police were lying. Of course, there was another alternative. One or the other could have been mistaken.

On closing argument, the prosecution emphasized that Berry and his witness had told a "ridiculous story" and that the only way the jury could find the defendant not guilty was to find that "those officers who testified are liars." Tr. 265. According to the prosecution:

The bottom line is this: If you vote not guilty, then what you're saying is those gentlemen are liars. I mean, there's no other way to say it. I mean, there's no other way to say it, but those officers who testified are liars.

I wish I could say it a different way because in the end, you either believe those officers, that they told the truth or you don't.

I mean, that's insulting. I mean, these are the same guys that when you call 9-1-1-, they show up and we're all glad that they're there. And he comes in and he insults them with this. And I guess more importantly, he insults you.

Tr. 265-68.

Thus, the prosecution's argument for a finding of guilt rested on the notion that Berry was a liar, and the police officers were telling the truth. As Berry pointed out in his brief, the fallacy in such questioning and the ensuing argument is that it misstates the law. In order to acquit Berry, jurors did not in fact have to find that the police were lying. All that the jury had to find was that it had a reasonable doubt about whether the officers lied or were simply mistaken in their version of what happened.

In *Randall v. State*, 806 So.2d 185, 210 (Miss. 2001), the Court specifically held it to be reversible constitutional error for the prosecution to argue that that in order to find the defendant not guilty, the jury would have to find the state's witnesses were lying and Randall was telling the truth. The *Randall* Court held that "[w]hile the State may properly comment on facts in evidence, the truth of the matter before us is that the jury could reject Randall's version of events *and* still find that the State did not prove each and every element beyond a reasonable doubt. The jury's choice was not an 'either, or.' *** Randall had no burden to create reasonable doubt."

Moreover, that the attorney for the state on appeal finds it difficult to believe "on many levels" that twenty-five officers were at the scene is as irrelevant to this appeal as it was to the trial. Again, the point is not whether Berry was mistaken or even lying about how many officers were at the scene. The point is whether or not the jury believed the officer who testified he saw Berry drop the pill bottle. The state cites no authority which contradicts *Randall*.

Furthermore, it was patently error for the prosecutor at trial to opine that "I don't give that any credence whatsoever that they [the officers] did that [lied or beat Berry][emphasis added]." Tr. 266. See, *Maurer v. Department of Corrections*, 32 F.3d 1286, 1289 (8th Cir. 1994) [vouching testimony found to have invaded the jury's exclusive province of determining credibility to the extent that it denied defendant due process of law.

The error in the prosecution's vouching for the police officers' credibility was compounded by the error in voir dire when the trial judge sustained the prosecution's objection to the following question by the defendant:

Q. Does everyone agree that police officers are human beings just like everybody in here and can be wrong and can make mistakes, and sometimes may be not even be as truthful as they might be? Does everybody agree that that's a possibility?

BY MR. ROGILLIO: Objection to that particular last---

BY THE COURT: Well, I'll sustain that last reference. **The jury will disregard that comment** [emphasis added].

Tr. 58.

Thus, Berry was not allowed to question the jury about possible bias about the very issue that was at the core of his defense—that the officers might be mistaken or lying.

The cumulative effect of the misstatement of the burden of proof and these other errors were reversible error.

VII. THE PROSECUTOR COMMITTED REVERSIBLE ERROR IN QUESTIONING THOMPSON ABOUT PRIOR INCONSISTENT STATEMENTS HE ALLEGEDLY MADE TO THE PROSECUTOR WITHOUT ADDUCING PROOF OF THE ALLEGED STATEMENTS.

The prosecution argues that the cross-examination of Thompson was proper. The state cites no case law in support of this notion. Berry, therefore, will rely on his law and argument from his initial brief. As for the state's interpretation of the testimony, the state is again wrong. The record speaks for itself, and Berry has cited it in his initial brief.

The state's procedural bar argument is not well-taken. The State made a similar contention in *State v. Babich*, 68 Wash.App. 438, 443-447, 842 P.2d 1053, 1057-1059 (Wash.App. Div. 3 1993), which the appellate court summarily, rejected stating:

[b]ut in this situation, failure to object is not a waiver. It was not the questions themselves that were improper; it was the failure to prove the statements in rebuttal that was error. Until the State rested its rebuttal, Ms. Babich had no way of knowing whether the State would or would not prove the prior statements. By that time it was too late to undo the prejudice resulting from the prosecutor citing those prior statements in questions heard by the jury.

Id. at 1059.

The Court in *Babich* similarly rejected a claim that the error was harmless. The Court pointed out that the prosecutors' actions constituted "[a] violation of the right of confrontation [which] is error of constitutional magnitude." One of the most fundamental constitutional rights of a defendant is found in the Sixth Amendment's Confrontation Clause which guarantees a defendant the right to confront witnesses against him. *Hutchins v. Wainwright*, 715 F.2d 512,

516 (11th Cir. 1983), *cert. den.* 465 U.S. 1071 (1984) [right to confront witnesses is a fundamental constitutional right].

CONCLUSION

This Court has an established practice of considering trial errors for their cumulative impact. *Williams v. State*, 445 So.2d 798, 810 (Miss. 1984). Singly or cumulatively, the errors at Appellant's trial deprived him of a fair trial, due process and reliability in sentencing in violation of the state and federal constitutions.

RESPECTFULLY SUBMITTED,
MARVIN BERRY, APPELLANT

BY: E. Michael Marks
ATTORNEY FOR APPELLANT

CERTIFICATE

I, the undersigned Attorney for Appellant, do hereby certify that I have delivered the original and three copies of the foregoing to the Clerk of this Court and have mailed a true and correct copy to the Honorable W. Swan Yerger, Circuit Judge, at PO Box 22711, Jackson, Mississippi 39225, Jim Hood, Attorney General, P. O. Box 220, Jackson, Mississippi 39205 and Robert Shuler Smith, District Attorney, P.O. Box 22747, Jackson, Mississippi 39225-2747.

This, the 10th day of August, 2010.

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