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

****

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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BRIEF OF APPELLANT

CERTIFICATE OF INTERESTED PARTIES

The undersigned Counsel of Record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this Court may evaluate possible disqualification or refusal:

1. Marvin Berry, Defendant-Appellant;
2. E. Michael Marks and Julie Ann Epps, counsel for Appellant on appeal;
3. Carter Dobbs, III and Micah Dutro, counsel for Appellant at trial;
4. The State of Mississippi; the office of Robert S. Smith, D.A., Jim Hood, AG.;
5. Scott E. Rogillio, ADA, and Shaun E. Yurtkuran, ADA, prosecutors at trial;
6. Honorable W. Swan Yerger, Circuit Judge.

This, the 23rd day of March, 2010.

s/Julie Ann Epps
COUNSEL FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Statutes

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.

STATEMENT OF THE CASE

(i) Course of the Proceedings and Dispositions in the Court Below:

On August 16, 2007, Marvin Berry was indicted in the Circuit Court of the First Judicial District of Hinds County for possessing on March 15, 2007, more than 2 grams but less than 10 grams of cocaine in violation of §41-29-139(1)(C), MCA, as amended. RI/4. On March 10, 2008,

the prosecutor moved to amend the indictment to charge Berry as an habitual offender pursuant to §99-19-83, MCA. R.I/9-10. On March 25, 2008, the judge granted the motion and amended the indictment to charge Berry as an habitual offender, subject to life without parole. R.I/15.

Berry was tried and convicted by a jury on the first amended indictment on March 24-25, 2008, Judge W. Swan Yerger, presiding. RE/6, Subsequently, during the sentencing hearing, the prosecutor orally moved to amend the indictment to charge that in addition to being an habitual offender pursuant to §99-19-83, MCA, Berry was also subject to having his sentence doubled because he also had a prior felony drug conviction. Tr. 295-299.

Over the objection of Berry, the trial judge orally granted the second motion to amend the indictment.[1] Tr. 299. No written order was entered on the docket showing that amendment. At the sentencing hearing, the judge found that Berry was an habitual as defined by §99-19-83, MCA. He sentenced Berry to life in the custody of the MDOC without the possibility of parole. RE/7.

The judge overruled Berry's Motion for Judgment Notwithstanding the Verdict or, in the Alternative, a New Trial on December 11, 2008. R.I/60.On December 17, 2008, Berry timely filed a Notice of Appeal to this Court. R.I/61-62.

(ii) Statement of Facts:

The case arises out of a drug sting arranged by the Hinds County Sheriff's Department at the Best Value Hotel on I-55 N in Jackson, Mississippi, on March 15, 2007.

Investigator Ricky Barner testified that a female confidential informant arranged for Berry to come to the Best Value Hotel to deliver cocaine around 11:00 p.m. that night Tr. 122. According to Barner, the CI made a call, and Berry arrived about 10 to 15 minutes later. Barner

[1] The court made no fact-findings but merely held "That motion is granted." Tr. 300.

trailed Berry from the hotel Berry was at to the Best Value. When Berry arrived at Best Value, he went up the breezeway before going to Room 114.

As he was getting ready to knock on the door of Room 114, Officer Mahaffey, who was in the room, took Berry "to the ground Tr. 123-24. According to Barner, "[b]y the time I walked up, they was going to the ground, at which time I seen a pill bottle fall out of Mr. Berry's right hand." Tr. 125. Barner immediately recovered the bottle which was within an "arm reach" of Berry. Tr. 132-33. It contained "several white like substance [sic]" which Barner field-tested. The substance field-tested positive for cocaine. Tr. 125. The pill bottle had "Marvin Berry" on it.[2] Tr. 138.

According to Barner, there were only six other deputies there. Only Investigators Swinney and Mchaffey were in the room. Other deputies were in the parking lot. Tr. 129. Mr. Berry's automobile was right in front of where all this happened. Gregory Thompson was in that car when Berry was apprehended. Tr. 132-33.

On cross-examination, Berry's attorney engaged in the following colloquy with Barner:

> Q. Okay. Well, how far away [from the room] were you parked?
> A. Not far because like as soon as him and Mahaffey got into it, I was right on top of it then.
> Q. Well, try to estimate, if you can, how far away you were when that hotel room door opened and Office Mahaffey and who else—whoever else was with him popped out –
> A. Swinney.
> Q. –out of the hotel room.
> A. I mean, I was right on it. As soon as – as soon as Mahaffey came in contact with him—
> Q. Uh-huh.
> A. –I mean, **I was exiting my** – I mean, I was there [emphasis added].

Tr. 135-36. He estimated that he was parked about 15 feet away. Tr. 136.

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[2] The prescription, which was dated 10/27/06, was for 32 tablets of Diovan to be taken once daily with no refills. Tr. 156.

Chancey Bass, a forensic scientist from the Mississippi Crime Lab, testified that the substance in the pill bottle "contained cocaine." Tr. 147.

Robert Mahaffey, another investigator for the Hinds County Sheriff's office, testified that he was involved in the investigation at the hotel at the request of Investigator Barner. He and Swinney were in the room waiting for the delivery. When Berry arrived, Swinney opened the door. Mahaffey stepped through the doorway and grabbed Berry. They fell between two cars, and according to him, a pill bottle flew from Berry's hand. Tr. 151, 154. According to Mahaffey, the CI was in the bathroom "[f]or her safety" and could not witness the take down. Tr. 152. The entire take down probably took about five seconds. Tr. 153.

After Berry was in custody, Mahaffey walked over to Barner. Moments later, he saw Barner going through the bottle. Tr. 154. He did not see where the bottle went after it flew out of Berry's hand, and he did not see Barner pick it up. Tr. 160. He also did not know if Barner was in his car when Mahaffey came out of the hotel room. Tr. 162.

Sergeant Kevin Swinney of the Sheriff's Department was in the hotel room with Mahaffey and the confidential informant. He was acting as security. Once Berry knocked on the door, he opened the door, and Mahaffey took Berry down after a "real short struggle" and secured him about two feet from the door. Tr. 167. "By that time, Investigator Barner had walked up and Mahaffey got Berry secured. Mahaffey pretty much had it taken care of." Tr. 168.

Swinney, who was standing to the side of the doorway, did not see a pill bottle. Tr. 172. He saw the entire take down. He never looked away from Berry and Mahaffey during that time. Tr. 173. Barner was several feet away at the time—walking toward them. Tr. 174. There were six or seven other officers there. Tr. 174. The parking lot was "kind of dim [that night] . . . . It wasn't like a street light was right there in front of the room." Tr. 176.

The female informant was in the bathroom because they did not want her involved. Tr. 169. Later, Swinney searched Berry's car but did not find anything. He did not question the person in the car. Tr. 177. He did not see the pill bottle until they were ready to leave. Tr. 178.

Richard Spooner, Commander of the Narcotics Division of the Sheriff's Department, testified that he was asked by Barner to assist in the operation. Barner advised Spooner that he had information that "a subject would be delivering cocaine to a hotel room and asked for my assistance." Tr. 182. He waited in the parking lot. By the time he got to the room, Berry was already detained. Tr. 183. He did not see Berry apprehended. Tr. 188. He never knew if Berry had dropped a pill bottle. He just knew that Berry was placed under arrest for cocaine. Tr. 185. He did not question the other person who was in Berry's car. Tr. 189. It was dark and he did not recall a lot of lights in the parking lot. Tr. 189. He also did not recall Berry's reaction to being arrested. Tr. 190-91.

At this point in the trial, the state rested, and Berry moved for a directed verdict which was overruled. Tr. 193.

Marvin Berry testified in his own defense that he went to the hotel that night at the request of a young lady who asked him to meet her there to have sex. Tr. 196. They normally met like that for sex or just to spend time together. No drugs were involved, and Berry denied having any drugs with him that night. His brother-in-law, Gregory Thompson, had called him before Berry went to the hotel room and had asked to borrow his car. Berry told Thompson that he could ride to the hotel with him and could take Berry's car until he finished having sex. Thompson, however, was to wait before leaving until after Berry made sure she was at the room. Then Thompson was to leave and come back and pick Berry up when Berry called. Tr. 197, 211.

Berry testified that when he got ready to knock on the door, about four or five officers came out of the room. He was thrown to the ground. Officers started asking, "Where is the dope?

Where is the dope?" "Who's the big fish?" Berry testified that he told them he did not know what they were talking about. Tr. 199. They told him they did not "want the small fish. We want the big fish." Tr. 200.

He testified that one or two of the younger officers kicked him in the side and stomped him in the chest. Tr. 217, 220. He did not sustain any major injuries although he thought he was on the ground for "maybe ten minutes" while they were beating him and asking questions. Tr. 217, 220. According to Berry, although older officers were at the scene, they never touched him. Tr. 200.

Berry testified that one officer walked up about 30 to 45 minutes later and said, "Here it is right here. Here it is. He threw it out of his right hand." He claimed that the officer who said that was not the officer [Berner] who had testified at the trial earlier. He believed that it was at this point that someone told him that he could give somebody up or go to Parchman. Tr. 202.

He told the officers he did not know anybody to give them. He testified that the drugs were not his. Tr. 203. He admitted that the pill bottle was his. Tr. 208.

Gregory Thompson testified that he called Berry to get a ride. Berry picked him up and told him he was going to go and see his old girlfriend. Berry let him ride with him to the hotel. Berry was going to call him later to come back and pick him up. He did not know anything about any drugs being involved between Berry and the girl. Tr. 223.

According to Thompson, when Berry went to knock on the door, four or five officers came through the door and a lot of officers pulled up—about 20-25. Berry's car was parked about two cars down from the door where Thompson could see everything that happened. The officers who came out from the door "attacked" Berry. When they could not get him to the ground, another officer hit him from behind. At that point Berry fell to the ground, and "it was a lot of commotion on the ground." Tr. 225.

He did not see anything fly out of Berry's hand. He could hear them talking and beating on him for about ten or 15 minutes. Tr. 226. They were running around trying to figure out what car he was in for about 25-30 minutes before they discovered the car Thompson was sitting right there about two cars away the whole time. Tr. 226.

The police came over and took him out, put him against the car and searched him. They were cursing him and asking where the drugs were. He told them he did not know anything about any drugs. In all, they searched him about three or four times but did not find anything on him. Several other officers searched the car—going through the console and glove compartment and the back seat "and everything." After a while, they told him "See the highway down there? Go start walking that way and don't look back." Tr. 227.

The first time he talked to the district attorney's office was yesterday. Tr. 228. He does not know for sure Berry was not dealing drugs, but he never knew him to deal drugs. Tr. 231.

After the defendant rested, the state called Tammy Gaines, the booking lieutenant, from the Hinds County Detention Center. Ms. Gaines testified that she recovered Exhibit 2 from the records department. According to her, it was a photograph of Marvin Berry. Exhibit 3, which she also recovered, purported to be a health screening form from where he was arrested on March 16, 2007. Tr. 238. The report indicated that Berry had no "obvious injuries." Tr. 239. The form showed that when asked if he had any medical problems they had not asked about or was hurt or injured, Berry responded, "No." Tr. 239. The booking photo showed Berry was wearing a white shirt. If he indeed was bruised as he claimed, the picture would not show it because of the shirt. Tr. 243. According to her, generally, if it were determined during the strip search that an arrestee needed any medical treatment, the officer doing the search would so note. Tr. 245.

Ms. Gaines, however, did not book in or see Marvin Berry that night; therefore, her testimony was based on the records she retrieved from the Detention Center. Ms. Gaines,

however, did not testify that she was the custodian of these records. Tr. 241. In other words, all here testimony was based on records prepared by someone else.

In rebuttal, Ricky Barner denied that there were four or five officers in the room and denied that ten officers came from one side of the hotel and ten more came from the other side. He denied that anybody beat Berry. Tr. 246.

After Barner's testimony, the state finally rested. Tr. 247.

SUMMARY OF THE ARGUMENT

The court would not let Berry cross-examine prosecution witnesses about the absence of the confidential informant at trial or argue that the failure to call her created reasonable doubt. Moreover, the trial court erred in not granting a continuance to allow Berry to obtain counsel after he told the court that his attorneys had failed to investigate the case or prepare a defense.

The prosecutor relied on inadmissible hearsay to convict Berry. 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).

B. The Merits:

During opening statements, defense counsel stated that there would be no evidence of a conversation between the CI. Tr. 114. At this point, the state objected to counsel's references to the confidential informant. A bench conference was held. The state orally moved to preclude the defense from cross-examining the officers about the informant, who she is, and what she said and to preclude references about why she was not produced or called by the state to testify. Tr. 115-17. According to the state, such evidence would "confuse" the jury and might produce reasonable doubt. RE/8-13. The trial judge sustained the state's motion *in limine* citing Mississippi Uniform Rules of Circuit and County Court Practice, Rule 9.04(B)(2). Tr. 120, RE/13, 30-31.

That rule states in pertinent part:

> B. The court may limit or deny disclosure authorized by subsection "A" [general discovery] if it finds that there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment, resulting from such disclosure, which outweighs any usefulness of the disclosure to the defense attorneys.
>
> The following is not subject to disclosure:
>
> ***
>
> 2. *Informants.* Disclosure of an informant's identity shall not be required unless the confidential informant is to be produced at a hearing or trial or a failure to disclose his/her identity will infringe the constitutional rights of the accused or unless the informant was or depicts himself/herself as an eyewitness to the event or events constituting the charge against the defendant.

Rule 9.04(B)(2) Miss. URCCC, however, is a discovery rule that imposes limitations on what the prosecution is required to disclose to the defense during discovery. It does not speak to anything other than the disclosure during discovery of the identity of the confidential informant and certainly does not purport to limit the evidence a defendant can introduce at trial.

Furthermore, the identity of the confidential informant was not an issue in this case since Berry obviously already knew the name of the informant because she was the person who telephoned him and arranged for him to be at the hotel although he may well not have known her current address because of the prosecution's refusal to disclose that information. What is issue here is not discovery of the name of the informant, the issue is Berry's right to confront and cross-examine witnesses and to present a defense.

These rights are secured by both the state and federal constitutions. The United States Supreme Court has long held that an accused's right to "establish a defense" is a "fundamental element of due process." *Washington v. Texas,* 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). In *Washington,* the Court was called upon for the first time "to decide whether the right of an accused to have compulsory process for obtaining witnesses in his favor, guaranteed in federal trials by the Sixth Amendment, is so fundamental and essential to a fair trial that it is incorporated in the Due Process Clause of the Fourteenth Amendment." *Id.* at 17-18, 87 S.Ct. 1920. Relying on *In re Oliver,* the Court observed that, among other things, **an accused's right "'to offer testimony'" is a basic component of his right to offer a defense.** *Id.,* at 18, 87 S.Ct. 1920 (*quoting In re Oliver,* 333 U.S. 257, 273, 68 S.Ct. 499, 92 L.Ed. 682 (1948)).

Accordingly, the Court held that "[t]he right to offer testimony of witnesses and to compel their attendance [ ] is in plain terms the right to present a defense" because "[j]ust as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense." *Washington v. Texas, supra* at 19, 87 S.Ct. 1920. It is then up to the jury to "decide where the truth lies." *Id.*

Likewise in *Crane v. Kentucky,* 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986), the Supreme Court spoke to the necessity of allowing a defendant to submit testimony regarding his defense. In *Crane,* the Court held that the exclusion of testimony surrounding the circumstances

of a defendant's confession deprived the defendant of his fundamental right--whether under the Due Process Clause of the Fourteenth Amendment or under the Compulsory Process or Confrontation Clauses of the Sixth Amendment--to present a defense. *Id.* at 690-91, 106 S.Ct. 2142. The Court concluded that the opportunity to be heard "would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence." *Id.* Consequently, the Court held that the "exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'" *Id.,* at 690-91, 106 S.Ct. 2142 (*quoting United States v. Cronic,* 466 U.S. 648, 656, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)).

In *Davis v. Alaska,* 415 U.S. 308, 315-16, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), the Court examined an accused's right to present a defense but in the context of the cross-examination of the state's witnesses. The Court held that "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested [,]" and that several means of discrediting a witness are essential to effective cross- examination. *Id.,* at 316, 94 S.Ct. 1105.

In *Davis,* the defendant at trial had tried to discredit a government witness by showing the existence of possible bias and prejudice by questioning him regarding the witness' adjudication as a juvenile delinquent and his probation status in order to demonstrate that the witness identified the defendant as the perpetrator because he was afraid his probation might be revoked. *Id.,* at 310-11, 94 S.Ct. 1105. The trial court refused to allow the testimony because of a state statute protecting the anonymity of juvenile offenders. *Id.,* at 311, 94 S.Ct. 1105. As a result, the petitioner's counsel "did his best" to expose the witness's state of mind at the time, but much of the witness' testimony went unchallenged. *Id.,* at 312-14, 94 S.Ct. 1105.

The Alaska Supreme Court affirmed, concluding that counsel for the defendant was otherwise able to show "'the possibility of bias or motive.'" *Id.*, 314-15, 94 S.Ct. 1105. The Supreme Court, however, reversed saying that it could not "accept the Alaska Supreme Court's conclusion that the cross-examination that was permitted defense counsel was adequate to develop the issue of bias properly to the jury." *Id.*, at 318, 94 S.Ct. 1105. The Court reasoned:

> While counsel was permitted to ask [the witness] whether he was biased, counsel was unable to make a record from which to argue why [the witness] might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial. On the basis of the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness or, as the prosecutor's objection put it, a 'rehash' of prior cross-examination. On these facts, it seems clear to us that to make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness.

Id.[3]

The Sixth Amendment's right to cross-examination and confrontation is similarly necessary to assure that a defendant will have a right to present a defense. As the Supreme Court has said, the Sixth Amendment's Confrontation Clause "'comes to us on faded parchment,' ··· with a lineage that traces back to the beginnings of Western legal culture," *Coy v. Iowa,* 487 U.S. 1012, 1015, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988) (quoting *California v. Green,* 399 U.S. 149, 174, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970) (Harlan, J., concurring)), and confers a "bedrock procedural guarantee." *Crawford v. Washington,* 541 U.S. 36, 42, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). So too, "[t]he right of cross-examination [in particular] is more than a desirable rule of trial procedure." *Chambers v. Mississippi,* 410 U.S. 284, 295, 93 S.Ct. 1038, 35 L.Ed.2d 297

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[3] *See also, Alford v. United States,* 282 U.S. 687, 691 (1931) which holds that where a witness was in custody awaiting disposition of charges, the defendant was "entitled to show by cross-examination that his testimony was affected by fear or favor;" *Delaware v. Van Arsdall,* 475 U.S. 673 (1986) [denial of opportunity to impeach witness for bias, like other Confrontation errors is subject to harmless error analysis using the standard enunciated for constitutional errors

(1973). Rather, it is "essential to a fair trial," *Pointer v. Texas,* 380 U.S. 400, 404, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965), insofar as "[t]he opportunity for cross-examination, protected by the Confrontation Clause, is critical for ensuring the integrity of the fact-finding process." *Kentucky v. Stincer,* 482 U.S. 730, 736, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987); *accord Chambers,* 410 U.S. at 295, 93 S.Ct. 1038(noting that cross-examination "helps assure the 'accuracy of the truth-determining process' ") (quoting *Dutton v. Evans,* 400 U.S. 74, 89, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970)).

This is because "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska,* 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). Indeed, it has been said that cross-examination is nothing less than the "'greatest legal engine ever invented for the discovery of truth.'" *Green,* 399 U.S. at 158, 90 S.Ct. 1930(quoting 5 J. Wigmore, *Evidence* § 1367 (3d ed.1940)); *accord Pointer,* 380 U.S. at 404, 85 S.Ct. 1065 (noting "the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case").

Here, the confidential informant is the one who called and arranged for Berry to come to the hotel. State's witnesses testified that she called Berry and arranged to buy cocaine from him which Berry was to deliver to the hotel. The problem with this testimony is that it is hearsay because no officer testified that he was actually present when the CI made the telephone call which brought Berry to the hotel. The content of the conversation between Berry and the CI, therefore, was hearsay which was admitted to show that Berry went to the hotel to purchase drugs. It should not have been admitted over Berry's objection. *See,* discussion in next Proposition.

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in *Chapman v. California,* 386 U.S. 18 (1967) and that is that the reviewing court must be able to state that the error was harmless beyond a reasonable doubt.

Berry, on the other hand, testified that the CI called him and arranged to meet him at the hotel for sex. The only witness then to an operative fact—whether the CI arranged a drug buy or a date was not only absent from the trial, but she was in effect allowed to testify through the officers' hearsay account of the telephone call that she called Berry and asked him to bring her drugs. Thus, the prosecution had the benefit of her "testimony" to refute Berry's testimony that he believed he was gong for a date.

Had Berry been allowed to argue the CI's absence, he might have been able to present a theory that after officers failed to discover any drugs on him, they retrieved a pill bottle bearing his name from his car and planted drugs on him because they believed he could supply them with information about other drug dealers. Alternatively, he might have argued that the CI had come into possession of the pill bottle during a previous sexual liaison with Berry and planted the pill bottle while officers were engaged in the "take down" and their attention was diverted from her.

D's possible defenses

Although the issue in this case is not whether the name of the informant was discoverable, the case of *People v. Tranchina,* 64 A.D.2d 616, 406 N.Y.S.2d 523 (N.Y.A.D. 1978) is instructive in demonstrating the materiality of confidential informant evidence to a defense similar to Berry's. In that case, the defendant was convicted of sale of controlled substance. An undercover officer testified that after a confidential informant arranged a sale with the defendant, he and the CI had gone to the apartment of the defendant where he purchased drugs. According to the officer, at the time of the actual sale, the informant was in the bathroom and did not witness the sale. The officer's testimony was corroborated in part by the backup team who testified that they had seen the officer and informant enter the apartment building together and emerge 15 minutes later with the drugs. As here, the defendant denied the sale. The state refused to disclose the name of the informant. The Court reversed stating that since the informant

could have shed relevant and material testimony regarding defendant's guilt, his name should have been disclosed.

In Berry's case, although officers testified that the informant was placed in the bathroom prior to the time that Berry knocked on the door, the evidence does not show where she was during the actual arrest and the hour after he was placed in handcuffs. Presumably, she did not remain in the bathroom that entire time. Without being able to call the CI or refer to the absence of her testimony about what occurred after Berry was arrested, Berry was deprived of his right to present a defense and to cross-examine the officers about where she was and what she could have seen and why she was not called to refute Berry's claim that she called him for sex, not drugs.

As more than one court has noted,

> "The practice of the Government in employing agent-informers in narcotics cases is well known. We also know that such agents are usually not trained officers-often they are themselves addicts or former addicts. The Government must know that an eager informer is exposed to temptations to produce as many accuseds as possible at the risk of trapping not merely an unwary criminal but sometimes an unwary innocent as well. One could hardly expect such informants always to stay on the proper side of the line which separates those two cases. *And since the Government chooses to utilize such agents, with the attendant risk of entrapment, it is fair to require the Government which uses this inherently dangerous procedure to take appropriate precautions to insure that no innocent man should be punished* [citing *United States v. Cimino*, 321 F.2d 509, 514 (2d Cir. 1963)]."

United States v. Barnes, 486 F.2d 776, 778, 780 (8th Cir. 1973). *Accord, Gilmore v. United States,* 256 F.2d 565, 567 (5th Cir. 1958) [testimony of informant who was "active participant in setting the stage" for drug transaction was material and relevant)].

Similarly in a case where the appellant claimed he knew who the informant was and that the informant had planted the drugs later found on the defendant, the appellate court held that the trial court had committed reversible error in not revealing the name of the informant and in

disallowing testimony from the suspected informant. *Hatton v. State*, 359 So.2d 822, 830-31 (Ala.Cr.App. 1977), *writ of certiorari quashed*, 359 So.2d 832 (Ala. 1977).

In the instant case, the prosecution introduced hearsay testimony that the CI made a telephone call to Berry requesting that Berry bring cocaine to the hotel room. The prosecution's hearsay testimony provided powerful compelling evidence that Berry possessed the cocaine found in the pill bottle despite his denials. In a similar case, the Court likewise noted the significance of the introduction of testimony regarding a telephone call the informant made to the defendant requesting the delivery of drugs. *People v. McShann,* 50 Cal.2d 802, 809, 330 P.2d 33, 37 (Cal. 1958). In that case, an informant allegedly made a telephone call arranging a drug buy from the defendant. After arranging the sale, the informant delivered the cocaine he had allegedly purchased to agents. At trial, the defendant denied that he had heroin in his possession and denied that he received the alleged telephone call from the informant. Officers who had listened to and recorded the alleged conversation testified to the call and a recording of it was introduced into evidence. In reversing the case, the Court noted that

> The informer's telephone call was persuasive evidence on possession, for it indicated that defendant was en route to make a sale of heroin when he was arrested and therefore knowingly had possession at that time. As the originator of the telephone call the informer was a material witness on the issue of possession. **The prosecution made him such a witness by introducing evidence of his telephone call to make a purchase of heroin** and by playing a recording of the telephone conversation before the jury [emphasis added].

Id. at 330 P.2d at 37.

The Court further noted that

> The prosecution could have relied solely on the testimony of the officers as to defendant's possession of heroin and as to his admissions without reference to the telephone call. They chose instead also to introduce evidence of the telephone call, which substantiated the testimony of Officers Goodrum and Reppas and discredited defendant's. Defendant denied receiving the call. He had no fair opportunity to substantiate his denial and impeach the testimony of the officers without disclosure of the informer's identity.

Id. at 330 P.2d 33, 38).

As in *McShann,* the prosecution elected to introduce hearsay testimony regarding the alleged content of the conversation between the informant and Berry over Berry's objection. Berry, on the other hand, was denied the opportunity to impeach that testimony. Similarly, in *McShann*, the alleged telephone call provided powerful evidence that Berry was in fact on his way to deliver cocaine and seriously undercut his defense that he was at the hotel room for a sexual encounter and did not bring the drugs. Not only should the hearsay testimony not have been omitted over his objection, he should have been allowed to cross-examine the officers about the informant and call her as a witness. As in *McShann,* the prosecution, by recounting the alleged conversation between Berry and the informant, made her a witness. As a witness against Berry, he was constitutionally entitled to such cross-examination as necessary to impeach her as a witness. *Id.*

As has been said, errors in precluding a defendant from presenting a defense or exploring bias are "by nature prejudicial." *Fry v. Pliler,* 551 U.S. 112, 124 (2007) [Breyer, J. concurring in part and dissenting in part citing *Chambers*]; *Kyles v. Whitley*, 514 U.S. 284 (1973) [similar statement as to errors under *Brady v. Maryland,* 373 U.S. 83 (1963). Because the error is constitutional, the burden is on the state to show that the error was harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18, 24 (1967).

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.

For example, this Court has held that the hearsay evidence provided to an officer in support of a search warrant is hearsay and inadmissible at trial. *Sisk v. State*, 290 So.2d 608, 611 (Miss. 1974). Because the introduction of the search warrant and affidavit in *Sisk* allowed the state to get into evidence the hearsay statements of the informant, this Court held that the appellant was deprived "of the right of confrontation and cross examination." *Id.*

Because the statements were inadmissible hearsay and unreliable, Berry's due process rights to a fair trial and his Sixth Amendment rights to cross-examination and confrontation were violated. Unreliable statements do not satisfy the constitutional demands for admissibility so both the due process and confrontation clauses require exclusion. *E.g., Idaho v. Wright,* 497 U.S. 805, 821 (1990). Because the statements were relied on by the prosecution as evidence to support a finding that Berry possessed the cocaine, this Court must reverse. The state cannot show beyond a reasonable doubt that the constitutional error in admitting the evidence was harmless. *Chapman v. California, supra.*

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

After voir dire, counsel for Berry informed the trial judge that Berry wished to fire his two attorneys. The trial judge questioned Berry, and one of the reasons Berry gave for his dissatisfaction with his attorneys was that they had failed to inform him that he was going to be arrested the previous day during the first day of trial on another indictment. The trial court determined that counsel were unaware that Berry was to be arrested. Tr. 89-90.

Berry then complained that he was not so much concerned about the indictment as he was about the trial that was going on at that time. He **complained that his attorneys had not investigated his case** and that all he could see was that they wanted him to plead guilty. **Without making specific inquiry into what evidence Berry claimed his attorneys had failed to investigate or discover**, the trial judge gave Berry the option of representing himself or having the attorneys move forward. RE 14-27. He, however, declined to grant Berry time to secure additional counsel on the ground of expediting the docket. RE 22.

The trial court made errors of law in denying Berry additional time to secure counsel. A Court abuses its discretion where it has made insufficient inquiry into the basis of a defendant's dissatisfaction with his attorney. 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); *United States v. D'Amore,* 56 F.3d at 1205 [inquiry inadequate for court to exercise appropriate discretion].

For example, in *United States v. Moore,* 159 F.3d 1154, 1158-59 (9th Cir. 1998), a case where defendant tried to excuse his attorney because of a conflict, the court found the inquiry about the defendant's request to continue to be inadequate where the trial court (1) did not inquire into how long a continuance would be needed for new counsel; (2) made no attempt to gauge the inconvenience caused by such a delay; (3) did not question the attorney or defendant as to the degree that their animosity prevented adequate preparation; and (4) did not ask why the motion had not been made earlier.

While a trial judge ordinarily has broad discretion about whether or not to deny a continuance, that discretion is necessarily subject to an accused's Sixth Amendment right to an attorney of his choice. Although a court necessarily can make sure the right does not obstruct the orderly administration of the docket, "**the desire of the trial courts to expedite court dockets is not a sufficient reason to deny an otherwise proper request for a continuance** [emphasis added]." *People v. Williams,* 577 194 N.W.2d 337, 342 (Mich. 1972); *United States v. Mitchell,* 354 F.2d 767, 768 (2nd Cir. 1966) ["At the same time, however, the desire for expedition can furnish no justification for the subversion of the Sixth Amendment right to present an effective defense through counsel"]. In short, there is a presumption in favor of honoring a defendant's right to an attorney of his choice.

Before a court can "engage in a measured exercise of discretion, it must conduct an inquiry adequate to create a 'sufficient basis for reaching an informed decision'" and where it fails to make such an inquiry, the court cannot say that the required balancing of competing interests has been made. *United States v. D'Amore,* 56 F.3d at 1205; *People v. Bingham,* 847 N.E. 2d 903 (Ill. App. 2006) [trial court must balance defendant's right against effective administration of justice and necessarily requires a review of the defendant's diligence and an inquiry into the actual request to see if the request is being used merely as a delaying tactic]. *See*

also, United States v. Gonzalez-Lopez, 399 F.3d at 929, 932 [lower court must articulate its findings for the benefit of the defendant and the reviewing court; where court fails to refer to an important balancing factor in its findings, reviewing court will infer it "played no part" in the lower court's decision]; *Henley v. State,* 855 N.E. 2d 1018 (Ind. 2006) [failure to consider factors to be balanced in determining requests for change of counsel is reversible error]; *People v. Williams,* 194 N.W. 2d 337 (Mich. 2006) [summary denial of continuance after defendant retained attorney the day of trial denied defendant counsel of choice].

Here in Berry's case, the lower court failed to make a sufficient inquiry to allow him to make an informed decision that the effective administration of justice outweighed Berry's right to counsel of his own choosing. First of all, the record does not indicate that the trial court even recognized that the defendant had a constitutional right to counsel of his own choosing or that he recognized any of the appropriate factors weighing in favor of a continuance—such as the grounds for Berry's dissatisfaction with counsel's preparation or the length of time it might require for Berry to obtain substitute counsel. The only factor considered by the trial judge was a desire to expedite the trial. 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).

Similarly, in *United States v. Gonzalez-Lopez,* 399 F.3d at 932 the court found it particularly troubling that there was no mention of the effect of the denial [of admission *pro hac vice* so as to permit out of state counsel to represent defendant] on the defendant's right to counsel of choice and concluded that the trial court, therefore, gave insufficient weight to this factor in exercising its discretion to deny defendant's counsel of choice.

As in *People v. Williams,* 194 N.W.2d at 341, the trial court in Berry's case similarly failed to ascertain the reasons for Berry's delay in making the request to hire new counsel and his reasons for dissatisfaction. For example, in *Williams,* the trial court denied a continuance where

the defendant hired new counsel the day of trial after a conflict over trial strategy arose between him and his prior attorney. In that case, the court erroneously found that the defendant's case had been set four times when in fact it had only been adjourned on two occasions. Moreover, the trial dockets were heavily burdened due to the July 1967 riots. *Id.* at 342.

In reversing the case for denying the defendant an attorney of his own choosing, the appellate court held that the court abused its discretion because the defendant had a legitimate concern over strategy; he was not guilty of negligence because the request was timely because it was made as soon as the conflict arose; and there was no evidence that the defendant had wrongfully delayed the trial on prior occasions. The Court held that the desire of the trial court to expedite its docket was not a sufficient reason to deny an otherwise proper request for continuance. *Id.* at 343.

Here too, the only reason given by the trial judge for denying the delay was a desire to expedite the docket. Because the trial judge failed to conduct an inquiry into the reasons for the request and the delay in making the request, the trial judge was unable to adequately weigh that reason against any legitimate reasons Berry might have had for the request. The trial judge's failure to conduct adequate inquiry violated Berry's rights to counsel of his own choosing and is reversible error. It is a fundamental principle of the American criminal justice system that the trial judge is charged with protecting the rights guaranteed by our Constitution. *Hayden v. State,* 972 So.2d at 536 *[quoting, Rose v. Lundy,* 455 U.S. 509, 518[, 102 S.Ct. 1198, 71 L.Ed.2d 379] (1982) (citing *Ex parte Royall,* 177[117] U.S. 241, 251[, 6 S.Ct. 734, 29 L.Ed. 868] (1986))].

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

In cross-examining Berry, the prosecutor attempted to question Berry about a photograph and whether or not it depicted him on the night of his arrest. The defense objected that the

photograph had not been provided in discovery. Tr. 218-19. The trial judge overruled the objection. Berry testified that he was not sure when the photograph was taken. Tr. 219.

After the defendant rested, the state called Tammy Gaines, a booking lieutenant from the Hinds County Detention Center. Tr. 236. Over objection by Berry that the documents had not been provided in discovery, Ms. Gaines was allowed to testify that she recovered Exhibit 2 from the records department at the Detention Center. Tr. 237. Exhibit 2 purported to be a photograph of Marvin Berry taken on the night of his arrest on the instant charges. Exhibit 3, which she also recovered, purported to be a health screening form from where Berry was arrested on March 16, 2007. Tr. 238. The report indicated that Berry had no "obvious injuries." Tr. 239. The form showed that when asked if he had any medical problems they had not asked about or was hurt or injured, Berry responded, "No." Tr. 239. The booking photo showed Berry was wearing a white shirt so that if he had a bruise, it would not show in the picture. Tr. 243. According to her, generally, if it were determined during the strip search that an arrestee needed any medical treatment, the officer doing the search would so note. Tr. 245.

Ms. Gaines, however, did not book in or see Marvin Berry that night; therefore, her testimony was based on the records she retrieved from the Detention Center. Ms. Gaines, however, did not testify that she was the custodian of these records. Tr. 241. In other words, all here testimony was based on records prepared by someone else.

In closing, the prosecution argued:

> Well, we tried to get this picture—we got this picture into evidence. This is Marvin Berry when he was booked. And they didn't want—the defense attorneys were objecting because they thought this would show bruises. Well, the defendant, that's not what he was thinking. He wasn't thinking this was going to show bruises. He knew it wasn't going to show bruises. He knew why we were introducing this. I think just like we al know why we're introducing this.
>
> You see here? He's got a white short on, a white Polo. It looks like it's been bleached. Now, if he'd been on the ground beaten, trampled and kicked, I think this Polo would be a little bit more dirty than it is right there in this picture. But

> that's why he sat right here and said I don't want – Mr. Rogillio tried to talk to him and say is this your – is this your photograph? He said – he slapped the thing down.
>
> Then you know what he did? *** He looked right over at his attorneys basically asking them for the answer.
>
> Now, when you know the truth, you know what the truth is. You don't need help. You don't need to consult with anybody. You don't need to talk to anybody because the truth is what it is, and you know it and you say it. You don't sit there and look for your attorneys for help. Well, you know why he did that? Because he's lying. And that's just the way it is.

Tr. 276-77.

Thus, the prosecution relied heavily on the photograph and other evidence which it had not previously provided to the defendant in discovery to impeach Berry's credibility. Since Berry's credibility was central to his defense, the evidence had a powerful effect on the jury's decision not to credit Berry.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039 (1984); *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).

> [i]t is vain to give the accused a day in court with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case [citation omitted].

Powell v. Alabama, 287 U.S. 45, 59, 53 S.Ct. 55 (1932). To be effective, an attorney must be provided with an "opportunity to make legal preparation in the light of such circumstances as may have been disclosed . . . ." *United States v. Ploeger*, 428 F.2d 1204, 1206 (6th Cir. 1970).

At trial, the prosecutor took the position that he was only required to disclose evidence which he planned to use in his case in chief and that he 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.

There are a number of problems with the prosecution's excuse and the ruling of the trial court. First of all, the evidence does not show that the prosecutor was surprised. On September 26, 2007,[4] 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.

Second, 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. Tr. 248-52. Notwithstanding this awareness, the prosecution withheld the photograph and used it to surprise Mr. Berry.

Third, the trial court was incorrect that the prosecution is not required to disclose rebuttal evidence. For example, this Court in *McGilberry v. State*, 741 So.2d 894, 917-18 (Miss. 1999), 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.*

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[4] Berry was indicted approximately one month earlier on August 16, 2007. R.I/4.

In *Johnson v. State*, 491 So.2d 834 (Miss. 1986), the prosecution failed to disclose photographs that were relevant to the case. Over objection the trial court allowed the prosecution to introduce the photographs during the testimony of a rebuttal witness under the authority of *Fells v. State*, 345 So.2d 618 (Miss. 1977) which allows certain rebuttal evidence when the prosecution's principal witness' identification is impeached. In reversing Johnson's conviction on the grounds that the photographs should not have been admitted into evidence the Court held as follows:

> As must be observed, however, there was no question concerning disclosure or discovery under Circuit court rule 4.06 because *Fells* pre-existed such. Pursuant to our present rules the photographs could not have been introduced into evidence during the State's case in chief because they were not disclosed to the defendant. The issue remains whether the photographs were admissible in rebuttal when the State's prime witness was impeached by contradictory testimony of the defendant. We are of the opinion the photographic lineup was discoverable. We also think the State's attorney had to know or should have realized the great probability the identify of the defendant would be put into issue when he pled not guilty, thereby placing some importance upon the photographs because they were the sources of the victim's first identification of the defendant.

In *Tolbert v. State*, 441 So.2d 1374 (Miss. 1983), *cert. denied*, 484 U.S. 1016 (1988), the Court addressed the question of whether the fact that statements made by the defendant in a criminal case were reserved for *rebuttal* removed them from the scope of a discovery order. The Court held:

> Under our holding in *Jackson v. State*, 426 So.2d 405 (Miss. 1983); and *Morris v. State*, 436 So. 2d 1381 (Miss. 1983), there is no distinction in an incriminating statement being offered by the state's case in chief, or reserving it for *rebuttal*, the accused is nevertheless entitled to *discovery* so as not to be caught by surprise at trial . . .

441 So. 2d at 1375.

In *Wardius v. State of Oregon,* 412 U.S. 470 (1973), the Oregon Notice of Alibi rule was brought in question because of the defendant's contention that permitting the discovery by the State of his alibi witnesses without a provision for reciprocal discovery of rebuttal witnesses of

the State amounted to a denial of due process and a fair trial. The United States Supreme Court in holding that the Due Process Clause of the Fourteenth Amendment forbids enforcement of alibi rules unless reciprocal discovery rights are given to criminal defendants, stated:

> The State may not insist that trials be run as a "search for truth" so far as defense witnesses are concerned, while maintaining "poker game" secrecy for its own witnesses. It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the state.

Id. 412 U.S. at 474-76.

This case is instructive because that is exactly what the state did here. The prosecution learned from discovery provided to them that Berry intended to claim that he was beaten by police. In order to impeach him, the prosecution asked Berry on cross-examination questions regarding the beating and its severity and whether he had any bruises. The prosecution then ambushed Berry with the photograph. This is precisely what the discovery rules and due process of law condemns. Neither the photograph nor any of the other booking documents should have been introduced into evidence.

In addition, Ms. Gaines was not the custodian of the jail records and her testimony does not come within any hearsay exception. Although Mississippi Rules 803(6) provides that business records are admissible but only if they are made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of a custodian or other qualified witness or self-authenticated pursuant to Rule 902(11).

Rule 902(11) provides:

> The records of a regularly conducted activity, within the scope of Rule 803(6), about which a certificate of the custodian or other qualified witness shows: (i) the first hand knowledge of that person about the making, maintenance and storage of

> the records; (ii) evidence that the records are authentic as required by Rule 901(a) and comply with Article X; and (iii) that the records were: (a) made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters; (b) kept in the course of the regularly conducted activity; and (c) made by the regularly conducted activity as a regular practice.

The State wholly failed to comply with Rules 803 and 902. In a similar case, the Court held that the evidence was inadmissible where the witness stated only that she was "familiar with the business records kept and maintained" but did not further testify that it was "made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of [Greater Canton] to make the ... record." *Greater Canton Ford Mercury, Inc. v. Lane,* 997 So.2d 198, 205 (Miss. 2008); *see also, Welsh v. Mounter,* 883 So.2d 46 (Miss. 2004).

Finally, here the trial court was incorrect that the evidence was harmless. Clearly, in closing argument, the prosecution heavily relied on the evidence to impeach Berry's credibility. Tr. 276-77. Because that was the only genuine issue in the case, the error was prejudicial, and this Court should reverse Berry's conviction.

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.

Section 99-19-83, states:

> Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to and served separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere, and where any one (1) of such felonies shall have been a crime of violence shall be sentenced to life imprisonment, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation.

Section 99-19-83, then requires proof beyond a reasonable doubt of that a defendant has "been sentenced to **and served separate terms of one (1) year or more** in any state and/or

federal penal institution [emphasis added]," and one of the felonies must have been for a crime of violence. Section 99-19-83 clearly requires, actual service of two separate terms of one year or more on both prior convictions. *Bogard v. State,* 624 So.2d 1313, 1320 (Miss. 1993) [and cases cited therein] [Statute requires proof "not only [that the defendant had] been at least twice previously convicted but that he has been sentenced to *and has served separate terms of one (1) year or more* in any state and/or federal penal institution [emphasis in original]"].

The prosecution's case is insufficient to show that Berry served separate terms of one year or more and that one offense was for a crime of violence. More specifically, the State failed to prove that Berry had served a one-year sentence on his armed robbery conviction, the offense the state claimed constituted the crime of violence.

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 penitentiary[5] or because it failed to prove the incarceration was continuous.

[5] Berry was in the county jail.

Similarly deficient is the state's proof that Berry was incarcerated for more than one year on a house burglary charge in Hinds County. Exhibit 5 (sentencing) The sentence computation record introduced by the state shows that Berry served at most 241 days in the Hinds County Detention Center on this sentence. *Id.*

Likewise deficient to show continuous incarceration for a year or more is Berry's conviction for possession of cocaine. That sentencing order shows that he served 7 months and 28 days in jail (not a penitentiary). Exhibit 7 (sentencing).

Finally, 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). The federal court judgment in this case shows Berry was convicted of a violation of 18 U.S.C. 2113(c) and was sentenced to 162 days. First of all, the state did not introduce the indictment so it is by no means clear that the conviction in this case was even for a felony. 18 U.S.C. 2113(c) provides for both a felony or misdemeanor conviction depending on the amount of the federal funds. The state introduced no evidence as to the amount. Furthermore, Berry clearly did not serve a year, and he did not serve it in a state or federal penitentiary. Thus, the state failed here to even prove a felony conviction.

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. Even so, Berry did not serve his sentence in a state or federal penitentiary. Exhibit 6 (Sentencing)

In summary, the state totally failed to prove that Berry was an habitual offender or that his sentence should be doubled. The Court, therefore, must be remanded for resentencing.

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.

Without objection from the defense, the prosecution asked Berry to give an opinion about whether or not the police officers were lying. Tr. 230, 232. Similarly, he asked Berry's only corroborating witness Gregory Thompson:

> Q. So the police, when they said that there was only two that came out of that room, they're lying?
>
> A. They're lying. It wasn't no two of them. There was about four or five of them. I was standing – sitting right in the car looking dead at them.

Tr. 230.

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. This sort of questioning and argument are improper because it wrongly tells jurors that in order to acquit, they must find the officers were liars. In fact, all that is required is for the jury to have a reasonable doubt. In *Randall v. State,* 806 So.2d 185, 210 (Miss. 2001), for example, the Court found constitutional error in

misstating the burden of proof where the prosecution argued 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."

Consequently, a prosecutor cannot ask the defendant on cross-examination to opine regarding the veracity of a law enforcement officer's testimony. *United States v. Sanchez,* 176 F.3d 1214, 1219-20 (9th Cir.1999) (holding that a prosecutor's questions were in error because they "compelled [the defendant] to give his opinion regarding the credibility of a deputy marshal"). As one court has stated, "the predominate, if not sole purpose of such questioning is simply to make the defendant look bad." *State v. Graves*, 668 N.W.2d 860, 872 (Iowa 2003).

For this reason, a majority of courts that have addressed this issue have determined that such questioning is categorically improper. Payne, Rebecca, *Admissibility of Testimony Concerning the Truthfulness or Untruthfulness of a Witness*, 35 The Colorado Lawyer 37 (December 2006).

> The general concern about "were they lying" questions is that asking one witness to express an opinion as to the veracity of another witness calls for improper comment on another witness' testimony, and that it is the province of the jury to determine the credibility of witnesses. *See State v. Casteneda-Perez,* 61 Wash.App. 354, 810 P.2d 74, 78-79 (1991). **Further, it is perceived as unfairly giving the jury the impressions that in order to acquit, they must determine that witnesses whose testimony is at odds with the testimony of the defendant are lying** [emphasis added]. *See id.*

State v. Pilot, 595 N.W.2d 511, 516 (Minn. 1999). *See also, United States v. Geston*, 299 F.3d 1130, 1135-37 (9th Cir. 2002) [reversing on "due process" grounds defendant's convictions for assault and use of force under color of law, because trial judge allowed prosecutor to cross-examine law enforcement officers about veracity of other witnesses' testimony]; *United States v.*

Jae Shik Cha, 97 F.3d 1462 (9th Cir. 1996); *United States v. Richter*, 826 F.2d 206, 208-09 (2d Cir. 1987) [finding, in prosecution for conspiracy to distribute methamphetamine and money laundering, trial judge erred by allowing government counsel to cross-examine defendant about whether other witnesses were lying when they testified inconsistently with his testimony]; *State v. Casteneda-Perez,* 810 P.2d 74, 79 (Wash. App. 1991) [holding prosecutor's questions asking witnesses whether other witnesses were lying was "contrary to the duty of prosecutors, which is to seek convictions based only on probative evidence and sound reason"]; *State v. Flanagan,* 801 P.2d 675, 679 (N.M. 1990) ["Whether the defendant believes the other witnesses were truthful or lying is simply irrelevant."]; *People v. Berrios,* 298 A.D.2d 597, 750 N.Y.S.2d 302, 302 (2002) ["Whether the defendant believed that the other witnesses were lying is irrelevant.]

Mississippi likewise prohibits the questioning of a witness about the credibility of another witness. With the proper foundation, a witness can be asked for an opinion as to the other witness's **character** for truthfulness or untruthfulness under M.R.E. 608, but the witness cannot be asked to give an opinion as to the truthfulness of the witness's statements. Such questions are irrelevant to the extent they invade the province of the jury. *Hart v. State*, 637 So.2d 1329 (Miss. 1994). It is the jury's role to evaluate credibility of witnesses and decide the relative reliability of the facts.

Not only did the prosecution erroneously invade the province of the jury and improperly tell it that in order to find Berry "not guilty" jurors had to find that the police, the same people who answered their 911 calls were liars, the prosecution further vouched for the credibility of the police. The prosecutor told the jury 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. In *United States v. Sanchez*, 176 F.3d at 1218, the Court considered the question of whether or not forcing a defendant to call a prosecution witness a liar constituted plain error. Finding that it, along with other prosecutorial misconduct, substantially prejudiced the defendant, the Court held that such conduct was improper cross-examination, stating:

> In *United States v. Richter,* 826 F.2d 206 (2nd Cir. 19870, the prosecutor forced the defendant to testify that an FBI agent was either mistaken or lying. *Id.* at 208. The Second Circuit held that the prosecutor was guilty of misconduct. In explaining its holding, the court stated:
>
> > Pointing to the discrepancies between Lazara's testimony concerning Richter's [FBI Special Agent] statements to him and Richter's testimony on the stand, the prosecutor asked Richter in a series of questions to testify that Lazzara was either mistaken or lying. This was improper cross-examination. Determinations of credibility are for the jury, *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 628, 64 S.Ct. 724, 729, 88 L.Ed.967 (1944), not for witnesses, *Greenberg v. United States*, 280 F.2d 472, 475 (1st Cir. 1960). Prosecutorial cross-examination which compels a defendant to state that law enforcement officers lied in their testimony is improper [citations omitted].

> Similarly in *United States v. Sullivan*, 85 F.3d 743 (1st Cir. 1996), the prosecutor asked the defendant a series of questions regarding whether another witness had lied [footnote and citation omitted]. The First Circuit held that "this type of questioning is improper." [*Id.*, at 749]. The court declared "we state the rule now emphatically: counsel should not ask one witness to comment on the veracity of the testimony of another witness." *Id.* at 750. The court reasoned that "[i]t is not the place of one witness to draw conclusions about, or cast aspersions upon another witness' veracity."

United States v. Sanchez, 176 F.3d at 1219-1220.

There can be no doubt that the prosecution's forcing Berry and Thompson to brand as liars the police witnesses was highly prejudicial as was the prosecution's vouching argument. In *United States v. Boyd*, 54 F.3d 868, 871 (D.C. Cir. 1995), the Court held that the prosecutor infringed on the jury's right to make credibility determinations when he asked the defendant why the police witnesses would make up a story about him. Although the error might not be reversible standing alone, this Court can consider it in determining cumulative error.

In *Flowers v. State,* 842 So.2d 531, 553-54 (Miss. 2003) (*Flowers II)*, this Court reversed even in the absence of objection where the prosecution committed errors remarkably similar to the ones here. First of all, the prosecutor in *Flowers II,* as he had in *Flowers I,* attempted to impeach defense witnesses based on their alleged prior inconsistent statements without introducing those statements. The Court pointed out that it had frequently held that "[t]his line of questioning without evidentiary basis has been found by this Court to be inflammatory and highly prejudicial." This Court held the prosecution's attempt to impeach the witnesses without introducing the inconsistent statements was reversible error even in the absence of an objection by defense counsel.

The Court held that "[t]he standard of review which this Court must apply to lawyer misconduct during opening statements or closing arguments is "whether the natural and probable effect of the improper argument is to create unjust prejudice against the accused so as to result in a decision influenced by the prejudice so created." *Sheppard v. State*, 777 So.2d at 661

(Miss.2001) (citing *Ormond v. State*, 599 So.2d 951, 961 (Miss.1992)). The Court went on to hold that the cumulative effect of the prosecution's misconduct was reversible error. *Flowers II,* 842 So.2d at 553-554. *Chambers v. Mississippi*, 410 U.S. 284, 298, 93 S.Ct. 1038, 1047 (1973) [reversing based on various evidentiary errors resulting in a denial of due process].

As the courts have pointed out, "prosecutors have been admonished time and again to avoid statements to the effect that, if the defendant is innocent, government agents must be lying" and to refrain from improper vouching arguments. *United States v. Richter*, 826 F.2d at 209. This Court should reverse Mr. Berry's conviction.

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.

In cross-examining Berry's only witness, Gregory Thompson, the prosecution repeatedly impeached Thompson by asking him questions designed to show that he had told the prosecutor something different from what he testified to at trial. Tr. 228.

Specifically, the following colloquy occurred:

> Q. Well, let's put it this way: Yesterday when we did talk to you -- you remember talking to us; do you not?
>
> A. Yes, sir.
>
> Q. And there was another man in the room, an investigator with our office, right?
>
> A. Yes, sir.
>
> Q. And you remember you told us that they steady beat on him for 20 minutes without letting up?
>
> A. No, I didn't tell you that. I told you because you -- because we had -- we had cleared that before we left out the room. I told you -- I said -- I didn't tell you that they constantly beat on him for 20 minutes.
>
> Q. And I think what happened was, if you remember right -- do you agree or disagree with this --

A. I disagree that they were beating on him 20 minutes constantly.

Q. Okay. And what my -- and at first, you admit that you did say that to us, right?

A. No, sir. I didn't -- I didn't admit that. I told you I got -- told you they didn't constantly beat on him 20 minutes. You were trying to get me to say that that's what I said, but I know I didn't say that.

Q. I think what happened was -- and you can tell me if you agree or disagree with this -- that I told you would you expect that this person would have gone to the hospital with these injuries, and that's when you said, "Well, it really wasn't a constant beating." And that's when you changed and started coming down off of how bad the beating was.

A. No, I didn't.

Q. And then I think also when I went further and said that he didn't have any injuries, then you said, "Well, maybe it was ten minutes off and on. "

A. No, I didn't. You was trying to confuse me. That's what you were trying to do to me.

Q. Okay. Am I confusing you now?

A. No. You're not confusing me, but I'm just telling you what you was trying to do, sir.

Q. Okay. But at that time, that's what you had said earlier, regardless of -- you did try to clear whatever you wanted to clear, right?

A. I cleared it up. We cleared it up before we left out the room. I told you they was beating – they had him on the ground 15, 20 minutes. They was beating on him and hollering at him and cursing him out and everything, talking about where the drugs at and everything.

Q. So--

A. I know exactly what I told you.

Q. So the police, when they said that there was only two that came out of that room, they're lying?

A. They're lying. It wasn't no two of them. There was about four or five of them. I was standing – sitting right in the car looking dead at them.

Q. Okay. And you stuck around this whole time?

> A. I was sitting right there in the car because I wanted to see -- what I'm saying, when the -- when the door bust open, I said -- I looked out and said, "What's going on," like to myself.

Tr. 228-30.

Such tactics as those engaged in by the prosecution here have been repeatedly condemned by this Court. In *Scott v. State*, 446 So.2d 580, (Miss. 1984), the Court considered a case virtually identical to the one here. In that case, the in an attempt to show that the witness had given a different statement before the grand jury, the prosecutor embarked on a series of questions giving his version of what he claimed the witness had told the grand jury without introducing the transcript to show that the witness had indeed contradicted herself.

The Court held that the prosecutor's assertions that the witness' testimony was contradictory amounted to "nothing more than hearsay testimony on his part." The Court concluded that "allowing a district attorney to accuse a witness of making conflicting statements . . . without offering any proof to that effect amounts to a denial of due process." *Id.*, at 584.

As the court pointed out, where the prosecutor fails to introduce competent evidence of what the witness has actually said, the jury "is far more likely to believe that the witness did indeed make those statements before the grand jury simply because the district attorney is insistent that she did. *Id.*

Similarly in *Walker v. State*, 740 So.2d 873 (Miss. 1999), the prosecutor cross-examined the defendant about his alleged participation in alleged gang activity and about making threats to the deceased. After Walker denied such activity, the prosecutor failed to rebut Walker's denials. In vacating the death penalty, the Court said:

> The asking of questions without a factual basis leaves an impression in the mind of jurors that the prosecutor actually had such facts in hand and that the insinuations through questioning contained some truth. **This leaves false and inadmissible ideas in the minds of jurors that cannot be adequately rebutted by the testimony of witnesses or instructions from the court.** See Bennett L. Gershman, *Prosecutorial Misconduct* § 9.4(a), p. 9-23 (1989). In *United States v.*

> *Silverstein*, 737 F.2d 864, 867-868 (10th Cir. 1984), cited by Gershman, the prosecutor on cross examination asked the defendant if he knew a certain inmate, to which the defendant responded no. The prosecutor went on to ask about alleged conversations between the defendant and the inmate, and the inmate continuously denied knowledge of the statements or the person. *United States v. Silverstein*, 737 F.2d at 867-68. The prosecutor never called that inmate as witness. The trial court was found in error for permitting the prosecutor to ask the defendant the questions when the prosecutor knew he could not prove by any evidence the substance of the alleged conversation. *Id.* The court of appeals held that a prosecutor who asks the accused a question that implies the existence of a prejudicial fact must be prepared to prove that fact. *Id.*

Walker, at 884. *See also, Hosford v. State*, 525 So.2d 789, 793 (Miss. 1988) [error for the prosecutor to accuse or insinuate that the accused is guilty of other crimes for which he denies, and then makes no attempt to prove them]; *Sumrall v. State*, 257 So.2d 853, 854 (Miss .1972). [prosecutors should refrain from doing or saying anything that would tend to cause the jury to disfavor the defendant due to matters other than evidence relative to the crime].

In *Flowers v. State,* 773 So.2d 309, 327 (Miss. 2000) [*Flowers I*], the Court found plain error where the state tried to impeach defense non-party witnesses with allegedly prior inconsistent statements without introducing proof of the alleged statements. In *Flowers v. State,* 842 So.2d 531 (Miss. 2003) [*Flowers II*], the Court again found plain error when the prosecutor once more attempted to impeach witnesses without proving the statements claimed by the prosecutor to be inconsistent.

In *State v. Babich*, 68 Wash.App. 438, 443-447, 842 P.2d 1053, 1057-1059 (Wash.App. Div. 3 1993), the Court pointed out that

> [I]f foundation questions are asked and the witness denies making the inconsistent statement, there may be error under particular circumstances if the cross-examiner does not later introduce extrinsic evidence of the statement. If the rule were otherwise, cross-examination could be abused by making insinuations about statements that the witness did not in fact make, and the jury could be misled into thinking that the statements allegedly attributable to the witness were evidence.

Id. at 1057.

No doubt the state will argue that counsel for Berry waived any error when they did not object to the prosecutor's cross-examination. The State made a similar contention in the *Babich* case, *supra,* 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].

Berry had a constitutional right to be convicted only by competent evidence, not by innuendo and hearsay. The effect of the cross-examination by the prosecutor was to place before the jury, as evidence, certain statements purportedly made to the prosecutor that contradicted Thompson's trial testimony. This was done without the sworn testimony of any witness. The cross-examination, which was conducted with such an apparent show of authenticity, was prejudicial to the constitutional rights of Berry. It was patently designed to show that both Berry and his witness Gregory Thompson were both lying.

Since the only genuine issue was Berry's credibility and Thompson was his only corroborating witness, the error requires reversal. *See, e.g., United States v. Gradsky,* 373 F.2d 706 (5th Cir. 1967) [vouching error not harmless where credibility was the issue]; *United States*

v. Crutchfield, 26 F.3d 1098, 1103 (11th Cir. 1994) [reversing for prosecutorial misconduct where "[t]he prejudicial effect of [the misconduct cannot be disputed, as this case turned largely on the jury's credibility determinations of the several witnesses who testified"]; *United States v. Sanchez*, *supra* [cumulative effect of prosecutorial misconduct undercutting defendant's credibility was not harmless]; *United States v. Watson*, 171 F.3d. 695 , 700-01 (D.C. Cir. 1999) [error not harmless where "credibility was key"]; *United States v. Manning*, 23 F.3d 570, 575 (1st Cir. 1994), *cert. denied*, 519 U.S. 853 (1993) [prosecutorial misconduct not harmless where it "significantly interfered with the jury's ability to make an essential and liminal credibility determination"]; *United States v. Eyester*, 948 F.2d at 1208 [vouching not harmless where issue was government witness credibility relative to defense witnesses].

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: *s/Julie Ann Epps*
ATTORNEY FOR APPELLANT

CERTIFICATE

I, Julie Ann Epps, 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 23rd day of March, 2010.

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