IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DAVID TREJO — APPELLANT

VS. — NO. 2008-KA-2133

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

On or about November 29, 2005, David Trejo was indicted for possess with intent to sell a quantity of more than thirty (30) grams of cocaine, a schedule II controlled substance in Madison County, Mississippi, in violation of Mississippi Code Annotated § 41-29-139 (1972), as amended. The indictment was amended to reflect that Trejo was an habitual offender pursuant to Mississippi Code Annotated § 99-19-81 in that he was convicted of possession of cocaine in the United States District Court in the Southern District of Texas and was sentenced to serve 70 months in federal prison on or about October 16, 1997). Trejo was also convicted of unauthorized use of an automobile in the District court of Cameron County Texas and was sentenced to serve a term of six (6) years in the custody of the Texas Department of Criminal Justice. Trejo was convicted of possession of cocain with intent to sell as an habitual offender pursuant to Section 99-19-81 of the Mississippi Code of 1972. The trial court conducted a sentencing hearing on December 12, 2008 and sentenced Trejo to serve a term of sixty (60) years in the custody of the Mississippi department of corrections as an habitual offender pursuant to Section 99-19-81 of the Mississippi Code of 1972, and as a subsequent drug offender pursuant to

Section 41-29-147 of the Mississippi Code of 1972, and as such his sentence shall not be reduced or suspended nor shall he be eligible for parole or probation. Trejo then filed his Motion for New Trial and/or Motion for Judgment Notwithstanding the Verdict on September 22, 2008. Said motion was denied by the trial court on December 12, 2008. Trejo now appeals from the Judgment of Conviction entered April 1, 2008, the Order of Sentence, entered December 12, 2008, and the Corrected Order Overruling the Motion for New Trial, entered December 12, 2008.

SUMMARY OF THE ARGUMENT

The trial court correctly overruled Trejo's Motion to Suppress. The trial court did not abuse it's discretion in overruling Trejo's Motion to Supress. The State did not violate Trejo's due process rights by losing the video recording of Trejo's traffic stop. There was no discovery violation by the State and the Trejo's trial counsel was not ineffective. Trejo cannot overcome the presumption of competence and cannot meet either prong of *Strickland*. The record does not reflect ineffective representation and this assignment of error is properly made as a Motion for Post Conviction Relief. The trial court correctly refused proposed jury instructions D-4 and D-5, since they were improper comments on the evidence and were covered elsewhere in the jury instructions. There was ample proof that Trejo was an habitual offender pursuant to Mississippi Code Annotated Section 99-19-81.

ARGUMENT

I. The trial court correctly overruled Trejo's Motion to Suppress.

The standard of review for the suppression of evidence is abuse of discretion. *Chamberlin v. State*, 989 So.2d 320, 336 (Miss.2008) (citing *Miss. Transp. Comm'n v. McLemore*, 863 So.2d 31, 34 (Miss.2003)). The United States Supreme Court has noted that swift and necessary

actions by officers "must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures." Terry, 392 U.S. at 20, 88 S.Ct. 1868. "To stop and temporarily detain is not an arrest, and the cases hold that given reasonable circumstances an officer may stop and detain a person to resolve an ambiguous situation without having sufficient knowledge to justify an arrest." *Singletary v. State*, 318 So.2d 873, 876 (Miss.1975). Moreover, the Supreme Court noted that it is imperative that the facts be judged against an objective standard: "Would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" *Terry*, 392 U.S. at 21-22, 88 S.Ct. 1868 (citing *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925); *Beck v. Ohio*, 379 U.S. 89, 96-97, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964)). QThe traditional reasonableness standard under U.S. Supreme Court jurisprudence is determined by balancing an individual's privacy interests against legitimate governmental interests. See *e.g.*, *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652-53, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995). To determine whether the search and seizure were unreasonable, the inquiry is two-fold: (1) whether the officer's action was justified at its inception, and (2) whether it was reasonably related in scope to the circumstances which justified the interference in the first place. *Terry*, 392 U.S. at 19-20, 88 S.Ct. 1868. In order to satisfy the first prong, the law enforcement officer must be able to point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21, 88 S.Ct. 1868.

"An automobile stop is ... subject to the constitutional imperative that it not be 'unreasonable' under the circumstances. As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has

occurred." *Whren v. United States*, 517 U.S. 806, 810, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996) (citing *Delaware v. Prouse*, 440 U.S. 648, 659, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979); *Pennsylvania v. Mimms*, 434 U.S. 106, 109, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977)). The constitutional reasonableness of a traffic stop does not depend on the actual motivations of the individual officers involved. *Whren*, 517 U.S. at 813, 116 S.Ct. 1769.

"[T]he test for probable cause in Mississippi is the totality of the circumstances." *Harrison v. State*, 800 So.2d 1134, 1138 (Miss.2001) (citing *Haddox v. State*, 636 So.2d 1229, 1235 (Miss.1994)). Probable cause has been further defined as "a practical, nontechnical concept, based upon the conventional consideration of every day life on which reasonable prudent men, not legal technicians act. It arises when the facts and circumstances with[in] an officer's knowledge, or of which he has reasonably trustworthy information, are sufficient in themselves to justify a man of average caution in the belief that a crime has been committed and that a particular individual committed it." *Id.* (quoting *Conway v. State*, 397 So.2d 1095, 1098 (Miss.1980)). The smell of marijuana constitutes reasonable suspicion and supports further investigation of a suspected criminal offense, including the search of the passengers and interior of a vehicle. *Dies v. State*, 926 So.2d 910, 918 (Miss.2006) (citing *Boches v. State*, 506 So.2d 254, 264 (Miss.1987)).

A police officer has the authority to stop a motorist if he believes that person is committing a traffic offense. *Burnett v. State*, 876 So.2d 409, 411 (Miss.Ct.App.2003). Furthermore, the officer may take precautions to ensure his personal safety. *Dees v. State*, 758 So.2d 492, 495 (Miss.Ct.App.2000). If, while taking these precautions, the officer sees contraband and arrests the motorist, he may then search the vehicle. *Townsend v. State*, 681

So.2d 497, 502 (Miss.1996).

In *McFarland v. State*, the court noted that McFarland erroneously believed that because Officer Fontaine never issued a citation for the traffic violation then the stop was not valid. That is not the case. See *McCollins v. State*, 798 So.2d 624, 628 (Miss.Ct.App.2001).

The facts in the instant case reflect that on or about January 21, 2005, at 1:17 a.m., Officer Chris Picou conducted a traffic stop on Interstate 55. There were two individuals in the vehicle, David Trejo and Pebbles Nutt. (Tr. 55) Trejo was driving a red Chevrolet SUV and Nutt was in the passenger seat. Picou testified that he approached Trejo from behind in the left lane. Trejo was travelling 58 to 60 miles per hour, approximately 10 miles per hour below the speed limit of 70 along that area of the highway. Trejo was traveling the lane used primarily by vehicles going at faster rates of speed. Officer Picou testified that there are several signs posted along the interstate advising drivers for slower traffic to stay to the right. (Tr. 57) Officer Picou testified that he flashed his headlights to bright to get the subject to move over to the right lane. (Tr. 56) He waited 10 to 15 seconds after flashing his bright beams. Officer Picou repeated this three times. (Tr. 57) Trejo did not move over into the right lane to allow Officer Picou to pass him on the left-hand side. (Tr. 57) After Trejo failed to respond, Officer Picou then activated his blue lights. Officer Picou testified that the vehicle had a Texas tag.

Officer Picou testified that he had some concern that Trejo might be intoxicated or getting tired and zoned out from driving due to the early morning hour. He testified that he wanted to go ahead and pull him to the side to check his status. (Tr. 58) Officer Picou testified that he did not issue Trejo a ticket for failure to yield or any other traffic violation. After Officer Picou pulled Trejo over, he walked up to the passenger side of the vehicle. He observed a female passenger

and the driver, Trejo. (Tr. 58) Officer Picou testified that he advised Trejo of who he was and the reason he had stopped Trejo. Trejo advised Officer Picou that he was coming from the Houson, Texas area and was en route to Ohio. (Tr. 64) Officer Picou observed that both Trejo and Nutt appeared to be fatigued. They also appeared to be nervous in Officer Picou's presence. Officer Picou testified that he could smell a strong odor of air freshener and fabric softener in the vehicle. (Tr. 59) Officer Picou testified that in his prior experience, such fresheners are used to cover the odor of a controlled substance. (Tr. 60) Officer Picou then obtained Trejo's driver's license. (Tr. 60)

Officer Picou testified that he returned to his vehicle and ran a driver's license and criminal history check on Trejo. The criminal history check revealed that Trejo had been arrested on a couple of occasions for possession of controlled substances with intent. (Tr. 60) Officer Picou learned from the sheriff's office that Trejo's license was good and that there was no NCIC warrant for him. (Tr. 60) Officer Picou testified that he got out of his vehicle and then asked Mr. Trejo to step back to where he was. Picou spoke with Trejo and asked him about his criminal history. Trejo responded that he had been arrested when he was younger for stealing a car and that was the only time he had ever been arrested. His failure to disclose his previous arrests for possession with intent heightened Officer Picou's suspicion. Officer Picou then asked Trejo if there was anything illegal in his vehicle. Trejo stated that there was not. Picou then asked for permission to search the vehicle, which Trejo denied. (Tr. 61) Officer Picou then advised Mr. Trejo that he was going to run his dog around the vehicle and that he was going to have the passenger step out back there with him while he did this. (Tr. 61)

The window was down on the passenger's side and the vehicle was turned off. Officer

Picou walked up to the passenger side door and asked Nutt to step out. He advised her that he was going to run the dog around and get her to stand at the back of the vehicle with Mr. Trejo. When Nutt first stepped out of the vehicle, she turned her back to Officer Picou very quickly. (Tr. 62) Concerned for his safety, Officer Picou stopped Nutt to turn around because he wanted her to pull her pockets inside out to make sure that there were no weapons, blades or knives. When Nutt turned around, Officer Picou saw a large bulge in her midsection. Officer Picou, using the back of his hand, reached over and touched in that area. Officer Picou testified that he could feel a hard brick-shaped package on her stomach. (Tr. 63) Officer Picou testified that at that point he knew that is was a controlled substance that was strapped to Nutt's body. (Tr. 63)

Officer Picou testified that the stop was initially an investigatory stop to make sure that Treho was not intoxicated or impaired. Officer Picou testified that he has found drivers to be impaired even when they did not commit a traffic violation.

The instant case is distinguishable from *Couldery v. State*, 890 So.2d 959 (Miss.Ct.App.2004), since the record shows evidence of a traffic violation. Mississippi Code Annotated § 63-3-601(d) (1972), as amended, provides that:

> Upon all roadways any vehicle proceeding at less the normal speed of traffic at the time and place and under the conditions then existing shall be driven in the right-hand lane then available for traffic, or as close as practicable to the right-hand curb of edge of the roadway, except when overtaking and passing another vehicle proceeding in the same direction or when preparing for a left turn at an intersection on into a private road or driveway.

Testimony at the suppression hearing clearly established that Trejo was moving at less than the normal speed of traffic at the time and place and under the existing conditions. Further, Trejo did not comply with the lawful order of a police officer, when Officer Picou flashed his

high beams three times to signal to Trejo to move to the right hand lane. The trial judge, considering the totality of the circumstances, correctly held that

Even if an officer's belief that the subject is violating the law is based on an erroneous conclusion of law or fact, such mistake does not necessarily render the probable cause defective, as long as the officer's "probable cause [was] based on good faith and a reasonable basis then it is valid." *United States v. Wallace*, 213 F.3d 1216 (9th Cir.2000) In *Wallace*, the Supreme Court found that probable cause existed because of reasonable belief that suspect committed or was committing crime even though officer was mistaken that all front-window tint was illegal); In *United States v. Sanders*, 196 F.3d 910 (8th Cir.1999), the court held that the officer objectively had reasonable basis for probable cause even though vehicle was not technically in violation of the statute. In *DeChene v. Smallwood*, 226 Va. 475, 311 S.E.2d 749 (1984), the court held that arrest resulting from mistake of law should be judged by the same test as one stemming from mistake of fact; whether the arresting officer acted "in good faith and with probable cause."

Officer Picou testified that he did not believe that Trejo had committed a traffic violation and the trial judge ruled that the probable cause to stop the vehicle was not due to any draffic violation, but rather found that based on the Defendant's non-response to the flashing of the headlights and not moving over and traveling in the inside lane less than the maximum posted speed limit, that the officer wanted to check to see if the driver was intoxicated or sleepy or had some other impairment. The trial judge held that this is good probable cause to stop the vehicle. The trial judge distinguished the *Couldery* case, stating, "The only reason he stopped the vehicle was because it was traveling in the left hand lane, I would have followed the ruling in or holding the *Couldery* case and would have granted the motion to suppress and dismissed the charge, but

this was not the officer's testimony."

The trial judge further noted that the controlled substance was found on the passenger outside the vehicle. No evidentiary items or controlled substances were taken from the vehicle. (Tr. 155) The trial judge held that Trejo had no standing to object to the search of the passenger. The trial court therefore held that since nothing was found in the vehicle, there was nothing for the court to suppress.

The automatic standing rule provided that one charged with a possessory crime automatically had standing to object to a search which tended to establish the guilt of possession of the prohibited items. Jones was expressly overruled as to the "automatic standing" rule in *United States v. Salvucci*, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980).

Jones also contained language to the effect that anyone legitimately on the premises searched had standing to raise a fourth amendment challenge. That view was expressly repudiated by the United States Supreme Court in *Rakas v. State of Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). In *Rakas* the Court said, "We do not question the conclusion in Jones that the defendant in that case suffered a violation of his personal Fourth Amendment rights if the search in question was unlawful. Nonetheless, we believe that the phrase 'legitimately on the premises' coined in Jones creates too broad a gauge for measurement of Fourth Amendment rights." *Rakas*, 439 U.S. at 141-42, 99 S.Ct. at 429, 58 L.Ed.2d at 400. The Court went on to say that it was not an issue of standing, but a question of whether or not the defendant's own fourth amendment rights had been violated and that the claim to the protection of the fourth amendment depended on the legitimate expectations of privacy which the individual had and which society would accept. *Id.* at 138-43 n. 12, 99 S.Ct. at 427-31 n. 12, 58 L.Ed.2d at

398-401 n. 12. Property interests, possessory interests, and such concepts are not irrelevant and are not to be disregarded, but neither are they to be controlling. *Id.*

In *United States v. Meyer*, 656 F.2d 979 (5th Cir.1981) the Fifth Circuit followed *Rakas* and held that "a defendant must establish that his own Fourth Amendment rights were violated by an unlawful search and seizure." *Meyer*, 656 F.2d at 980. Additionally the Court said, "While an ownership of possessory interest is not necessarily required, the mere legitimate presence on the searched premises by invitation or otherwise, is insufficient in itself to create a protectable expectation." *Id.* at 981 (citing *Rakas*, 439 U.S. at 142-43, 99 S.Ct. at 429-30, 58 L.Ed.2d at 400-01).

Under the totality of the circumstance, where Trejo was driving approximately 10-12 miles an hour under the speed limit, in the lane that is statutorily reserved for traffic moving at higher rates of speed; Trejo did not respond to Officer Picou's repeated flashes of his high beams; and, Trejo was in a a car with an out-of-state tag, traveling in the early morning hours, Officer Picou had probable cause to stop Trejo's vehicle to ensure that he was not intoxicated or impaired. Further, after the stop, Trejo and Nutt appeared to be fatigued and very nervous, the car had a strong smell of air fresheners typical of drug traffickers who attempt to cover the scent of illegal drugs and Trejo lied to Officer Picou about his criminal back ground. These further indications heightened Officer Picou's suspicions and indicated that it was reasonable to believe that Trejo and Nutt were trafficking narcotics. Treho then refused consented for Officer Picou to search his vehicle. This sequence of events created probable cause for Officer Picou to determine that it was proper to use his K9 around the outside of the vehicle to detect drugs. This proved to be unnecessary since, when Nutt exited the car, she turned her back to Officer Picou

very quickly, arousing his suspicion that she might have a weapon. For his safety, he asked her turn around, at which time he saw the outline of the contraband around her midsection. At this point he read Trejo and Nutt their rights. After which, Trejo declared that the cocaine was his.

This issue is without merit. Trejo was in violation of Mississippi Code Annotated § 63-3-601(d) (1972), as amended. Further, as the trial court noted, the totality of the circumstances showed probable cause. Trejo was traveling considerably less that the maximum speed and traveling in the left hand lane despite signs along the interstate directing slow moving traffic to the right hand land. He was further traveling in a vehicle with an out-of-state tag in the wee hours of the morning. These factors taken together, in their totality created probable cause for Officer Picou to stop Trejo. Therefore, the trial court correctly denied the Motion to Suppress. As noted earlier, Trejo has no standing to object to the search of Nutt and admitted that the drugs were his, thus establishing joint possession. Since Trejo has no standing to object to Picou's search of Nutt, the four bricks of cocaine found on Nutt were correctly admitted into evidence.

Trejo argues that his detention was not reasonably related in scope to the circumstances which justified the stop initially. Trejo cites *U.S. v. Grant*, 349 F.3d 192, (5th Cir. 2003) for the proposition that, "[w]hen the purposes of the stop are resolved and the officer's initial suspicion have been verified or dispelled the detention must end unless there is additional reasonable suspicion supported by articulable facts." However, after Officer Picou stopped Trejo, his suspicions were not dispelled. In fact, the stop revealed that the occupants of the car were extremely nervous and fatigued. Trejo fumbled with his license and seemed to have difficulty removing it from his wallet. There was the strong odor of air fresheners sometimes used to overwhelm the scent of contraband drugs. The stop further revealed Trejo's prior arrests for

possession of cocaine. When asked about his criminal background, Trejo lied to Officer Picou. These additional factors which manifested after the car was initially stopped were sufficient to justify the further detention of Trejo and Nutt. The trial court correctly found that the length of the stop was not excessive and was justified by the totality of the circumstances.

This issue is without merit and the jury's verdict and the rulings of the trial court should be upheld.

II. The State did not violate Trejo's due process rights due to the loss of the video recording of Trejo's traffic stop.

Officer Picou testified on cross examination that there was an in-dash camera in his vehicle on the night he stopped Trejo and Nutt. The camera was set to begin recording five seconds after Officer Picou turned on his blue lights. Officer Picou testified that the camera did record the traffic stop. He testified that last time the tape was seen was with the last district attorney's office in the file. (Tr. 140) Picou testified that the camera was set to activate whenever he turned on his blue lights. Picou testified that prior to the grand jury, and during the old District Attorney's administration, he gave the tape to the District Attorney's Office. In an attempt to find the tape Officer Picou went back to the Madison County Sheriff's Office and had the lieutenant there look through all the items in the case to make sure that the DA's Office hadn't sent it back to them. Officer Picou determined that it was never given back to the Sheriff's Office to be kept in evidence.

The record reflects that during the time leading up to the trial of this case, there was a change in the administration of the District Attorney's Office. There is no evidence, testimony or indication of any wrong doing or intentional withholding of discoverable evidence by the DA's

Office.

Trejo argues "The State, by withholding the video tape of Trejo's stop, violated Trejo's due process rights by disregarding its duty to preserve evidence that might be significant to Trejo's case. The State also violated Trejo's due process rights under the United States Supreme Court's holding in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963).

Trejo makes great noise over the missing video tape, but it appears that the tape would not have helped him if it had appeared. Trejo disputes the validity of the stop by Officer Picou. However, Officer Picou testified that the camera did not begin to record until five seconds after he turned on his blue lights. This is after the events the led up to Picou's decision to stop Trejo's vehicle. Prior to the time the camera began recording, Officer Picou approached Trejo from behind in the left hand, or "overtaking" lane. Officer Picou testified that Trejo was traveling 10-12 miles per hour below the maximum speed limit and was in the lane clearly designated for fast moving traffic. Trejo did not respond as Officer Picou flashed his high-beam headlights at Trejo three times, pausing 10 seconds between each flash. It was after Trejo failed to respond that Picou activated his blue lights and pulled Trejo over. These are the events that lead up to the stop, and they would not have appeared on the tape. Thus the tape would have been no help to Trejo.

Further, while it is established that the State had the duty to turn over all exculpatory material relevant to a defendant, Trejo is unable to establish *Brady* violation. The United States Supreme Court has stated that "the suppression by the prosecution of *evidence favorable to an accused* upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland,

373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215, 218 (1963). See also Howard v. State, 945 So.2d 326, 337 (Miss.2006); Simon v. State, 857 So.2d 668, 699 (Miss.2003). [Emphasis added.]

In order to establish a Brady violation, the defendant must show: (1) that the State possessed *evidence favorable to the defendant*; (2) that the defendant did not possess the evidence and could not have obtained it himself with reasonable diligence; (3) *that the prosecution suppressed the favorable evidence*; and (4) that *had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.* Howard v. State, 945 So.2d 326 (Miss. 2006); *King v. State*, 656 So.2d 1168, 1174 (Miss.1995).

Trejo is unable to show that the State possessed evidence favorable to the defendant, since the only testimony that relates to the content of the video suggests that the video was favorable to the State. Further, there is no proof that the prosecution *suppressed* the video tape, merely, that it was lost. Trejo argues that it is "safe to conclude that the video tape was suppressed on the State's part." This accusation is completely unsupportable. There is no evidence at any hearing at any time that the State intentionally withheld this piece of evidence. It appears, that this videotape was lost. Finally, Trejo is unable to establish that had the tape been found, a reasonable probability exists that the outcome of the proceedings would have been different. Trejo cannot the requirements to prove a *Brady* violation. Therefore, this issue is without merit and the jury's verdict and the rulings of the trial court should be affirmed.

III. There was no discovery violation by the State and the Trejo's trial counsel was not ineffective.

Trejo alleges that the State committed a discovery violation in failing to produce the tape from the in-dash camera on Officer Picou's car. However, there is no motion or objection at trial citing Rule 9.04. Therefore it is procedurally barred. Where an argument has never been raised before the trial court, we repeatedly have held that "a trial judge will not be found in error on a matter not presented to the trial court for a decision." *Purvis v. Barnes*, 791 So.2d 199, 203 (Miss.2001). This issue is not properly before this Court, thus, it is without merit.

For an ineffective assistance of counsel claim to succeed, a defendant must satisfy the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Stringer v. State*, 627 So.2d 326, 328 (Miss.1993). The test requires that the defendant first show that counsel was deficient; he must then show that the deficiency prejudiced his defense. *McQuarter v. State*, 574 So.2d 685, 687 (Miss.1990) (citing *Strickland*, 466 U.S. at 687). Further, the defendant must overcome a "strong but rebuttable presumption that counsel's conduct falls within a broad range of reasonable professional assistance." Id. (citing *Gilliard v. State*, 462 So.2d 710, 714 (Miss.1985)).

The record in the case at bar reflects no deficiencies on the part of the trial counsel. Mississippi appellate courts have held that the "[c]onduct of trial counsel is measured toward the view that he has wide latitudinal discretion in effectuating reasonable representation on behalf of his client and that the decisions made at trial are strategic." *Scott v. State*, 742 So.2d 1190, 1195 (Miss.Ct.App.1999) (citing *Vielee v. State*, 653 So.2d 920, 922 (Miss.1995)). Furthermore, "[c]ounsel's choice of whether or not to file certain motions, call certain witnesses, ask certain questions, or make certain objections fall[s] within the ambit of trial strategy." *Id.* at 1196(¶ 14) (citations omitted). Mississippi appellate courts rarely second guess trial counsel regarding

matters of trial strategy. *Shorter v. State*, 946 So.2d 815, 819 (Miss.Ct.App.2007).

Even if trial counsel were deficient, Trejo still fails to satisfy the second prong of the Strickland test, which requires a showing that counsel's deficient performance prejudiced his defense. To satisfy this part of the test, Trejo would have to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Ransom v. State*, 919 So.2d 887, 890 (Miss .2005) (quoting *Foster v. State*, 687 So.2d 1124, 1130 (Miss.1996). The deficiencies Trejo alleges do not rise to this level.

A review of the record as a whole, reflects no obvious deficient performance, on the face of the record, by Trejo's trial counsel. A determination as to whether defense counsel's failure to pursue a defense strategy or call certain witnesses affected the outcome of the trial would involve factual inquiries that are not obvious on the face of the cold record on direct appeal. *Williams v. State*, 791 So.2d 895, 898-99 (Miss.Ct.App.2001). Where the record reflects no obvious ineffective assistance of counsel on the face of the record that the better practice is to deny relief on direct appeal. An appellant may pursue relief in a post-conviction relief proceeding. *Id.* This issue is without merit and the verdict of the jury and the rulings of the trial court should be affirmed.

IV. The trial court correctly refused proposed jury instructions D-4 and D-5.

Officer Picou testified on cross examination that there was an in-dash camera in his vehicle on the night he stopped Trejo and Nutt. The camera was set to begin recording five seconds after Officer Picou turned on his blue lights. Officer Picou testified that the camera did record the traffic stop. He testified that last time the tape was seen was with the last district

attorney's office in the file. (Tr. 140) Picou testified that the camera was set to activate whenever the blue lights are turned on. Picou testified that prior to the grand jury, and during the old District Attorney's administration, he gave the tape to the District Attorney's Office. In an attempt to find the tape Officer Picou went back to the Madison County Sheriff's Office and had the lieutenant there look through all the items in the case to make sure that the DA's Office hadn't sent it back to them. Officer Picou determined that it was never given back to the Sheriff's Office to be kept in evidence.

The record reflects that during the time leading up to the trial of this case, there was a change in the administration of the District Attorney's Office. There is no evidence, testimony or indication of any wrong doing or intentional withholding of discoverable evidence by the DA's Office. Trejo offered two jury instructions regarding the State's conduct of the it's investigation. Both instructions were refused by the trial court. Instruction D-4 stated:

> It is a defense theory that the prosecution's investigation evidence in this case was negligent, incomplete, purposefully distorted and/or not done in good faith.
>
> You are to assess the credibility of the investigative evidence together with all of the other evidence.
>
> Investigation which is thorough and conducted in good faith may be credible while an investigation which is incomplete, negligent or in bad faith may be found to have lesser value or no value at all.
>
> In deciding the credibility of the witnesses and the weight, if any, to give the prosecution's [sic] evidence, consider whether the investigation was negligent and/or conducted in bad faith.

Instruction D-5 stated:

> When potential evidence is not pursued by the party in the best position to make such an investigation, one may infer that the potential results of that investigation would be unfavorable to the party's cause.
>
> If you find the State's [sic] investigation in this matter to be negligent, incompetent, purposefully distorted and/or not done in good faith, you may draw

an adverse inference against the prosecution. This adverse inference may leave you with a reasonable doubt as to the defendant's guilt.

"[W]hile a party is entitled to have jury instructions submitted that represent his or her theory of the case, an instruction that 'incorrectly states the law, is covered fairly elsewhere in the instructions, or is without foundation in the evidence' need not be submitted to the jury." State v. McMurry, 906 So.2d 43, 46 (Miss.Ct.App.2004) (quoting *Agnew v. State*, 783 So.2d 699, 702 (Miss.2001)). The jury instructions D4 and D5 are without foundation in the evidence. There is testimony only of a missing video tape. There is no suggestion in the record of malfeasance of any kind. There is no testimony of any negligence, purposeful distortion or bad faith in the investigation carried out by the state. There is no evidence that the State conducted an incomplete investigation or did not explore every avenue available. Without some basis in the record, these jury instructions are improper and were correctly refused by the trial court. Further, these two instructions are already covered by Instruction Nos. 1 and D10 (C.P. 48), wherein, the trial court instructed the jury:

> It is your function to determine the facts in this case and to consider and weight the evidence for that purpose. You are to apply the law to the facts, and in this way decide the case. The evidence you are to consider consists of the testimony and statements of the witnesses, any stipulations made by the attorneys, and any exhibits admitted into evidence. You are also permitted to draw such reasonable inferences from the evidence as seem justified in the light of your own experience. ***It is your prerogative to determine what weight and what credibility will be assigned the testimony and supporting evidence of each witness in this case.*** You are required and expected to use your good common sense and sound honest judgment in considering and weighing the testimony of each witness who has testified. You should not be influenced by bias, sympathy or prejudice. Your verdict should be based on the evidence and not upon speculation, guesswork or conjecture.

Further, the trial court gave instruction D10 which stated, "***A reasonable doubt may arise***

not only from the evidence produced but also from a lack of evidence."

Finally, the offered instructions are an improper comment on the evidence. As previously stated, a party is entitled to have his theory of the case presented to the jury through instructions, if there is adequate evidence to support it. Reese v. Summers , 792 So.2d 992, 994 (Miss. 2001) (citing *Murphy v. Burney*, 27 So.2d 773, 774 (Miss.1946)); see also PACCAR Financial Corp. v. Howard, 615 So.2d 583, 590 (Miss.1993). Nonetheless, "[i]t is also well established that instructions to the jury should not single out or contain comments on specific evidence." Crimm v. State, 888 So.2d 1178, 1186 (Miss.Ct.App.2004) (quoting *Lester v. State*, 744 So.2d 757, 759 (Miss.1999)). Accordingly, the trial court did not abuse its discretion in refusing to grant jury instructions that inappropriately commented on the evidence.

This issue is without merit and the jury's verdict and the rulings of the trial court should be affirmed.

V. The trial court correctly sentenced Trejo as an habitual offender.

Trejo was sentenced as an habitual offender pursuant to Mississippi Code Annotated Section 99-19-81. Trejo's indictment was amended to include the following language, in pertinent part:

> It is also charged that the defendant in a habitual offender pursuant to Miss. Code Ann. § 99-19-81 in that he was convicted of possession of cocaine in the United States District Court, Southern District of Texas (Corpus Christi), Criminal Docket Number 2:97-cr-oo142-1, and sentenced to served 70 months in Federal prison on or about October 16, 1997 (a copy of this conviction is attached hereto as Exhibit "A"). Defendant was further convicted of the felony of Unauthorized Use of a Motor Vehicle in the 197th District Court of Cameron County, Texas, Cause Number 92-CR-963-C, and sentenced to serve a term of six (6) years in the custody of the Texas Department of Criminal Justice, Institutional Division (a copy of this conviction is attached hereto as Exhibit "B."

Trejo alleges that the State did not prove that Trejo had previously been convicted of and sentenced to one year of more for the above listed crimes. However, the State provided the investigator's testimony to outline the investigation and to show that Trejo had, in fact, been convicted of two prior felonies, thus satisfying Section 99-19=81 of the Mississippi Code Annotated.

Investigator David Ruth testified that he found a certified copy of a conviction against Guadalupe Leal. Ruth testified that he took information from an NCIC printout provided to him on Trejo. He used the FBI number and provided the information to the State of Texas who then provided the certified copies of the judgments of conviction. Ruth testified that Guadalupe Leal was convicted of unauthorized use of a motor vehicle and was sentenced to six (6) years with no suspension. (Tr. 215) The thumb print on the certified judgment of conviction was initialed D.T. Ruth also testified that he had obtained a Case History on David Arnoldo Trejo from the District Clerk's Office of Cameron County Texas. The cause number listed on the case history matched the certified conviction for Guadalupe Leal. The date of the birth on the two documents was the same as well. The report from the Madison County Sheriff's Department also showed the same date of birth. The entire certified Judgment of Conviction was received by Ruth from the Cameron County District Court, the last page was stamped certified. (Tr. 219) Ruth identified two judgements from the United States District Court, Southern District of Texas. David Arnoldo Trejo was listed as the defendant on each one. One document showed a revocation for eight months and the second showed a sentence for 70 months with five years supervised release. Ruth testified that he also contact the criminal justice section of the FBI in Clarksburg, Virginia and learned that Guadalupe Leal was listed as an alias on an arrest of David Trejo.

Based on the certified judgments of conviction and the testimony of Investigator Ruth, the trial judge sentenced Trejo under Mississippi Code Annotated Section 99-19-81.

This case is clearly distinguishable from cases where the State attempted to prove prior felony convictions by nothing more than an NCIS report. The best evidence of a conviction is a certified copy of the judgment of conviction, which certified judgements were presented to the trial court and admitted into evidence in the instant case. *Vince v. State*, 844 So.2d 510, 517 (Miss.Ct.App.2003). With certified judgements of conviction and testimony of an investigator clearly showing that the alias used on one of the two certified judgments was an alias used by Trejo, along with matching cause numbers on the NCIS report, matching birthdates on all reports as well as the initials beside the thumb print on the conviction under Trejo's alias, there was ample evidence for the trial judge to sentence Trejo as an habitual offender.

CONCLUSION

The assignments of error presented by the Appellant are without merit and the jury's verdict and the rulings of the trial court should be affirmed.

Respectfully submitted,

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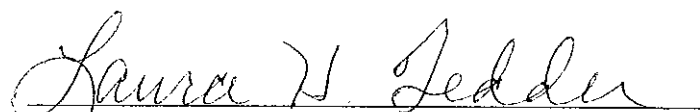
STATE OF MISSISSIPPI

By: 

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CERTIFICATE OF SERVICE

I, Laura H. Tedder, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 31st day of July, 2009.

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