IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CHRISTOPHER KEON DRUMMOND — APPELLANT

VS. — NO. 2008-KA-0313-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

The weight of the evidence, the effectiveness of trial counsel, alleged hearsay testimony, want of a speedy trial, and cumulative error form the nucleus of this appeal from a conviction of aggravated assault, *viz.*, a shooting which left the victim paralyzed from the waist down.

CHRISTOPHER KEON DRUMMOND, a/k/a "Funk," a/k/a "Chris Webb" (®. 34, 38, 41, 58-59, 62), a non-testifying defendant charged with shooting and seriously wounding Larry Moffett, a fifty (50) year old resident of Gulfport (®. 10), prosecutes a criminal appeal from the Circuit Court of Harrison County, Stephen B. Simpson, Circuit Judge, presiding.

Following a trial by jury conducted on December 12-13, 2007, Drummond was convicted of using a handgun to shoot and seriously wound Larry Moffett. Moffett was rendered a paraplegic and disabled for life (®. 16) by a bullet which entered his side, passed through both kidneys, and lodged in his vertebral column (® 15-16), all in violation of Miss.Code Ann. §97-3-7(2)(b).

Drummond was thereafter sentenced to serve twenty (20) years in the MDOC. (®. 131)

An indictment returned on May 1, 2007, charged that Drummond, on or about May 30, 2006,

> "... did unlawfully, feloniously, wilfully and purposely cause bodily injury to Larry James Moffett, with a deadly weapon, to-wit: a handgun, by shooting the said Larry James Moffett with said weapon, contrary to the form of the statute in such cases made and provided, ..." (C.P. at 6)

Drummond was arrested on July 14, 2006, following the issuance of a warrant on May 30th. (®. 105) He waived arraignment on August 6, 2007, and was tried on December 12-13, 2007. (®. 94, 105; C.P. at 3)

Glenn F. Rishel, Jr. represented Drummond effectively at trial and perfected Drummond's appeal to this Court. (C.P. at 39-42)

An appellate brief filed by the Mississippi Office of Indigent Appeals was, on motion to strike filed by Court Counsel, struck on July 30, 2008.

Drummond was permitted to file a *pro se* brief and has done so here.

Drummond raises the following issues:

1. Whether the verdict of the jury was against the overwhelming weight of the evidence.

2. Whether Drummond received the ineffective assistance of counsel.

3. Whether the trial court erred in allowing a witness to testify to alleged hearsay information.

4. Whether Drummond was denied both his statutory and constitutional right to a speedy trial.

5. Whether cumulative error necessitates reversal even if a single error does not.

STATEMENT OF FACTS

The salient facts articulated by Drummond in the original brief struck by this Court are accurate. We repeat some of them here.

On May 30, 2006, around 9:00 p.m., Doris Duckworth drove up to a home located at 1411 Dixie Avenue in Gulfport and blew her horn. Her purpose was to summon Larry Moffett outside. (®. 13, 38-40, 50-51) Duckworth testified she wanted to warn Moffett that Drummond was looking for him. (®. 38)

As Moffett was coming outside the house, a van that had been following Duckworth drove up from behind and stopped. (®. 50) A black male identified by Duckworth as Drummond got out of the van and spoke with Duckworth's female passenger, a young woman named Noonie.

Before anything else could be said the person from the van walked behind Duckworth's vehicle, confronted Moffett with an accusation of theft of drugs, and then shot Moffett one time. The bullet wound rendered Moffett a paraplegic and disabled for life. (®. 16)

Duckworth, both at trial and in a pretrial photographic lineup as well, identified the shooter as Christopher Drummond. (®. 34, 41-42, 44-45)

Larry Moffett, on the other hand, could not make an identification of any kind. He testified he did not know the black male who shot him. "I've never seen the boy before in my life." (®. 17, 13-14)

Duckworth testified that prior to the shooting she had been at the home of Tony Henderson where she overheard Drummond threaten to kill Moffett because he had allegedly stolen some pills belonging to Drummond. (®. 39)

Tony Henderson corroborated Duckworth's testimony concerning Drummond's threat to kill Moffett. (®. 28)

Duckworth testified she drove to Moffett's location in order to warn him about the threats, and on the way she noticed a van was following her. (®. 40-41) Duckworth took evasive action and thought she had lost the van. (®. 50-51) She had not.

Duckworth testified she saw Drummond shoot Moffett at close range by the driver's window. (®. 38, 41-42, 54-55) Duckworth left the scene immediately after the shooting because she " got scared after Larry [Moffett] fell." (®. 42, 47, 49) A short time later she was interviewed by local authorities, identified Drummond as the shooter, and subsequently picked him out of a photographic lineup. (®. 43-45)

Eight (8) witnesses testified for the State of Mississippi during its case-in-chief, including Doris Duckworth, an ear and eyewitness to the shooting who positively identified Drummond as the shooter, both in court and out-of-court in a photographic lineup. (®. 34, 41-42, 44-45)

At the close of the State's case-in-chief Drummond's motion for a directed verdict was overruled based upon the eyewitness identification by Duckworth and the testimony of Tony Henderson that on a day prior to the day that Moffett was shot, Drummond told Henderson to tell Moffett that Drummond was going to kill Moffett because Moffett stole some "little pink round pills" that belonged to Drummond. (®. 28) At the time this statement was made, Drummond " . . . had a gun in his hand." (®. at 29)

After being personally advised of his right to testify or not, Drummond personally told Judge Simpson he did not desire to testify in this cause. (®. 106-07)

Peremptory instruction was subsequently denied. (C.P. at 25)

The jury retired to deliberate at 11:08 a.m. and returned with the following verdict an hour later at 12:07 p.m. "We, the jury[,] find the defendant, Christopher Keon Drummond, guilty of aggravated assault." (®. 126)

A poll of the jury, individually by name, reflected the verdict was unanimous. (®. 126-27)

Judge Simpson, who was aware that Moffett suffered serious and debilitating injuries, thereafter sentenced Drummond to serve twenty (20) years in the MDOC. (®. 130-31)

Drummond filed a motion for a new trial or for judgment notwithstanding the verdict on December 14, 2007, alleging, *inter alia*, the verdict of the jury was " . . . contrary to the weight of the evidence." (C.P. at 36-37)

On February 7, 2008, that motion was overruled. (C.P. at 38)

SUMMARY OF THE ARGUMENT

Weight of Evidence. The circuit judge did not abuse his judicial discretion in overruling Drummond's motion for a new trial grounded, in part, on the allegation the verdict of the jury was against the overwhelming weight of the evidence. Drummond did not testify at trial and failed to call a single witness in his defense.

The ear and eyewitness testimony of Doris Duckworth identifying Drummond as the shooter, and the testimony of Anthony Henderson that Drummond, gun in hand, told Henderson he intended to kill Moffett because Moffett stole his pills weighs heavily in favor of guilty. Put another way, the evidence does not preponderate in favor of Drummond.

Ineffective Assistance of Counsel. To prove a claim of ineffective assistance of counsel, a defendant must show (1) a deficiency in counsel's performance (2) sufficient to constitute prejudice to the defense. **Strickland v. Washington,** 466 U.S. 668, 687 (1984); **Moody v. State,** 644 So.2d 451, 456 (Miss. 1994).

The burden of proving both prongs of **Strickland** is on the defendant who faces a "rebuttal presumption that counsel's performance falls within the broad spectrum of reasonable professional assistance." **Moody v. State,** *supra*, 644 So.2d at 456; **McQuarter v. State,** 574 So.2d 685, 687 (Miss. 1990).

Drummond has failed to satisfy both prongs of the **Strickland** test.

Hearsay Evidence. The evidence complained about by Drummond was non-hearsay and patently admissible.

In any event, there was no objection, contemporaneous or otherwise, to the specific testimony identified by Drummond. Accordingly, his compliant is procedurally barred.

Denial of a Speedy Trial. This issue is raised for the first time on appeal. Accordingly, it should not be addressed here.

In any event, Drummond never asserted his right to a speedy trial and has failed to demonstrate one whit of prejudice to his defense. Most of Drummond's argument on this issue refers to the defendant/appellant as a person named "McClendon." (Appellant's Brief at 22-23) This, we think, is fatal to "Drummond's" complaint. Although Drummond was known by several nick names, "McClendon" was not one of them.

In any event, it is clear from the record that Drummond was denied neither his statutory nor constitutional right to a speedy trial.

Drummond has neither alleged nor demonstrated that delay, if any, caused specific prejudice or problems in the preparation and trial of his case.

The familiar analysis found in **Barker v. Wingo** [citation omitted] clearly favors the State.

Cumulative Error. Because there is no reversible error in any part there is no reversible error to the whole. **McFee v. State**, 511 So.2d 130, 136 (Miss. 1987).

ARGUMENT

ISSUE ONE

THE VERDICT OF THE JURY WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE. THE EVIDENCE FAILS TO PREPONDERATE IN FAVOR OF DRUMMOND.

Drummond claims the guilty verdict returned is against the overwhelming weight of the evidence. We disagree.

In the case *sub judice,* the prosecution had ear and eyewitness testimony from Doris Duckworth identifying Drummond, a/k/a "Funk," as the shooter (®. 34, 41-42), as well as solid testimony from Anthony Henderson reflecting that Drummond told Henderson to tell Larry Moffett that Drummond, who had a gun in his hand at the time he spoke, was going to kill Moffett because Moffett stole Drummond's little pink pills. (®. 28)

Duckworth described Drummond's threat to kill Moffett as well. ®. 39, 57) She also picked the person she knew as "Funk" out of a photographic lineup and positively identified him as the shooter. ®. 44-45)

Drummond did not testify and produced no witnesses in his defense. Accordingly, the evidence pointed overwhelmingly to Drummond's guilt of aggravated assault.

"Weight" implicates the denial of a motion for a new trial while "sufficiency" implicates the denial of motions for directed verdict, peremptory instruction, and judgment notwithstanding the verdict. **May v. State,** 460 So.2d 778, 781 (Miss. 1984).

This Court reviews the trial court's denial of a post-trial motion under the abuse of discretion standard. **Flowers v. State,** 601 So.2d 828, 833 (Miss. 1992); **Robinson v. State,** 566 So.2d 1240, 1242 (Miss. 1990). No abuse of judicial discretion has been demonstrated here because the testimony of the witnesses for the State fully supports the verdict. Put another way, the evidence does not preponderate in favor of Drummond.

Drummond, we note, blurs the distinction between "weight" and "sufficiency" by stating that his motion for a directed verdict made at the close of the State's case should have been granted.

We need only to point to the observations made by the circuit judge. He denied Drummond's

motion for a directed verdict with the following rhetoric which is both judicious and correct:

> THE COURT: All right. The testimony of Ms. Duckworth who was present at the time the shot was fired striking Mr. Moffett, she identified Mr. Drummond, the defendant, as the shooter.
>
> It was based on her knowledge of Mr. Drummond, knowing him from the community and knowing his family. That taken also in light of Mr. Tony Henderson's testimony with respect to knowing the defendant, having had prior conversations in the days just prior to the shooting where Mr. Drummond made threats with respect to killing the defendant, that testimony, that eyewitness testimony, and Mr. Henderson's testimony and all the reasonable inferences that may be drawn therefrom clearly make this a direct evidence case and a question for the jury to decide, and the motion for directed verdict is overruled. (®. 106)

Drummond's defense was that of mis-identification by Doris Duckworth as well as defense counsel's commendable efforts to convince the jury that Duckworth was a prevaricator of the worst kind. (®. 117-18)

Drummond, at his own request, was granted jury instruction D-3A which placed the identification testimony squarely in the lap of the fact-finder. (C.P. at 24) "[T]he [Supreme] [C]ourt is bound by the jury findings upon an issue presented by [an] instruction requested by appellant." **Kinney v. State,** 336 So.2d 493, 496 (Miss.1976).

In the end the credibility of both Duckworth and Henderson were matters for the jury to consider. Their testimony was certainly worthy of belief. The evidence as a whole fails to preponderate in favor of Drummond. Accordingly, the trial judge did not abuse his broad judicial discretion in overruling the defendant's subsequent motion for a new trial based upon Drummond's claim "c) the verdict is contrary to the weight of the evidence." (C.P. at 38)

The applicable standard of review is found in **McCallum v. State**, No. 2007-KA-00992-COA decided December 9, 2008 (¶¶ 23-24) [Not Yet Reported] where we find the following

language:

> McCallum also argues that the trial judge erred in denying his motion for a new trial because he claims that his conviction was against the overwhelming weight of the evidence. "Motions for [a] new trial challenge the weight of the evidence supporting the verdict." *Bridges v. State,* 807 So.2d 1228, 1231 (¶14) (Miss. 2002). In *Chambliss v. State,* 919 So.2d 30, 33-34 (¶10) (Miss. 2005) (quoting *Bush*, 895 So.2d at 844 (¶18)), the Mississippi Supreme Court held that:
>
> > When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, we will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice. *Herring v. State,* 691 So.2d 948, 957 (Miss. 1997). We have stated that on a motion for new trial, the court sits as a thirteenth juror. The motion, however, is addressed to the discretion of the court, which should be exercised with caution, and the power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict. *Amiker v. Drugs for Less, Inc.,* 796 So.2d 942, 947 (Miss. 2000). However, the evidence should be weighed in the light most favorable to the verdict. *Herring,* 691 So.2d at 957. A reversal on the grounds that the verdict was against the overwhelming weight of the evidence, "unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict." *McQueen v. State,* 423 So.2d 800, 803 (Miss. 1982). Rather, as the "thirteenth juror," the court simply disagrees with the jury's resolution of the conflicting testimony. *Id.* This difference of opinion does not signify acquittal any more than a disagreement among the jurors themselves. *Id.* Instead, the proper remedy is to grant a new trial.
>
> We conclude that the jury's verdict was not against the overwhelming weight of the evidence. Additionally, as previously stated, Clark testified as to what happened on the day of the shooting, and Butler testified that he witnessed McCallum

> shoot Clark. McCallum's testimony is not sufficient to support a finding that the jury's verdict was against the overwhelming weight of the evidence. Given the weight of the evidence supporting McCallum's conviction, allowing the jury's verdict to stand will not "sanction an unconscionable injustice." There is no merit to this issue. (¶¶ 23-24, Slip Opinion at 11-12]

It is elementary that the jury, not the trial or reviewing Court, is the **sole judge of** the weight and credibility of evidence. **Harris v. State**, 532 So.2d 602 (Miss. 1988); **Byrd v. State**, 522 So.2d 756, 760 (Miss. 1988). "Under our system, the jury is charged with the responsibility for weighing and considering . . . the credibility of witnesses." **Harris v. State**, 527 So.2d 647, 649 (Miss. 1988).

We reiterate.

The jury, not the reviewing Court, judges the weight and credibility of each witness's testimony and is free to accept or reject it. **Bailey v. State**, 729 So.2d 1255 (Miss. 1999). Of course, the jury, in a criminal prosecution, is permitted to accept the testimony of some witnesses and reject that of others and may accept or reject in part the testimony of any witness or may believe in part the evidence on behalf of the State and the defendant. **Evans v. State**, 725 So.2d 613 (Miss. 1997).

We are of the opinion the verdict finding Drummond guilty of aggravated assault is not against the overwhelming weight of the evidence and that to affirm his conviction would not sanction an unconscionable injustice.

"[I]t is not for this court to pass upon the credibility of witnesses, [*viz.*, Duckworth and Henderson], and where the evidence justifies the verdict it must be accepted as having been found worthy of belief." **Grooms v. State,** 357 So.2d 292, 295 (Miss. 1978) quoting from **Murphree v. State,** 228 So.2d 599, 601 (Miss. 1969). *See also* **Pinson v. State,** 518 So.2d

1220, 1224 (Miss. 1980) ["It is not our function to determine whose testimony to believe."] Put another way,

> "[w]e do not sit as jurors. That fact-finding body, while being overseen by the trial court, has the constitutional duty to decide which witnesses are relating an accurate account of the occurrences giving rise to the trial. * * * " **Griffin v. State,** 381 So.2d 155, 157 (Miss. 1980).

The following language found in **Hyde v. State**, 413 So.2d 1042, 1044 (Miss. 1982), quoting from **Evans v. State**, 159 Miss. 561, 132 So. 563, 564 (1931), is applicable here:

> We invite the attention of the bar to the fact that we do not reverse criminal cases where there is a straight issue of fact, or a conflict in the facts; juries are impaneled for the very purpose of passing upon such questions of disputed fact, and we do not intend to invade the province and prerogative of the jury.

In **Maiben v. State**, 405 So.2d 87, 88 (Miss. 1981), this Court announced that

> . . . . . we will not set aside a guilty verdict, absent other error, **unless it is clearly a result of prejudice, bias or fraud, or is manifestly against the weight of credible evidence.** [emphasis supplied]

The following observations made in **Groseclose v. State**, 440 So.2d 297, 300 (Miss. 1983), are also worth repeating here:

> We will not order a new trial unless convinced that the verdict is so contrary to the overwhelming weight of the evidence that, to allow it to stand, **would be to sanction an unconscionable injustice.** *Pearson v. State*, 428 So.2d 1361, 1364 (Miss. 1983). Any less stringent rule would denigrate the constitutional power and responsibility of the jury in our criminal justice system. [emphasis supplied]

In short, this Court will not set aside a guilty verdict unless the verdict is manifestly against the weight of credible evidence [**Maiben v. State,** 405 So.2d 87, 88 (Miss. 1981)] and unless this Court is convinced that to allow the verdict to stand, would be to sanction an

unconscionable injustice. **Groseclose v. State**, 440 So.2d 297, 300 (Miss. 1983).

Contrary to Drummond's position, the case at bar does not exist in this posture.

ISSUE TWO

DRUMMOND HAS FAILED ON DIRECT APPEAL TO MAKE OUT A CLAIM *PRIMA FACIE* OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL. THE RECORD FAILS TO AFFIRMATIVELY REFLECT INEFFECTIVENESS OF CONSTITUTIONAL DIMENSIONS.

TRIAL COUNSEL'S PERFORMANCE WAS NEITHER DEFICIENT NOR DID ANY DEFICIENCY PREJUDICE THE DEFENDANT.

Drummond, relying largely upon a nine (9) page quotation from the seminal decision of **Strickland v. Washington,** *supra*, 466, U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), contends he was denied the effective assistance of trial counsel. (Appellant's Brief at 5, 7-15)

Specifically, he argues in Issue One that during the State's direct examination of Larry Moffett, the victim, defense counsel failed to object to an attempt by the prosecutor to elicit hearsay information. (Appellant's Brief at 16)

Drummond also argues in a separate issue (Issue Two) that Mr. Rishel was ineffective in the constitutional sense because he failed to object to additional hearsay testimony elicited from the victim concerning Doris Duckworth's identification of the shooter. (Appellant's Brief at 18-19)

Drummond's brief recites the correct law, but reaches the wrong conclusion. (C.P. at 22-25)

First, the criticized testimony was non-hearsay. Therefore, counsel could not have been ineffective for his failure to object on hearsay grounds. (Appellant's Brief at 16-17, 18-19)

Second, the failure to make certain objections falls within the ambit of trial strategy and cannot give rise to a claim of ineffective counsel. The truth of this matter is found in **Jackson v. State,** 815 So.2d 1196, 1200 (¶8) (Miss. 2002), where we find the following language penned by Justice Cobb:

> Our standard of review for a claim of ineffective assistance of counsel is a two part test: the defendant must prove, under the totality of the circumstances, that (1) his attorney's performance was deficient and (2) the deficiency deprived the defendant of a fair trial. *Hiter v. State*, 660 So.2d 961, 965 (Miss. 1995). This review is highly deferential to the attorney, with a strong presumption that the attorney's conduct fell within the wide range of reasonable professional assistance. *Id.* at 965. **With respect to the overall performance of the attorney, 'counsel's choice of whether or not to file certain motions, call witnesses, ask certain questions, or make certain objections fall within the ambit of trial strategy' and cannot give rise to an ineffective assistance of counsel claim.** *Cole v. State*, 666 So.2d 767, 777 (Miss. 1995). [emphasis ours]

See also **Harris v. State,** 822 So.2d 1129 (Ct.App.Miss. 2002).

The following language articulated by the Court of Appeals in **Reynolds v. State,** 736 So.2d 500, 511 (Ct.App.Miss. 1999), (¶41), is also *apropos* to the issue before the Court:

> "[T]here is no 'single, particular way to defend a client or to provide effective assistance.' " *Handley*, 574 So.2d at 684 (quoting *Cabello*, 524 So.2d at 317). Defense counsel is presumed competent. *Johnson v. State*, 476 So.2d 1195, 1204 (Miss. 1985). "There is no constitutional right then to errorless counsel . . . " *See Handley*, 574 So.2d at 683 (quoting *Cabello*, 524 So.2d at 315). * * * "

We must, of course, gauge counsel's performance by the applicable standard supplied by **Strickland v. Washington,** *supra*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Drummond has failed to demonstrate on direct appeal that trial counsel's "over-all" performance

was deficient and that the deficiency actually prejudiced the defendant.

As noted in our response to Drummond's weight of the evidence complaint, the prosecution had ear and eyewitness testimony from Doris Duckworth identifying Drummond, a/k/a "Funk," as the shooter (®. 34, 41-42), as well as solid testimony from Anthony Henderson reflecting that Drummond told Henderson to tell Larry Moffett that Drummond, who had a gun in his hand at the time he spoke, was going to kill Moffett because Moffett stole Drummond's little pink pills. (®. 28)

Duckworth described Drummond's threat to kill Moffett as well. (®. 39, 57) She also picked the person she knew as "Funk" out of a photographic lineup and positively identified him as the shooter. ®. 44-45)

Drummond did not testify and produced no witnesses in his defense. Accordingly, the evidence pointed overwhelmingly to Drummond's guilt of aggravated assault.

Drummond raises the issue of ineffective counsel for the first time on direct appeal. The scope of review is found in the recent decision of Wynn v. State, 964 So.2d 1196, 1200 (Ct.App.Miss. 2007), where we find the following language penned by Justice Carlton:

> While this Court may consider the merits of a claim of ineffective assistance of counsel raised for the first time on direct appeal, it is unusual to do so because "[w]e are limited to the trial court record in our review of the claim and there is usually insufficient evidence within the record to evaluate the claim." *Wilcher v. State*, 863 So.2d 776, 825 (¶171) (Miss. 2003) (citing *Aguilar v. State*, 847 So.2d 871, 878 (¶17) (Miss.Ct.App. 2002) (citation omitted)). Our supreme court instructs that, on direct appeal, the entire record should be reviewed. *Read v. State*, 430 So.2d 832, 841 (Miss. 1983). This Court will reach the merits of an ineffective assistance claim only in instances where, "(1) the record affirmatively shows ineffectiveness of constitutional dimensions, or (2) the parties stipulate that the record is adequate to allow the appellate court to make the finding without consideration of the findings of fact of the trial judge." *Wilcher*,

> 863 So.2d at 825 (¶171) (citations omitted). Where the record is insufficient to support a claim of ineffective assistance, "[t]he appropriate conclusion is to deny relief, preserving the defendant's right to argue the same issue through a petition for post-conviction relief." *Aguilar*, 847 So.2d at 878 (¶17) (citing *Read*, 430 So.2d at 837).

In the end, the record in the **Wynn** case did not affirmatively show ineffectiveness of constitutional dimensions.

The same is true here.

Drummond has failed to demonstrate on direct appeal that trial counsel's "over-all" performance was deficient and that any deficiency actually prejudiced the defendant. In other words, the official record fails to affirmatively reflect ineffectiveness of constitutional dimension.

After all, it was not trial counsel's performance that sealed the fate of Christopher Drummond. Rather, it was testimony concerning a prior threat to kill and ear and eyewitness testimony identifying him as the shooter, together with reasonable inferences from all the evidence, that pointed to guilt beyond a reasonable doubt.

ISSUE THREE

THERE BEING NO OBJECTION, CONTEMPORANEOUS OR OTHERWISE, TO THE ALLEGED HEARSAY TESTIMONY COMPLAINED ABOUT FOR THE FIRST TIME ON APPEAL, THE ARGUMENT IS PROCEDURALLY BARRED.

Drummond complains about the admission of hearsay testimony from Moffett, the victim, regarding statements, out-of-court, made to him by Duckworth identifying Drummond as the man who shot him. The problem with this argument is that Moffett's testimony failed to generate an objection, contemporaneous or otherwise, to the allegedly objectionable testimony

recited by Drummond in his brief at pages 17-18. Drummond concedes the point in his brief at page 19. Consequently, Drummond's complaint is procedurally barred.

Regrettably, there is no ruling by the trial judge to review. We respectfully point out the testimony of Moffett complained about "here and now" was not so obviously egregious and prejudicial "then and there."

Quite frankly, the testimony was innocuous. Moffett did not identify the "she" or the shooter in his allegedly objectionable testimony.

These observations, standing alone, are fatal to Drummond's hearsay complaint raised here for the first time on appeal. In short, any error was waived when Drummond failed to object during trial. Accordingly, Drummond has "forfeited" his right to raise this claim on appeal. *See* **United States v. Dodson,** 288 F.3d 153 (5th Cir. 2002), reh denied, cert denied 123 S.Ct. 32 [Forfeiture is the failure to make the timely assertion of a right, generally by failure to object to an error in the proceedings.]

It is elementary that a contemporaneous objection is required in order to preserve an error for appellate review. **Caston v. State,** 823 So.2d 473 (Miss. 2002), reh denied; **Logan v. State,** 773 So.2d 338 (Miss. 2000); **Florence v. State,** 755 So.2d 1065 (Miss. 2000); **Jackson v. State,** 766 So.2d 795 (Ct.App.Miss. 2000); **Goree v. State,** 750 So.2d 1260 (Ct.App.Miss. 1999).

Otherwise the error, if any at all, is waived for appeal purposes. **Caston v. State,** *supra,* 823 So.2d 473 (Miss. 2002), reh denied.

Stated differently, "[t]he failure to object at trial acts as a procedural bar in an appeal." **White v. State,** 964 So.2d 1181, 1185 (Ct.App.Miss. 2007), citing **Jackson v. State,** 832 So.2d at 579, 581(¶3) (Ct.App. Miss. 2002), citing **Carr v. State,** 655 So.2d 824, 853 (Miss. 1995).

A defendant is not entitled to raise new issues on appeal that he has not first presented to the trial court for consideration. **Hodgin v. State,** 964 So.2d 492 (Miss. 2007). This rule is not diminished in a capital case. **Flowers v. State,** 947 So.2d 910 (Miss. 2007). Moreover, it also applies to constitutional questions. **Williams v. State,** 971 So.2d 581 (Miss. 2007) ["As a general rule, constitutional questions not asserted at the trial level are deemed waived."] *See also* **Ross v. State,** 954 So.2d 968, 987-88, 1015 (Miss. 2006); **Rogers v. State,** 928 So.2d 831, 834 (Miss. 2006).

In **Gonzales v. State,** 963 So.2d 1138, 1144 (Miss. 2007), the Supreme Court reaffirmed the rule with the following rhetoric:

> 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).

The contemporaneous objection rule has been applied to speedy trial violations, discovery violations, ***Batson*** violations, in-court identifications, admission of wrongfully obtained evidence, trial *in absentia,* and the like. *See* **Miller v. State,** 956 So.2d 221 (Miss. 2007) [speedy trial]; **Jackson v. State,** 962 So.2d 649 (Ct.App.Miss. 2007), reh den, cert den [discovery]; **Flowers v. State,** 947 So.2d 910 (Miss. 2007) and **Roles v. State,** 952 So.2d 1043 (Ct.App.Miss. 2007) [***Batson***]; **Black v. State,** 949 So.2d 105 (Ct.App.Miss. 2007) [in-court identifications]; **Gonzales v. State,** *supra,* 963 So.2d 1138 (Miss. 2007)[wrongfully obtained evidence]; **Mallard v. State,** 798 So.2d 539 (Miss. 2001) [trial *in absentia*].

The contemporaneous objection rule is in place in order to enable the trial judge to correct error with proper instructions to the jury whenever possible. **Slaughter v. State,** 815 So.2d 1122 (Miss. 2002), reh denied.

A trial court cannot be put in error unless it had an opportunity to first pass on the question. **Palm v. State,** 748 So.2d 135 (Miss. 1999); **Fulgham v. State,** 770 So.2d 1021 (Ct.App.Miss. 2000). *See also* **Mallard v. State,** *supra*, 798 So.2d 539, 542 (Miss. 2001), where this Court held that Mallard's complaint that she was tried in her absence was waived, for the purposes of appeal, since she failed to object to her trial *in absentia.*

Miss.Code Ann. § 99-35-143 is precisely in point. It reads, in its pertinent parts, that

> [a] judgment in a criminal case **shall not be reversed** because the transcript of the record does not show a proper organization of the court below or of the grand jury, or where the court was held, or that the prisoner was present in court during the trial or any part of it, or that the court asked him if he had anything to say why judgment should not be pronounced against him upon the verdict, **or because of any error or omission in the case in the court below, except where the errors or omission are jurisdictional in their character, unless the record show that the errors complained of were made ground of special exception in that court.** [emphasis added]

The underlying bases for the existence of a contemporaneous objection rule are contained in **Oates v. State**, 421 So.2d 1025, 1030 (Miss. 1982), where we find the following:

> There are three basic considerations which underlie the rule requiring specific objections. It avoids costly new trials. Boring v. State, 253 So.2d 251 (Miss. 1971). It allows the offering party an opportunity to obviate the objection. Heard v. State, 59 Miss. 545 (Miss. 1882). Lastly, a trial court is not put in error unless it had an opportunity to pass on the question. Boutwell v. State, 165 Miss. 16, 143 So. 479 (1932). These rules apply with equal force in the instant case; accordingly, we hold that appellant did not properly preserve the question for appellate review.

In **Leverett v. State**, 197 So.2d 889, 890 (Miss. 1967), this Court, quoting from **Collins v. State**, 173 Miss. 179, 180, 159 So. 865 (1935), penned the following language:

> The Supreme Court is a court of appeals, it has no original jurisdiction; it can only try questions that have been tried and passed upon by the court from which the appeal is taken. Whatever remedy appellant has is in the trial court, not in this court. This court can only pass on the question after the trial court has done so.

In **Sumner v. State,** 316 So.2d 926, 927 (Miss. 1975), we find the following language concerning the time for making an objection:

> The rule governing the time of objection to evidence is that it must be made as soon as it appears that the evidence is objectionable, or as soon as it could reasonably have been known to the objecting party, unless some special reason makes a postponement desirable for him which is not unfair to the proponent of the evidence. *Williams v. State*, 171 Miss. 324, 157 So. 717 (1934) and cases cited therein. See also cases in Mississippi Digest under Criminal Law at 693.

We reiterate. "A trial judge will not be found in error on a matter not presented to him for decision." **Ballenger v. State**, 667 So.2d 1242, 1256 (Miss. 1995) citing numerous cases. *See also* **McLendon v. State,** 945 So.2d 372 (Miss. 2006), reh den, cert den; **Howard v. State,** 945 So.2d 326 (Miss. 2006), reh den, cert den. "[The Supreme Court] cannot find that a trial judge committed reversible error on a matter not brought before him to consider." **Montgomery v. State,** 891 So.2d 179, 187 (Miss. 2004) reh den.

No egregious violation of a fundamental or substantial right is involved here, and the procedural bar/waiver/forfeiture rule is applicable to Christopher Drummond.

ISSUE FOUR

DRUMMOND WAS NOT DENIED HIS STATUTORY AND CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL.

Drummond claims for the first time on appeal he was denied both his statutory and constitutional right to a speedy trial. This argument has no more merit than those preceding

it.

First, we note with profound interest Drummond's three (3) references on page 22 to the defendant as "McClendon" and eight (8) more similar references to "McClendon" on page 23. Misidentification of the defendant/appellant simply detracts from the validity of Drummond's speedy trial complaint.

Drummond and his writ-writer have apparently confused this case with the case of another defendant.

Second, Drummond failed to assert his right to a speedy trial prior to trial or during trial. "Failure to assert the right will make it difficult for a defendant to prove denial of a speedy trial." **Hersick v. State,** 904 So.2d 116, 123 (Miss. 2004).

In any event, Drummond committed his crime on May 30, 2006. After he was identified as a suspect, a warrant was issued for his arrest on May 30th. (®. 105) Drummond was arrested and charged with the offense on July 14, 2006. (®. 94, 105) He was indicted on May 1, 2007. (C.P. at 6) Drummond waived arraignment on August 6, 2007, and was tried on December 12-13, 2007.

On motion by the court, one continuance was granted on September 12, 2007, for good cause shown, *viz.,* the case had been set for trial during a week the court cancelled the docket and trials. (C.P. at 9) Trial was reset for December 10, 2007. (C.P. at 9)

Drummond seeks reversal of his conviction for aggravated assault on the ground he was denied both his statutory and his constitutional rights to a speedy trial. Such was a non-issue at trial and should be a non-issue here because it was never raised or mentioned in the lower court.

In any event, assuming this matter is properly before the reviewing court for review,

there was no violation of the 270 day rule and the familiar **Barker v. Wingo** (citation omitted) factors clearly favor the State.

The predicate for the former is the so-called 270-rule found in Miss.Code Ann. § 99-17-1. **Wesley v. State,** 872 So.2d 763 (Ct.App.Miss. 2004).

The genesis of the latter is the seminal decision of **Barker v. Wingo,** 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), which sets forth four (4) factors for consideration and balancing. **Anderson v. State,** 874 So.2d 1000 (Ct.App.Miss. 2004), reh denied.

Statutory Right to a Speedy Trial.

Drummond committed his crime on May 30, 2006. After he was identified as a suspect, a warrant was issued for his arrest on May 30th. (®. 105) Drummond was arrested and charged with the offense on July 14, 2006. (®. 94, 105) He was indicted on May 1, 2007. (C.P. at 6)

Drummond waived arraignment and entered a plea of not guilty on August 6, 2007. (C.P. at 8) Trial took place four (4) months later on December 12-13, 2007. Accordingly, Drummond was not denied his statutory right to a speedy trial which is required within 270 days of arraignment.

Constitutional Right to a Speedy Trial.

A defendant's constitutional right to a speedy trial attaches at the time of a formal indictment, information, or arrest. **Anderson v. State,** *supra*, 874 So.2d 1000 (Ct.App.Miss. 2004), reh denied. *See also* **Wheeler v. State,** 826 So.2d 731, 737 (Miss. 2002) ["The time begins to run from the date of indictment."]; **Adams v. State,** 583 So.2d 165, 167 (Miss. 1991)["Unlike the statutory right to speedy trial, Adams' constitutional guarantee to a speedy

trial attached at the time he was arrested."]; **Smith v. State,** 550 So.2d 406, 408 (Miss. 1989) ["(T)he constitutional right to a speedy trial attaches when a person has been accused."]; **Jackson v. State,** 864 So.2d 1047 (Ct.App. Miss. 2004).

Drummond states in his brief his right to a speedy trial " . . . commenced on May 30, 2006, the date he was arrested." (Appellant's Brief at 20-21) Drummond is mistaken about the date of his arrest which, according to the testimony, took place on July 14, 2006. ®. 94, 105)

Drummond's argument is devoid of merit because an analysis of the familiar **Barker** factors favor the State. As noted, Drummond was arrested on July 14, 2006, waived arraignment on August 6, 2007, and was tried four (4) months later on December 12-13, 2007.

We rely, in part, upon **Noe v. State**, 616 So.2d 298, 300 (Miss. 1993), where this Court stated:

> When a defendant's constitutional right to a speedy trial is at issue, the balancing test set out in **Barker v. Wingo**, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), is applicable. The factors to consider are: (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant has asserted his right to a speedy trial; and (4) whether the defendant was prejudiced by the delay.

On balance, an analysis of the so-called **Barker** factors, when considered together with other relevant circumstances such as a trial by jury free of arguable error, favors the State.

(1) Length of the Delay. Approximately 506 days as opposed to Drummond's claim of 677 days - nevertheless, ". . . presumptively prejudicial triggering an analysis of the remaining factors." **Wheeler v. State,** 826 So.2d 731, 737 (Miss. 2002).

Drummond was arrested on July 14, 2006, and brought to trial on December 12-13, 2007.

Although the delay was not egregiously protracted, this factor favors Drummond.

Nevertheless, presumptive prejudice alone is not sufficient to allow a defendant to prevail on speedy trial grounds. **Anderson v. State,** *supra*, 874 So.2d 1000 (Ct.App.Miss. 2004).

(2) Reasons for the Delay. On motion of the trial court, one continuance granted on September 12, 2007, for good cause.

A continuance upon motion of the court should not be weighed against the State. *Cf.* **Wesley v. State,** 872 So.2d at 763; **Forrest v. State,** 863 So.2d 1056; **Anderson v. State,** 874 So.2d at 1000.

This factor favors the State.

(3) Assertion of Right. None. Nada.

This factor favors the State.

(4) Prejudice by the Delay. No actual prejudice demonstrated or implied.

There is an absence of any suggestion in the record of actual or implied prejudice to Drummond. The mere spectre of prejudice is not a viable basis for reversal. **Adams v. State,** 583 So.2d 165 (Miss. 1991); **Wiley v. State**, 582 So.2d 1008 (Miss. 1991); **Handley v. State**, 574 So.2d 671 (Miss. 1990); **Jaco v. State**, 574 So.2d 625 (Miss. 1990).

The fourth and final **Barker** factor favors the State.

In **Noe**, *supra*, 616 So.2d at 300, this Court stated the following with respect to the four **Barker** factors:

> This Court recognized in **Beavers v. State**, *supra*, 498 So.2d 788, 790 (Miss. 1986), that
>
> [n]o methodical formula exists according to

> which the **Barker** weighing and balancing process must be performed. The weight to be given each factor necessarily turns on the quality of evidence available on each and, in the absence of evidence, identification of the party with the risk of non-persuasion. In the end, no one factor is dispositive. The totality of the circumstances must be considered.

"[T]he risk of non-persuasion rests with the prosecution." **Jefferson v. State,** *supra*, 818 So.2d at 1106 quoting from **Brengettcy v. State,** 794 So.2d 987, 993 (Miss. 2001). *See also* **Jackson v. State,** *supra*, 864 So.2d 1047 (Ct.App.Miss. 2004).

We are mindful that no one factor is dispositive of the question. Nor is the balancing process restricted to the **Barker** factors to the exclusion of any other relevant circumstances. In **Barker**, *supra*, 33 L.Ed.2d at 118, the Supreme Court opined:

> We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process.

See also **Jefferson v. State,** *supra*, 818 So.2d 1099 (Miss. 2002)[Balancing process not restricted solely to four **Barker** factors to exclusion of other relevant circumstances.]

In other words, " . . . the totality of the circumstances is considered." **Jefferson v. State**, *supra*, 818 So.2d at 1106.

On balance, an analysis of the four **Barker** factors, when considered together with other relevant circumstances such as a trial by jury presumptively free of issues worthy of argument on appeal, favors the State. Even if there was some delay in bringing Drummond to trial, it does not appear the delay was for the purpose of gaining a tactical advantage. *See* **Alexander**

v. State, *supra*, 875 So.2d 261 (Ct.App.Miss. 2004).

This Court has said, perhaps most recently in **Johnson v. State**, 666 So.2d 784, 793 (Miss. 1995), that " [a] balance is struck in favor of rejecting a defendant's speedy trial claim if 'the delay is neither intentional nor egregiously protracted, and where there is a complete absence of actual prejudice.' " *See also* **Williford v. State,** 820 So.2d 13 (Ct.App.Miss. 2002), reh denied, cert denied.

ISSUE FIVE

THERE BEING NO REVERSIBLE ERROR IN ANY PART, THERE CAN BE NO REVERSIBLE ERROR TO THE WHOLE.

Drummond argues the cumulative effect of all errors deprived him of a fundamentally fair trial. (Appellant's Brief at 24)

The complete answer to this contention is found in **Genry v. State**, 735 So.2d 186, 201 (Miss. 1999), where we find the following language:

> This court may reverse a conviction and sentence based upon cumulative effect of errors that independently would not require reversal. **Jenkins v. State**, 607 So.2d 1171, 1183-84 (Miss. 1992); **Hansen v. State**, 592 So.2d 114, 153 (Miss. 1991). However, where "there was no reversible error in any part, so there is no reversible error to the whole." **McFee v. State**, 511 So.2d 130, 136 (Miss. 1987).

Contrary to Drummond's suggestion otherwise, this is not a proper case for application of the doctrine of either "cumulative" or "plain" error. It was true in the **Genry** case, and it is equally true here, that since the appellant failed " . . . to assert any assignments of error containing actual error on the part of the trial judge in this case, this Court finds that this case should not [be] reverse[d] based upon cumulative error." 735 So.2d at 201.

The same is true here.

CONCLUSION

Although the delay in this case was nearly a year and a half from arrest to trial, we note that in examining a constitutional challenge to want of a speedy trial, there is no specified time frame that renders the delay unconstitutional. **Poole v. State,** *supra*, 826 So.2d 1222 (Miss. 2002), reh denied. *See also* **Moore v. State,** 822 So.2d 1100 (Ct.App.Miss. 2002), cert denied [Delay of three years and seven months, even if presumptively prejudicial, did not result in violation of defendant's constitutional right to a speedy trial.]

Drummond has cited no deliberate or malicious activity on the part of the prosecution in delaying his trial nor has he pointed to any bad faith on the part of the State. **Williford v. State,** 820 So.2d 13 (Ct.App.Miss. 2002), reh denied, cert denied.

Appellee respectfully submits that Drummond, despite any delay from arrest/arraignment/indictment to trial, was not denied his statutory or constitutional right to a speedy trial.

Nor was he denied the effective assistance of legal counsel.

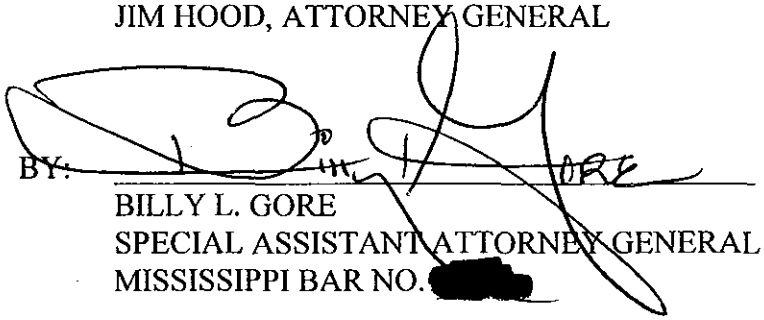
Finally, the trial judge did not abuse his judicial discretion in overruling Drummond's motion for a new trial. Affirmation here would not sanction an unconscionable injustice.

No reversible error took place during the trial of this cause. Accordingly, the judgment

of conviction, as well as the twenty (20) year sentence imposed in its wake should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I, Billy L. Gore, 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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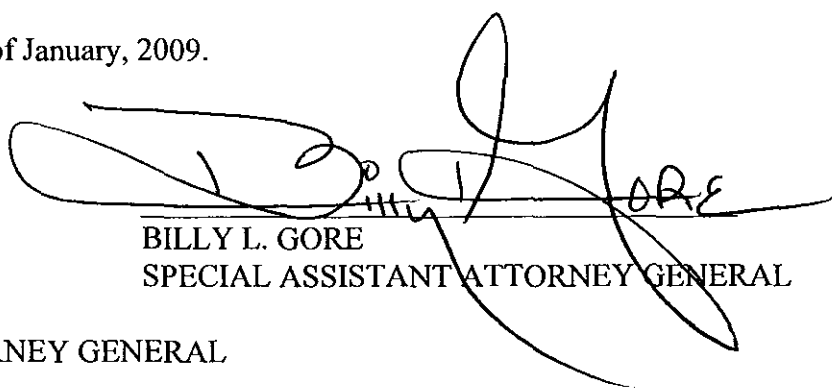
This the 14th day of January, 2009.



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