

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

COA NO. 2008-TS-01077-SCT

JOEY DANTE JOHNSON	:	APPELLANT
	:	
VS	:	
	:	
STATE OF MISSISSIPPI	:	APPELLEE

APPEAL FROM THE CIRCUIT COURT OF LEAKE COUNTY  
NO. 07-CR-047-LE-C

BRIEF FOR APPELLANT

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ORAL ARGUMENT REQUESTED

CERTIFICATE OF INTERESTED PARTIES

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JOEY DANTE JOHNSON	:	APPELLANT
	:	
VS	:	
	:	
STATE OF MISSISSIPPI	:	APPELLEE

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made to facilitate the Supreme Court examination for possible disqualification or recusal.

Joey Dante Johnson (Appellant)

Honorable Mark Duncan (District Attorney, Eighth District, Philadelphia, MS)

Honorable Vernon Cotten (Circuit Court Judge, Carthage, MS)

Honorable Michael E. Robinson of Smith, Rushing, Cotton & Robinson, PLLC (Attorney of Record for Joey Dante Johnson in COA 07-CR-047-LEC)

Honorable Robert R. Brooks (Attorney of Record for State of Mississippi, COA 07-CR-047-LEC)

Honorable Stephen Kilgore (Attorney of Record for State of Mississippi, COA 07-CR-047-LEC)

Honorable Jack Thames (Attorney of Record for State of Mississippi, COA 07-CR-047-LEC)



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Attorney of Record for Joey Dante Johnson, Appellant

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**III.**  
**STATEMENT OF ISSUES**

1. The Circuit Court of Leake County Mississippi erred by denying a Motion for a JNOV or in the alternative a Motion for a new trial.
2. The mandatory sentencing provision of Mississippi Habitual Offender statute unconstitutionally deprives a criminal defendant of adequate procedural due process by eliminating judicial discretion in the sentencing phase of a criminal trial.
3. The Legislature does not have the power to completely abolish a fundamental right of freedom without adequate procedural due process.
4. In the first phase of this capital trial, Appellant was denied the right, as guaranteed by the United States Constitution, to a fair trial by an impartial and unimpaired jury as evidenced by one juror was legally deaf, jury not sequestered, impaneled from same community as alleged armed robbery.
5. Appellant's prior guilty plea is constitutionally defective because appellant did not have notice of all constitutional rights being waived, specifically that the guilty plea would later be used to impose enhanced sentencing. 2
6. Serious and substantial deficiencies of counsel occurred at trial sufficient enough to meet both the "Strickland two-part test" and /or the "Cronic error standard" of per se ineffective counsel resulting in deprivation of appellant's fundamental right to receive a fair and impartial trial.
7. A proper foundation was not presented at trial for the admission of gun evidence resulting in a prejudicial weight of evidence causing an unreliable guilty conviction.
8. The right to a fair trial was denied to appellant as a result of the cumulative effective of prejudicial testimony that became the feature of the state's case, destroying a presumption of innocence and causing a guilty verdict that is not supported by the sufficiency and weight of the evidence in each count of armed robbery.

#### **IV. STATEMENT OF CASE**

Joey Dante Johnson was indicted for three counts of armed robbery against Kendrick Green, Andrew Whittington, and Marcus McKee pursuant to Mississippi Code Ann. § 97-3-79 (1972). The indictment stated in bold type "Armed Robbery Three Counts Habitual Offender. (RE 1-7). The indictment did not indicate which provision of the Habitual Offender statute would be charged against appellant. On May 13 and 14, 2008, Johnson was tried by a jury in the Circuit Court of Leake County, Mississippi, the Honorable Vernon Cotton presiding. The jury instructions provided the jury with three verdict options in each of the three armed robbery counts. (RE 8-10). The jury convicted appellant of all three counts of armed robbery electing not to recommend a life sentence. (RE 11). Judge Cotten determined the Court was required to sentence appellant as a Habitual Offender upon receipt of two prior felony guilty pleas. (RE 12). Appellant was sentenced to 41 years on each count, each count to run concurrent, without eligibility of parole or probation at a bifurcated hearing pursuant to Mississippi Code Ann. § 99-19-81. (RE 13-15). The trial court denied all motions for a JNOV or in the alternative a new trial. (RE 16-17). A notice of appeal was filed with the Mississippi Supreme Court on June 20, 2008 (RE 18-19).



## CASE FACTS

After watching the Super Bowl on February 4<sup>th</sup>, 2007, a group of friends (Joey Johnson, Eddie Vivians, Kendrick Green, Bernard Green, Andrew Whittington, and Marcus McKee) met at the Harmony Community Center. (RE 20-24). Every Super Bowl game has a winner and loser and this particular group of friends was no exception. A bet was allegedly made about the Super Bowl game. (RE 24-28). The chastising victor verbally taunted the losing party as the losing party was in the process of taking crack from a can, leading to an undisputed verbal altercation. (RE 28-30). Insulting words quickly escalated into a physical fight on a grand scale, complete with guns. (RE 28, 29) It is sad but true, all of the friends turned foe provided undisputed testimony that nearly all of them at one point or another held, beat one another with or fired guns. (RE 22, 26, 31-36). Prior to the fighting event, trial testimony indicates some of the parties involved in the fight had also been drinking and allegedly smoking crack. (RE 28, 37).

But the worst tragedy of this trial is the parade of confusing, often conflicting and vague testimony that departed so drastically from any notion of a fair trial that the best "sports commentator" could not have decided who won the fight, let alone kept score. The ringing of gun shots was silenced when Kendrick Green withdrew from the fight and ran in fear with a confiscated pistol to a nearby officer's house to turn in the pistol and report the fighting event. (RE 38-41). There is no doubt officers arriving on the fight scene heard the same confusing and vague account of facts, which might explain why an armed robbery indictment was middle ground between attempted murder and a fight. Maybe at the time armed robbery seemed a fair charge to hold against someone under the circumstances. However, it is this same logic that caused the jury to convict Joey Johnson

of three counts of armed robbery when the same mountain of confusing and vague “bad act” testimony was presented at trial. Prejudicial evidence was the “case-in-chief” for the prosecution at trial. The accumulation of prejudicial testimony, often irrelevant or based on improper assumptions, created an image that allowed the jury to see guilt in a smoking mirror.

### **SUMMARY OF ARGUMENT**

This appeal presents important, specific questions about the fundamental right to receive a fair and impartial trial that should be cloaked in the protection of adequate procedural due process, non-prejudicial testimony and an impartial jury. The basis of the appeal is grounded in the notion that no person should be deprived of the fundamental right to freedom without adequate due process of law. Capital cases are unique, therefore a heightened procedural standard should be observed in the sentencing phase as well the guilt phase of trial, before a reliable irrevocable penalty can be imposed on the accused. Such procedural safeguards should include notice to an accused that a guilty plea will later pose a risk of a life sentence. Likewise, Constitutional concepts of judicial discretion in sentencing should invalidate statutory provisions that require mandatory sentencing. Judicial procedure should not have the effect of abolishing a fundamental right i.e. right of a judge/jury to decide a sentence. A guilty conviction based on an impartial, impaired jury violates the concept of a fair trial.

Along those same lines, a person has a Constitutional guarantee to receive a fair trial. Thus, when the state substantially interferes with a trial to the extent an impaired jury hears a theory of guilt based on circumstantial and prejudicial testimony, the verdict should be set aside. Appellant’s counsel was inefficient by trial design when “new” trial

testimony, as well improperly admitted evidence, and highly charged prejudicial testimony became a feature of the state's case. Based on these arguments, appellant believes a guilty conviction was obtained without a fair trial.

## ISSUE ONE

**“Mandatory Sentencing” violates principles of separation of powers, Sixth Amendment and Fourteenth Amendment by allowing the state legislature to employ judicial procedure that encroaches deprives a criminal defendant of Constitutionally protected fundamental interests rendering Miss. Code Sect. 99-19-81 unconstitutional.**

Strict application of the Mississippi Habitual Offender procedural rules results in a legislative encroachment on a judicial function that unconstitutionally takes sentencing discretion away from the jury and/or judge, and simultaneously wipes out a criminal defendant's liberty interest without adequate procedural safeguards.

### **A. Separation of Power Argument “Legislative Abolishment of Fundamental Rights”**

The US Supreme Court analyzed a Separation of Power challenge to statutory sentencing guidelines that imposed sentencing ranges on the judiciary. *See Mistretta v. U.S.*, 488 U.S. 361 (1989)(affirming no violation of the non-delegation doctrine occurred under the enactment of the Sentencing Reform Act of 1984, that abolished indeterminate criminal sentencing, established a U.S. Sentencing Commission within the judicial branch and empowered commission members to promulgate binding sentencing guidelines for federal judges), *and Power & Light Co. v. S.E.C.*, 329 U.S. 90,105 (1946) (Delegation of legal authority affirmed when Congress clearly delineates the general policy, the public agency to apply the policy, and the boundaries of the delegated policy). Mississippi, as well as other state courts have followed the *Mistretta* reasoning and

affirmed there is no violation of Separation of Powers in statutorily mandated sentencing.

Fisher v. State, 690 So. 2d268, 275 (Miss. 1996).

*+ treated  
positively*

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However, the Mistretta ruling is limited in application to an analysis between the legislature and the judicial branch. The court was not presented with a Separation of Powers challenge between the legislature and an individual's fundamental rights. Cf.

Elrod v. Burns, 427 U.S. 347 (1976) (affirming government interference with

?

constitutional rights i.e. freedom of speech is impermissible. If the government could deny a benefit based on a constitutional right, i.e. speech, the individual exercise of those freedoms would be void. Thus allowing the government to produce a result indirectly that could not be commanded directly.)

The constitutional prohibition on encroachment of protections afforded by the U.S. Constitution is not absolute; some restraints are permitted for appropriate reasons.

Id. But cf. Elrod v. Burns, 427 U.S. 347 (1976) (governmental purpose of denying a constitutional protection is not allowed to create incentives that the government could not command directly) with Douglas v. Jeannette, 319 U.S. 157 (1943) (facts sufficient to show deprivation of a constitutionally protected right... will sustain a cause of action whenever it appears that the abridgment of the right is effected under color of a state statute or ordinance.) and Elrod v. Burns, 427 U.S. 347 (1976) ( any significant impairment of constitutional rights must survive strict scrutiny if any deterrent on the exercise of the right arises. "Encroachment cannot be justified by a mere showing of a legitimate state interest"). Undoubtedly, the legislative intent and policy supporting the Habitual Offender statute was to protect the public from career criminals. The power of the state to enact legislation to protect the citizens is not disputed. But, the scope of

legislative power is subject to constitutional limitations that demand protection of a criminal defendant's liberty interests. By operation of law the Habitual Offender statute, indirectly and directly strips away the fundamental interests of an accused with unconstitutional procedural processes.

### 1. No Jury Determination of Habitual Offender Status

The Statute is a "Three Strikes You're Out Rule." Under color of statute, a procedural process is strictly followed to impose maximum mandatory sentencing, often a life sentence, for a three-time convicted felon. A Habitual Offender Status determination is procedurally made by a trial judge, without a jury determination, based on the conviction of two prior felonies. *See* Miss. Code Ann. § 99-19-81(2008); Nathan v. State, 552 So.2d 99 (Miss. 1989). The two prior felonies do not have to be the result of a criminal trial conviction; it can be based on a mere record copy of two prior guilty pleas. Id.

The statute does not expressly provide the defendant a right to challenge prosecution's proof of guilty plea convictions. Miss. Code Ann. § 99-19-81(2008). The right to challenge a prior guilty plea conviction is procedurally denied when the right remains silent and is not incorporated into the trial process automatically. This is a prime example of the government doing indirectly something it may not achieve directly.

### 2. Defendant waives Constitutional Rights to Jury Without Notice

Case law suggests the accused is not entitled to be informed that his guilty plea can be ✓ used against him for enhanced sentencing. Presley v. State, 498 So.2d 832 (Miss.1986). Subsequent cases have held prior felony convictions can only be used if the accused made a "knowing and intelligent" guilty plea free of constitutional defects. Wilson v.

State, 574 So2d. 1324 (Miss. 1990) Cf. Custiss v. U.S., 511 U.S. 485 (1994)(Justice Souter, J., joined by Blackmun and Stevens, JJ., dissenting)(absent clear statutory intent to preclude all challenges during sentencing to prior convictions relied upon for enhancement, it must be presumed an accused is permitted to show at sentencing that prior convictions offered for enhancement were unconstitutionally obtained).

Although prior guilty pleas waive constitutional rights to a jury trial, the accused is not entitled to information that enhanced sentencing can be imposed for future crimes. An issue i.e. knowledge of constitutional rights waived, that must inquire into the state of mind or totality of circumstances is a question of fact that is traditionally decided by a jury. Miller v. Fenton, 474 U.S. 104 (1985). See also Beck v. Alabama, 447 U.S. 625, 637-38 (1980)(heightened procedural protections in capital trial applies to guilt phase as well as penalty phase); Crump v. State, 654 So.2d 809, 811 (Fla. 1988)(irrevocable penalty requires a heightened degree of reliability of procedural fairness).

#### **B. Judicial Discretion Conflicts with Supremacy Clause and Mississippi Habitual Offender Statute**

Historically, the Constitution has not specifically assigned sentencing to the exclusive jurisdiction of any one the three branches of government. Mistretta v. U.S., 488 U.S. 361 (1989). Congress does have the power to fix the sentence for a federal crime, U.S. v. Wiltberger, 5 Wheat. 76 (1820) and the scope of judicial discretion is subject to congressional control. Ex Parte U.S., 242 U.S. 27 (1916); 488 U.S. at 364. Generally, courts recognize broad judicial discretion to the sentencing judge within a statutory range. See U.S. v. Grayson, 438 U.S. 41, 45-46 (1978); 488 U.S. at 364-365. Although the U.S. Sentencing Commission's sentencing guidelines were binding on the courts,

judicial discretion is preserved to depart from the guidelines in the presence of aggravating or mitigating factors. 488 U.S. at 367.

The language of the Sentencing provisions of the Mississippi Habitual Offender statute plainly states sentencing is not discretionary, meaning a trial judge must impose a mandatory sentence to a maximum term without eligibility of probation or parole. Miss. Code Ann Sect 99-19-81 Art 12. *But cf. Watkins v. State*, 500 So. 2d 462 (Miss. 1987)(jury recommendation necessary to impose a life sentence for armed robbery conviction and habitual offender). Contrary to the Watkins ruling, Appellant was sentenced to life imprisonment against the jury verdict. (RE 8-11).

No!  
Watkins  
irrelevant;  
not sentenced to  
life

The scope of judicial discretion under the Habitual Offender statute has been examined by Mississippi courts. See Harris v. State, 527 So. 2d 647 (Miss. 1988); Courtney v. State, 704 So.2d 1352 (Ct. App. 1997)(affirming sentencing under the Habitual Offender statute is not discretionary). But, the court began to shift away from upholding a strict adherence to "mandatory" sentences by granting judicial discretion, pursuant to the Supremacy Clause, which allowed judicial application of proportionality in sentencing schemes. Clowers v. State, 522 So.2d 762 (Miss. 1988). Constitutional principles were also controlling in Watkins, holding a jury recommendation is necessary to impose a life sentence for a Habitual Offender. Watkins v. State, 500 So.2d 462 (Miss. 1987).

← 1

negatively treated

not necessary at all

While the plain and ordinary language of the Mississippi Habitual Offender statute takes away judicial discretion, the Supremacy clause allows judicial discretion in sentencing. Strict adherence to the mandatory sentencing provisions of the statute is too broad in scope, i.e. it is not the least restrictive means to deprive a person of the

fundamental right to freedom. A person should not be deprived of the fundamental right to freedom without the exercise of all constitutional boundaries of judicial discretion. The failure to apply a proportionality analysis to a sentence is constitutionally defective because judicial power should not remain silent when important fundamental rights are before the court.

### **Legislative Procedural Limitations Apply to Protection of Fundamental Rights**

#### **1. Legislative Limitations on Procedural Rules**

Congress has the power to regulate the practice and procedure of the federal courts, or to delegate such authority, provided those rules are not inconsistent with...the constitution of the United States. Sibbach v. Wilson & Co., 312 U.S. 1, 8 (1941). But, Congressional rule-making authority to proscribe judicial rules and procedures is not plenary, it is subject to certain limitations. Id. Two important limitations apply to both federal and state procedural rules: 1) the court shall not "abridge, enlarge, nor modify substantive rights," in the guise of regulating procedure and 2) the right of trial by jury as at common law and the United States Constitution must be preserved. Sibbach v. Wilson & Co., 312 U.S. 1, 8 (1941). Therefore, the validity of a federal or a state rule that invades substantive rights will be balanced to assess constitutionality of procedural processes. Although the state legislature has the power to proscribe sentencing rules and procedures to state courts, those procedural rules cannot procedurally remove the fundamental right to freedom without affording a person appropriate procedural due process.

The Fourteenth Amendment demands protection of liberty interests, such as freedom, by demanding protection of liberty interests through due process of law. Jury



discretion to impose punishment is not merely a matter of state procedural law, it is a liberty interest preserved by the Fourteenth Amendment against arbitrary deprivation by the State. Hicks v. Oklahoma, 447 U.S. 343 (1980). Both the Oklahoma Court of Appeals and the US Supreme Court invalidated a mandatory habitual offender statutory sentencing scheme. Hicks v. Oklahoma, 447 U.S. 343 (1980). Upon a third conviction of a twice previously convicted felon, the jury imposed a 40-year sentence pursuant to instructions to a state habitual offender statute. Id. Procedural due process was violated by incorrectly instructing the jury a mandatory sentence was required, although the defendant was entitled to have his punishment fixed by a jury. Id. Similarly, in error Judge Cotten believed that he did not have any discretion in imposing a life sentence, thus depriving Appellant of adequate procedural due process. (RE 66-68). The Assistant D.A. failed to inform the trial court of the Clower ruling, (holding the Supremacy Clause allows application of a proportionality test to exercise judicial discretion in Mandatory Sentencing.) Clowers v. State, 522 So.2d 762 (Miss. 1988). *OK law*  
*didn't impose life-sentence*

## 2. Mandatory Judicial Status Determination without discretion

The procedural rule mandating Habitual Offender status, without a jury, violates the Sixth Amendment because "status" is a fact capable of imposing an increased sentence. A criminal defendant's interest of requiring a jury for any fact that imposes criminal punishment is not merely a matter of state procedural law, it is a liberty interest protected by the Fourteenth Amendment. Hicks v. Oklahoma, 447 U.S. 343 (1980). A criminal defendant has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by a jury within statutory discretion. Id. at 344; citing to Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1. In sum, the Habitual

Offender status demands a procedural process that eliminates a fundamental right of freedom without adequate procedural due process. The trial court created a presumption of guilt before the jury made any determinations of fact or began deliberations. During the pre-trial conference, the prosecutor informed Judge Cotten that "if it wasn't for the Habitual Offender, you could sentence him to anything you please..." (RE68). Although, this brief argues that a judicial determination of Habitual Offender status is unconstitutional, pretrial procedure of Appellant's trial did not even comport with the current statute. The pre-trial conference was not the appropriate time to establish Habitual Offender status. Instead, the statute demands a bifurcated hearing with a status determination after the jury returns a verdict in the criminal trial. Miss. Code Ann. § 99-19-81 (2008). The misstatement of law and manipulation of habitual offender status, to a judge seemingly unfamiliar with case law application of the sentencing scheme, amounted to an unjust, arbitrary taking of Mr. Johnson's freedom and was a blatant disregard of any notions of a fair trial.

## ISSUE TWO

**Serious and substantial deficiencies of counsel occurred at trial sufficient enough to meet both the "Strickland two-part test" and/or the "Cronic error standard of per se ineffective counsel" resulting in a deprivation of Appellant's fundamental right to receive a fair and impartial trial in violation of the Sixth Amendment.**

The right to counsel as required by the Sixth Amendment is the right to the effective assistance of counsel Strickland v. Washington, 466 U.S. 668, 686 (1984). Generally, Strickland requires a two-part test for evaluating a criminal defendant's claim, under the Federal Constitution's Sixth Amendment, of ineffective assistance of counsel. Bell v. Cone, 535 U.S. 685 (2002). Applying Strickland principles, a defendant must prove both

(1) deficient performance, and (2) prejudice from counsel's unprofessional errors. 466 U.S. at 686 (1984).

However, United States v Cronic, identified certain instances where prejudice may be presumed, negating the need for a prejudicial showing of counsel's errors. United States v Cronic, 466 US 648 (1984). Decided on the same day as Strickland, the Supreme Court (1) established certain specific failures of counsel warrant a "*per se*" presumption of ineffectiveness, in which prejudice would be presumed and (2) determined that one such situation occurred when counsel failed to subject the case to "meaningful adversarial testing." Bell v. Cone, 535 U.S. 685 (2002). To establish Cronic error the counselor's failure must be complete. Id. When the trial process loses its character as a confrontation between adversaries, the constitutional guaranty is violated. United States v Cronic, 466 US 648 (1984) Differentiating between structural errors using the Strickland analysis and the Cronic error standard is a matter of kind, not degree. Bell v. Cone, 535 U.S. 685 (2002). The whole point of the Cronic error is to presume ineffectiveness *without* inquiring on an error-by-error basis into the wisdom of counsel's actual performance (and any resulting prejudice) under Strickland. Bell v. Quintero, 544 U.S. 93 (2005). The Cronic presumption is based on the notion that some circumstances are so inherently prejudicial the cost of litigating their effect is unjustified, therefore prejudice is presumed. Cone at 685.

Time has not eroded prejudicial principles identified in the force of Justice Sutherland's opinion for the Court in Powell v. Alabama, 287 U.S. 45 (1932):

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If

charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." United States v Cronic, 466 US 648, 664 (1984)

#### **Cronic Error Argument:**

Appellant counsel's failure to subject the trial to "meaningful adversarial testing" establishes per se ineffective assistance of counsel. The following circumstances that occurred at trial provide proof of a lack of "meaningful adversarial testing":

1. Jury Impaired Counsel failed to raise material issues that prevented the court from seating an impartial jury, adequately instructed on the law, and weight of the evidence. Due process and the Sixth Amendment guarantee a defendant the right to an unimpaired jury. Tanner v. U.S., 483 U.S. 107,110 and 115 (1987). Trial testimony starts with Eddie Vivian's statement that the physical altercations began with Bernard Green acting as the first aggressor charging Joey Johnson with a gun. (RE 22). Self defense is corroborated by other witness testimony. (RE 30) However, Appellant's counsel failed to submit a self-defense jury instruction to the court for consideration as a rebuttal to the

robbery charge. Appellant Counsel also failed to submit a request for the jury to be advised of the heightened burden of proof required for a case based on circumstantial evidence. Most importantly a change of venue should have been sought by Appellant Counsel. Instead, the jury was impaneled from the same small community, most of the jurors lived near the Harmony Community Center. The risk of impartiality was further compounded by not sequestering the jury. Although this was a capital case being tried by jurors living in the community, Appellant's counsel did not request jury sequestration.

2. One Juror is Legally Deaf After trial, it was discovered that Helen Spivey served on the jury even though she receives a disability check for being deaf.

3. Failure of Trial Court to apply correct law During the pre-trial conference, Judge Cotten required clarification from the Assistant DA about application of Mandatory Sentencing under the Habitual Offender statute. Both the Assistant DA and Appellant counsel failed to inform Judge Cotten that a proportionality test could be used to exercise judicial discretion in sentencing. Clowers v. State, 522 So.2d 762 (Miss. 1988).

4. Habitual Offender Status Pre-Trial Appellant Counsel failed to object when the Assistant DA referred to Appellant as a Habitual Offender to Judge Cotten during the Pre-Trial Conference. Habitual Offender status is determined after the jury verdict, not before the trial begins.

5. Improper Foundation for Gun Evidence Trial testimony linking the gun to Appellant was elicited by leading questions without objection from Appellant Counsel. (RE39). The Assistant DA asked Kendrick, "Joey...had a revolver, and he had another pistol too right?" (RE 39). Following this testimony, the point was highlighted to the jury

that a revolver and a pistol (automatic) were two different types of guns. (RE 57). Yet, a "*Pistol*," was referred to as the robbery weapon throughout the trial and the gun was introduced into evidence as a "*Pistol*." (RE 41). The gun evidence carried a great deal of weight at trial, not only was the type of gun a confusing issue, but how Kendrick obtained the gun is a mystery. A structural trial defect occurred when the gun was admitted into evidence without a proper foundation, especially when perjury would have been a better idea. Although Kendrick fails to give proper foundation testimony about the gun alleging: 1) he picked up a pistol off the ground, 2) he got a revolver from Joey Johnson, and 3) he does not know how he ended up with the gun, this rendition of facts was good enough to introduce a pistol (automatic presumably) into evidence at trial. (RE 39, 54-55). Also according to one witness the gun changed hands at one point. (RE22). A conviction obtained by the knowing use of false evidence is fundamentally unfair. Evans v. Virginia, 471 U.S. 1025 (1985). A combination of the confusing references (pistol v. revolver) and a witness not able to describe without conflict how and where he got the gun was an improper foundation to introduce the gun into evidence resulting in an unreliable guilty conviction.

6. Witness credibility The "victim witnesses" admit to a history of alcohol consumption prior to signing affidavits. (RE 38). Appellant testified the witnesses were also smoking crack on the night of the robbery. (RE 29). At trial the multiple "victim witnesses" gave vague, confusing, and often changing testimony. (RE 26, 39, 42, 45-47,54). The Assistant DA resorted to eliciting testimony with frequent leading questions. (35,39, 51.). Appellant counsel failed to object to leading questions, question the witnesses for impairment or request a Motion for a Continuance even though the

witnesses were performing poorly on the stand throwing out facts without fully developed connections. (RE 22,24-25). One of the main elements of a fair trial includes the right to confront witnesses. Drope v. Missouri, 420 U.S. 162, 171-172 (1975). A witness that can only provide testimony against the accused through leading questions without any “meaningful adversarial testing” does not meet the confrontation requirements demanded by the constitution.

7. “New” Testimony “New” testimony was presented at trial claiming Joey got out of the car *with* two pistols saying “where is the money.. you lost the bet.”. (RE 24) . The “new” trial testimony was a significant and material change in the nature of the states evidence and testimony. The surprise introduction of “two gun” testimony at trial was prejudicial and resulted in a defense that could not reasonably be expected to provide fair and adequate representation. “New” testimony at trial produced a structural trial defect by creating an environment that guaranteed “ineffective assistance of counsel.”

The above-mentioned errors provide proof that Appellant’s guilty conviction was obtained without proper “meaningful adversarial testing” of the state’s case, supporting a presumption of ineffective counsel based on Cronin error analysis.

#### Strickland two part test Argument

The same above-mentioned errors, along with others contained herein, also satisfies the Strickland analysis.

1) The first prong can be established by the following:

A. The Assistant DA materially and substantially interfered with the ability of counsel to adequately defend the accused.

B. Appellant Counsel independent of the Assistant DA was ineffective

2) The second prong is met by showing Appellant's counsel did not act as counsel resulting in a failure to adequately protect appellant from a prejudicial and structurally defective trial.

The structural defects in Appellant's trial rebut any presumption of competent counsel. Structural defects are "errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment." Strickland v. Washington, 466 U.S. 668 (1984). Unlike trial errors that require a "harmless-error" test, certain structural defects in the trial process defy analysis by harmless-error standards. See Sullivan v. U.S., 508 U.S. 275, 279 (1993); Strickland at 682. A structural defect affects the trial by infecting the entire trial process, thus demands automatic reversal. See Sullivan, 508 U.S. at 281 (holding that an unconstitutional "reasonable doubt" instruction given by a trial judge constitutes a "structural" error); US.v.Gonzalez Lopez, 548 U.S. 140 (2006); Wilson v. State of Fla., 764 So. 2d at 818 (Fla. 4<sup>th</sup> DCA 2000). More specifically, "errors involving a structural defect in the framework of a trial deprive defendants of 'basic protections' without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence ... and no criminal punishment may be regarded as fundamentally fair." Id.

#### Fair Trial Benchmark

Competent counsel is usually presumed. Strickland at 699. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct resulted in a fair trial. Id. at 686. A fair trial includes advocacy free from interference by third parties. For



example, if the Government interferes with the ability of counsel to make independent decisions about how to conduct the defense, it is a violation of the right to effective assistance of counsel. *See, e.g., Geders v. United States*, 425 U.S. 80 (1976) (bar on attorney-client consultation during overnight recess); *Herring v. New York*, 422 U. S. 853 (1975) (bar on summation at bench trial); *Brooks v. Tennessee*, 406 U. S. 605, 406 U. S. 612-613 (1972) (requirement that defendant be first defense witness); *Ferguson v. Georgia*, 365 U. S. 570, 365 U. S. 593-596 (1961) (bar on direct examination of defendant). However, a counselor acting alone may deprive a defendant of the right to effective assistance by failing to render "adequate legal assistance," *Cuyler v. Sullivan*, 446 U. S. 344. *Id.* at 446 U. S. 345-350 (actual conflict of interest adversely affecting lawyer's performance renders assistance ineffective). Deficiency is established by a showing that counsel's performance fell below and "objective standard of reasonableness." *Strickland* at 682.

### **Point One Deficient Counsel**

In addition to the Chronic errors mentioned above, the following errors rendered the trial structurally deficient:

1. Multiple count indictment in Single Trial Appellant Counsel failed to Make a Motion to Quash a single trial for Multiple indictments. There is great potential for mischief in allowing a multi-count indictment where the charges arise out of separate transactions...leading the jury to believe the accused is charged with so much he must be guilty of something. *McCarty v. Mississippi*, So. 2d 909 (1989). Any presumption of innocence is destroyed where evidence of an alleged crime is allowed that would not be mutually admissible in separate trials. *Id.* Allowing a single trial was a substantial

interference of the government on the ability to Appellant counsel to provide an adequate defense. The failure of Appellant counsel to recognize the risks and not request separate trials was ineffective counsel. The Appellant was convicted based on prejudicial multiple victim witness testimony that would likely have not supported a guilty conviction in <sup>disagree</sup> separate trials.

2. Prejudicial testimony Appellant Counsel failed to raise objections to prejudicial testimony, when testimony became a story about “bad acts” unconnected to establishing the elements of an armed robbery, i.e. “presence” of guns (RE 22-24), breaking a gold chain inscribed with Jesus Christ (RE 48-51) and ripping off church pants. (RE 52). Appellant’s own counsel even introduced prejudicial testimony of prior criminal acts at the objection of the state. (RE 65). The trial court erred by allowing prejudicial testimony of prior criminal acts to impeach a witness. (RE62). The cumulative effective of highly prejudicial testimony became the “feature” of the state’s case. Multiple “victim witness” testimony should have been outweighed by the prejudicial impact, the prejudicial testimony violated Appellant’s Right to a Fair and Impartial trial.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Fed. R. Evid. 403

3. Failure to provide case law to support Motion for Directed Verdict or New Trial

Although counsel properly raised a Motion for a Directed Verdict or in the alternative a Motion for a New Trial, counsel could not provide any case law to support his position.

(RE 16-17) A settled principle of criminal law demands that testimony which fails to make out a case of armed robbery and instead merely proves evidence of a fight, the court should sustain a JNOV. Smith v. State, 237 Miss. 498 (1959). A motion for directed verdict challenges the sufficiency of the evidence. Grihim v. State, 760 So. 2d 865, 866 (Miss. Ct. App. 2000). However, a motion for a new trial falls within a lower standard of review by challenging the weight of the evidence. Whitten v. Cox, 799 So. 2d 1, 12 (Miss. 2000). Based on the state's circumstantial evidence, if Appellant counsel had been prepared with arguments to support his motions they should have been successful. — Making a motion without a valid argument is just going through the "motion" of a trial without the ability to be effective as counsel, thus prejudicing appellant.

### **Point Two Prejudice**

To establish prejudice, "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland at 694. No trial is ever free of errors. However, structural defects in this trial were material and sufficient enough to deprive Appellant of a criminal trial reliable enough for a determination of guilt or innocence.

1. "Presence" of Gun Evidence Prejudicial The "new" testimony of two guns was prejudicial because the mere presence of two guns under the circumstances should not have been enough to establish a threatening taking of property. (RE 24-25). There is a mountain of legal difference between a person merely "carrying" a gun then later entering a fist fight and a person that is "using" a gun to fight. Likewise, there is significant legal difference between someone demanding money owed on a bet and a person demanding money from someone with no legal or illegal duty to pay the money.

Willie Griffith is the only witness that gives descriptive testimony of how and where Joey Johnson held the pistols.(RE 42) According to Willie, when Joey Johnson got out of his car on two occasions Joey had two guns “tucked”, not pointed at anyone. (RE 42). The “friends” had pistols tucked in their belt as well and admit they routinely carry guns when they go to the Harmony Community Center. (RE 35, 56) Although it was pointed out to the jury “how” the “friends” carried guns routinely for protection, appellant was never questioned about his gun carrying habits. Although Joey Johnson carried “tucked” guns as well, volumes of prejudicial testimony was delivered at trial about “when” and “where” shooting happened, but “how” Joey carried his gun on arrival should have been pointed out to the jury at trial to provide meaningful adversarial testing of the “shooting” testimony. (RE 42, 44). *disagree*

Before the jury ever heard any facts, Mr. Johnson was referred to as a Habitual Offender. It is apparent in Judge Cotton’s opening statement to the jury that this Habitual Offender status was fixed when he informed the jury that the purpose of a criminal trial was punishment. By proceeding with a single trial for multiple indictments, any presumption of innocence was destroyed. The cumulative and often confusing testimony of the “victim witnesses” distorted jury perception and lead to illogical inferences. After reviewing the trial record, it is apparent on reflection that the State did not obtain any of the property alleged to be stolen from Joey Johnson. None of the witnesses knew for sure where the necklace was found. Likewise the money and wallet was not recovered from Joey Johnson. Instead the State took pictures of these items after they had been gathered from other sources and presented the pictures to the jury as proof the property was taken by Appellant. In fact most of the “property” obtained by the state was handed to the state *check H?*

by the "victim witnesses." Appellant counsel's failure to request separate trials, raise objections, raise jury awareness of the source of the property, or request additional jury instructions for self-defense and circumstantial evidence materially prejudiced and altered the outcome of the trial. Even when surprised with "new" two gun testimony at trial appellant counsel proceeded with the trial. A reasonable attorney would have objected and raised a Motion for a Continuance to prepare an adequate defense if faced with new testimony material enough to alter the outcome of the trial. Lack of effective counsel at trial allowed the State to manipulate the trial at all stages to orchestrate a highly prejudicial trial resulting in a verdict not balanced with the weight of the evidence.

### **ISSUE THREE**

#### **Whether the evidence presented at trial was sufficient to establish the Three Counts of Armed Robbery and Whether the Jury's Verdict was against the overwhelming weight of the evidence**

It is well settled in Mississippi that intent to commit a crime consists of three elements: (1) intent to commit a particular crime; (2) a direct act done toward its commission; and (3) the failure to consummate its commission. Edwards v. State, 500 So. 2d 967, 969 (Miss. 1986) (citing Bucklew v. State, 206 So. 2d 200, 202 (Miss. 1968)). The overt act must be the apparent result in the usual course of events undisturbed by extraneous factors in the commission of the crime itself. Greenwood v. State, 744 So. 2d 767, 770 (Miss. 1999).

#### **A. Sufficiency of Evidence**

The standard to challenge the sufficiency of evidence demands an analysis of trial evidence, in a light most favorable to the state, to determine whether a reasonable juror could find, beyond a reasonable doubt, that the defendant is guilty. May v. State, 460 So.

2d 778, 781 (Miss. 1984). A settled principle of criminal law demands that testimony which fails to make out a case of armed robbery and instead merely proves evidence of a fight, should sustain a JNOV. Smith v. State, 237 Miss. 498 (1959). See McClain v. State, 625 So. 2d 774, 778 (Miss. 1993)(affirming court may reverse the trial court's ruling only where one or more of the elements of the offense charged is lacking to such a degree that reasonable jurors could only have found the defendant not guilty).

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1. Lack of Gun Evidence Bernard admits that he obtained a gun from Kendrick that he used in the fight. (RE 35). While Kendrick seems confused about how he “ended up” with a gun to turn in to Officer Nealy (RE 39, 41). In contrast, Officer John Nealy testified that Kendrick Green turned in a Rossi .357 Magnum, with six spent shell casings. (RE 58). The greatest issue presented at this point is the gun was never directly linked to Appellant by any physical evidence, i.e. fingerprints or proof of ownership (RE 60). In addition, testimony is conflicting among witnesses and Officer Nealy about whether a revolver or an automatic pistol was obtained from Kendrick. (RE 39-41, 58). Since so many guns were involved, no gun should have been linked to Appellant or admitted into evidence without a proper foundation. Trial testimony puts Appellant in possession of two guns, a missing gun, friends with guns, guns changing hands, guns fired from trucks, and lost guns that ended up at Uncle’s house. (RE 22, 24, 36, 42, 59). In fact little is known about the gun admitted into evidence at trial. Officer Coombs admitted the identity of the owner is unknown, no fingerprints were taken from the gun, nor did anyone check Joey Johnson’s clothes for gunshot residue. (RE 60-61). The failure of the Assistant DA to pursue possible exculpatory evidence when testimony suggests exculpatory evidence is present, resulted in another structural trial defect.

2. Lack of Physical Property Evidence Willie Griffin is the star witness of the Joey Johnson v. Andrew Whittington fight. Although the fight testimony is vague, Andrew's pants were ripped off causing "something" to fall out of the pants. (RE 42). Although Willie provided testimony that Joey Johnson picked up "something" that fell out of Andrew's pocket, "nothing" is admitted into evidence as the "something" taken from Andrew Whittington. On cross-examination, Andrew changed his testimony drastically claiming that he even saw Joey take his wallet. (RE 46-47). No wallet or other physical evidence i.e. torn pants was submitted into evidence to support the testimony of either witness.

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3. Improper Expert Testimony Another structural trial defect occurs when Kendrick Green, the same party that struggled with earlier testimony about how he "ended up" with a gun is allowed to give expert gun testimony. (RE 57). Kendrick was allowed to explain the difference between a Jennings 9mm and a revolver. (RE 57). This raises several issues because Kendrick: 1) not listed as an Expert Witness, 2) not qualified as an Expert Witness, 3) allowed to give expert testimony at trial 4) without objection to the expert testimony, and 5) the State offered no proof that Kendrick Green was a qualified expert on gun identification. Although a witness can describe something in their possession, there is no proof Kendrick owned a Jennings 9mm (automatic pistol) at the time of the fight. A person is not deemed an expert in a subject simply because an item is transported in their vehicle. Since most of the parties had guns, the state would have a duty to pursue possible exculpatory evidence i.e. ascertain ownership and gun type of all guns present on the night of the fight. Instead the jury heard a testimonial comparison of a possible non-existent gun to the revolver admitted into evidence. (RE

57). Expert testimony without proper qualification and proof of facts resulted in an unreliable conviction.

### **B. Weight of Evidence**

A motion for a new trial falls within a lower standard of review by challenging the weight of the evidence. Whitten v. Cox, 799 So. 2d 1, 12 (Miss. 2000). A trial judge should grant a Motion for a New Trial when the judge is certain the verdict is so contrary to the overwhelming weight of the evidence that failure to grant the motion would result in an unconscionable injustice. Youngblood v. State, 759 So. 2d 479,483 (Miss. Ct. App. 2000). In making the determination of whether a verdict is against the overwhelming weight of the evidence, the Court must view all evidence in the light most consistent with the jury verdict, and not overturn the verdict unless the lower court abused its discretion in denying the motion. Veal v. State, 585 So. 2d 693, 695 (Miss. 1991). Testimonial evidence of a single witness will support a conviction if the testimony is not unreasonable. Clanton v. State, 279 So. 2d 599, 600 (Miss. 1973).

The feature of the State's case against Appellant was circumstantial and prejudicial testimony. Beginning with one witness claiming the reason he gave Appellant \$20 was to stop the Joey Johnson v. Bernard Green fight over the bet. (RE 26). However, \$20 was not enough, presumably to satisfy the bet. (RE 25). No physical evidence of a wallet, phone, or money was found on Joey Johnson or presented at trial, with most of the witnesses speculating Joey took the money and some witnesses even changed their testimony on the stand from "did not see " to "definitely saw" Joey take it." (RE 45-47)

But it is the cumulative effect of prejudicial testimony that tainted the jury verdict. One focus of the trial centered on testimony about property damage, i.e. the gold chain



that was snatched off during the "Joey Johnson v. Kendrick Green" fight. (RE 48-51).

Without any evidence that Appellant demanded the gold chain, a photograph is introduced into evidence and submitted to the jury to create an inference of robbery. (RE 50-51). After the photograph is passed to the jury, the witness points out the chain was inscribed with "Jesus Christ." (RE 51). Similar prejudicial testimony was heard by the jury when another witness testified Appellant ripped off Andrew Whittington's "church pants." (RE 52).

The prejudicial religious testimony and photographic evidence taken as a whole vilified Appellant portraying him as an "evil-doer." The jury was artfully misled because Appellant did not demand possession of the gold chain. (RE 48). Appellant did not receive a fair and impartial trial due to ineffective counsel and prejudicial errors resulting in structural trial defects so egregious the verdict shocks the conscience in light of the weight of the evidence.

### CONCLUSION

Based on the foregoing arguments, reasoning, and citation of authority, Appellant respectfully requests that this Court invalidate the mandatory sentencing provision of the Mississippi Habitual Offender Statute that removes judicial discretion in sentencing a habitual offender, grant a JNOV or in the alternative a new trial, or remand for resentencing.

Respectfully submitted on this the 28<sup>th</sup> day of January, 2009.

JOEY DONTE JOHNSON

BY: 

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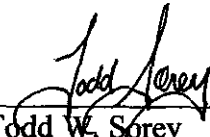
CERTIFICATE OF SERVICE

I, Todd W. Sorey, attorney for appellant, Joey Donte Johnson, certify that I have this day served a copy of this Brief and Record Excerpt by United States mail with postage prepaid on the following persons at these addresses:

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This the 28<sup>th</sup> day of January, 2009.

  
\_\_\_\_\_  
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