IN THE SUPREME COURT OF MISSISSIPPI

CARLOS JACKSON
APPELLANT

VS. CASE NO. 2009-KA-00173-COA

STATE OF MISSISSIPPI
APPELLEE

REPLY BRIEF FOR APPELLANT

DANIEL E. MORRIS
MSB#: [redacted]
MORRIS & ASSOCIATES
900 South Chrisman Avenue
Post Office Box 656
Cleveland, MS 38732
Tel: (662) 846-6691
Fax: (662) 843-8136
DANIELMORRIS@THEMORRISLAWFIRMOFMISSISSIPPI.COM

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CARLOS JACKSON
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VS. CASE NO. 2009-KA-00173-COA

STATE OF MISSISSIPPI
APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF
PIKE COUNTY, MISSISSIPPI

CERTIFICATE OF INTERESTED PERSONS

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

1. CARLOS JACKSON, Appellant
2. Honorable DANIEL E. MORRIS, Attorney for Appellant, CARLOS JACKSON
3. Honorable DeWitt "Dee" Bates, Attorney for Appellee
6. Honorable Jim Hood, Attorney General for the State

THIS, the 5th day of January, 2010.

DANIEL E. MORRIS, MSB# 102723
Attorney for Appellant CARLOS JACKSON

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STATEMENT OF THE CASE[1]

A. Nature of the Case, Course of Proceedings and Disposition Below

This is an appeal by Appellant **CARLOS JACKSON** (hereinafter "**Carlos**") from the conviction and sentence of eighty (80) years to serve under the control and supervision of the Mississippi State Department of Corrections. The Appellant was convicted of Sexual

[1] The appeal record in this cause consists of the transcript of the December 14, 2009 trial before the Honorable David Strong (T.__) and the record excerpts filed pursuant to M.R.A.P. 30 (r.e.__).

Batter, Sexual Battery, Aggravated Assault, and Burglary of a Dwelling after being indicted for this offense on September 7, 2007 by the Pike County Grand Jury.

Carlos pled not guilty at arraignments and proceeded to trial on December 14, 2008 before Circuit Court Judge David Strong; and at the end of said trial, the jury returned a verdict finding the Appellant, **CARLOS JACKSON**, guilty as charged. Appellant filed his Notice of Appeal on January 16, 2009 and amended on March 12, 2009 and his Motion for Judgment Notwithstanding the Verdict or in the Alternative, New Trial on March 3, 2009.

B. Facts

On June 10, 2007 Carlos Jackson was at home with membets of his immediate family, which included his Father, Mother, Brother, and Sister. Carlos called the mother of his three children. She came to his parent's home to pick him up to go the movie theatre in Hammond. On the way the couple stopped at the "Community Store" so Carlos could purchase cigarettes. Carlos stayed in the store for an extended period of time. The mother of his children left because of Carlos's long visit.

Carlos then caught a ride to Sunshine Apartments with Mr. Frank Tate. Carlos then went to Venisha Cleamons's apartment. Venisha Cleamons is Carlos's cousin. She was not home. Carlos then went to Sunday Montague's apartment. Sunday Montague is Carlos's ex-girlfriend. Sunday was not at home. Carlos then went to Deneycia Reynolds's apartment.

He looked for her boyfriend's car and did not see his car. He then knocked on the door but no one answered. He then went to the back door and wrapped his hand with his

shirt. Carlos knocked out the side window to gain entry. Once inside Carlos put the shirt over his shoulder and started to look for the telephone. Carlos did not see a telephone so he tried to see if there was a phone in the bedroom but the door was locked. Carlos then went to the kitchen to get a knife to the bedroom door.

When Carlos opened the door Ms. Reynolds and Mr. Carol jumped out of the bed. Mr. Carol started cursing and arguing with Carlos. Carlos then ordered Mr. Carol to go into the bathroom. Ms. Reynolds screamed that all she had was $20 twenty dollars. Carlos yelled at Deneycia and told her that he did not want any money.

When Carlos escorted Mr. Carol to the bathroom Deneycia ran out of the apartment screaming. Carlos ran after Deneycia to get her to quiet down because he had no intent to rob them. Carlos and Deneycia ended up in Mr. Andrew's apartment. Mr. Carol gave chase and wrestled with Carlos for the knife. Carlos never tried to stab Mr. Carol. Carlos bit Mr. Carol in order to get loose.

Carlos then ran into the woods behind the apartment. After hiding in the woods behind the apartment Carlos asked to be arrested by Chief Reynolds. He was arrested by Chief Reynolds. Chief Reynolds took Carlos to the Pike County Jail and booked him.

SUMMARY OF REBUTTAL

1. Rebuttal to the State's Argument against whether the trial court erred in the sentencing phase?

It is without question that the trial court used knowledge in the sentencing phase that

was not introduced by the state or defense. The Court is allowed to look in its own court records but that is the limit.

2. Rebuttal to the State's Argument against whether the trial court erred in failing to grant the Appellant's objection to the testimony of Sunday Montague?

In rebuttal to the State's use of Baldwin v. State 732 So.2d 236, (Miss. 1999) the Supreme Court allows the taking of judicial notice of its own court records and the viewing of other pending charges. The court cannot go out and find charges that are not pending or non-adjudicated. The statements the court made were of personal knowledge and not based on anything brought out in the trial.

Ms. Montague's testimony did not impeach the expert witness. Her testimony was only to prejudice the juror. Ms. Montague's testimony was the last evidence heard by the jury and to leave the jury with a negative and prejudiced image of the Appellant. Any testimony to disprove Dr. Sumner' testimony should have been given by Dr. Lott.

3. Rebuttal to the State's Argument against whether the trial court erred in granting the state's Batson challenges?

The state did not make a prima facie case to prove that race was the controlling issue in the challenge. The state merely stated that he believed that race was the only reason for the peremptory challenges of the Appellant. The State must do more than merely state the

race of the person. The state must make a real case for the court to uphold a Batson challenge.

4. **Rebuttal to the State's Argument against whether the Appellant received ineffective counsel?**

The Appellant's restate that the first a proof of ineffective counsel fact that the defense's expert was under the influence of mind altering medication and counsel refused seek to have the testimony postponed or have the trial continued. It was ineffective counsel for Plaintiff's counsel to put a man who had been hit in the head and face with a metal chair (T. p 265 l. 8 – l. 13). No person is going to think straight after that kind of head trauma.

ARGUMENT

I.

THE TRIAL COURT ERRED IN SENTENCING CARLOS JACKSON

The trial court erred when it used evidence in the sentencing phase that was not introduced during the trial and evidence that should not have been introduced by the state. The court did not perform a pre-sentencing investigation. If the pre-sentencing investigation had been ordered then the trial court would have been able to use all the information at his disposal.

In rebuttal to the State's use of Baldwin v. State 732 So.2d 236, (Miss. 1999) the Supreme Court allows the taking of judicial notice of its own court records and the viewing of other pending charges. The court cannot go out and find charges that are not pending or

non-adjudicated. The statements the court made were of personal knowledge and not based on anything brought out in the trial.

If we are to believe the State's stance on this issue we will essentially allow defendants to be convicted on past acts. We will allow the complete criminal history and prior bad acts to determine whether a defendant is guilty of a crime. We will not let the evidence or the current disposition of the defendant to be tried.

The court used information that it may have believed to have been true. The fact remains that believing and knowing are two completely different situations. If the information had been documented then there would not be a reason to contest the court's reasoning and basis for his sentencing. In this case what the trial court knew or believed he knew cannot be substituted for the facts. The pre-sentencing investigation would have given the court all the information needed to hand down a fair sentence to Carlos Jackson.

The State erred in offering evidence that Carlos had been represented by Attorney Wayne Dowdy in previous criminal proceedings. The Appellant was convicted of armed robbery in May of 1997. This trial was well after the 10 year period for introduction of prior convictions. This evidence should never have been introduced by the State.

According to Hoops v. State, 681 So. 2d 521, (Miss. 1996) "this Court has used the three-pronged analysis as set forth by the United States Supreme Court in *Solem v. Helm,* 463 U.S. 277, 292, 103 S.Ct. 3001, 3010, 77 L.Ed.2d 637 (1983), to review the proportionality of certain sentences. *See Fleming,* 604 So.2d at 302-03; *Glowers v. State,* 522 So.2d 762, 764

(Miss.1988); *Davis v. State,* 510 So.2d 794, 797 (Miss.1987); *Presley v. State,* 474 So.2d 612, 618 (Miss.1985). *Solem,* however, was overruled in *Harmelin v. Michigan,* 501 U.S. 957, 965-66, 111 S.Ct. 2680, 2686-87, 115 L.Ed.2d 836 (1991), to the extent that it found a guarantee of proportionality in the Eighth Amendment. *Smallwood v. Johnson,* 73 F.3d 1343, 1346 n. 4 (5th Cir.1996); *McGruder v. Puckett,* 954 F.2d 313, 315-16 (5th Cir.1992), *cert. denied,* 506 U.S. 849, 113 S.Ct. 146, 121 L.Ed.2d 98 (1992). "In light of *Harmelin,* it appears that *Solem* is to apply only when a threshold comparison of the crime committed to the sentence imposed leads to an inference of 'gross disproportionality.'" *Smallwood,* 73 F.3d at 1347 (citing *Harmelin,* 501 U.S. at 1005, 111 S.Ct. at 2707)."

The Appellant has and will show that there is more than an inference of 'gross disproportionality. It is a miscarriage of justice to sentence a legally mentally retarded young man of 28 years of age to serve 80 years in prison.

It was shown in the transcript that Carlos Jackson suffers from mental retardation. The Court ignored this fact in the sentencing of Carlos. The State and Defense both agreed to the Appellant's mental defect. They merely disagreed on the M'naghten test. We must reiterate that the Court completely ignored the fact that the State's own expert witness agreed that the Appellant suffered from mental defects. The fact that the Appellant suffered from mental defects was not addressed by the court during the sentencing phase. Again, The trial court should have taken into account the Appellant's mental state.

II.

THE TRIAL COURT ERRED IN ALLOWING THE TESTIMONY OF SUNDAY MONTAGUE

The State has erroneously used Uniform Circuit and County Court Rule 9.05. This is the Alibi Defense Discovery Rule. When there is to be an alibi offered the State is not required to disclose of its rebuttal witness. There was no alibi offered in this case. The Appellant did not claim that he was not the person who committed these crimes he was charged with. The Appellant did not claim that he was voluntarily intoxicated. For those reasons the State's claim that Rule 9.05 applies is of no merit. The State cannot rely on a rule which does not apply to the instant case.

Secondly the State claims that Ms. Montague's testimony was merely used to clear up issues with the Appellant's drug use history. Her testimony could only be used to impeach the testimony of the expert witness. Dr. Sumner never stated that Carlos did not use cocaine. Dr. Sumner' testimony stated that the Appellant did have a history of cocaine use (T. 283). Dr. Sumner stated that the Appellant used cocaine. Dr. Sumner only other testimony about the Appellant's cocaine use dealt with the pre-screening and post-screening at St. Dominic's Hospital. Dr. Sumner only stated that the toxicology screen did not show cocaine in the Appellant's blood stream at those times.

Ms. Montague's testimony did not impeach the expert witness. Her testimony was only to prejudice the juror. Ms. Montague's testimony was the last evidence heard by the

jury and to leave the jury with a negative and prejudiced image of the Appellant. Any testimony to disprove Dr. Sumner' testimony should have been given by Dr. Lott.

The testimony Sunday Montague gave was highly prejudicial and had nothing to do with the alleged commission of the crime. If the Appellant took cocaine three weeks before the alleged commission of the crime it had nothing to do with Saturday June 10, 2007. The Appellant could have snorted a ton of cocaine but that has nothing to do with this case. Sunday Montague's testimony was highly prejudicial and had no bearing on this case other than to prejudice the jury against the Appellant.

III.

THE TRIAL COURT ERRED IN GRANTING THE STATES BATSON CHALLENGES

In the case of Jackson v. State,962 So.2d 649,Miss.App.,2007 the court stated: Under Batson, the party objecting to the peremptory challenge must first make a prima facie showing that race was the criteria for the exercise of the peremptory strike, the burden then shifts to the party exercising the challenge to offer a race-neutral explanation for striking the potential juror, and finally, the trial court must determine whether the objecting party has met its burden to prove that there has been purposeful discrimination in the exercise of the peremptory strike.

The state did not make a prima facie case to prove that race was the controlling issue in the challenge. The state merely stated that he believed that race was the only reason for

the peremptory challenges of the Appellant. The State must do more than merely state the race of the person. The state must make a real case for the court to uphold a Batson challenge.

IV.

INEFFECTIVE COUNSEL

The test for ineffectiveness of counsel is two-pronged: defendant must demonstrate that his counsel's performance was deficient, and that deficiency prejudiced defense of case. The Two-pronged test for ineffectiveness of counsel also requires showing that counsel's errors were so serious as to deprive defendant of fair trial that is a trial whose result is reliable. U.S.C.A. Const. Amendment. 6.

The Appellant's restate that the first a proof of ineffective counsel fact that the defense's expert was under the influence of mind altering medication and counsel refused seek to have the testimony postponed or have the trial continued. It was ineffective counsel for Plaintiff's counsel to put a man who had been hit in the head and face with a metal chair (T. p 265 l. 8 – l. 13). No person is going to think straight after that kind of head trauma.

Again, this court has normally stated that an ineffective expert is not a basis for reverse on ineffective counsel. This case is different in that the only witness who mattered was high on prescription drugs. The expert was as high as a Georgia Pine. Dr. Sumner admitted on the stand that he was taking medication (T. p. 265 l. 8 – l. 13).

V.

CONCLUSION

Although this Court may find that each error standing alone is insufficient to establish manifest error to award a new trial, when reviewing each error cumulative this Court has no choice but to reverse the conviction of CARLOS JACKSON and dismiss the charges against him or in the alternative, grant him a new trial. Not to do so, would be allowing a manifest injustice to continue.

SO REBUTTED, this the 5TH _ day of JANUARY, 2010.

Respectfully submitted,

CARLOS JACKSON, *Appellant*

BY: _____

DANIEL E. MORRIS, MSB# [redacted]
Attorney for the Appellant
Post Office Box 656
Cleveland, MS 38732
Tel: (662) 846-6691
Fax: (662) 843-8136
DANIELMORRIS@THEMORRISLAWFIRMOFMISSISSIPPI.COM

CERTIFICATE OF SERVICE

I, DANIEL E. MORRIS, do hereby certify that I have this day mailed, by U.S. mail, postage prepaid, a true and correct copy of the Appellant's Reply Brief to the following:

Jim Hood
Post Office Box 220
Jackson, MS 39205

Honorable David Strong, Jr.
Circuit Court Judge
Post Office Box 1387
McComb, MS 39649

Charles and Wanda Jackson
1710 Jenkins Lane
Liberty, MS 39645

Dewitt Bates, Jr.
284 E. Bay St.
Magnolia, MS 39652

THIS, the 5th day of January, 2010.

DANIEL E. MORRIS