IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JOEL SISTRUNK **APPELLANT**

V. **NO. 2009-KA-0179-COA**

STATE OF MISSISSIPPI **APPELLEE**

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 the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Joel Sistrunk, Appellant
3. Honorable Dee T. Bates, District Attorney
4. Honorable Michael M. Taylor, Circuit Court Judge

This the 14th day of July, 2009.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

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STATEMENT OF THE CASE

This case proceeds from the Circuit Court of Walthall County, Mississippi, and a judgment of conviction for possession of at least two (2) but less than ten (10) dosage units of hydrocodone entered against Joel Sistrunk following a jury trial held on October 8, 2008, the Honorable Michael M. Taylor, Circuit Judge, presiding. (C.P. 86-88, Tr. 157, R.E.2-4). Sistrunk was adjudged a habitual offender under Mississippi Code Annotated Section 99-19-81, and the trial court sentenced him to serve a term of eight (8) years in the custody of the Mississippi Department of Corrections. (C.P. 87-88, Tr. 167, R.E, 3-4). The trial court denied Sistrunk's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. (C.P. 89-97, R.E. 5-9). Sistrunk is presently incarcerated and now appeals to this Court for relief.

STATEMENT OF THE FACTS

On July 4, 2007, Tracy O'Quin of the Tylertown Police Department received a report that a late model yellow truck was driving carelessly down Highway 27 in Tylertown, Mississippi. (Tr. 109-10, 119). Officer O'Quin waited near an intersection in his patrol car, and, a few minutes later, a late model yellow truck drove by. (Tr. 110, 119). Officer O'Quin followed the truck and pulled it over after the truck allegedly crossed over the center line. (Tr. 110, 119).

Officer O'Quin approached the driver's side of the truck and noticed Sistrunk, who Officer O'Quin had known "for quite some time." (Tr. 111). Officer O'Quin claimed to smell alcohol coming from the truck; however, he was unsure whether the odor was emanating from Sistrunk or

his passenger, Bertram O'Quin. (Tr. 111).[1] He then asked Sistrunk to step out of the car, and, when Sistrunk opened the door, he (Officer O'Quin) noticed "a small brown bottle lying on the kick panel kind of between the seat and the door. . . ." (Tr. 111).[2] Sistrunk said that he drank a beer or two after work, and he did not have anything illegal in his truck. (Tr. 111).

According to Officer O'Quin, Sistrunk granted him permission to search his truck. (Tr. 111). Officer O'Quin then opened the door, retrieved the small brown bottle, opened it, and found three pills that he believed to be hydrocodone. (Tr. 111). Officer O'Quin later administered a breathalyser test that indicated that Sistrunk was not over the legal limit for alcohol. (Tr. 120). Officer Quin did not charge Sistrunk with a DUI; instead, he turned Sistrunk over to Agent Aubrey Hill, a narcotics agent. (Tr. 113-14). Sistrunk was not charged with possession of hydrocodone on July 4, 2007 (the date of his arrest), apparently because he indicated that he wanted to work as a confidential informant. (Tr. 117).

On August 9, 2007, Officer O'Quin filed charges against Sistrunk for possession of hydrocodone. (Tr. 122, 141, Ex. S-1 at 02:55). Later that day, Officer O'Quin and Agent Hill called Sistrunk to the police station and spoke with him about acting as a confidential informant; the conversation was tape-recorded; Sistrunk was not informed of this. (Tr. 120).

Prior to trial, Sistrunk made a motion in limine to exclude prior bad acts evidence including prior convictions.[3] (Tr. 92). The trial court granted this motion, and ruled that such evidence would

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[1] From the record, it appears that Officer O'Quin and Bertram O'Quinn were not related. (See Tr. 105).

[2] At trial, Officer O'Quin explained that a "kick panel" is the "metal strip or a plastic strip between the driver's seat and the door that holds the carpet down. . . ." (Tr. 118-19).

[3] Specifically, defense counsel stated, "Pretty short motion, Your Honor, in keeping past conduct, past bad conduct and criminal convictions of the Defendant." (Tr. 92).

be excluded unless Sistrunk first opened the door, and the State then approached the bench to obtain leave. (Tr. 93-95, R.E. 10-13).

During the State's direct examination of its first witness, Officer O'Quin, the State introduced into evidence a copy of a tape-recorded statement between Sistrunk, Officer O'Quin, and Agent Hill that took place on August 9, 2007. (Tr. 116, Ex. S-1). On the tape the officers, accused Sistrunk of telling others that the police planted the pills in his truck. (Ex. S-1 at 00:58-01:32). Officer O'Quin testified that the purpose of the tape was to clear this issue up: "I wanted him to state the truth." (Tr. 116, 121). Sistrunk denied saying that the officer's planted the drugs in his truck. (Ex. S-1 at 00:58-01:32). He also admitted that his mother gave him a couple pain pills about a week earlier for back pain. (Ex. S-1 at 01:36-01:40). Officer O'Quin then informed Sistrunk that he filed charges against him earlier that morning for possession of hyrocodone. (Ex. S-1 at 02:55).

The conversation then continued on the topic of Sistrunk possibly acting as a confidential informant. (Ex. S-1). One of the Officers stated to Sistrunk: "I know - - cause' I've known you a long time. . . I know there's somebody - - you can go right now if you wanted something and go score something." (Ex. S-1 at 03:53-04:08). Sistrunk stated, "I know where the crack dealers are, don't get me wrong." (Ex. S-1 at 04:07-04:09). He then talked about numerous people he knows who sell or use various drugs and various places that drugs are sold. (Ex S-1 at 04:10-14:00).

On the tape, Sistrunk also talked about his prior charges and incarceration; at one point, he stated, "I know two people that I can get, they said they were willing to help me anyway to keep me from going back to the penitentiary." (Ex. S-1 at 04:19-04:25). At another point, Sistrunk stated, "[t]his was when I got tied up and was spose' to give [someone] one point three grams of marijuana, and I stayed in Marion County court for over four years. First they say they had audio and video of me giving it to him. . . ." (Ex. S-1 at 11:15-). He also stated, "well they come arrest me and took me

over to Marion County and I had to make bond the next day . . . and when I got out of jail . . . " (Ex. S-1 at 11:56-12:09).

At trial, the bottle found in Sistrunk's truck and the pills discovered therein were admitted into evidence as exhibits. (Tr. 112-13, Ex. S-5, S-6). Page Mills, a forensic scientist with the Mississippi Crime Laboratory, tested the pills. (Tr. 124-28). Mills testified that the tablets contained hydrocodone and acetaminophen; she testified that "the acetaminophen is 650 milligrams, and the hydrocodone is 10 milligrams." (Tr. 129). However, the crime lab report Mills prepared does not contain a milligram amount for either acetaminophen or hydrocodone. (Tr. 129-30, Ex. S-7). Mills claimed that the milligram of Sistrunk's prescription and his mother's prescription did not match the milligram amounts of the pills that she tested–the pills recovered from Sistrunk's truck. (Tr. 131-33).

The defense called Agent Hill to testify, and attempted (apparently) to show that Sistrunk was charged with possession because the Officers were mad at him for telling others that the police planted the pills in his truck.. (Tr. 138-143). After Agent Hill's testimony the defense rested. (Tr. 143). During closing argument, the prosecutor stated:

> You heard this tape of the Defendant talking. What you heard was someone who knows more about the drug trade probably than about anyone you could find. He knew who had dope, when they had dope, who he got marijuana from, who he had done dope with, time and time again. Ladies and gentlemen the evidence is clear, it's convincing, and it's beyond a reasonable doubt.

(Tr. 149). After deliberation, the jury returned a verdict of guilty. (Tr. 157).

SUMMARY OF THE ARGUMENT

The trial court erred in admitting into evidence Exhibit S-1–the tape-recorded statement of Sistrunk. This tape was taken in violation of Sistrunk's Fifth Amendment right against self-incrimination as announced in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966). Therefore,

Sistrunk is entitled to a new trial.

The tape was also admitted in direct violation of the motion in limine granted by the trial court before trial. The motion in limine excluded evidence of Sistrunks prior bad acts and prior convictions, unless Sistrunk opened the door to such evidence and the State approached the bench and obtained leave. The tape contained volumes of extremely prejudicial, inadmissible evidence regarding Sistrunk's prior drug use, his knowledge of the drug trade in the area, as well as his own prior arrests and/or incarceration for drug related offenses. Thus, the State committed a discovery violation in offering the tape into evidence and the trial court erred in not sua sponte ordering a mistrial.

Sistrunk received constitutionally ineffective assistance of counsel, in that, trial counsel failed to object to the admission into evidence of Exhibit S-1. The statement was taken in clear violation of Sistrunk's Miranda rights and it contained volumes of prejudicial evidence regarding his prior bad acts and prior arrests or incarceration that had already been excluded by a motion in limine. Under no circumstances should this evidence been admitted without objection. Trial counsel's performance on this point was deficient and it undoubtedly prejudiced Sistrunk's case and deprived him of a fair trial. Accordingly, Sistrunk is entitled to a new trial.

Additionally, the State committed a discovery violation in failing to disclose or supplement its disclosure to apprise the defense that Mills would testify as to a milligram amount of the pills she tested that were recovered from Sistrunk's truck. The State only provided the defense with Mills' crime lab report, which did not indicate that she had tested for or determined a milligram amount. Mills' trial testimony that the pills were ten (10) milligram hydrocodone pills, unfairly surprised the defense, who from Mills crime lab report, reasonably believed that Mills did not test for or reach an opinion as to the milligram amount of the pills. Therefore, Sistrunk is entitled to a new trial.

Finally, the verdict was supported by insufficient evidence and was against the overwhelming weight of the evidence. Mills' testimony regarding the milligram amount of the pills was the crucial evidence upon which the merits of Sistrunk's case turned. Mills' testimony was incredible because her crime lab report suggested that she did not test for or reach an opinion as to the milligram amount. Moreover, the record does not indicate that her testimony as to milligram amount was based on sufficient facts or data or that she relied on reliable scientific principals and/or methods in reaching her opinion. Therefore, her opinion as to milligram amount was speculative and insufficient expert testimony under Mississippi Rule of Evidence 702. Accordingly, there was insufficient evidence to support Sistrunk's verdict, and he is entitled to have his conviction sentence and fines reversed and a judgment of acquittal rendered in his favor. Alternatively, the verdict was against the overwhelming weight of the evidence, and Sistrunk is entitled to have his conviction sentence and fines reversed and this case remanded for a new trial.

ARGUMENT

I. THE TRIAL COURT ERRED IN ADMITTING EXHIBIT S-1, AS IT WAS OBTAINED IN VIOLATION OF SISTRUNK'S FIFTH AMENDMENT RIGHTS UNDER *MIRANDA V. ARIZONA*, 384 U.S. 436 (1966).

It is acknowledged that no objection was made at trial regarding the lack of *Miranda* warnings, and Sistrunk must rely on plain error to raise this argument on appeal. *Watts v. State*, 733 So. 2d 214, 233 (¶53) (Miss. 1999). This Court has previously held that "the admission into evidence of the defendant's statement given in violation of *Miranda* is reviewable under the plain-error doctrine." *Starr v. State*, 997 So. 2d 262, 266 (¶11) (Miss. Ct. App. 2008) (citing *Smith v. State*, 907 So. 2d 389, 393-94 (¶¶9-11) (Miss. Ct. App. 2005)).

"To determine if plain error has occurred, this Court must look at whether the trial court

deviated from a known legal rule, whether that deviation created an error which was plain, clear, or obvious, and whether the deviation prejudiced the eventual outcome of the trial." *Starr*, 997 So. 2d at 266 (¶11) (citing *McGee v. State*, 953 So. 2d 211, 215 (¶8) (Miss. 2007)).

The Fifth Amendment of the United States Constitution provides in pertinent part; "No person shall. . . . be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. Similarly, Article 3, Section 26 of the Mississippi Constitution provides, in pertinent part: "In all criminal prosecutions the accused shall. . . . not be compelled to give evidence against himself." Miss. Const. Art. 3 § 26.

In *Miranda v. Arizona*, the United States Supreme Court outlined the now-familiar warnings police officers must give to suspects in their custody before they may interrogate, in order to protect the suspect's privilege against self-incrimination. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966). The Court, in *Miranda*, stated that "[t]he Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given." *Miranda*, 86 U.S. at 468, 86 S.Ct. at 1625.

"The threshold question in a Miranda rights analysis is whether the defendant was in custody and being interrogated when the statement in question was made." *Neese v. State*, 993 So. 2d 837, 842 (¶8) (Miss. Ct. App. 2008)(quoting *Drake v. State*, 800 So. 2d 508, 513 (¶12) (Miss. 2001)). In *Drake v. State*, the Mississippi Supreme Court stated:

> The test for whether a person is in custody is whether a reasonable person would feel that she was in custody. That is, whether a reasonable person would feel that she was going to jail-and not just being temporarily detained.... Whether a reasonable person would feel that she was "in custody" depends on the totality of the circumstances. Factors to consider include: (a) the place of interrogation; (b) the time of

> interrogation; (c) the people present; (d) the amount of force or physical restraint used by the officers; (e) the length and form of the questions; (f) whether the defendant comes to the authorities voluntarily; and (g) what the defendant is told about the situation.

Drake v. State, 800 So. 2d 508, 513 (¶12) (Miss. 2001) (quoting *Hunt v. State*, 687 So. 2d 1154, 1160 (Miss. 1996)).

In the instant case, the totality of the circumstances show that Sistrunk was in custody. The interrogation took place in Sheriff Duane Dillon's office. (Tr. 121). The time of the interrogation is unclear; however, it occurred shortly after Officer O'Quin filed charges against Sistrunk. The only people present were Officer O'Quin, Agent Hill, and Sistrunk. The record does not indicate that any physical force was used to restrain Sistrunk. Sistrunk was asked questions for about fifteen minutes. From the tape, it is clear that the officers were upset with Sistrunk for allegedly telling others that the pills were planted in his truck. The questions were asked in an accusatory fashion. It is unclear whether Sistrunk came to the police office voluntarily; however, the tape implies that he was ordered or at least asked to come: "You know what you're here for right?" (Ex. S-1 at 00:27) (officer to Sistrunk). On the tape, Sistrunk was told for the first time that he had been formally charged with possession or hydrocodone. (Ex. S-1 at 02:55).

Under these circumstances, a reasonable person would feel that he or she was going to jail or was not free to leave. Thus, Sistrunk was in custody at the time the officers interrogated him. The tape (Ex. S-1) was made on August 9, 2007. (Tr. 116). That morning, before the statement was taken, Officer O'Quin signed and filed formal charges against Sistrunk for possession of hydrocodone. (Tr. 122, Ex. S-1). At the time of the statement, Officer O'Quin did not tell Sistrunck that he was being recorded. (Tr. 120). An officer, on tape, informed Sistrunk, in a sheriff's office, that charges had been filed against him for possession of hydrocodone. (Tr. 122, 141, Ex. S-1 at

02:55). Sistrunk was not given any Miranda warnings on tape, and the record does not reveal that Sistrunk was otherwise advised of and/or waived his Miranda rights before giving the statement.

Accordingly, Sistrunk's statements on Exhibit S-1 were obtained in violation of Miranda, and he is entitled to a new trial.

II. THE STATE COMMITTED PROSECUTORIAL MISCONDUCT IN OFFERING EXHIBIT S-1 INTO EVIDENCE DESPITE THE MOTION IN LIMINE PROHIBITING EVIDENCE OF PRIOR CONVICTIONS AND PRIOR BAD ACTS EVIDENCE, AND THE TRIAL COURT ERRED IN NOT SUA SPONTE ORDERING A MISTRIAL.

Prior to trial, Sistrunk made a motion in limine to exclude prior bad acts evidence including prior convictions. (Tr. 92, R.E. 10-13). The trial court granted this motion, and ruled that such evidence was excluded unless Sistrunk first opened the door, and the State then approached the bench to obtain leave. (Tr. 93-95, R.E. 10-13). Nevertheless, during the State's direct examination of its first witness, Officer O'Quin, it introduced into evidence Exhibit S-1–the tape-recorded statement of Sistrunk taken by Officer O'Quin and Agent Hill on Auguest 9, 2007.

As outlined above, this tape contained volumes of prior bad acts evidence and at least two references to Sistrunk's prior arrests and/or incarceration. (See Ex. S-1). One of the officers stated to Sistrunk: "I know - - cause' I've known you a long time. . . I know there's somebody - - you can go right now if you wanted something and go score something." (Ex. S-1 at 03:53-04:08). Sistrunk stated, "I know where the crack dealers are, don't get me wrong." (Ex. S-1 at 04:07-04:09). He also exhibited a great deal of intimate knowledge about the drug trade in and around Walthall County, and he talked about numerous people he knows who sell and use various drugs as well as various places that drugs are sold. (Ex S-1 at 04:10-14:00). Sistrunk also referenced his prior charges and incarceration; at one point, he stated, "I know two people that I can get, they said they were willing

to help me anyway to keep me from going back to the penitentiary." (Ex. S-1 at 04:19-04:25). At another point on the tape, Sistrunk stated, "[t]his was when I got tied up and was spose' to give [someone] one point three grams of marijuana, and I stayed in Marion County court for over four years. First they say they had audio and video of me giving it to him. . . ." (Ex. S-1 at 11:15-). He also stated, "well they come arrest me and took me over to Marion County and I had to make bond the next day . . . and when I got out of jail . . . " (Ex. S-1 at 11:56-12:09).

These statement constitute evidence, which under the circumstances, was inadmissible pursuant to Mississippi Rules of Evidence 404(a)(1) and 404(b) and 609(a)(1), which, by necessary implication, were the subject of Sistrunk's motion in limine. Moreover, Sistrunk did not open the door to this evidence; the State offered it during the direct examination of its very first witness. The State also did not approach the bench and request leave to introduce this evidence.

Trial counsel did not object to Exhibit S-1,[4] and it is acknowledged that this issue would ordinarily be procedurally barred due to counsel's failure to make a contemporaneous objection. See e.g., *Quinn v. State*, 873 So. 2d 1033, 1039 (¶28) (Miss. Ct. App. 2003); *Patton v. State*, 742 So. 2d 150, 153-54 (¶9) (Miss. Ct. App. 1999). However, Sistrunk contends that this error constituted plain error, in that, the error clearly violated Rules 404(a)(1) and 404(b), as well as the State's duty to abide by the motion in limine, and it resulted in extremely damaging evidence which prejudiced the outcome of his case. Also, as explained above, the tape was taken in violation of Sistrunk's fundamental right against self-incrimination, and should be addressed as plain error for this reason if no other.

Under Rule 404(a)(1), character evidence of an accused is permissible only id "offered by

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[4] As explained below, Sistrunk contends that he received ineffective assistance of counsel for this reason.

an accused, or by the prosecution to rebut the same. M.R.E. 404(a)(1). In the instant case, Sistrunk did not offer character evidence. He did not testify and did not call a character witness; in fact, defense counsel had not even cross-examined the State's first witness. Thus, Exhibit S-1 was clearly not offered by the State to rebut evidence of Sistrunk's good character.

Under Rule 404(b), "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted I conformity therewith." M.R.E 404(b). Exhibit S-1 contained numerous statements regarding Sistrunk's prior drug use (taking pain pills from his mother, smoking marijuana) as well as prior arrest(s) and incarceration for drug related offenses.

Sistrunk was on trial for a drug charge. The statements contained in Exhibit S-1 showed that he uses drugs, knows who to get them from and where, and he has previously been arrested and/or incarcerated for drug related offenses. The error in admitting this evidence resulted in extremely damaging evidence which undoubtedly prejudiced the outcome of the trial. This prejudice was furthered when the State argued the following during closing argument:

> You heard this tape of the Defendant talking. What you heard was someone who knows more about the drug trade probably than about anyone you could find. He knew who had dope, when they had dope, who he got marijuana from, who he had done dope with, time and time again. Ladies and gentlemen the evidence is clear, it's convincing, and it's beyond a reasonable doubt.

(Tr. 149). This is precisely the danger that Rule 404 seeks to prevent.

Sistrunk contends that the State committed prosecutorial misconduct in offering the Exhibit S-1 in spite of the motion in limime, and, further, the trial court erred in failing to *sua sponte* order a mistrial, pursuant to Uniform Circuit and County Court Rule 3.12, due to the State's misconduct and the extremely damaging nature of the evidence. Accordingly, Sistrunk contends that he is entitled to a new trial.

III. SISTRUNK'S TRIAL COUNSEL WAS INEFFECTIVE IN FAILING

TO OBJECT TO THE ADMISSION OF EXHIBIT S-1 AND TO THE PROSECUTOR'S CLOSING ARGUMENT RECOUNTING THE PREJUDICIAL EVIDENCE CONTAINED IN EXHIBIT S-1.

Ar trial, Sistrunk's attorney failed to object to Exhibit S-1. As alluded to above, Exhibit S-1 was obtained in violation of Sistrunk's rights against self-incrimnation, and contained volumes of prejudicial evidence that was clearly inadmissible under Rules 404(a)(1) and 404(b). As explained in more detail below, trial counsel was ineffective for failing to object to the admission of Exhibit S-1 and to the potion of the prosecutor's closing argument recounting the prejudicial evidence contained in Exhibit S-1.

To establish a claim of ineffective assistance of counsel, the defendant must show that: (1) trial counsel's performance was deficient, and (2) trial counsel's deficient performance prejudiced his or her defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984); *Ravencraft v. State*, 989 So. 2d 437, 443 (¶31) (Miss. Ct. App. 2008). The defendant bears the burden of proving both prongs and faces a rebuttable presumption that trial counsel's performance "is within the wide range of reasonable conduct and that his attorney's decisions were strategic." *Id.* (citing *Edwards v. State*, 615 So. 2d 590, 596 (Miss. 1993)). The defendant may rebut this presumption, however, by demonstrating a reasonable probability that, but for his trial attorney's errors, he would have received a different result in the trial court. *Stringer v. State,* 627 So. 2d 326, 329 (Miss. 1993).

Under the first prong of *Strickland,* "the errors of counsel's performance must be so serious that they prevented counsel from functioning as the Sixth Amendment guarantees." *Havard v. State*, 928 So. 2d 771, 781 (¶8) (Miss. 2006) (citing *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052). Under the second prong, "the errors of counsel must have been so serious that they deprived the defendant of a fair trial, that being a trial with a reliable result." *Id.*

"For a defendant to prevail on a claim of ineffectiveness, counsel's representation must have

fallen 'below an objective standard of reasonableness.'" *Id.* at 780-81 (¶7) (quoting *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, at 686, 104 S.Ct. 2052. This is precisely what happened at trial in the instant case.

Although, counsel's performance is presumed to be "within the wide range of reasonable conduct and . . . strategic[,]" trial counsel's decision not to object to Exhibit S-1 was clearly unreasonable. Under no circumstances should evidence of this type pass without objection from defense counsel. Apparently, trial counsel did not object to Exhibit S-1 because he was of the opinion that it was a good defense that the officers decided to charge Sistrunk only because they were upset with him. (See closing argument at Tr. 152-155). This is not a legal defense, and the value of any juror sympathy/empathy to be gained by this position is clearly outweighed by the massive amount of destructive evidence revealed in Exhibit S-1. As the State stressed in closing argument: "What you heard was someone who knows more about the drug trade probably than about anyone you could find. He knew who had dope, when they had dope, who he got marijuana from, who he had done dope with, time and time again." If trial counsel's decision was strategic, it was severely flawed strategy that was unreasonable under the circumstances. Trial counsel's performance clearly fell below the "objective standard of reasonableness," and his failure to object to Exhibit S-1 was deficient performance.

Trial counsel's deficiency prejudiced Sistrunk's defense to point that it deprived him of a fair trial and jeopardized the reliability of the jury's verdict. Sistrunk was on trial for a drug offense for a substance that he had a prescription for. He did not testify, and, due to trial counsel's failure to object, the jury was allowed to hear inadmissible evidence of "someone who knows more about the

drug trade probably than about anyone you could find. He knew who had dope, when they had dope, who he got marijuana from, who he had done dope with, time and time again." (Tr. 149). Although Mills testified that the pills recovered from Sistrunk's truck were of a different amount than the pills that he was prescribed, her report did not contain a milligram amount and did not reflect that she performed a test to determine a milligram amount. Thus, the jury could have easily discredited her testimony and found Sistrunk not guilty; if not for the statements contained in Exhibit S-1, there is a reasonable probability that this would have been the case. However, trial counsel's failure to object to Exhibit S-1 allowed very damning evidence that prejudiced Sistrunk's case to the point that he was deprived the a fair trial, and the result reached by the jury is unreliable.

Accordingly, Sistrunk received constitutionally ineffective assistance of counsel, and he is entitled to a new trial.

IV. THE STATE COMMITTED A DISCOVERY VIOLATION RELATING TO MILLS' TESTIMONY CONCERNING THE MILLIGRAM AMOUNT OF THE PILLS RECOVERED FROM SISTRUNK'S TRUCK.

At trial, the State called Heather Mills, the crime lab technition. Mills testified that she the tablets contained hydrocodone and acetaminophen; she also claimed that "the acetaminophen is 650 milligrams, and the hydrocodone is 10 milligrams." (Tr. 129). However, the crime lab report Mills prepared does not contain a milligram amount for either acetaminophen or hydrocodone. (Tr. 129-30, Ex. S-7).

When Mills testified as to the milligram amount of the pills recovered from Sistrunk's truck, trial counsel objected and asserted that the State committed a discovery violation. (Tr. 129). Trial counsel argued that the State only provided him with Mills' crime lab report, and did not tell him that Mills would testify as to the milligram amount of the pills. (Tr. 129-30). The State claimed that

it "told" trial counsel that Mills would testify to the milligram amount; however, trial counsel did not recall this. (Tr. 129-30). The trial court overruled trial counsel's objection. (Tr. 130).

As explained below, the State's failure to disclose Mills' testimony constituted a discovery violation which unfairly surprised the defense, and the trial court erred in refusing to grant a continuance to allow defense counsel a reasonable opportunity to interview the informant and prepare for trial. This Court has stated that "justice is more nearly achieved when, well in advance of trial, each side has reasonable access to the evidence of the other." *Moore v. State*, 536 So. 2d 909, 911 (Miss. 1988) (citation omitted).

This Court reviews the trial court's ruling on a discovery violation under the abuse of discretion standard of review. *Montgomery v. State*, 891 So.2d 179, 181 (¶6) (Miss.2004).

Under Rule 9.04 of the Uniform Rules of Circuit and County Court, the prosecution must disclose to the defense:

> Names and addresses of all witnesses in chief proposed to be offered by the prosecution at trial, together with a copy of the contents of any statement, written or recorded or otherwise preserved of each such witness and *the substance of any oral statement made by any such witness.*

URCCC 9.04(A)(1) (emphasis added). Under Rule 9.04(A)(4), the State is required to provide "any reports, statements, or opinions of experts, written, recorded or otherwise preserved, made in connection with the particular case. . . ." URCCC 9.04(A)(4). Significantly, Rule 9.04(E) provides that "both the State and the defendant have a duty to timely supplement discovery." URCCC 9.04(E).

Although the defense received a copy of the crime lab report, nowhere does it suggest that Mills reached a determination and/or would testify as to the milligram amount of the pills. (See Ex. S-7). Mills opinion as to the milligram amount was surely discoverable under Rule 9.04(A)(1) or

9.04(A)(4). Having received only Mills crime lab report, trial counsel was understandably under the impression that she had not reached an opinion as to the milligram amount of the pills. Therefore, her trial testimony unfairly surprised the defense.

Rule 9.04(I) provides the procedure to be followed by the trial court concerning a discovery violation; that rule states in pertinent part:

> If during the course of trial, the prosecution attempts to introduce evidence which has not been timely disclosed to the defense as required by these rules, and the defense objects to the introduction for that reason, the court shall act as follows:
>
> 1. Grant the defense a reasonable opportunity to interview the newly discovered witness, to examine the newly produced documents, photographs, or other evidence; and
>
> 2. If, after such opportunity, the defense claims unfair surprise or undue prejudice and seeks a continuance or a mistrial, the court shall, in the interest of justice and absent unusual circumstances, exclude the evidence or grant a continuance for a period of time reasonably necessary for the defense to meet the non-disclosed evidence or grant a mistrial.

URCCC 9.04(I).

Although trial counsel did not explicitly request a continuance, it is implicit from the context of the objection that he desired one. Also, the trial court overruled his objection very quickly without affording trial counsel an opportunity to interview Mills regarding her opinion as to the milligram amount. Therefore, the trial court failed to follow the procedure set forth in Rule 9.04(I)(1), which precedes the requirement that trial counsel request a continuance under 9.04(I)(2).

The State committed a discovery violation which unfairly surprised the defense, and the trial court failed to follow the procedure set forth in Rule 9.04(I). Therefore, Sistrunk asserts that he is entitled to a new trial.

V. THE VERDICT WAS SUPPORTED BY INSUFFICIENT EVIDENCE AND WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

A motion for new trial challenges the weight of the evidence. *Lima v. State*, 7 So. 3d 903, 908 (¶21) (Miss. 2009). In reviewing a challenge to the weight of the evidence, the verdict will be only be disturbed "when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." *Bush v. State*, 895 So. 2d 836, 844 (Miss. 2005). The evidence is viewed in the light most favorable to the verdict. *Id.* (citing *Herring v. State*, 691 So. 2d 948, 957 (Miss.1997)). This Court "sits as a hypothetical thirteenth juror." *Lamar v. State*, 983 So. 2d 364, 367 (¶5) (Miss. Ct. App. 2008) (citing *Bush*, 895 So. 2d at 844 (¶18)). "If, in this position, the Court disagrees with the verdict of the jury, 'the proper remedy is to grant a new trial.'" *Id.*

In reviewing the sufficiency of the evidence, the relevant inquiry is whether, "viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Bush v. State*, 895 So. 2d 836, 843 (Miss. 2005) (quoting *Jackson v. Virginia*, 443 U.S. 307, 315, 99 S.Ct. 2781, (1979)). The verdict will not be disturbed where the evidence so reviewed is such that "reasonable fair-minded men in the exercise of impartial judgment might reach different conclusions on every element of the offense." *Id.* (citing *Edwards v. State*, 469 So.2d 68, 70 (Miss.1985)). However, the proper remedy is to reverse and render where the evidence "point[s] in favor of the defendant on any element of the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty[.]" *Id.*

In the instant case, Sistrunk had a prescription to hydrocodone. (Ex. S-3, D-2). Specifically, his prescription was for five (5) milligrams of hydrocodone. (Ex. S-3, D-2). At trial, Mills testified that the pills recovered from Sistrunk's truck contained ten (10) milligrams of hydrocodone. (Tr. 129, 131). Significantly, Mills' crime lab report did not reflect that she determined a milligram

amount and it did not contain a milligram amount. (See Ex. S7). Mills' testimony on this point was the evidence upon which this case turned. However, her testimony as to the milligram amount was incredible.

Mills crime lab report suggests that she never even tested the pills for milligram amount and reached no determination as to the milligram amount. (See. Ex. S-7). Furthermore, the record does not indicate and Mills did not testify to the facts or data upon which she based this opinion and that she relied on reliable principles and methods in reaching this opinion. Therefore, her opinion was speculative and insufficient pursuant to Mississippi Rule of Evidence 702. See *Edmonds v. State*, 955 So. 2d 787, 791-92 (Miss. 2007).

In light of the unreliable/speculative nature of Mills testimony as to the milligram amount and the fact that Sistrunk had a prescription for hydrocodone, Sistrunk submits that the evidence was insufficient to support his conviction, and he is entitled to have his conviction sentence and fines reversed and a judgment of acquittal rendered in his favor. Alternatively, Sistrunk submits that the verdict was against the overwhelming weight of the evidence and that allowing the jury's verdict to stand would sanction an unconscionable injustice. Consequently, he requests, in the alternative, that this Court reverse his conviction sentence and fines and remand this case for a new trial.

CONCLUSION

Based on the propositions briefed and the authorities cited above, together with any plain error noticed by the Court which has not been specifically raised, Sistrunk respectfully requests that this honorable Court reverse the conviction, sentence and fines entered in the trial court and render a judgment of acquittal in his favor. In the alternative, Sistrunk requests that this Court reverse his conviction sentence and fines and remand this case for a new trial.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

Hunter N Aikens
COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I, Hunter N Aikens, Counsel for Joel Sistrunk, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

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Circuit Court Judge
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This the 14th day of July, 2009.

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