IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JAMAL ANTWAN PRITCHETT **APPELLANT**

V. **NO. 2009-KA-0325-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. Jamal Antwan Pritchett, Appellant
3. Honorable E.J. (Bilbo) Mitchell, District Attorney
4. Honorable Robert W. Bailey, Circuit Court Judge

This the 29 day of June, 2009.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

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STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Lauderdale County, Mississippi, and a judgment of conviction of Robbery by Use of a Deadly Weapon. Jamal Pritchett was

sentenced to ten (10) years in the custody of the Department of Corrections, with his sentence to run consecutive to a previous sentence. Pritchett was also ordered to pay a fine of $500.00, $1,000.00 to the Victim's Compensation Fund, restitution of $207.00 to Burns and Burns, and costs of $306.50. Pritchett's conviction followed a jury trial on December 9-10, 2008, Honorable Robert Walter Bailey, presiding. Pritchett is presently incarcerated with the Mississippi Department of Corrections.

FACTS

On or about October 17, 2007, Charles Sisson was held up at gun point while working at the Texaco Food Mart #7 near Highway 39 and 45 bypass. Rodrickas Marsh and Octavious McNeil testified that they were involved in the robbery of the store. Tr. 138-70. During their testimony they both claim that Jamal Pritchett was involved also.

According to Marsh, late October 16 or early October 17, Marsh and McNeil met up with Pritchett and Lorenzo Norman on 53rd and 52nd street. Tr. 140-41. As they were together, someone mentioned going to rob a store. Tr. 141. In Norman's white Ford Explorer, Pritchett, Marsh, McNeil, and Norman went to the Texaco store. Tr. 142. Marsh continued to state that Pritchett insisted that he could go in the store. *Id.* However, Marsh stated that they told Pritchett to not go into the store. *Id.*

In preparation for going into the store, Marsh and McNeil used shirt sleeves to hide their faces. Tr. 143. However, Pritchett did not have anything covering his face. *Id.* Marsh told the court that upon arriving at the store, Pritchett went into the store first. *Id.* Marsh did

not know why Pritchett was going into the store. *Id.* After Pritchett went into the store, Marsh and McNeil ran into the store. Tr. 144. When they were inside the store, Marsh and McNeil told the store clerk to give them the money, to which the clerk complied. *Id.* Marsh and McNeil also grabbed cigarettes and a telephone to prevent the clerk from calling the police. *Id.* The boys then went back to 53rd street and split up the money. Tr. 145.

According to the testimony of McNeil, Norman and Pritchett came to 5th Street to where Marsh and McNeil were located. Tr. 163. While all four boys were together, they talked about a robbery. *Id.* McNeil claimed that Norman had the idea of the robbery. *Id.* Everyone agreed to Norman's idea, but there was no planning. Tr. 164. They just thought it was a good store to rob. *Id.*

McNeil continued to testify that Norman was the driver, Pritchett, Marsh, and himself were going to rob the store. Tr. 165. McNeil claimed that Pritchett's role was to go into the store and let them know if everything was clear for them to come inside the store. *Id.* Pritchett was to waive his hand to let them know that everything was ok to enter the store. Tr. 166.

McNeil who was masked along with Marsh, stated that Pritchett was not masked and was not sure about a weapon. *Id.* McNeil did have a pistol and thought that Marsh had a pistol also, but he did not see a knife. *Id.*

When McNeil and Marsh entered the store, McNeil told the clerk to give him the money out of the cash register and Marsh grabbed some cigarettes. Tr. 167. Then all three

boys ran out of the store and got into Norman's Ford Explorer. *Id.* After leaving the store, the boys went back to 5th Street and split up the money.

However according to Pritchett's statements, he did not have anything to do with the robbery. Tr. 114, Exhibit 7. After Pritchett gave numerous statements denied any involvement in the robbery, Pritchett told Officer Arrington his version of the events at the Texaco Store. *Id.* In Pritchett's statement on the evening of October 16, 2007, he was picked up by Norman around seven-thirty p.m. and taken to his grandma's house. Exhibit 7. Pritchett and Norman left Pritchett's grandmothers house and went and picked up his cousins. *Id.* The cousins wanted to get a cigar, so the boys all went to the Texaco store to buy a cigar. *Id.*

Pritchett went into the store to the counter to buy the cigar and Norman came to the front door of the store and told the boys to hurry up they were burning his gas. *Id.* The boys then all went back to some apartments and smoked. *Id.* Norman and Pritchett then left the cousins and drove around to 53rd Avenue were they ran into McNeil and Marsh. *Id.*

According to Pritchett, McNeil and Marsh wanted to go to the store, but on another side of town. *Id.* So Norman took them to the same Texaco that Pritchett, Norman, and the cousins had just visited. *Id.* Pritchett told Officer Arrington in his statement that the guys in the vehicle gave him a dollar to go buy a cigar and another dollar for going into the store. *Id.*

Pritchett went into the store to get the cigar and something to drink, and McNeil and Marsh run into the store wearing masks. *Id.* Pritchett ducked behind a chip rack. *Id.* McNeil was waving a gun around and Marsh ran behind the counter. *Id.* Pritchett told Officer Arrington that he heard McNeil tell the clerk to open the cash register. *Id.*

Pritchett decided to make a run for it and ran out of the store. *Id.* McNeil and Marsh ran out behind Pritchett. *Id.* When they all got back into the vehicle, McNeil and Marsh told Pritchett that he better not snitch. *Id.*

SUMMARY OF THE ARGUMENT

Jamal Pritchett was irreparably and unfairly prejudiced when evidence of gang membership was admitted over the objections of Pritchett's attorney. The testimony was irrelevant and there was no evidence that the incident was the result of any gang activity. Therefore, the jury was presented the evidence in error.

The jury's verdict was also against the overwhelming weight of the evidence. Pritchett had only went into the store for a second time that night to get a cigar and something to drink. He had no control that McNeil and Marsh were using him to rob the store. Pritchett had no knowledge of the robbery and was not even covering his face as were the other two boys. The verdict was against the weight of the evidence.

ARGUMENT

ISSUE NO. 1

JAMAL PRITCHETT WAS IRREPARABLY AND UNFAIRLY PREJUDICED WHEN EVIDENCE OF GANG MEMBERSHIP WAS ADMITTED OVER THE OBJECTION OF PRITCHETT'S ATTORNEY

A. Standard of Review.

In setting forth the standard of review regarding the admission of evidence, the Courts have stated that the admissibility and relevance of evidence "is within the discretion of the trial court and, absent an abuse if that discretion, the trial court's decision will not be disturbed on appeal." ***Ellis v. State***, 856 So.2d 561, 565 (Miss. App. 2003)(citing ***Reynolds v. State***, 784 So.2d 929, 932 (Miss. 2001). "As long as the trial court remains within the confines of the Mississippi Rules of Evidence, its decision to admit or exclude evidence will be accorded a high degree of deference." ***Johnson v. State***, 567 So.2d 237, 238 (Miss. 1990). And "the admission or exclusion of evidence must result in prejudice or harm, if a cause is to be reversed on that account." ***Jackson v. State***, 594 So.2d 20, 25 (Miss. 1992).

B. Admission of Evidence Regarding Gang Membership of Jamal Pritchett Was Irrelevant Because the Prosecution Did Not Lay a Proper Foundation Which Showed a Connection Between Gang Membership and the Alleged Crime.

At trial, testimony regarding the alleged gang membership of Jamal Pritchett was brought up on numerous occasions over the objections of Pritchett's attorney. The United States Supreme Court in ***Dawson v. Delaware***, 503 U.S. 159, 165, 112 S.Ct. 1093, 1097

(1992), held that the admission of such evidence in certain instances amounts to constitutional error. "Although we cannot accept Dawson's broad submission, we nevertheless agree with him that, in this case, the receipt into the evidence of the stipulation regarding his membership in the Aryan Brotherhood was constitutional error." *Id.*

In ***Randall v. State***, 806 So.2d 185 (Miss. 2002), the Mississippi Supreme Court discussed ***Dawson*** at length. In Dawson, the defendant was convicted of first degree murder. He entered into a stipulation which provided: The Aryan Brotherhood refers to a white racist prison gang that began in the 1960's in California in response to other gangs of racial minorities. The separate gangs calling themselves the Aryan Brotherhood now exist in many state prisons, including Delaware. ***Dawson***, 503 U.S. at 162, 112 S.Ct. at 1096.

The defendant entered into this stipulation in exchange for the State's agreement not to call an expert witness to testify about the Aryan Brotherhood. *Id.* The United States Supreme Court flatly rejected a per se ban of the admission of evidence concerning one's belief and associations at a sentence simply because those beliefs and associations are protected by the First Amendment. *Id* at 165, 112 S.Ct. at 1097. The Court said "because the prosecution did not prove that the Aryan Brotherhood had committed any unlawful or violent acts, or had even endorsed such acts, the Aryan Brotherhood evidence was also not relevant to help prove any aggravating circumstances." *Id* at 116, 112 S.Ct.

at 1098. The Court went on to say that there may be instances when such association is relevant.. They gave us an example of proof when a defendant's membership in an organization that endorses the killing of any identifiable group might be relevant to a jury's determination into whether a defendant will be dangerous in the future. Id. The problem with the evidence was that it never showed specifically how the defendant's affiliation in any way contributed to any of the aggravating circumstances. ***Randall v. State***, 806 So.2d 185, 219 (Miss. 2002)(quoting ***Dawson v. Delaware***, 503 U.S. 159, 165, 112 S.Ct. 1093, 1097 (1992)).

The Court in ***Dawson*** went on to state that "Delaware might have avoided this problem if it had presented evidence showing more than mere abstract beliefs on Dawson's part, but on the present record one is left with the feeling that the Aryan Brotherhood evidence was employed simply because the jury would find these beliefs morally reprehensible. Because Delaware failed to do more, we cannot find the evidence was properly admitted as relevant character evidence." ***Dawson v. Delaware***, 503 U.S. 159, 166-67, 112 S.Ct 1093, 1098 (1992).

The Dawson Court gave an indication of the foundation required in order to make the evidence admissible. "Before the penalty hearing, the prosecution claimed that its expert witness would show that the Aryan Brotherhood is a white racist prison gang that is associated with drugs and violent escape attempts at prisons, and that advocates the murder of fellow inmates. If credible and otherwise admissible evidence to that effect

had been presented, we would have a much different case." Dawson, 503 U.S. at 165, 112 S.Ct. at 1097 (1992).

To be sure, gang evidence is not per se inadmissible, and under the proper circumstances, it can be used as both impeachment and substantive evidence. "[T]he government could impeach a defense witness by showing that both the defendant and the witness were members if the Aryan Brotherhood, and that members were sworn to lie on behalf of each other." ***Dawson v. Delaware***, 503 U.S. at 164, 112 S.Ct. at 1097 (1992)(citing ***United States v. Abel***, 469 U.S. 45, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984)). See also ***Hoops v. State***, 681 So.2d 521, 530 (Miss. 1996). However, the feelings of a group of people in general "is not probative with respect to the feelings of each individual member . . . ." ***Burroughs v. State***, 767 So.2d 246, 249 (Miss.App. 2000). Rather, it is the credibility of the individuals who are going to testify that is relevant and not the credibility of the group in general. *Id.*

In the present case, the prosecution offered no such evidence, nor was this an isolated event. Pritchett objected to the introduction of the gang evidence through the statements to be presented to the jury. Tr. 103-04. Pritchett even requested that the statements be redacted regarding the gang evidence since they are not relevant to this crime. *Id.* Prosecution offered no explanation why the gang evidence should be admitted other than the fact that it was proof that Pritchett was associated with a gang. Tr 104-05. The trial judge overruled the objected finding that the Defendant' statement was relevant

under Rule 401 and that it was also more probative than prejudicial under Rule 404(b). Tr. 105. Gangs were mentioned numerous times throughout Pritchett's case, and this had to have an effect on the jury hearing the case.

Goree v. State, 748 S0.2d 829 (Miss. App. 1999), is nearly on point. There, the Court of Appeals found:

> The indictment charged that Goree had committed an aggravated assault against Horne in what appears, as was noted by the trial court, to have been a senseless act without any clear ratinale or meaning . . . . However, the State failed to produce any testimony, except by innuendo, to support its theory that the crime against Horne was in some way correlative to Goree's gang affiliation.

Goree, 748 So2d. at 837. The Court of Appeals further found that a proper foundation had not been laid to make the gang evidence admissible.

> We recognize that a witness's affiliation with a gang could be relevant, under appropriate circumstances, to establish potential bais, particularly in situations involving crimes committed between rival gangs members. However, that is not the case in the matter before us today or at least not the case as is indicated in the record. In addition, we fail to see how being a member of a gang *ipso facto* challenges that witness's credibility as was also argued by the State at trial.

Id.

The Court of Appeals went on to find that street gang evidence is highly prejudicial, and then reversed and remanded because the prosecution did not lay a proper foundation to make the evidence admissible.

> We note that the State did, however, succeed in establishing a strong probability that Goree was in fact an active gang member of the Black

> Gangsters or at the very least had strong affiliations with them, but that, standing alone, has no connection to the crime.
> Much more is rewuired when such highly prejudical evidence is sought to be admitted against an accused . . . . The key issue remains whether Goree's gang affiliation was in some way related or linked to the crime charged. We note that the State could produce no witnesses or evidence with which to directly link Goree's gang affiliation to the crime as it was committed against Horne. Therefore, without more, any linkage between Goree's gang affiliation and the crime committed is the result of pure speculation and innuendo. We reverse and remand.

Goree v. State, 748 So.2d at 837-38.

Three years after ***Goree***, the Mississippi Supreme Court in ***Randall v. State***, 806 So.2d 185, 220 (Miss. 2002), held, "Standing alone, any alleged gang membership or affiliation is not relevant." The Court went on the state, "[t]his is not to say that it might not become so for rebuttal purposes depending on circumstances in the next trial. Consequently, unless a proper foundation is laid in the next trial which would make gang membership relevant, this information has no reason to be before the jury." ***Randall***, 806 So.2d at 220.

In the case before the Court, the evidence of street gang membership or affiliation was certainly not relevant. It was brought in without any qualifying expert testimony, and there was absolutely no foundation laid to make the evidence admissible. There were numerous diametrically opposed stories as to how the events on the night in question took place, none of the versions even remotely suggested that the alleged incident was gang-related.

It appears that the only reason the prosecution sought to admit the street gang evidence was to prejudice the jury against Pritchett. In other words to encourage the jury to find Pritchett guilty because of his association with a street gang. When the trial court allowed the street gang testimony into evidence, the credibility of Pritchett was destroyed by the improper admission of highly prejudicial evidence. Therefore, the Appellant respectfully submits that the Court should reverse and remand for a new trial.

ISSUE NO. 2

THE TRIAL COURT ERRED IN DENYING PRITCHETT'S MOTION FOR A NEW TRIAL BECAUSE THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Should this Court reject Pritchett's contention that he was unfairly prejudiced when evidence of gang membership was admitted over his objection, Pritchett asserts, in the alternative, that not granting Pritchett a new trial was against the overwhelming weight of the evidence.

In reviewing a challenge to the weight of the evidence, the verdict will 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.'

Pritchett after several interviews with police finally admitted to knowing McNeil and Marsh. Exhibit 7. Pritchett told Officer Arrington that he was given a dollar to buy a cigar and a dollar for going into the store. Id. Pritchett did not know that McNeil and Marsh were going to rob the store. Id. Pritchett had already been in the Texaco just a few hours prior. Id. He knew that the store clerk would recognize him if he went back and tried to rob the store.

Also, McNeil and Marsh had different stories about the robbery. Marsh stated that he told Pritchett not to go into the store. Tr. 142. He did not know why Pritchett went into the store and did not know what he was going to do while he was in the store. Tr. 143.. However, McNeil testified that Pritchett was to go into the store and let them know if it was alright for them to go into the store. Tr. 165. Also, McNeil never saw a knife, and he thought Marsh had a pistol. However, Marsh actually had a knife and dropped it in the store. The stories presented by McNeil and Marsh are inconsistent.

Moreover, Pritchett went into the store without anything covering his face, whereas the other two individuals had masks. Tr. 143. Pritchett, who had previously been in the store, would have had a mask on if he was planning on robbing the store. Pritchett was also threatened that he better not "snitch" after they all left the store.

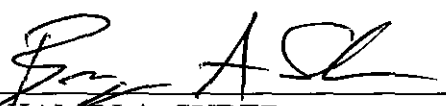
Furthermore, McNeil and Marsh has everything to gain by testifying against Pritchett. Both McNeil and Marsh are awaiting sentencing for pleading guilty to robbing the store.

The verdict was against the overwhelming weight of the evidence. Pritchett therefore respectfully asserts that the foregoing facts demonstrate that the verdict was against the overwhelming weight of the evidence, and the Court should reverse and remand for a new trial.

CONCLUSION

Given the facts presented in the trial below, the admission of gang evidence was highly prejudicial which denied Pritchett a fair trial. The verdict was also contrary to the overwhelming weight of the evidence. Jamal Antwan Pritchett is entitled to have his conviction reversed and remanded for a new trial.

Respectfully submitted,
MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Jamal Antwan Pritchett, Appellant

BY: 

BENJAMIN A. SUBER
MISSISSIPPI BAR NO. [redacted]

CERTIFICATE OF SERVICE

I, Benjamin A. Suber, Counsel for Jamal Antwan Pritchett, 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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