IN THE SUPREME COURT OF MISSISSIPPI
NO. 2009-KA-00327-SCT

IVAN RUSSELL McCLELLAN — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
George T. Holmes, MSB No. [redacted]
301 N. Lamar St., Ste 210
Jackson MS 39201
601 576-4200

Counsel for Appellant

IN THE SUPREME COURT OF MISSISSIPPI
NO. 2009-KA-00327-SCT

IVAN RUSSELL McCLELLAN — APPELLANT

V.

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. Ivan Russell McClellan

THIS 20th day of July, 2009.

Respectfully submitted,

IVAN RUSSELL McCLELLAN

By: George T. Holmes

George T. Holmes,
Mississippi Office of Indigent Appeals

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES

OTHER AUTHORITIES

STATEMENT OF THE ISSUES

ISSUE NO. 1: WHETHER McCLELLAN'S MOTION TO SUPPRESS SHOULD HAVE BEEN SUSTAINED?

ISSUE NO. 2: WHETHER THE VERDICT IS SUPPORTED BY THE WEIGHT OF EVIDENCE?

ISSUE NO. 3: WHETHER THE TRIAL COURT ALLOWED IMPROPER IMPEACHMENT EVIDENCE?

ISSUE NO. 4: WHETHER MERGER PROHIBITED PROSECUTION FOR BOTH POSSESSION OF PRECURSOR AND POSSESSION OF 250 DOSAGE UNITS OF EPHEDRINE?

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Lowndes County, Mississippi where Ivan Russell McClellan was convicted of possession of having at least two methamphetamine precursors and possession of more than 250 dosage units of pseudoephedrine or ephedrine, under MCA §41-29-313 (1)(a) and 2(c)(I) (Rev. 2005). A jury trial was conducted February 19-20, 2009, with Honorable James T. Kitchens, Circuit Judge, presiding. McClellan was sentenced as an habitual offender under MCA §99-19-81 (1972) to thirty (30) years on the precursor charge and five (5) years, concurrent, on the possession charge and is presently incarcerated with the Mississippi Department of Corrections.

FACTS

Narcotics officers responded to Fred's Dollar Store on 18th Avenue in Columbus December 5, 2007 around 2:00 p. m.[T. 79]. There was a call regarding a white male and female leaving Fred's after allegedly purchasing "numerous boxes of pseudoephedrine" a necessary ingredient in the illegal manufacture of methamphetamine. [T. 80, 127]. Fred's personnel had been instructed to call police if large quantities of products containing pseudoephedrine or ephedrine were ever purchased by anyone. *Id.* At trial one of the officers described a large quantity as more than two boxes. [T. 81].

In this case, the white mane and woman had allegedly purchased four (4) boxes of over the counter medications containing pseudoephedrine or ephedrine each for a total of eight (8) boxes. *Id.* The store workers purportedly were able to give police a suspected identity of the couple purchases as Ivan Russell McClellan and Katina Langford McGee due to identification requirements for pseudoephedrine. [T. 83].

The couple were described by Fred's personnel as driving off in "a blue older model vehicle," subsequently deduced by police to be a Ford Mustang spotted nearby with an Alabama tag. [T. 81-82, 84, 127, 130-31]. Some officers went directly to Fred's, others searched the area looking for the blue vehicle. [T. 82].

The blue Mustang was spotted at a convenience store called the Dutch Village near the intersection of Highway 12 and 82. [T. 82]. Officers were notified and surveillance of the vehicle was set up. [T. 84-86].

The occupants of the car were Ivan McClellan and Katina McGee. McClellan did not enter the Dutch Village, only Katina. [T. 129, 176]. After Katina got back in the car and the couple drove off, officers went in the convenience store and were allegedly informed that Katina had purchased a pseudoephedrine/ephedrine product. [T. 86, 88, 177]. After leaving the Dutch Village the couple reportedly went to a Dollar General Store from which no purchases were made. [T. 86-88].

The Mustang left the Dollar General Store and proceeded on through town. [T. 89]. The officers decided to stop the Mustang on Highway 182, Ivan McClellan was driving, Katina McGee was passenger. [T. 89-91]. The officers allegedly obtained consent to search the Mustang, which belonged to Ivan McClellan, and allegedly discovered 308 pills containing pseudoephedrine/ephedrine, three cans of engine starting spray (ethyl ether, hexanes, and heptanes) and three containers of granular drain opener (ammonium nitrate), a bottle of isopropyl alcohol, and a package of lithium batteries. [T. 91-100, 109-10 , 157, 187-88]. Samples were sent to the crime lab and tested to be as suspected. [T. 100-03, 154]. The items were described as being used together in the manufacture of illicit methamphetamine. [T. 156-64].

McClellan and McGee were arrested and charged with possession of two or more precursors of methamphetamine with intent to manufacture. [T. 100]. The next morning, December 6, 2009, the subjects were questioned. [T. 109-10]. After allegedly being advised of his rights under *Miranda v. Arizona* , 384 U. S. 436, 86 S. Ct. 1602 (1966),

McClellan reportedly gave a consensual statement admitting that he was going to take the items which were seized from the Mustang and "make methamphetamine." [T. 112-18, 123, 125-27]. McClellan also was reported as saying that McGee "was helping him." *Id.*

SUMMARY OF THE ARGUMENT

The police lacked probable cause or reasonable suspicion to stop McClellan, so, the subsequent search of his vehicle, arrest and purported statement were fruit of the poisonous tree and inadmissible at trial. The verdict was contrary to the weight of evidence. The trial court's ruling on impeachment evidence prevented the defendant from presenting a defense. The two charges in this case merge, so there should not have been two convictions.

ARGUMENT

ISSUE NO. 1: [redacted]

[redacted] [T. 92, 94, 97, 104-06]. [redacted]

[redacted]. [T. 124-25].

Standard of Review

Under this issue there is a mixed standard of review. *Floyd v. City of Crystal Springs*, 749 So.2d 110, 113(¶ 11) (Miss.1999). For reasonable suspicion or probable cause to make the vehicle stop, the review is *de novo*. *Id.* The trial court's factual findings made in support of its legal conclusions are reviewed under a clearly erroneous standard. *Id.* Otherwise, evidentiary rulings are reviewed on a standard of abuse of discretion and any resulting prejudice. *Id.* See also, *Dies v. State,* 926 So. 2d 910, 917 (¶ 20) (Miss. 2006).

Automobile Stops in General

The Fourth Amendment to the United States Constitution and Article 3, § 23 of the Mississippi Constitution of 1890 secure an individual's right to be free from unreasonable searches and seizures. *Floyd* 749 So.2d at 114 (¶ 14). The purpose of the "Fourth Amendment is to 'shield the citizen from unwarranted intrusions into his privacy.' " *Jones v. United States*, 357 U.S. 493, 499, 78 S.Ct. 1253 (1958). The Fourth Amendment is incorporated to states through the Fourteenth Amendment. *U. S. v. Grant*, 349 F.3d 192, 196 (5th Cir.2003).

Except for a few specifically established exceptions, warrantless searches are per se unreasonable. *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507 (1967). Contraband that is discovered during an unreasonable, illegal, search may not be admitted

into evidence at a subsequent trial. *Carney v. State*, 525 So.2d 776, 785 (Miss.1988), *Terry v. Ohio*, 392 U.S. 1, 30, 88 S.Ct. 1868 (1968). There is a rule of strict construction of search and seizure provisions in favor of the individual and against the state. *Barker v. State*, 241 So. 2d 355, 358 (Miss. 1970).

Due to impracticalities, an exception to the warrant requirement is provided for routine traffic stops which are treated as non-custodial investigatory stops under *Terry v. Ohio*, 392 U.S. 1, 20, 88 S.Ct. 1868 (1968). Traffic stops are seizures for the purposes of the Fourth Amendment. *Couldery v. State*, 890 So.2d 959, 962 (¶ 8) (Miss. Ct. App.2004), *United States v. Lopez-Moreno*, 420 F.3d 420, 430 (5th Cir. 2005).

Legal justification for investigative stops is reviewed on a case by case basis. *Singletary v. State*, 318 So.2d 873, 877 (Miss. 1975). The determining factor is reasonableness, and the United States Supreme Court has stated that, as a general rule, "the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation [or other crime] has occurred." *Whren v. United States*, 517 U.S. 806, 810, 116 S.Ct. 1769, 1772, 135 L.Ed.2d 89 (1996).

As stated in *Floyd, supra*, "given reasonable circumstances an officer may stop and detain a person to resolve an ambiguous situation without having sufficient knowledge to justify an arrest." 749 So.2d at 114 (¶16). Citing *Singletary v. State*, 318 So.2d 873, 876 (Miss.1975). See also *McCray v. State*, 486 So.2d 1247, 1249 (Miss.1986) and *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

However, the state's interest in investigating possible criminal conduct based on an officer's reasonable suspicion may, nevertheless, be outweighed by the Fourth Amendment interest of the in remaining free from the governmental intrusion. *Delaware v. Prouse*, 440 U.S. 648, 654-55, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979).

Under *Terry* there is a two-tiered "reasonable suspicion" inquiry under which a deciding court asks whether a officer's conduct was (1) justified at its inception; and (2) whether the search and seizure were reasonably related in scope to the circumstances which initially justified the stop. *Floyd,* 749 So.2d at 114 (¶17), *Terry*, 392 U.S. at 20, 88 S.Ct. 1868.

Under the automobile exception police may conduct a warrantless search of an automobile and any containers therein if they have probable cause to believe that it contains contraband or evidence of crime, or valid consent. *California v. Acevedo*, 500 U.S. 565, 576, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991), *Millsap v. State*, 767 So.2d 286, 292 (Miss. Ct. App. 2000).

For the present case it is pertinent that "[r]easonable cause for an investigatory stop may be based on an officer's personal observation or on an informant's tip if it bears indicia of reliability." *Floyd v. City of Crystal Springs*, 749 So.2d 110, 118 (Miss.1999). "Reasonable suspicion is dependent upon the content of the information possessed by the detaining officer as well as its degree of reliability" to be considered with other factors under the 'totality of the circumstances.'" *Id.*, see also *Williamson v. State*, 876 So.2d

353, 355 (Miss.2004).

Discussion

[redacted] No police officer in this case saw any felony or misdemeanor being committed. The stop was based on a vague description from Fred's and the officers merely following the blue Mustang to a store. The identification of the blue Mustang did not come from Fred's personnel, but from another police officer. [T. 130-31].

In [redacted] 992 So.2d 191, 193-95, (¶¶4-5, 11) (Miss. 2004), the defendant was stopped by Horn Lake police when a clerk from a Walgreens store notified authorities that Burchfield and another person had just purchased a large quantity of a product containing ephedrine and were "leaving the parking lot in a silver Cadillac with Arkansas license plates, traveling westbound on Goodman Road from Highway 51." *Id.* An officer who heard the call went straight to Goodman Road, spotted the Cadillac and initiated a traffic stop. Burchfield was the passenger. *Id.* When speaking with the driver, the officer noticed in plain view a "Walgreens bag on the back seat containing two boxes of ephedrine." When the officer requested, and received, permission to search the vehicle, he found two different bags with 864 unit dosages (pills) of ephedrine, one of the bags was in the trunk. *Id.* [redacted] *Id.* [redacted]

[redacted] *Id.*

The difference between *Burchfield* and the present facts is that the Fred's clerks here did not give a detailed description of a particular automobile model nor any information about the license plate, or the direction of travel, and, when the stop was made, there was nothing in plain view to reinforce any suspicion the officers had of possible illegal activity. [T. 89-91, 136]. These factors, which are missing from the present case, were the basis of the *Burchfield* court's finding that the stop in that case and subsequent search were valid. *Burchfield*, 992 So.2d 195 (¶11).

distinguished case

The same can be said for two other similar cases, both of which had very good descriptions of the suspected perpetrators and vehicles. In [redacted], 881 So.2d 820, 823 (Miss. 2004), store clerks called and notified police of a large ephedrine product purchase, and, [redacted] *Id.* Incidently, [redacted]. 881 So. 2d at 825-26.

In [redacted], 876 So.2d 353, 354 (¶¶3-4) (Miss. 2004), Waynesboro police received an anonymous tip that "[redacted]" had purchased "[redacted]" of an ephedrine product and had attempted purchases at another store, and had [redacted], ... [redacted]

Highway 84." Police proceeded to Highway 84, spotted a white van in the parking lot of Fred's Dollar Store. *Id.* The officer "verified that the white van had two white males inside, and the tag number matched the number provided to the police." *Id.* In the present case, however, the only information the officers had was a white couple in "a blue older model vehicle." [T. 81-82]. [The police also had their names & followed them to a convience store where they purchased more Pseudo...]

Under the totality of the circumstances here, with such a vague description and officers not seeing an offense being committed, the officers lacked probable cause and reasonable suspicion to effectuate an investigative stop. To put it another way, the information from the Fred's personnel lacked "indicia of reliability" and there were no confirming observations *Floyd v. City of Crystal Springs*, 749 So.2d 110, 118 (Miss.1999). Without a reasonable basis for the stop, this case is governed by decisions in which the Supreme Court and the Court of Appeals "have ruled that actions which do not constitute criminal offenses cannot objectively form a stop and therefore, the stops are illegal." 277 So.2d 435 (Miss.1973); *Couldery v. State*, 890 So.2d 959 (Miss. Ct. App.2004).

In *Couldery*, the officer initiated a traffic stop for driving in the left-hand lane on the interstate. After reviewing the statutory offenses the officer put forth as the basis for the citation, the Court concluded that the actions of the driver did not constitute a criminal offense, that driving in the left-hand lane on the interstate was not illegal. Therefore, the officer's misapprehension of the law precluded the stop from being valid. *Couldery,* 890

So.2d at 967.

In the present case, it follows that the alleged pseudoephedrine/ephedrine products, the alleged precursors, and McClellan's subsequently purported admissions in this case are all fruit of a search incident to an illegal stop in violation of the Fourth Amendment. and *Couldery,* 890 So.2d at 967, and *Wong Sun v. United States*, 371 U.S. 471, 485-86, 83 S.Ct. 407, 416, 9 L.Ed.2d 441 (1963).

* [redacted] *

In *Conerly v. State*, 760 So.2d 737, 741-42 (Miss. 2000), the defendant claimed his confession was the fruit of an illegal arrest, even though he was *Mirandized.* The *Conerly* court recognized that in Mississippi, "*Miranda* warnings, alone and per se, do not always make a confession admissible... [contrarily] a confession given while in custody following an illegal arrest is not per se inadmissible." (¶ 11, citations omitted). Rather, "a confession's admissibility must be decided on the facts of each case." *Id.* [Citations omitted]

The *Conerly* court pointed out that, in [redacted] 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975), [redacted]

[redacted]" First, the giving of the *Miranda* warnings and the circumstances are considered. The quicker a "confession" comes the more likely it is the product of the "coercive impact of incarceration." *Conerly,* 760 So.2d 741 (¶12). See *Hall v. State*, 427

So.2d 957, 959 (Miss.1983). Here, McClellan's so-called confession came within less than 24 hours after his arrest. It should be noted that McClellan, who cannot read, was questioned in the more coercive county jail rather than the police department. [T. 111, 117-18, 139]. This would have heightened McClellan's discomfort.

Secondly, the temporal proximity of the arrest and the confession are considered. Here as shown, McClellan's statement came very quickly before he could become acclimated to incarceration. Moreover, the questioning apparently took place prior to McClellan having an initial appearance before a neutral magistrate. See, e. g., *Abram v. State*, 606 So.2d 1015, 1029 (Miss.1992).

Thirdly, there should be a determination of intervening circumstances, which there are none on the record here. Fourthly, the purpose and flagrancy of any official misconduct; and fifthly, any other relevant circumstances are reviewed. There is no indication of misconduct in the record, other than taking advantage of coercive surroundings.

Nevertheless, application of the *Brown v. Illinois* five part test suggests that with the illegal arrest and his questioning in the jail under coercive circumstances, McClellan's statement should have been suppressed as well as fruit of the illegal arrest notwithstanding the *Miranda* warnings.

A new trial is respectfully requested.

ISSUE NO. 2: [redacted]

The state's evidence included testimony that someone bought ephedrine from Freds in Columbus while using the identification of Ivan McClellan and Katina McGee. [T. 128-29]. The Fred's purchase was not shown to put McClellan in possession of 250 dosage units of ephedrine product. Also, at the Dutch Village store, only Katina McGee's made a purchase of ephedrine. [T. 129]. The police never did a photographic line-up with the store clerks to see if the persons purchasing the cold remedies matched either defendant. [T. 133]. The identification of the blue Mustang did not come from Fred's personnel, but from a police officer. [T. 130-31].

The box of medication in Exhibit 7 and the rubbing alcohol, Exhibit 6, were found in a closed suitcase, belonging to Katina. [T. 99, 135-36]. Nothing illegal was found in McClellan's suitcase. [T. 137-38]. One package of pills was concealed in the car's console or gear shift area, and everything else was in the back seat, out of McClellan's

area of control. [T. 135-38.]. No fingerprint evidence was collected. *Id.* There was no investigation of who purchased the engine starter spray or the lithium batteries either. *Id.*

In the present case, all told, only 212 dosage units, less than 250, were found in the console area of McClellan's Mustang. [T. 95-96, 136]. Police found 96 units in Katina's luggage. [T. 99].

It was already shown that McClellan's so-called confession is unreliable. McLellan could not read very well and had to rely on what the questioning officers told him his typed statement contained. [T. 139-40]. Without McClellan's alleged admissions, there was no proof of any intent nor ability to make methamphetamine. From the state's testimony, what was missing for the necessary chemical reactions was, white gasoline (Coleman® fuel), sodium hydroxide and hydrochloride gas (sulphuric acid and table salt). [T. 159, 60, 173-74].

[redacted]

Legal proof of possession requires, "sufficient facts to warrant a finding that the defendant was aware of the particular substance and was intentionally and consciously in possession of it." *Hamm v. State*, 735 So. 2d 1025, 1028 (Miss. 1999). "Constructive possession may be shown by establishing that the drug involved was subject to his dominion or control. Proximity is usually an essential element, but by itself is not adequate in the absence of other circumstances." *Id.*

If actual physical possession is not established, the State can attempt to prove constructive possession. [redacted], 971 So.2d 581, 587(¶ 16) (Miss.2007). "[redacted]" *Id.* "[T]here must be sufficient facts to warrant a finding that the defendant [redacted]." *Id.* In [redacted], 718 So.2d 1107, 1111(¶ 13) (Miss.1998), [redacted] [Was he the actual owner of the blue Mustange?]

In *Robinson v. State* 967 So.2d 695, 697 (Miss. Ct. App., 2007) drugs were found in Robinson's trunk. Robinson claimed that the car was not in his exclusive control or possession since other people had access to it. Nevertheless, based on proof that Robinson was the "sole occupant and owner" of the vehicle at the time the drugs were found, and, since the officer testified he smelled marijuana when approaching Robinson's car, there was sufficient proof to show constructive. 967 So.2d 699-700. Other matters of note were that Robinson consented to a search of the interior of the car, but not the trunk. *Id.*

In the present case, unlike *Robinson*, McClellan was not the sole occupant, and ephedrine was found in Katina's suitcase without any proof that McClellan had access to or control of Katina's belongings. Moreover, McClellan consented to the search of his

entire automobile indicating that he did not have knowledge of anything illegal.

In *Powell v. State*, 355 So.2d 1378, 1379 (Miss.1978) the court recognized in regards to the aforesaid presumption that:

> where contraband is found upon premises not in the exclusive control and possession of the accused, additional incriminating facts must connect the accused with the contraband. Where the premises upon which contraband is found is not in the exclusive possession of the accused, the accused is entitled to acquittal, absent some competent evidence connecting him with the contraband. [Citing *Sisk v. State*, 290 So.2d 608 (Miss.1974).]

In *Roach v. State,* 7 So.3d 911, 927 (Miss. 2009), Roach argued that there was insufficient evidence tp establish constructive possession of the cocaine and hydromorphone found near Roach in his home. Roach argued under *Powell, supra,* that there were no "additional incriminating facts" connecting him to the drugs. *Id.*

The *Roach* court considered the following factors in rejecting Roach's arguments, no one else was found in Roach's house, his wife was outside, others in the yard denied possession of the drugs. Roach was located "within arm's reach" of the crack cocaine found in a couch cushion, and close to a bag containing cocaine and hydromorphone discovered in his kitchen. *Id.* No one else was in Roach's house near the contraband. All of these factors were found to be legally sufficient to establish Roach's constructive possession of the drugs. *Id.*

"When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, we will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an

unconscionable injustice." *Bush v. State*, 895 So. 2d 836, 844 (Miss. 2005). That which supports the verdict is to be accepted as true and the evidence generally must be construed in the light most favorable to the verdict. *Herring v. State*, 691 So. 2d 948, 957 (Miss. 1997). Mississippi appellate courts do not hesitate to order a new trial where a determination of guilt is based on extremely weak or tenuous evidence. *Dilworth v. State*, 909 So. 2d 731,737 (Miss. 2005).

The weight of evidence in this case falls in the "extremely weak or tenuous" category and supports neither a conviction in Count 1 nor Count 2. A new trial is respectfully requested.

what is the standard of review for this?

ISSUE NO. 3: [redacted]

The trial court ruled that the state would be allowed to use McClellan's July 1996 burglary conviction for which he was sentenced to three (3) years with (2) suspended, under M. R. E. 609(1)(B) [T. 201-06]. After this ruling, McClellan chose not to testify. [T. 206]

Under [redacted] 518 So.2d 632, 636 (Miss.1987), a trial court must weigh the following factors in deciding whether to admit a prior felony for impeachment of a non-party witness or party witness under M. R. E. 609 (a) and (b):

[redacted]

> this past conviction was for ↑ burglary, this time for drug...

[redacted]

In *Triplett v. State*, 881 So.2d 303 (Miss. Ct. App.2004), the trial court there, as here, allowed the state to use Triplett's prior burglary and receiving stolen goods convictions as impeachment. In reviewing the factors under *Peterson v. State*, *supra*, the *Triplett* court found the trial court abused its discretion in the admission of the prior convictions even though the trial court went through the appropriate steps under *Peterson*. 881 So. 2d 307.

The *Triplet* court saw "little, if any, impeachment value in Triplett's prior burglary convictions and his receiving stolen property conviction" since "burglary is not necessarily a crime affecting veracity." [Citing *Townsend v. State*, 605 So.2d 767, 769 (Miss.1992)]. Triplett's receiving conviction was "close" to ten (10) years old and had "little probative value." 881 So. 2nd at 307. Triplett's prior convictions for burglary and receiving were too "similar to the crime for which Triplett was being tried, business burglary," making "the prejudicial effect of admitting the convictions is very high." *Id.*

[redacted]

[redacted]. Therefore, the admission of the McClellan's prior burglary conviction was more prejudicial than probative which is forbidden by 609 (1)(b).(See also, M. R. E. 403).

The rest of the *Peterson* factors do not militate against the prejudice shown above, there is no apparent similarity between the prior burglary and new charge, the defendant's testimony was important to his presentation of a defense, since his co-defendant was also charged and was probably not available to testify, and the centrality of the credibility issue is likewise important to the defendant's case and theory of defense.

McClellan chose not to testify immediately after the trial court's ruling because of the risk the prior's prejudicial effect with the jury. The end result is that the trial court's abuse of discretion resulted in McClellan not being able to present a defense. As stated in *Ross v. State*, 954 So.2d 968, 996 (¶56) (Miss. 2007), "[t]he trial court's discretion must also insure the constitutional right of the accused to present a full defense in his or her case," which did not happen in the present case. See also, U. S. Const. Amendments VI and XIV, and Art. 3 §26 Miss. Const. 1890. A new trial is respectfully requested.

ISSUE NO. 4: [redacted]

[redacted]

In *Wolf v. State*, 281 So.2d 445, 446 (Miss.1973), the defendant was convicted "on an indictment charging that he did have in his 'possession and produce' a certain narcotic drug." In remanding the case for resentencing, the *Wolf* court turned to *West v. State*, 49 So.2d 271 (Miss.1950) where an indictment charged that the defendant possessed "a still and the integral parts thereof." The *West* court held "that the indictment was not duplicitous in charging in the same count the offense of possession fo the still and of possession of the 'integral parts of a still,' each being a statutory offense, the Court said that the 'whole includes its parts." 281 So.2d 447. The *Wolf* court said, "[i]n the present case we have concluded that the possession, although a lesser offense in itself, was only incidental to the more serious charge of production of marijuana, and that possession and production were parts of the same transaction."

Even though Wolf's indictment was not ruled defective, applicable to the present facts, the *Wolf* court held, "... here, where in a single count indictment, possession and production of a controlled substance is charged conjunctively, such possession and production constitute aspects of a single transaction and that the possession, having been

merely incidental to the production of the substance, did not constitute a charge of a separate or distinct offense." 281 So. 2d at 448.

The *Wolf* court also pointed out "[t]he general rule is stated in 22 C.J.S. Criminal Law § 295(3) (1961) as follows:

> An accused may not properly be prosecuted for two offenses with relation to narcotics where both arise out of the same transaction and one is necessarily incident to the other, but where the same transaction gives rise to separate and distinct offenses, a prosecution for one will not ordinarily bar prosecution for the others.

281 So. 2d at 447.

In *Laughter v. State*, 241 So.2d 641(Miss.1970), also cited in *Wolf,* Laughter was indicted in one indictment for possession of marijuana, and by a separate indictment, charged with sale of the same marijuana. Following a conviction on the possession charge, Laughter was tried on the sale of the same marijuana. *Id.* Laughter sought to quash the second indictment. The *Laughter* court recognized that, "the possession, for which [Laughter] had been convicted previously, and the sale, for which he was to be tried, arose out of the same transaction and that the possession for which he had been convicted was necessarily incidental to the sale" so, the possession charge was "a lesser included or constituent offense of the sale" and prosecution for both would be double jeopardy. 241 So.2d at 644.

merger →

260, 264 (Miss.1967). One example is that, if a person strikes another with a deadly weapon, causing death, the defendant cannot be charged with both homicide and assault. *Faraga v. State*, 514 So.2d 295, 311 (Miss.1987).

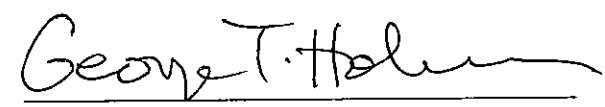
It follows, therefore, as a matter of law, that McClellan could not be convicted under Count 1 of possession of precursors and under Count 2 of possession of 250 dosage units of pseudoephedrine or ephedrine. A new trial on one of the counts is respectfully requested, or a rendering of either count with remand for resentencing.

CONCLUSION

McClellan is entitled to have his convictions reversed with remand for a new trial or is entitled to be resentenced.

Respectfully submitted,

IVAN RUSSELL McCLELLAN

By: 

George T. Holmes,
Mississippi Office of Indigent Appeals

CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 20th day of July, 2009, mailed a true and correct copy of the above and foregoing Brief Of Appellant to Hon. James T. Kitchens, Jr., Circuit Judge, P. O. Box 1387, Columbus MS 39703, and to Hon. Forrest Allgood, Dist. Atty. , P. O. Box 1044, Columbus MS 39703, and to Hon. Charles Maris, Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid.

George T. Holmes

George T. Holmes

MISSISSIPPI OFFICE OF INDIGENT APPEALS
George T. Holmes, MSB No. [redacted]
301 N. Lamar St., Ste 210
Jackson MS 39201
601 576-4200