

**IN THE SUPREME COURT OF THE  
STATE OF MISSISSIPPI**

*Mississippi Supreme Court Cause No. 2009-KA-00890-SCT  
Lauderdale County Cause No. 359-08*

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**TYRONE GOWDY,**  
*Appellant*

v.

**STATE OF MISSISSIPPI,**  
*Appellee*


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**APPEAL FROM THE CIRCUIT COURT OF  
LAUDERDALE COUNTY, MISSISSIPPI  
HONORABLE ROBERT WALTER BAILEY, CIRCUIT JUDGE**

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**BRIEF OF APPELLANT**

Respectfully submitted by:

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**TYRONE GOWDY**

**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 the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Honorable Robert Walter Bailey, Lauderdale County Circuit Court Judge
2. Honorable A. Randall Harris, Attorney for the Appellant
3. Honorable Marcus Evans, Trial Attorney
4. Attorney General Jim Hood, Attorney for the Appellee
5. City of Meridian Police Department, Investigating Agency
6. Officer John Straight, Meridian Police Department
7. Honorable E. J. (Bilbo) Mitchell, Lauderdale County District Attorney
8. Honorable Dan Angero, Lauderdale County Assistant District Attorney
9. Honorable Lisa Howell, Lauderdale County Assistant District Attorney
10. David Rosenbaum, Lauderdale County Sheriff's Department

11. Officer Rick McCary, City of Meridian Police Department
12. Officer Jerry Jordan, City of Meridian Police Department

Respectfully Submitted,

**TYRONE GOWDY,**  
Appellant

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- B. *Trial Counsel Rendered the Ineffective Assistance of Counsel in his Failure to Move the Court to Grant a Limiting Jury Instruction as Concerned the Prior DUI Offenses.*
- C. *Trial Counsel Rendered the Ineffective Assistance of Counsel in his Failure to Object to the Introduction of Other Crimes Evidence, to wit: Being Ticketed for Driving While License Suspended for DUI and for Outstanding Warrants (strongly suggesting other crimes).*
- D. *Trial Counsel Rendered the Ineffective Assistance of Counsel by his Failure to Object to Unfair Surprise When the State Moved to have Tyrone Gowdy Sentenced as an Habitual Offender.*
- E. *Trial Counsel Rendered Ineffective Assistance at Trial by his Failure to have the Video Tape Produced for Examination.*

- F. *Trial Counsel Failed to Offer a Defense Theory of the Case Instruction.*
- G. *Trial Counsel Rendered Ineffective Assistance Counsel by his Failure to Object to Prosecutorial Misconduct on Cross Examination and During Closing Argument*
- H. *Trial Counsel was Ineffective in not Offering a Circumstantial Evidence Instruction.*
- I. *Trial Counsel Rendered the Ineffective Assistance of Counsel for the following:*
- J. *Trial Counsel Rendered Ineffective Assistance of Counsel for his Failure to Object to the State's Peremptory Strikes of Jurors who Voted Not Guilty in a Prior Jury on which they Served.*
- K. *Trial Counsel Rendered Ineffective Assistance of Counsel in his Failure to Include Significant Errors in the Post-Trial Motion for JNOV and/or New Trial.*

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## **STATEMENT OF INCARCERATION**

The appellant is currently incarcerated in the Mississippi Department of Corrections.

## **STATEMENT OF ISSUES**

### **ISSUE ONE**

#### **TYRONE GOWDY WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WITHIN THE MEANING OF *STRICKLAND V. WASHINGTON***

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EFFECT OF THE ERRORS AT HIS TRIAL**

### STATEMENT OF THE CASE

Tyrone Gowdy, hereafter, "Gowdy," was charged by Grand Jury Indictment with the felony offense knowingly operating a motor vehicle while under the influence of intoxicating liquor, having refused to submit to a chemical test of his breath and further, that Gowdy has been convicted of at least two D.U.I.'s, making this the 3<sup>rd</sup> or subsequent offense within five years, in violation of Miss. Code Ann. §63-11-30, against the peace and dignity of the State of Mississippi. (CP. 2-6) (RE. 12).

The incident charged in the indictment occurred on March 30, 2008, within the city limits of Meridian, Lauderdale County, Mississippi. The investigating/arresting agency was the City of Meridian Police Department. Officer John Straight of the Meridian Police Department was on patrol in the area of 10<sup>th</sup> Avenue at or about 12:45 in the morning when he observed a vehicle allegedly driven by Gowdy, run a stop sign. Officer Straight turned on his blue lights and pulled the vehicle over. The driver of the vehicle exited and took off running. Officer Straight finally caught up with Gowdy and both hit the ground. Straight was joined by Officer Jerry Jordan and Gowdy was cuffed. (T.I. 67-72).

Straight testified that Gowdy's speech was slurred and that he smelled of alcohol. The D.U.I. officers arrived at the scene and ultimately, Gowdy was ticketed for driving on a suspended license and D.U.I. It was not until arrival at the police station that Gowdy was positively identified. (T.I. 76). Officer David Rosenbaum, Meridian D.U.I. Officer, attempted to conduct a field sobriety test but Gowdy refused. (T.I. 94-98).

The jury trial on the indictment commenced on February 3, 2009, and concluded on February 4, 2009. The voir dire of the prospective jurors concluded and 12 jurors were selected along with 2 alternates. (T.I. 56).

The State called three witnesses in its case-in-chief and rested. (T.I. 120).

The defense called the defendant Tyrone Gowdy and rested. (T.I. 163).

The State called Officer Jerry Jordan in Rebuttal and finally rested. (T.II. 173).

The trial judge delivered the instruction of court and following arguments of counsel, the jury retired for deliberations. (T.II. 178; 201) (C.P. 19-26 ) (RE. 20-27).

The jury returned from deliberations with its unanimous verdict of guilt as charged. (T.II. 202) (C.P. 31) (RE. 28).

A sentencing hearing was conducted on April 21, 2009, with the State offering two witnesses. The State rested. (T.II. 222).

The defense rested absent producing any witness testimony. (T.II. 223).

The trial court delivered the sentence of the court. (T.II. 232-235) (C.P. 32) (RE. 29).

Post-trial motions were filed and heard on May 7, 2009. The motions were denied by the trial court. (T.II. 237-241) (C.P. 39-41) (RE. 35-37).

## SUMMARY OF THE ARGUMENT

Tyrone Gowdy respectfully submits that he has been denied his fundamental constitutional rights, as guaranteed by the United States and Mississippi Constitutions; specifically, but not limited to, the effective assistance of counsel, due process, right to a fair and impartial trial by jury, and the prohibition against cruel and inhuman punishment. *See*: Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution as well as the Due Process Clause; Article 3, §§13, 14, 21, 22, 23, 24, 26, 27, 28, 31 and 32 of the Mississippi Constitution.

Trial counsel was ineffective in not moving the court to strike the entire jury venire due to the inappropriate and unduly prejudicial voir dire conducted by the state. The district attorney improperly and unfairly elicited voting information from jurors concerning cases on which they had previously served on. Such information is confidential and the respective jurors were forced and pressured to disclose their respective vote. Gowdy was denied his fundamental right to a fair and impartial jury and rendered the ineffective assistance of counsel as provided for by *Strickland v. Washington* and its progeny.

The trial jury was informed of prior offenses for which Gowdy had been convicted in strict violation of the Mississippi Rules of Evidence and absent trial counsel objection, and additionally, the State invaded the province of the jury by seeking a commitment. Trial counsel was ineffective in his failure to object and have the matters stricken from the record.

The State engaged in improper cross-examination and closing argument, neither of which were objected to by trial counsel. The State's prosecutorial misconduct took place without timely objection.

The sentence imposed by the court was cruel, unusual and unduly excessive punishment as prohibited by the United States and Mississippi Constitutions.

The plethora of errors which occurred during the jury trial warrant the reversal of Gowdy's conviction, vacation of the sentence imposed and a new trial

Further, Gowdy would state and show that his trial counsel committed numerous instances of ineffective assistance of counsel, which are to be specifically and separately briefed herein.



## ARGUMENT

### ISSUE ONE

#### **TYRONE GOWDY WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WITHIN THE MEANING OF *STRICKLAND V. WASHINGTON***

1, An overview of the level of professional competence is appropriate before the discussion of the ineffective actions of trial counsel with regard to the numerous alleged instances of IAC. The issue of ineffective assistance of counsel is not a slur against counsel's good name. In *Curry v. Zant*, 371 S.E.2d 647 (Ga. 1988), the Georgia Supreme Court ruled that:

Conscientious counsel is not necessarily effective counsel. The failure to obtain a second opinion, which might have been the basis for a successful defense of not guilty by reason of insanity and would certainly have provided crucial evidence in mitigation, so prejudiced the defense that the plea of guilty and the sentence of death must be set aside.

*Id.* at 649.

2. The legal test as to effective assistance of counsel was established in *Strickland v. Washington*, 466 U.S. 668 (1984), where the United States Supreme Court held that on a claim of ineffective assistance of counsel, the benchmark is "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." *Leatherwood v. State*, 473 So.2d 964, 968 (Miss. 1985) (citing *Strickland*, 104 S.Ct. at 2064). This has been refined further in *Williams v. Taylor*, 529 U.S. 362 (2000). The claim of ineffective assistance of counsel is governed by a standard that asks whether there is a 'reasonable probability' that, but for the constitutional infirmities at trial, "the result of the proceeding would have been different." *Williams v. Taylor*, 146 L.Ed.2d at 416; *United States v. Bagley*, 473 U.S. 667, 682 (1985) (citing *Strickland*, 466 U.S. at 694);

*Connell v. State*, 691 So.2d 1004 (Miss. 1997). A "reasonable probability" is one that is "sufficient to undermine confidence in the outcome." *Williams v. Taylor*, 146 L.Ed.2d at 416, 420; *United States v. Bagley*, 473 U.S. at 682.

A. *Trial Counsel's Failure to Object to Evidence of Other Crimes, Wrongs or Acts Evidence.*

3. At trial there were several instances where the State was unfairly allowed to offer evidence of other crimes, wrongs, or acts, without objection from trial counsel. Trial counsel's failure to offer objections unduly prejudiced the defendant's case and denied him a fundamentally fair trial within the meaning of *Strickland v. Washington*.

4. The first instance of the State informing the jury of prior offenses occurred during opening statement during the voir dire of the jury venire, where the district attorney stated to the jury venire that "he had three prior DUI offenses within five years before March 30, 2008." Granted, such language is part and parcel of the indictment, however, the appellant would strenuously object to this practice being permissible. The sole issue in the appellant's trial should have been was he guilty of driving while intoxicated or not. If he was so found, then whatever enhancement was appropriate, would be the subject matter of sentencing. The appellant respectfully submits that allowing the government to state up front that the accused has been previously convicted of a crimes is unfairly prejudicial and denies a defendant fair trial.

5. This Court in *Rigby v. State*, 826 So.2d 694 (Miss. 2002), addressed the specific issue raised in this appeal and held adverse to the appellant's position. Gowdy however, respectfully moves the Court to re-examine its prior holding and reverse Rigby, and render an opinion in conformity with what appears to be a consensus on the issue. A strong dissent in Rigby acknowledges the fact that "It

is fundamentally unfair to place prior convictions of a defendant in front of jurors and then ask them to ignore those convictions when determining guilt.” *Rigby v. State* at 709 (¶51), (Graves, J., dissenting).

6. In *State v. Harbaugh*, 754 So.2d 691 (Fla. 2000), the identical issue was decided by the Florida Supreme Court in which the court re-affirmed its holding in *State v. Rodriguez*, 575 So.2d 1262 (Fla. 1991), “a procedure whereby a defendant is charged with felony DUI, requiring three previous convictions of misdemeanor DUI, in addition to the presently charged DUI, must be tried in a bifurcated process.” The *Harbaugh* Court concluded the following:

if a defendant charged with felony DUI elects to be tried by jury, the court shall conduct a jury trial on the elements of the single incident of DUI at issue without allowing the jury to learn of the alleged prior DUI offense. If the jury returns a guilty verdict as to that single incident of DUI, the trial court shall conduct a separate proceeding without a jury to determine, in accord with general principles of law, whether the defendant had been convicted on three or more prior occasions. *Id.* at 693.

7. Notwithstanding the Court’s prior holding, Gowdy submits that the real issue involved is the fundamental fairness of a court’s application of the law to a specific set of facts. By accepting and utilizing the Florida approach, the State of Mississippi is in no way prejudiced and the uncertainty of a jury’s true motive supporting its finding is eliminated. The appellant’s case epitomizes the reasoning behind Rules 403 and 404 of the Mississippi Rules of Evidence. The desired end result would still be achieved with bifurcation.

B. *Trial Counsel Rendered the Ineffective Assistance of Counsel in his Failure to Move the Court to Grant a Limiting Jury Instruction as Concerned the Prior DUI Offenses.*

8. If one accepts that the logic of the trial court in allowing the trial jury to hear evidence of other crimes by way of prior DUI offenses, then it was the duty of trial counsel to have the trial court

instruct the jury as to the specific purposes for which such evidence was permitted in the first instance. Without any such instruction, the trial jury was free to use the evidence in a manner inconsistent with the legislative intent of the Rules of Evidence. *See: Rules 403 and 404, Mississippi Rules of Evidence.* (T.I. 12-13,24).

9. Because of the current state of this Court's holdings on the issue, there are no guarantees that a jury would use such testimony for legitimate purposes. In the absence of the limiting instruction, Gowdy was unduly prejudiced and deprived of a fundamentally fair trial in violation of the United States and Mississippi Constitutions.

C. *Trial Counsel Rendered the Ineffective Assistance of Counsel in his Failure to Object to the Introduction of Other Crimes Evidence, to wit: Being Ticketed for Driving While License Suspended for DUI and for Outstanding Warrants (strongly suggesting other crimes).*

10. During the direct examination of Officer John Straight of the Meridian Police Department, the district attorney elicited, without objection from trial counsel, damaging evidence of other crimes that Gowdy had been charged with. The inflammatory remarks were of a nature that they were sure to prejudice the defendant with the jury. Such elicitation was not only prosecutorial misconduct but other crimes evidence considered by the trial jury without limiting instructions. The testimony should have been objected to and stricken with an admonition to the jury to disregard the same. (T.I. 75-76).

D. *Trial Counsel Rendered the Ineffective Assistance of Counsel by his Failure to Object to Unfair Surprise When the State Moved to have Tyrone Gowdy Sentenced as an Habitual Offender.*

11. At the conclusion of all of the evidence and the final discharge of the trial jury, the district attorney for the first time stated the intention to proceed against the defendant as an habitual offender. The indictment makes no mention of habitual offender status, other than enhancing language

related to prior DUI's. Trial counsel failed to object and as a result, the appellant was unduly prejudiced and denied a meaningful opportunity to challenge any prior convictions to be relied upon by the state. Gowdy was not afforded any notice that the State intended to proceed under Mississippi's habitual offender statute, and was unfairly denied any chance of a collateral challenge to the priors.

12. In Mississippi the proper means for attacking prior convictions is by separate post-conviction actions in the respective court in which they occurred, and not in the court in which they are being used as aggravating factors or for enhancement purposes. *Russell v. State*, 849 So.2d 95 (Miss. 2003). The state's failure to provide adequate notice of its intention to proceed under the habitual offender statutes combined with trial counsel's failure to object, unduly denied Tyrone Gowdy of the opportunity to collaterally attack the priors relied upon by the state. Allowing the State to enter at the 11<sup>th</sup> hour and charge habitual offender status outside of the relevant indictment, is fundamentally unfair and denies the appellant due process of law. *See: Riley v. Commonwealth*, 120 S.W.3d 622 (Ky. 2003) (prior judgment valid until set aside by the court that entered it). In an enhanced sentence proceeding predicated on a prior conviction, the United States Constitution requires a trial court to consider an offender's allegations that the prior conviction is invalid only when the challenge of the prior conviction is based on the denial of the offender's constitutional right to a lawyer. *State v. Hahn*, 618 N.W.2d 528 (Wis. 2000); *See also: Carswell v. State*, 589 S.E.2d 605 (Ga. App. 2003) (Counsel's performance was deficient in an aggravated assault case for failing to object to two prior convictions used by the state in aggravation of sentence because those guilty pleas may not have been entered into voluntarily. Because the court found that reversal was required on the substantive issue, the court found that the question of prejudice with respect to the ineffectiveness of counsel was moot).

13. In a collateral attack upon a conviction used for enhancement, a defendant has the burden

of proof and he may not rely on the mere silence of the record, but must affirmatively allege an actual denial of his or her constitutional rights, which must be substantiated on the face of the proof offered by the state to establish such convictions, and must make a valid prima facie showing that the prior conviction is invalid. *Hansen v. State*, 716 P.2d 688 (Okla.Crim.App. 1986); *People v. Sumstine*, 687 P.2d 904 (Cal. 1984); *Armour v. State*, 479 N.E.2d 1294 (Ind. 1985); *People v. Montoya*, 640 P.2d 234 (Colo.Ct.App. 1981).

14. In the instant case nothing in the record indicates that trial counsel ever questioned any of the prior convictions relied upon by the state and therefore rendered the ineffective assistance of counsel, resulting in severe prejudice to the appellant, being sentenced to life without parole.

E. *Trial Counsel Rendered Ineffective Assistance at Trial by his Failure to have the Video Tape Produced for Examination.*

15. The State failed to produce the video tape of the traffic stop which could have revealed evidence beneficial to the appellant. In the alternative, if the video had been taped over, the appellant may have been entitled to a spoliation instruction. The absence of the video tape should have been accounted for and trial counsel's failure to do so was neglect.

F. *Trial Counsel Failed to Offer a Defense Theory of the Case Instruction*

16. Appellant respectfully submits that trial counsel's failure to offer a defense theory instruction and/or an instruction on appellant's theory of the case was tantamount to ineffective representation of counsel and unduly prejudiced Gowdy. The appellant's theory of the case was that he did not refuse to take a breath test leaving the matter as a question of fact for the jury to decide. Allowing testimony of the appellant's refusal to take a breath test was plain error and failure to object was counsel's prejudicial mistake. (T.I. 89; T.II. 162). No instruction was offered and charged to the

trial jury setting out the appellant's theory of the case. (C.P. 19-26) (RE. 20-27)

G. *Trial Counsel Rendered Ineffective Assistance Counsel by his Failure to Object to Prosecutorial Misconduct on Cross Examination and During Closing Argument*

17. The prosecutor on cross-examination of Gowdy and during closing argument referred to two prior occasions when the appellant registered .111 and .232 on previous chemical tests and the same is submitted to be misconduct, plain error, and ineffective assistance of counsel for failure to timely object. (T.II. 151-152,187-188). In *Thomas v. State*, 2009-MS-04081-COA (Miss. Ct. App. 2009), the State impermissibly inquired into the details of a prior conviction. In reversing the conviction the court found 'Thomas is correct that the details of his conviction for shooting a woman in 1999, were inadmissible'. In the case at bar, the State twice elicited on cross examination and argued during closing argument the prohibited particulars of Gowdy's two prior D.U.I. convictions by alerting the jury that he had once blown .111, and on another occasion .232.

The State's conduct is violative of Rule 404 (b), M.R.E., in that evidence of other crimes is not admissible to prove the character of a person in order to show that he acted in conformity therewith. The particular prejudice in this case is that the appellant was facing a felony D.U.I., and the prior conviction particulars both centered on D.U.I. convictions. *See Reed v. State*, 637 So.2d 194 (Miss. 1994) (the Court, in reversing, held that the evidence of another sale was unduly prejudicial). The test results in prior D.U.I.s do not meet any of the exceptions to 404 (b) and Gowdy did not open the door to the elicitation of such testimony. *Spraggins v. State*, 606 So.2d 592, 593 (Miss. 1992). Trial counsel's failure to object is ineffective assistance of counsel.

H. *Trial Counsel was Ineffective in not Offering a Circumstantial Evidence Instruction*

18. Whether or not the appellant was under the influence is a question of fact for a jury to

decide. In the instant case there was no Intoxilyzer test performed thus, the evidence of intoxication is circumstantial due to its being based solely on non-scientific evidence. Refusal to take a breath test is not tantamount to intoxication. It is merely one factor which may be considered by a jury—not the only critical determinant of intoxication. The prosecution’s constant reliance on Tyrone Gowdy’s refusal to take a breath test unfairly prejudiced him and allowed the jury to render a decision based on unreliable evidence. Trial counsel was ineffective in not submitting a circumstantial evidence instruction as a safeguard.

I. *Trial Counsel Rendered the Ineffective Assistance of Counsel for the following:*

- (1) Failure to point out to the trial jury that the arresting officer never mentioned the smell of alcohol in his first statement;
- (2) The officer at the scene did not prepare a statement of the incident until a few weeks before the jury trial;
- (3) Trial counsel failed to cross-examine state witnesses on the above two points and as a result, the appellant suffered severe prejudice.

J. *Trial Counsel Rendered Ineffective Assistance of Counsel for his Failure to Object to the State’s Peremptory Strikes of Jurors who Voted Not Guilty in a Prior Jury on which they Served.*

19. During voir dire of the jury venire, the prosecutor elicited information from potential jurors directly related to how they had voted on previous cases on which they had served as jurors. The inquiry was made absent any objection from trial counsel and the strikes were irrelevant to the case-at-bar. No valid reasons, race-neutral or otherwise, were offered to the trial court and the practice served only to deny the appellant of a fair and impartial jury as guaranteed by the United States and Mississippi Constitutions. The prosecutor did not offer any reasons, nor did the trial judge request any.



Gowdy respectfully submits that the trial court erred in allowing the peremptory strikes of the jurors who voted not guilty in a previous case. (T.I. 53-55)

20. Juror numbers 4, 5, 7, 14 and 20 had previously voted not guilty in a prior case and were all peremptorily struck by the State.

21. The appellant would submit that the practice in the instant case is contrary to the intent holdings in *Flowers v. State*, 947 So.2d 910 (Miss. 2007), *Davis v. State*, 551 So.2d 165 (Miss. 1989) and *Harper v. State*, 635 So.2d 864 (Miss. 1994), and resulted in the appellant being denied a fair and impartial jury. Trial counsel rendered ineffective assistance of counsel within the meaning of *Strickland*.

K. *Trial Counsel Rendered Ineffective Assistance of Counsel in his Failure to Include Significant Errors in the Post-Trial Motion for JNOV and/or New Trial.*

22. The post-trial motion filed by trial counsel on the appellant's behalf is wholly inadequate and is nothing more than a generic skeletal listing of routine and customary issues that are commonly offered as a catch-all pleading with marginal possibilities of a granting of relief. (C.P. 39-41) (RE. 35-37). Trial counsel's failure to raise significant trial errors typically results in a court applied waiver of such issues and thereby denying an accused of due process as guaranteed by the United States and Mississippi Constitutions.

## **ISSUE TWO**

### **THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOWING THE STATE TO VOIR DIRE THE PROSPECTIVE JURORS ON THEIR RESPECTIVE VERDICTS IN PRIOR CASES ON WHICH THEY SERVED AS JURORS**

23. During the state's voir dire of the jury venire, the prosecution improperly elicited

responses from panel members as to the verdict they each individually returned on previous trials of which they sat as jurors. When considering the facts of this particular case, appellant respectfully submits this practice to be plain reversible error and the entire venire was tainted by such questioning. The entire venire should have been discharged. Although in *Flowers v. State*, 947 So.2d 910 (Miss. 2007), the State's challenge of a potential juror was upheld as race-neutral in light of a *Batson* challenge, the Court did hold that the strike will be more closely scrutinized when a supposedly race-neutral reason has little relevance to the case-at-hand. *Id.* at 929 (¶ 47). This is not a case of peremptorily striking a juror because of his vote where a *Batson* issue was present. This is a case where the prosecutor identified potential jurors who had voted not guilty and sought to remove them from the trial jury. The prosecutor's practice in this instance is submitted to be an abuse of such strikes as it is invading the province of the jury or punishing a jury for his prior freedom of speech and jury service. This is of no relevance in this case where *Batson* is a non-existent issue.

24. The prosecutors purpose was to remove prospective jurors that had voted not guilty in a prior case on which they served. The strikes were pre-textual and denied the appellant of a fair and impartial jury, and the end result was a trial jury having no one selected who had previously voted not guilty on a prior jury.

### **ISSUE THREE**

**CONSIDERING THE GRAVITY OF THE OFFENSE  
AND THE HARSHNESS OF THE SENTENCE IMPOSED,  
APPELLANT SUBMITS THAT THE JUDGMENT OF  
THE TRIAL COURT IS EXCESSIVE, CRUEL, UNUSUAL  
AND DISPROPORTIONATE AND AS A RESULT,  
VIOLATES THE EIGHTH AMENDMENT TO THE  
UNITED STATES CONSTITUTION AND**

## CORRESPONDING PORTIONS OF THE MISSISSIPPI CONSTITUTION

26. The maximum statutory penalty for Felony Driving Under the Influence is five years. The appellant was sentenced to serve life imprisonment as an habitual offender without the possibility of reduction of sentence, probation, early release, or suspension of such sentence. The trial court held that considering the prior criminal history and the cases relied upon by the court, the sentence was not disproportionate. The appellant disagrees and respectfully states that the sentence imposed violates the Eighth Amendment prohibition against excessive, cruel and unusual punishment. (T.II. 232-235) (C.P. 37) (RE. 33).

27. In *Solem v. Helm*, 463 U.S. 263 (1983), the United States Supreme Court found that a life sentence with no possibility of parole, imposed upon a recidivist who had committed his seventh non-violent felony, violated the Eighth Amendment, as it was disproportionate to the crime. The Court set forth three objective criteria by which the proportionality of a particular sentence was to be judged: (1) the gravity of the offense and the harshness of the penalty; (2) the sentence imposed for other crimes of greater and lesser seriousness in the same jurisdiction; and, (3) the sentence imposed for the commission of the same crime in other jurisdictions.

28. In *Harmelin v. Michigan*, 501 U.S. 957 (1991), the Supreme Court very nearly overruled *Solem v. Helm*. The five members of the majority were divided as to what the Eighth Amendment means in the context of non-capital sentencing, but they agreed that the sentence was not unconstitutional merely because its mandatory nature precludes judicial inquiry into mitigating factors; individualized sentencing is necessary only in death penalty cases. Severe mandatory penalties may be cruel, but they are not unusual in the constitutional sense. However, three justices agreed that the

Eighth Amendment guarantees no right to individualized sentences in non-capital cases but said that *stare decisis* dictates continued adherence to the narrow proportionality principle in *Solem v. Helm*. A sentencing court must look at the state's definition of the crime to determine whether the prior offense should be counted. The appellant respectfully submits that the Eighth Amendment Cruel and Unusual Punishment Clause requires a non-capital sentence to be proportional to the offense of conviction. Punishment should be proportionate to the crime for which it is imposed. *Atkins v. Virginia*, 536 U.S. 304 (2002); *Roach v. State*, 7 So.3d 911 (Miss. 2009) (attack under the Eighth Amendment may be subject to the Solem three-pronged proportionality analysis in cases where a threshold comparison of the crime committed to the sentence imposed leads to an inference of gross disproportionality); *Hudson v. State*, 2009 WL 311167 (Miss.App. 2009); *Sumrell v. State*, 972 So.2d 572 (Miss. 2008) (the Court will review a sentence that allegedly imposed a penalty that is disproportionate to the crime).

29. Appellant submits that there is a distinction between his case and other cases in the current jurisdiction as well as other jurisdictions. It is recognized that the Court's precedents holding that punishment for recidivism is appropriate and not disproportionate, the punishment must fall within the guidelines set out in the *Solem* case that referenced the offense which was committed and now has the recidivist statute applied to that offense.

30. The Supreme Court recognizes that application of the Solem factors assumes that courts are competent to judge the gravity of an offense, at least on a relative scale. The Court goes on to recognize that this broad assumption is justified and that courts traditionally make these judgments just as legislatures do in the first instance. *Solem v. Helm* at 292.

31. On looking to the gravity of the offense and the harshness of the penalty, on a scale of

one to ten, one being a minor offense and ten being a serious offense, that is involving violence or a violation of a felony DUI statute, the appellant's score would be a three at most. He was stopped for driving under the influence having been previously convicted of two priors within five years.

The statutory penalty is five years and a fine. Under Mississippi law it makes no difference whether the prior DUIs were felony or misdemeanor for purposes of enhancement to a felony grade offense. For purposes of argument we can say that because of the habitual enhancement, the penalty went from five years to life imprisonment without parole. It is respectfully submitted that considering the seriousness of the offense with the applied sentence, five years to life without parole, the punishment is argued to be clearly disproportionate in this case.

32. A holding by this Court that either the statute or the implementation of the statute by reference to the Solem guidelines is cruel and unusual punishment is appropriate. Continuing the analysis to determine the existence of cruel and unusual punishment, our attention is refocused on the Supreme Court's holding in *Solem*, considering the three-pronged procedure, would appear to hold that to avoid a proportionality analysis in the instant case the appellant's conviction should be a felony that is a crime of violence. Felony DUI is not a crime of violence and therefore it is argued that a proportionality analysis by this Court is appropriate. *United States v. Kinsey*, 843 F.2d 383 (9<sup>th</sup> Cir. 1988) (case recognizes the basic guidelines set out in *Solem v. Helm* but disposes of the issue adverse to the appellant); *United States v. Blankenship*, 934 F.2d 1110 (5<sup>th</sup> Cir. 1991) (Blankenship's prior convictions were too remote in time to serve as a proper predicate for enhancement). Placing a time limit on previous convictions recognizes that Congress sought to infuse the sentencing system with proportionality.

33. The case of *United States v. Jordan*, 915 F.2d 622 (11<sup>th</sup> Cir. 1990), recognized that

through the introduction of the sentencing guidelines, Congress sought to replace disparity that had typified a discretionary sentencing system with a sentencing system emphasizing uniformity, proportionality, and certainty of punishment. Granted, Mississippi does not have an equivalent sentencing guideline system but the appellant would argue that the same approach should be implemented in cases of such seriousness as the appellant's.

34. Sentencing is within the complete discretion of the trial court and not subject to review if within the limits set by the relevant statute. *Nichols v. State*, 826 So.2d 1288 (¶ 10) (Miss. 2002), The reviewing court must first look at the question of whether an inference of disproportionality may be drawn from a comparison of the crime committed to the sentence meted out. *Baskin v. State*, 986 So.2d 338 (¶ 13-14) (Miss.2008), citing *Williams v. State*, 784 So.2d 230, 236 (¶ 16) (Miss. Ct. App. 2000). The trial court relied on *Baskin* in sentencing the appellant and this Court found the sentence in *Baskin* to pass constitutional muster, however, *Baskin* is clearly distinguishable from the appellant's case. *Baskin* knew before trial that he was looking at a 60 year sentence without parole. The appellant thought the maximum for his offense was five years. The appellant went from what he thought was a five year maximum to life without parole. The gravity of the offense versus the harshness of the sentence is as extreme as it can get. In comparing sentences in other jurisdictions it is hard to believe that one would find a life without parole sentence meted out in a driving under the influence case, even considering a recidivist provision. The exercise of the trial court's discretion resulted in a disproportionate sentence within the meaning of *Solem*.

35. A further consideration in the appellant's case is that sentencing implicates due process and it is submitted that he has a due process right to an individualized sentence. Under the due process concept the appellant is asking this Court to consider, do the basic tenets of a criminal statute that

imposes a minimum or fixed sentence for specified crimes comport with due process, on the whole? In the appellant's case there is a violation of due process based on the fact that his felony record is being used against him without due process guidelines placing a limit on the prior felony ages and the fact that his prior felony convictions are being used to enhance a nonviolent felony offense of Driving Under the Influence. *See: United States v. Shano*, 955 F.2d 291 (5<sup>th</sup> Cir. 1991) (mere possession of a firearm is not a crime of violence, and one cannot be sentenced under § 4 Career Offender Section of the sentencing guidelines).

36. What the trial court has effectively done, is impose the harshest sentence on the appellant for a crime that is without question a non-violent offense. It is submitted that the sentence imposed by the trial court does not comport with the fundamental principles of due process or equal protection of the laws.

37. In summary the appellant would argue that the sentence imposed by the trial court is disproportionate to the underlying crime and is cruel and unusual punishment as defined by the Eighth Amendment to the United States Constitution and the corresponding provisions in the Mississippi Constitution. This Court, at a minimum, is requested to vacate the sentence and remand the matter to the trial court for a new sentencing hearing in accordance with specific guidelines in keeping with the current case law and the principles of fundamental fairness.

#### **ISSUE FOUR**

#### **THE TRIAL COURT COMMITTED PLAIN REVERSIBLE ERROR IN FAILING TO PROVIDE CAUTIONARY JURY INSTRUCTIONS REGARDING THE USE OF EVIDENCE OF OTHER CRIMES, WRONGS OR ACTS**

38. Throughout Tyrone Gowdy's trial, the prosecution was permitted to make references to other crimes, wrongs and acts for which he had committed and been convicted of. Appellant disagrees that such evidence is appropriate in a felony DUI case, but accepting the same for purposes of discussion of this issue, the trial court was under a duty to, at a minimum, provide the trial jury with a cautionary instruction concerning how to treat such evidence. MRE Rules 403 and 404. Without such instruction it cannot be said with any assurance that the trial jury reached a guilty verdict based solely on the evidence that was adduced in open court. The prior offenses included driving while license suspended, DUIs and the particulars of two of the prior DUI convictions. When the State alerts the jury that on one of the occasions, Gowdy blew .232, nearly three times the legal limit, and the jury is not instructed how to treat such evidence, then the result is a foregone conclusion- guilty as charged. Moreover, when the State informs the jury in closing that ' he knows what it feels like to be impaired (T.II. 187), referencing the .111 and .232, this is tantamount to advising the jury that he did it before, and now he's done it again, in violation of MRE 404. These arguments even more accentuate the 'in conformity with' prohibitions and a cautionary instruction was necessary to insure the jury based its verdict on competent evidence.

#### **ISSUE FIVE**

#### **THE TRIAL COURT ERRED IN ALLOWING THE STATE TO AMEND THE INDICTMENT TO INCLUDE HABITUAL OFFENDER ENHANCEMENT**

39. After conviction of the indicted offense but prior to sentencing, the State was permitted to amend the indictment to include the habitual offender sentencing provisions. (C.P. 14-18, 33-34,



36) (R.E. 17-18, 30-32). The appellant recognizes that this Court has held that prior offenses used to enhance punishment under the habitual offender statute are not substantive elements of the offense charged. *Shumaker v. State*, 956 So.2d 1078, 1087 (¶ 26) (Miss.Ct.App. 2007). The established test announced by this Court for whether an amendment to the indictment will prejudice the defense is whether the defense as it originally stood would be equally available after the amendment is made. *Id.* at 1087 (¶ 25). The appellant would argue that such action by the prosecution was vindictive, but assuming for purposes of argument that vindictiveness was not the state's motive, principles of due process and fundamental fairness should label such a tactic as being fundamentally unfair.

40. It is suggested to be fundamentally unfair for the simple reason that Tyrone Gowdy had no idea that he should be subjected to enhanced punishment via the habitual offender provisions. He was provided no advance notice and was denied a meaningful opportunity to attack the validity of such prior convictions before his trial commenced. The appellant submits that he had been placed in a catch-22 position and found himself in a position of too late to respond to the unfair surprise of a habitual sentencing hearing. The appellant argues that by so doing, the state violated the appellant's due process rights as guaranteed by the United States and Mississippi Constitutions.

## **ISSUE SIX**

### **PETITIONER WAS DENIED HIS RIGHTS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION AND MISSISSIPPI LAW DUE TO THE CUMULATIVE EFFECT OF THE ERRORS AT HIS TRIAL**

41. The Mississippi Supreme Court's review of cases has consisted of a review of the

aggregate effect of the variety of errors, which often appear in criminal trials. *Jenkins v. State*, 607 So.2d 1171 (Miss. 1992).

42. Several of the errors discussed above cannot be harmless. Although the appellant is entitled to relief on any of the errors standing alone, it is clear that "[w]hen all the errors are taken together, the combined prejudicial effect requires reversal." *Williams v. State*, 445 So.2d 798, 810 (Miss. 1984); *Nixon v. State*, 641 So.2d 751 (Miss. 1994) (the Court specifically considered "the cumulative effect of any discovered errors or 'near errors'").

43. Furthermore, a reviewing court must also consider the cumulative effect of counsel's deficient performance. *Williams v. Taylor*, 529 U.S. 362 (2000); *Moore v. Johnson*, 194 F.3d 586 (5<sup>th</sup> Cir., Tex. 1999).

44. When reviewing the prejudicial impact of the array of error discussed in the brief of the appellant, the Court should note that the trial did not meet the exacting standards of reliability required by the United States and Mississippi Constitutions. *Griffin v. State*, 557 So.2d 542 (Miss. 1990).

45. In light of the cumulative effect of the errors, the appellant is entitled to relief.

### CONCLUSION

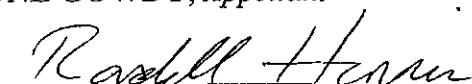
In view of the issues presented and briefed, the appellant would respectfully submit to the Court that his conviction and sentence should be reversed and vacated respectively, and the matter remanded to the trial court for a new trial on the merits. In the alternative, the appellant would submit that his sentence of life without parole should be vacated, and the matter remanded to the trial court for a new

sentencing hearing consistent with appropriate guidelines as the Court deems appropriate, and in accord with the holdings in *Solem v. Helm*, and its progeny.

Respectfully submitted,

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BY:



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**CERTIFICATE OF SERVICE**

I, the undersigned attorney of record for the appellant, do hereby certify that I have on this day mailed postage fully prepaid, a true and correct copy of the foregoing Brief of Appellant to the following:

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This the 9th day of December, 2009.

