IN THE COURT OF APPEALS
OF THE STATE OF MISSISSIPPI

EDDIE TIMMS	**APPELLANT**
V.	**NO. 2009-KA-00955**
STATE OF MISSISSIPPI	**APPELLEE**

BRIEF OF APPELLANT
EDDIE TIMMS

APPEAL FROM THE CIRCUIT COURT OF
HOLMES COUNTY, MISSISSIPPI

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record for Appellant Eddie Timms 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 disqualification or recusal.

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EDDIE TIMMS, Appellant

By: _____
LISA M. ROSS, Attorney for
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REQUEST FOR ORAL ARGUMENT

COMES NOW, the Appellant, Eddie Timms, and requests oral argument. Oral argument would be beneficial to the Court's understanding of the facts as they apply to the law on the issues raised in this appeal.

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PROCEDURAL HISTORY

On or about May 4th and 8th 2009, Eddie Timms (hereinafter "Timms") was tried before a jury in the Circuit Court of Holmes County, Mississippi on charges of possession of a firearm by a convicted felon and possession of a stolen firearm. The jury returned a verdict of guilty on both charges. Circuit Court Judge Jannie Lewis sentenced Timms to a term of five years (three years suspended, two years to serve) in the custody of the Mississippi Department of Corrections on the charge of possession of a firearm by a convicted felon. On the charge of possession of a stolen firearm, Judge Lewis sentenced Timms to a term of five years in the custody of the MDOC. Judge Lewis ordered Timms to serve his sentences consecutively.

After the trial, Timms filed a motion for judgment notwithstanding the verdicts. His post-trial motion was denied. Timms appeals from the verdicts of guilty on the charges of possession of a firearm by a convicted felon and possession of a stolen firearm.

STATEMENT OF THE ISSUES

1. WHETHER PROSECUTOR VIOLATED TIMMS' RIGHT TO A FAIR AND IMPARTIAL TRIAL WHEN HE COMMENTED ON TIMMS' FAILURE TO CALL THE OCCUPANTS IN THE VEHICLE AS WITNESSES IN HIS DEFENSE

2. WHETHER TIMMS' TRIAL COUNSEL'S PERFORMANCE WAS SO DEFICIENT THAT IT DEPRIVED TIMMS OF HIS CONSTITUTIONAL RIGHT TO COUNSEL AND A FAIR AND IMPARTIAL TRIAL

3. WHETHER THE TRIAL COURT SUA SPONTE SHOULD HAVE PREVENTED JURORS FROM HEARING OR RECEIVING EVIDENCE THAT TIMMS WAS CHARGED BUT NEVER CONVICTED OF POSSESSION OF A STOLEN FIREARM

4. WHETHER THE CUMULATIVE ERRORS IN THIS CASE DEPRIVED TIMMS OF HIS RIGHT TO A FAIR TRIAL

STATEMENT OF THE CASE

The facts of this case are hotly contested. Law enforcement officials in Goodman, Mississippi claim Timms, a convicted felon, confessed that he owned two guns found in the trunk of a vehicle in which he was a passenger on February 18, 2009.

At trial, Timms' defense counsel suggested that only a person who had taken a leave of his senses would admit to having guns in their possession if he had a prior conviction of possession of a firearm in the past. (T. p. 82, l. 23-29).

The jury in Timms' trial on charges of felon in possession of a handgun and possession of a stolen handgun heard from three witnesses. The State subpoenaed and called two witnesses: Officer Ellington and Goodman Police Chief Noah Coffee. (C.P. 13). The State did not ask the clerk to issue subpoenaes for DeAndre Moore, Phyllis Moore or Joel Landfair, who were in the vehicle when the guns were discovered. (C.P.13). Although Timms subpoenaed two witnesses, he did not call either of them. (C.P. 15). Timms, however, took the witness stand in his own defense. (T. p. 108-118).

A review of the transcript produces three different accounts of what happened on February 18, 2009 when law enforcement officials encountered Timms.

At trial, the State called Ellington as its first witness. (T. p. 68). On February 18, 2008, Ellington worked as a patrolman for the Goodman Police Department. (T. p. 68, l. 16). Ellington testified that at approximately 7:45 p.m. on February 18, 2008, "we received a call that someone had a gun in Goodhaven apartments which was De - -- I think DeAndre Moore." (T. p. 69, l. 21-23). "And they stated that the car was leaving Goodhaven. And myself and two cars was sitting at a BP station in Goodman and we noticed a white vehicle that fit the description. And after stopping the vehicle, we noticed it was Eddie sitting in the rear and three other people

inside the car." (T. p. 69, l. 21-29), T. p. 70, l. 1). DeAndre Moore was driving the car. (T. p. 70, l. 2-3).

Ellington testified that when Moore's vehicle was stopped, Moore, Timms and Landfair got out of the vehicle. (T. p. 70, l. 8-9). Ellington testified that the men were told to get back in the vehicle. (T. p. 70, l. 10-12). Ellington testified that "he [Timms] remained standing out, talking to us." (T. p. 70, l. 13-17). According to Ellington, Timms did not have any guns on his person. (T. p. 79, 18-23). DeAndre Moore, who reportedly was seen with the gun at the apartment complex, was driving the vehicle. (T. p. 70, l. 3-4).

Ellington testified that "we just asked the driver if – did they have any weapons on 'em, and he stated no. And we asked him would he pop the trunk, and he popped the trunk, we noticed two shotguns laying in the trunk." (T. p. 70, l. 21-25). Ellington explained: "We asked the driver of the car would he open the trunk so could see whether there was weapons. Once we get a call there's weapons involved, that's probable cause to do a search on a vehicle." (T. p. 81, l. 3-11).

Ellington testified that he picked up one of the shotguns and Chief Coffee picked up the other shotgun. (T. p. 71, l. 8-13). Ellington testified that after "Chief Coffee retrieved the guns, he [Timms] stated, um, Chief, I think those guns are mine." (T. p. 71, l. 25-27). Ellington testified that Timms stated "um, something about somebody been stealing some dogs from him, and he needed it because they was stealing the dogs or something." (T. p. 72, l. 4-6). "He just volunteered that information." (T. p. 83, l. 17-19).

During his cross-examination of Ellington, the following colloquy took place between Ellington and Timms' trial counsel:

Q. And had you ever heard of Mr. Timms having any serious mental problems?

A. No, sir.

Q. Okay. Had he ever acted insane in your presence?

A. No, sir.

Q. Had anyone told you in the community that he was a crazy person?

A. No, Sir.

Q. Okay. And did you have occasion this day, or any day, to have any conversation with Mr. Timms to evaluate his mental status for yourself?

A. No, Sir.

Q. In his conversations with you and Mr. Coffee at the scene, did it appear that Mr. Timms had any kind of mental difficulties?

A. No, sir. (T. p. 79, l. 24-20, p. 80, l. 1-11).

Although the prosecutor did not question Ellington about Timms' previous felony conviction, Timms' trial counsel during cross-examination asked "Now, do you know anything about Mr. Timms' past, whether he had any kind of criminal record in the past, whether he'd ever been convicted of having a firearm in his possession in the past, for example?" (T. p. 82, l. 15-19). Ellington responded "Not knowing it, but have heard of it." (T. p. 82, l. 20). Timms' counsel did not object to hearsay. (T. p. 82, l. 15-29). Timms' counsel continued: "Okay. And you had heard that he had had a conviction for possession of a firearm in the past." (T. p. 82, l. 21-23). Ellington answered "No, sir." Timms' trial counsel then poised a hypothetical. "If Mr. Timms had had a prior conviction of possession of a firearm – and you said that he didn't act like he was mentally ill or you never knew him to be mentally ill – would it make sense for a man who had served time for the same type charge to admit –" (T. p. 82, l. 23-29). Before Ellington

responded, the prosecutor objected. (T. p. 83, l. 1-3). The court sustained the objection. (T. p. 83, l. 4).

On re-direct examination of Ellington, the prosecutor sought to introduce evidence of Timms' prior felony conviction. (T. p. 85). Timms' trial counsel did not make a motion to stipulate that Timms was a prior convicted felon. (*See*, Docket Sheet, Pleadings, Exhibits, Orders Filed, Dispositions, Etc.). The prosecutor stated "You Honor, I have what has been marked for identification purposes as Exhibit S-3 which is a certified copy of the commitment orders, Notice of Criminal Disposition, in Cause No. 10570 concerning Mr. Eddie Timms, as well as a true and correct copy of the indictment, which is also notarized by Ms. Hart, as well as the sentencing order which has been notarized and an order dismissing Count II of that indictment that we could offer into evidence at this time, Your Honor." (T. p. 85, l. 10-20).

When asked by the trial judge if he had any objections, Timms' trial counsel answered "no ma'am." (T. p. 85, l. 21-24). The documents outlined above were admitted into evidence as Exhibit S-3. (T. p. 85, l. 25-26). The prosecutor asked Ellington to read count 1 of the indictment: "possession of cocaine enhanced by possession of a firearm." (T. p. 86, l. 12-18).

Chief Coffee described the events of February 18, 2008 like way. "Officer Ellington said to me, There the car go there. So he got in his car, I got in mine, and we followed them to make a stop." (T. p. 91, l. 21-25). Chief Coffee testified "I ordered 'em both back in the car." (T. p. 93, l. 6-7). "Um, I told the driver, the reason why we stopped you is, we got a report that someone in Goodhaven was walking around with a – with a gun and they left the area in a car that fit the description of the car you're driving. And I asked him did he have any weapons in the car. He said no. I shined my flash – my light in the car to see could – could I see a weapon. I didn't. Officer Ellington said, Pop the trunk. At that time Eddie was laying – leaning on the

trunk, and I asked him to move off the trunk." (T. p. 92, l. 13-24, T. p. 70, l. 26-28, and T. p. 71, l. 1-3).

Coffee testified that when Timms moved off the trunk, "I opened the trunk. There was the two sawed-off shotguns in the trunk." (T. p. 93, l. 13). "I grabbed hold to 'em, and immediately, I unloaded 'em. At that time Eddie said, Don't take my gun, man. I've had 'em a for a long time. He stated that somebody had been stealing his dogs, and he was on his way out there to check. And I told him – I said, You don't supposed to have these guns anyway. And he said, I can have a shotgun. And I asked him, Where you get that from? He said, It's the law. So we took possession of the weapons, and I told him I would get up with him later." (T. p. 93, l. 16-27).

Chief Coffee testified that Timms also said "At least let me keep one. And this was the one he chose out of the two." (T. p. 95, l. 22-27).

No arrests were made that night. (T. p. 81, l. 12-13). Although authorities claim Timms confessed on the scene, he was not arrested. (T. 84, p. 20-24). Chief Coffee testified that no one else in the car was charged because "the guns is illegal. He owned the gun. He admits – He claimed them." (T. p. 96, l. 12-20).

Chief Coffee also testified " [w]e went – we trans – we took the guns to the Goodman Police Department and locked them up and that – we finished the rest of our shift. Well, the next evening, Officer Ellington and I was on together and I asked him to run the serial numbers on the guns. That's when we discovered that one of the guns that was in their possession belong to Goodman Police Department. And, um, we didn't get a hit on the other one." (T. p. 93, l.27-29, T. p. 94, l. 1-7).

Ellington and Chief Coffee identified the weapons found in the vehicle as a Mossberg sawed-off 12-guage and a Remington 870 Express Magnum. (T. p. 73, l. 1-13, T. p. 74, l. 5-13, T. p. 94, l. 15-19, T. p. 95, l. 15-29, T. p. 96, l. 1-11). Ellington testified that he ran a background search on the Remington 870 Express Magnum. (T. p. 75, l. 9-24). "It come up stolen from the Goodman Police Department." (T. p. 75, l. 27-28). No fingerprints were lifted from the guns. (T. p. 81, l. 25-27).

Timms testified that he was a passenger in a car driven by DeAndre Moore. (T. p. 108, l. 26-28). When Officer Ellington and Chief Coffee stopped Moore, Moore and Timms exited the vehicle. (T. p. 109, l. 3-8). Timms testified "[w]e got out of the car when they pulled us over. Chief Coffee pulled his gun up and told us to go back with our hands in the air and get back in the car, and that's what we did." (T. p. 109, l. 9-15).

Timms testified that he did not have any conversations with Officer Ellington or Chief Coffee about anything found in the trunk of the car. (T. p. 109, l. 16-26). Timms' trial counsel asked him if he had ever been treated for mental illness. (T. p. 110, l. 29, T. p. 112, l. 1). Timms responded in the negative. (T. p. 112, l. 2). While on direct examination, Timms' trial counsel asked Timms: "Okay. As a sane person, knowing that you had been convicted of possession of a firearm in the past, would it have been logical for you to have said these are my guns in the trunk?" Timms testified "No, I did not say that." (T. p. 112, l. 3-7). Timms testified that he did not tell Ellington or Chief Coffee that the guns belonged to him. (T. p. 112, l. 12-14).

During the State's cross-examination of Timms, the prosecutor asked Timms about his relationships with DeAndre Moore, Phyllis Moore and Joel Landfair. (T. p. 113, l. 8-29). The prosecutor elicited testimony to show that Timms was close friends to DeAndre Moore, Phyllis Moore and Joel Landfair. (T. p. 113, l. 8-29). The prosecutor did not ask Timms why he didn't

call DeAndre Moore, Phyllis Moore and Joel Landfair as witnesses in his defense. (T. p. 113-116).

The State began closing arguments by pointing to Exhibit S-3. The prosecutor stated "it's a notice of criminal disposition form the Mississippi Department of Corrections. And it talks about Count I in Cause No. 10570. It says right here possession of cocaine enhanced by possession of a firearm at the time of arrest... The charge in that case in count I was possession of cocaine enhanced by possession of a firearm at the time of arrest and, basically, the indictment reads 1.62 grams more or less of cocaine. That doesn't really matter." (T. p. 127, l. 7-20).

In closing argument, the prosecutor also argued "All he [Timms] had to do was push a button. And he didn't have to testify. That was his God-given right and you couldn't hold it against him. But since he chose to testify, I can comment on his case and the evidence that was presented. Where are DeAndre Moore, Phyllis Moore, and Joel Landfair? He's got access to the clerk's office just like we do. He can subpoena anybody he wants to, and door would have been busting wide open with folks coming to his aid if there was a person in existence that could have come to his aid. And the reason it didn't happen is because there was nobody that could testify for him. (T. p. 131, l. 18-29, T. p. 132, l. 1).

SUMMARY OF ARGUMENT

1. TIMMS WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO A FAIR AND IMPARTIAL TRIAL WHEN THE PROSECUTOR COMMENTED DURING CLOSING ARGUMENTS THAT TIMMS FAILED TO CALL THE OCCUPANTS OF THE VEHICLES AS WITNESSES TO HIS DEFENSE

2. TIMMS' TRIAL COUNSEL'S PERFORMANCE WAS SO DEFICIENT THAT IT DEPRIVED TIMMS OF HIS CONSTITUTIONAL RIGHT TO COUNSEL AND A FAIR AND IMPARTIAL TRIAL

3. THE TRIAL COURT *SUA SPONTE* SHOULD HAVE PREVENTED JURORS FROM HEARING OR RECEIVING EVIDENCE THAT TIMMS WAS CHARGED BUT NEVER CONVICTED OF POSSESSION OF A STOLEN FIREARM IN THE ABSENCE OF CONDUCTING A BALANCING TEST UNDER MRE 403

4. THE CUMULATIVE ERRORS IN THIS CASE DENIED TIMMS HIS RIGHT TO A FAIR TRIAL

ARGUMENT

WHETHER TIMMS WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO A FAIR AND IMPARTIAL TRIAL WHEN THE PROSECUTOR DURING CLOSE ARGUMENT COMMENTED THAT TIMMS FAILED TO CALL THE OCCUPANTS IN THE VEHICLE AS WITNESSES TO HIS DEFENSE

Timms is guaranteed a fair trial under the Sixth Amendment to the United States Constitution. The Sixth Amendment states "in all criminal prosecutions, the accused shall enjoy the right to speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." *U.S. Const. Amend. VI.* Article 3 § 26 of the Mississippi Constitution provides that "in all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both, to demand the nature and cause of the accusation, to be confronted by the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and , in all prosecutions by indictment or information, a speedy and public trial by an impartial jury of the county where the offense was committed;..."

It is well established in Mississippi jurisprudence that "it is improper to comment on the failure of either party to call a witness equally accessible to both parties." *Ross v. State*, 603 So.2d 857, 864 (Miss. 1992). In *Taylor v. State*, 672 So.2d 1246, 1270 (Miss. 1996), the Mississippi Supreme Court held that "an improper comment on the failure to call a witness does not require reversal unless the probable effect of the improper comment created unjust prejudice against the accused resulting in a decision influenced by prejudice."

In the case *sub judice*, the prosecutor during closing argument told the jury: "And he didn't have to testify. That was his God-given right and you couldn't hold it against him. But since he chose to testify, I can comment on his case and the evidence that was presented. Where are DeAndre Moore, Phyllis Moore, and Joel Landfair? He's got access to the clerk's office just like we do. He can subpoena anybody he wants to, and that door would have been busting wide open with folks coming to his aid if there was a person in existence that could have come to his aid. And the reason it didn't happen is because there was nobody that could testify for him." (T. P. 131, l. 18-29).

A review of the court papers in this case shows that the State made no effort to secure DeAndre Moore, Phyllis Moore and Joel Landfair as witnesses in this matter. The State requested the clerk of court to issue subpoenaes for Ellington and Chief Coffee. During the presentation of its case-in-chief, the prosecutor did not elicit any testimony from Ellington or Chief Coffee to show that DeAndre Moore, Phyllis Moore or Joel Landfair were uncooperative. In the absence of any attempt by the State to secure the testimony of DeAndre Moore, Phyllis Moore or Joel Landfair, this Court should find the prosecutor's comments particularly troubling. There was only one conclusion that the jury could have drawn from the prosecutor's comments. That is, Timms did not call DeAndre Moore, Phyllis Moore, and Joel Landfair because their testimony was favorable to the State. If that were so, the prosecutor should have called them as witnesses. Had the prosecutor called them as witnesses, Timms would have been able to cross-examine them.

Here, the prosecutor presented no evidence that DeAndre Moore, Phyliss Moore and Joel Landfair were not equally accessible to the State as they may have been to Timms. In the absence of such a showing, this Court should find that the prosecutor's comments require

reversal because it created unjust prejudice against Timms "resulting in a decision influenced by prejudice."

TIMMS' TRIAL COUNSEL'S PERFORMANCE WAS SO DEFICIENT THAT IT DEPRIVED TIMMS OF HIS CONSTITUTIONAL RIGHT TO COUNSEL AND A FAIR AND IMPARTIAL TRIAL

As stated above, the Sixth Amendment of the United States Constitution and Article 3 § 26 of the Mississippi Constitution guarantee Timms a right to be represented by counsel. In *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d (1984), the United States Supreme Court set forth a two-part test to establish claims of ineffective assistance of counsel. First, the defendant must show that counsel's performance was deficient, and second, the defendant must show that the deficient performance prejudiced his defense. The Mississippi Supreme Court adopted the two-part test set forth in *Strickland* in *Stringer v. State.* 454 So.2d 468 (Miss. 1984). Once a defendant proves that his trial counsel's performance is deficient, he must "show a 'reasonable probability' that, but for counsel's unprofessional errors, a different outcome would have resulted at trial." Id. at 694, 104 S.Ct. 2052.

In *Moody v. State*, 644 S.2d 451 (Miss. 1994) the Mississippi Supreme Court held that defense counsel's efforts were both deficient and prejudicial. In *Moody*, the Court noted that there were twenty-one instances of deficient performance which were confirmed by the record.

The performance of Timms' trial counsel is akin to the performance of defense counsel in *Moody*. First, Timms' trial counsel failed to seek a stipulation that Timms was a prior convicted felon before the trial commenced. In *Old Chief v. United States*, 519 U.S. 172, 186, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997), the court held that the trial court committed reversible error when it allowed the prosecution to present evidence of prior assault conviction to prove that the

defendant was a prior convicted felon in possession of a firearm. The U.S. Supreme Court noted that the defendant offered to stipulate that he was a prior convicted felon.

Because *Old Chief* clearly entitles a defendant who has a prior conviction to stipulate that he is a prior convicted felon, Timms' counsel should have stipulated to that fact. Had Timms' trial counsel sought a stipulation that Timms was a prior convicted felon, the prosecutor would not have been able to put in evidence of Timms' conviction for "possession of cocaine enhanced by possession of a firearm."

More importantly, had Timms' counsel sought the stipulation, under *Old Chief* the trial court could not have allowed Exhibit S-3 which contained a notice of criminal disposition and indictment showing that Timms had been previously charged with possession of a stolen firearm. In *Esco v. State of Mississippi*, 9 So.3d 1156, 1165 (Miss. COA 2009), the court held that where a defendant fails to enter into a stipulation about his prior conviction, the court stated "the prosecution [was] entitled to prove its case by evidence of its own choice, or more exactly, that a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the government chooses to present it."

Second, Timms' trial counsel's failed to object when the prosecutor presented a "certified copy of the commitment orders, Notice of Criminal Disposition, in Cause No. 10570 concerning Mr. Eddie Timms, as well as a true and correct copy of the indictment, which is also notarized by Ms. Hart, as well as the sentencing order which has been notarized and an order dismissing Count II of that indictment that we could offer into evidence at this time, Your Honor." (T. p. 85, l. 10-20). The trial judge asked Timms' trial counsel did he have any objections, he said, "No, ma'am." The trial judge responded 'excused me." Timms' counsel stated "No, ma'am." (T. p. 85, l. 21-24).

While it is true that in the absence of a stipulation, the prosecutor was entitled to prove its case by evidence of its own choice. The prosecutor, however, did not have the right to present evidence that was not truthful. In the instant case, the Notice of Criminal Disposition and Indictment contained in Exhibit S-3 show that Timms was charged with possession of a stolen firearm in February 2002. Timms was never convicted of that charge. (*See*, Timms' guilty plea attached to Motion to Enlarge Record). The possession of a stolen firearm charge was *nolle prossed.* Because a charge is not a conviction, it was not "relevant evidence" as defined by M.R.E. 401 and should not have been admitted. Moreover, even if the trial court determined that evidence of Timms' prior charge was relevant, the Court still would have been required to conduct a balancing test prior to the admission of evidence about a charge that was *nolle prossed.*

In addition, it was incumbent on Timms' trial counsel to prevent the jury from hearing that Timms was charged with possession of a stolen firearm. This is precisely why all evidence must be filtered through MRE 401 and 403. Timms' trial counsel's failure to prevent the jury from hearing evidence of a *nolle prossed* charge do is especially alarming because Timms was on trial for possession of a stolen firearm. There is no question that the jury could have inferred that Timms was guilty of possession of a stolen firearm because Timms had a propensity for possessing stolen firearms.

More importantly, had Timms' trial attorney investigated his background, he would have known that Timms had not been convicted of "possession of cocaine enhanced by possession of a firearm" Contrary to assertions by his trial counsel, prior to his trial in the case *sub judice* Timms had not been convicted of possession of a firearm. In 2002, Timms was charged with "possession of cocaine enhanced by possession of a firearm." Had Timms' trial counsel

bothered to investigate, he would have discovered that Timms, while indicted on the charge of "possession of cocaine enhanced by possession of a firearm," actually entered a plea of guilty to simple possession of cocaine in Cause No. 10,570 on February 13, 2002. A copy of Timms' guilty plea states that the maximum sentence for the charge to which Timms was pleading guilty is eight years and minimum sentence is two years. The petition shows that the maximum fine was $50,000.00.

What is clear from the section of the guilty plea petition containing the maximum and minimum sentences and fines is Timms did not plead to the enhancement and he was not sentenced pursuant to the enhancement. Under MCA § 41-29-152(1) "Any person who violates Section 41-29-313 or who violates Section 41-29-139 with reference to a controlled substance listed in Schedule I, II, III, IV or V as set out in Sections 41-29-113 through 41-29-121, Mississippi Code of 1972, inclusive, and has in his possession any firearm, either at the time of the commission of the offense or at the time any arrest is made, may be punished by a fine up to twice that authorized by Section 41-29-139 or 41-29-313, or by a term of imprisonment or confinement up to twice that authorized by Section 41-29-139 or 41-29-313, or both."

Had Timms entered a plea to the charge of "possession of cocaine enhanced by possession of firearm at time of arrest," the guilty plea petition would have stated that the minimum fine was $100,000.00 (2 x $50,000.00). The minimum sentence for the charge of "possession of cocaine enhanced by possession of firearm at time of arrest," would have been four years (2 x 2 years) and the maximum sentence would have been sixteen years (2 x 8 years). Had Timms' trial counsel investigated his criminal record, he would not have asked law enforcement about Timms' prior criminal record and he would not have asked Timms in the presence of the jury: "Okay. As a sane person, knowing that you had been convicted of

possession of a firearm in the past, would it have been logical for you to have said these are my guns in the trunk?" The record in this case shows that Timms never had been convicted of possession of a firearm.

Third, Timms' trial counsel elicited prejudicial hearsay during cross-examination of Ellington. The information sought by Timms' trial counsel was objectionable under M.R,E. 401 and should not have been allowed into evidence unless the trial court had conducted a balancing test under M.R.E. 403 and concluded that the probative value outweighed the prejudicial effect. Timms' trial counsel opened the door for the jury to conclude that Timms was guilty because he had a propensity for possessing firearms as well as possessing stolen firearms.

Recall, Timms' trial counsel asked Ellington, "Now, do you know anything about Mr. Timms' past, whether he had any kind of criminal record in the past, whether he'd ever been convicted of having a firearm in his possession in the past, for example?" Ellington replied, "Not knowing it, but have heard of it." Timms' trial counsel then asked "okay. And you had heard that he had had a conviction for possession of a firearm in the past?" Ellington responded, "No, sir." Timms' counsel then asked "Okay. Let me state a hypothetical. If Mr. Timms had had a prior conviction of possession of a firearm -- and you said that he didn't act like he was mentally ill or you never knew him to be mentally ill -- would it make sense for a man who had served time for the same type charge to admit –" The prosecutor objected. The trial judge sustained the objection.

Fourth, had Timms' counsel investigated Timms' criminal record and followed prevailing legal authority, he would have agreed to a stipulation that Timms was a convicted felon. Had he done so, the jury would not have had any knowledge of Timms' prior criminal history, especially erroneous information that Timms was convicted of "possession of cocaine

enhanced by possession of firearm" or "possession of a firearm." In addition, Timms' trial counsel would have objected to S-3 to prevent the jury from learning that Timms, who was being tried for possession of a stolen firearm, previously had been charged, but not convicted, of the same offense.

In the instant case, there is no question that there is a reasonable probability that, but for counsel's unprofessional errors, a different outcome would have resulted at trial. Consequently, this Court should reverse Timms' conviction which was secured in violation of his constitutional right to competent counsel and a fair and impartial trial.

THE TRIAL JUDGE COMMITTED PLAIN ERROR IN ALLOWING THE ADMISSION OF EXHIBIT S-3

The determination of relevancy of evidence is left to the sound discretion of the trial judge whose determination will not be reversed in the absence of clear abuse. *Lambert v. State*, 462 So.2d 308, 313 (Miss. 1984); *McNeil v. State*, 308 So.2d 236 (Miss. 1975). The trial court committed plain error when she allowed the State to introduce Exhibit S-3 into evidence. In *Baskin v. State*, 991 So.2d 179, 181 (Miss. App. 2008), the court stated "Rule 103(d) of the Mississippi Rules of Evidence allows a court to take notice of any plain error affecting a substantial right even though it was not brought to the court's attention. In addressing the issue of plain error, the supreme court has said the following: If no contemporaneous objection is made at trial, a party must rely on the plain error rule to raise the assignment of error on appeal. *Foster v. State*, 639 Co.2d 1263, 1289 (Miss. 1994) citing *Gray v. State*, 487 So.2d 1304, 1312 (Miss. 1986). The plain error doctrine requires that there be an error and that the error must have resulted in a manifest miscarriage of justice. *Williams v. State*, 794 So.2d 181, 187 (Miss. 2001) citing *Grady v. State*, 549 So.2d 1316, 1321 (Miss. 1989). The plain error rule will only be

applied when a defendant's substantive or fundamental rights are affected. *Grubb v. State*, 584 So.2d 786, 789 (Miss. 1991).

As stated above, because Timms' trial counsel did not seek a stipulation regarding his prior conviction, the State was entitled to prove that Timms was a convicted felon in the manner it chose. The State, however, was not entitled to present evidence of crimes that Timms had not been convicted of committing. "The general rule is that evidence of a crime, other than the one for which the accused is being tried, is not admissible." *Palmer v. State*, 939 So.2d 792, 795 (¶ 8) (Miss. 2005). In Mississippi, "evidence of prior criminal activity on the part of one criminally accused is inadmissible where the prior offense has not resulted in a conviction." *Watts v. State*, 635 So.2d 1364, 1367 (Miss. 1994) citing *Tobias v. State*, 472 So.2d 398, 400 (Misss. 1985); *Donald v. State*, 472 So.2d 370, 372 (Miss. 1985); *Hughes v. State*, 470 So.2d 1046, 1048 (Miss. 1985); *West v. State*, 463 So.2d 1048, 1051-52 (Miss. 1985); *Tucker v. State*, 403 So.2d 1274, 1275 (Miss. 1981): *Sumrall v. State*, 257 So.2d 853 (Miss. 1972).

In *Watts v. State*, 635 So.2d 1364, 1368 (Miss. 1994), the trial judge allowed the prosecutor to introduce evidence that the defendant was connected to a prior burglary, of which he had not been convicted. The prosecutor contended that the testimony was necessary to present a complete story of the crime charged. The Mississippi Supreme Court rejected the State's argument. The court noted that the trial court failed to conduct a balancing test as required by M.R.E. 403. The court also stated "we again arrive full circle at the possibility that the jury improperly inferred that Watts `committed the crime for which he is on trial because he is a person who has displayed criminal propensities in the past.'" Id. The Court also pointed out that "if presented to the jury, it has great prejudicial effect and it would arguably inject collateral issues into the case." Id. More importantly, the Court stated "in addition to the fact

that no test of prejudicial effect versus probative value was conducted, there is also the fact that the 'other crime' testimony was give free of any limiting instruction....We find no indication that a proper limiting instruction was submitted to the jury in the case **sub judice**, making it all the more likely that the testimony of another possible crime was considered for impermissible purposes, i.e. to imply that on this particular occasion, Watts was acting in conformity with his established character. We must conclude that the multiple problems associated with the admission of the testimony of evidence of another crime at Watts' trial constitutes reversible error. Further, while recognizing the need to be thorough, we would point out in hindsight that there appeared to be sufficient evidence to support Watts' conviction without the need to resort to evidence of Watts' connection to another unrelated crime. In a case where sufficient evidence is presented on each essential element of the crime, and a conviction is seemingly assured, the prosecution might do well to follow the old adage that 'more is not always better' rather than risk upsetting the conviction by seeking to introduce inadmissible, and unnecessary evidence." Id. at 1368-69.

In the instant case, Timms' counsel did not request and the trial court did not give a limiting instruction. As the court stated in *Watts*, the trial court's failure to give a limiting instruction makes it "all the more likely that the testimony of another possible crime was considered for impermissible purposes, i.e. to imply that on this particular occasion," Timms was acting in conformity with his established character. Like the *Watts* Court, this court should conclude that "the multiple problems associated with the admission of the testimony of evidence of another crime at Watts' trial constitutes reversible error."

CERTIFICATE OF SERVICE

I, Lisa M. Ross, attorney for Eddie Timms, certify that a true and correct copy of the above and foregoing document has been forwarded to the following, via regular mail:

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SO CERTIFIED, this the 23rd day of February 2010.

Lisa M. Ross
LISA M. ROSS

SO CERTIFIED, this the 23rd day of February, 2009.

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