IN THE SUPREME COURT OF MISSISSIPPI
NO. 2009-KA-01861-SCT

RICHARD LEON LONG — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

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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. Richard Leon Long

THIS 1st day of July, 2009.

Respectfully submitted,

RICHARD LEON LONG

By: George T. Holmes

George T. Holmes,
Mississippi Office of Indigent Appeals

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STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of DeSoto County, Mississippi where Richard Long was convicted of sale of a controlled substance within one-thousand (1000) feet of a public park, as provided in Miss. Code Ann. §§ 41-29-139(a)(1) and 41-29-142 (1972) . A jury trial was conducted October 28, 2009, with Honorable Robert P. Chamberlin, Circuit Judge, presiding. Long was sentenced to life imprisonment, without parole, as an habitual offender under Miss. Code Ann. §99-19-1983 (1972), and is presently incarcerated with the Mississippi Department of Corrections.

FACTS

Jerry Rodgers, a Olive Branch Police Officer, testified that he, acting under-cover, purchased thirty-four (34) Diazepam pills on January 22, 2008, from a man he identified as Richard Leon Long, within ninety-six (96) feet of a park. [T. 131-53]. Rodgers said the buy was set up with Long from previous conversations. *Id.* Rodgers explained how the transaction was completed with appropriated funds and video recorded by a surreptitiously concealed camera device. [*Id.*; Ex. 2]. The video recording of the purported event was shown to the jury. [T. 145; Ex. 2].

Rodgers said the alleged drugs were turned in to police evidence. [T. 142]. Chain of custody evidence was offered. [T. 156, 160]. A toxicologist from the Mississippi Crime Lab testified that the pills Rodgers said he obtained from Long were, indeed, the controlled substance Diazepam, and a report was introduced . [T. 161-62; Ex. 1].

Long presented no testimony in defense, and the jury convicted him. At sentencing, Long was determined to be an habitual offender with at least one prior "violent" offense, as charged in the indictment amended by order entered September 24, 2009. [Supp. R. 1].

SUMMARY OF THE ARGUMENT

The weight of evidence does not support the verdict. Proof of a narcotics sale within 1000 feet of a public park was inadequate for any enhancement. Long was prejudiced by inflammatory closing argument by the state and was not adequately shown to be a violent habitual offender. The sentence of life without parole is unconstitutionally disproportionate.

ARGUMENT

ISSUE NO. 1: WHETHER THE VERDICT IS SUPPORTED BY THE WEIGHT OF EVIDENCE?

The undercover officer Rodgers did not make an arrest when the alleged purchase took place. [T. 152]. The purported video recording of the alleged drug sale is inconclusive. [Ex. 2]. No money is shown on the video, no drugs are shown on the video and the person from whom the drugs were allegedly purchased is shown so briefly, that he is unidentifiable considering the poor quality of the recording. *Id.* So, the testimony and physical evidence are unreliable.

The verdict of guilty was clearly contrary to the evidence entitling Long to a reversal and rendering of an acquittal, or alternatively to a new trial. *Hall v. State*, 644 So. 2d 1223, 1228 (Miss. 1994); *Brown v. State*, 829 So. 2d 93, 103 (Miss. 2002).

When a jury's verdict is so contrary to the weight of the credible evidence or is not supported by the evidence, a miscarriage of justice results and the reviewing appellate

court must reverse and grant a new trial. *Kelly v. State*, 910 So. 2d 535, 539-40 (Miss. 2005).

ISSUE NO. 2: WHETHER INFLAMMATORY CLOSING ARGUMENT BY THE STATE REQUIRES A NEW TRIAL?

In closing argument, the prosecutor asked the jury twice to "hold [Long] accountable" on the charges; because, it is important to "control" the "illegal sale of drugs" [T. 184]. "He's selling drugs near a park ... I'm just glad we caught him when we did." *Id.*

It is the appellant's position that the above argument constituted a forbidden send-a-message argument condemned by the court in *Payton v. State,* 785 So.2d 267 (Miss. 1999) and *Brown v. State* 986 So.2d 270 (Miss. 2008). In reversing for improper "send a message" arguments, the *Brown* court applied in the two-pronged test set out in *Spicer v. State*, 921 So. 2d 292, 317 (Miss. 2006).

The first question to answer is whether defense counsel objected; but, even in the absence of objection, the issue is not procedurally barred if "the [send-a-message] argument is so 'inflammatory' that the trial judge should have objected on his own motion." 986 So. 2d 275. The second question is whether defense counsel invited the comment so as to waive an objection. *Id.* If the answers to the first two questions keep the issue alive, next it must be determined "(1) whether the remarks were improper, and (2) if so, whether the remarks prejudicially affected the accused's rights." *Id.* "It must be

clear beyond a reasonable doubt, that absent the prosecutor's comments, the jury [would] have found the defendant guilty. This goes beyond a finding of sufficient evidence to sustain a conviction." [Citations omitted.]. *Id.*

Applying the multi-part test to the present facts, there was no objection, but the error is plain, and should have been recognized by the trial court. There was no invitation to the argument under the circumstances.

Regarding the lack of an objection, in *Payton*, defense counsel failed to object to the prosecutor's "send-a-message" comments. *Payton*, 785 So.2d at 270. Nevertheless, the *Payton* court held that, "if the argument is so 'inflammatory' that the trial judge should have objected on his own motion the point may be considered." [Citations omitted.]. *Id.*

In reversing, and very applicable to the present case, the *Payton* court said, "[s]tanding alone, the district attorney's use of the 'send a message' argument in this case would be reversible error because of the prejudice against Payton evidenced by his more severe sentence, ... [f]undamental fairness principles dictate that Payton's convictions and sentences resulting from the apparent prejudice be reversed and this case remanded for a new trial." 785 So.2d at 272.

Like Payton, Richard Long's prejudice is a severe sentence, life imprisonment. The error is plain, and a new trial is required and respectfully requested.

ISSUE NO. 3: WHETHER THE STATE PRESENTED COMPETENT PROOF OF THE ALLEGED SALE WITHIN 1000 FEET OF A PARK?

There were two inadequacies in the state's evidence of a sale within 1000 feet of a park. First, there was no proof that the park in question is a "public park" as required by the statute. Secondly, there were no actual measurements of the distance from the place of the alleged sale and the so-called park. [T. 138-41].

This issue only pertains to sentencing, but the trial court should have sustained Long's motion for directed verdict, or otherwise granted a JNOV without the enhancement. Miss. Code Ann. § 41-29-142. (1972) provides, *inter alia*, that any person who sells a controlled substance within "one thousand (1,000) feet of, the real property comprising" a "public park" shall, upon conviction, be punished by the term of imprisonment of up to twice that normally authorized.

In *Foster v. State*, 928 So. 2d 873, 881-82 (Miss. Ct. App. 2005), the defendant argued that the State "presented insufficient evidence that the park was a public park," particularly that "no one with personal knowledge" testified that the park was a "public park" thereby failing the requirement that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." M.R.E. 602.

The narcotics officer in *Foster* was asked whether the park was a city park, and he answered, "as far as I know." *Id.* The officer added that the area was used by a

community college for sports, but the officer did not know who owned the property. *Id.*

The *Foster* court noted that, in addition to the officer's testimony, documented measurements were taken and the officer testified that the park was maintained by municipal employees with city equipment. *Id.* Another officer testified that "[e]verybody knows that's the city park" and that "he knew it was a city park." *Id.* Even the defendant Foster said the area "probably" was a public park and that he did not doubt it. *Id.* So, the *Foster* court found sufficient evidence that the area was a park. *Id.*

Turning to the present case. There were no documented measurements offered to the court. There was no proof of a legal dedication of the area as a park. There was no evidence of maintenance by a public agency; and, there was no testimony from a person with knowledge that the area was indeed a "public park". Unlike the *Foster* case, there was insufficient evidence of a sale withing 1000 feet of a public park and the weight of evidence is contrary to the verdict.

Even if the area was proven to be a park, the evidence was insufficient to prove any alleged sale occurred within 1000 feet. In *Perkins v. State*, No. 2008-KA-01387-COA (Miss. Ct. App. 2009) (¶10), the defendant was charged with a narcotic sale within 1500 feet of a church. A law enforcement officer testified that he measured the distance between the point where the buy occurred and the church using an "electronic range finder" and said that the buy occurred within 147 feet of the church. *Id.* There was conflicting evidence as to the exact location of the transaction, but the *Perkins* court said

that was the jury's province and held that there was sufficient evidence in the record to support the jury's finding of a sale taking place within 1,500 feet of a church. *Id.*

In *Brown v. State*, 995 So. 2d 698, 701-02 (Miss. 2008), the court held a hearing to determine whether the crime occurred within 1,500 feet of a church. *Id.* The state's witness "testified that he had measured a distance of approximately 720 feet" from the point of sale to the church. The finding was that the guilty verdict was not based on insufficient evidence, and the verdict was not against the weight of evidence. *Id.*

Contrarily, in *Williams v. State*, 794 So. 2d 181, 187-88 (Miss. 2001), [overruled on other grounds by *Brown v. State*, 995 So. 2d 698, 702-03 (Miss. 2008)], the court found that it was "not clear from the testimony whether Williams' transaction occurred within 1,500 feet of a building on the school property or 1,000 feet from the school's property. *Id.* The testimony was deemed "imprecise" and failed to prove that the transaction occurred within the distances provided in the statute. The *Williams* court said, that since the measuring points were not established, the proof failed and, therefore, the sentence enhancement did not apply and Williams' sentence was reversed with remand for resentencing without the enhancement. *Id.*

Therefore, comparison of the lack of measurement in this case to the precision exhibited in those cited above, and specifically required in *Williams*, requires the Court here to find that the enhancement of §41-29-142 is inapplicable here. Richard Long respectfully asks the court to remand for resentencing under this and other issues.

ISSUE NO. 4: WHETHER THE TRIAL COURT SHOULD HAVE DEVELOPED MORE PROOF REGARDING LONG'S PRIOR CONVICTIONS AT SENTENCING?

At sentencing, Richard Long challenged the characterization of his prior convictions as meeting the definition of "violent offenses" under MCA §99-19-83 (1972). [T. 202-05]. Long stated that his Colorado conviction of sexual assault of a child was consensual sex with an underage teen. *Id.* Regarding the prior conviction of aggravated incest, Long stated that the alleged victim was not his daughter. *Id.* The position here is that the trial court erred by not investigating the nature of Long's prior convictions which were the basis of his habitual sentence.

Based on the mere paper records available to this Court, it would appear that Long's prior could be characterized as violent offenses. *U.S. v. Munguia-Sanchez* 365 F. 3d 877 (10th Cir. 2004); *U. S. v. Rayo-Valdez* 302 F. 3d 314 (5th Cir. 2002). However, since Long challenged the particular elements of the underlying offenses, the trial court should have continued sentencing for further development of these issues, or required the state to put on more proof that the particular offenses were indeed violent. *Keyes v. State*, 549 So. 2d 949, 951 (Miss. 1989). The result is that the trial court erred in sentencing Long as a violent habitual offender. Resentencing is respectfully requested.

ISSUE NO. 5: WHETHER LONG'S SENTENCE IS ILLEGAL OR OTHERWISE UNCONSTITUTIONALLY DISPROPORTIONATE?

Richard Long's position is that a sentence of life without parole for the offense conduct in this case is unconstitutionally disproportionate and constitutes cruel and unusual punishment prohibited by the Eighth Amendment to the United States Constitution and Article 3 §28 of the Constitution of the State of Mississippi. According to *Tate v. State*, 912 So. 2d 919, (Miss. 2005), normally, sentencing within statutory limits is within the discretion of the trial court not subject to appellate review. See also, *Nichols v. State*, 826 So. 2d 1288, 1290 (Miss. 2002); *Hoops v. State*, 681 So. 2d 521, 537 (Miss. 1996).

Notwithstanding, if a sentence is "grossly disproportionate" to the criminal offense, "the sentence is subject to attack on the grounds that it violates the Eighth Amendment prohibition of cruel and unusual punishment". *Hoops*, 681 So. 2d at 537. With a life sentence, an extended proportionality analysis is appropriate under the Eighth Amendment *Barnwell v. State*, 567 So. 2d 215, 221 (Miss. 1990).

The factors to evaluate the constitutional proportionality of a sentence are:

(1) The gravity of the offense and the harshness of the penalty;
(2) Comparison of the sentence with sentences imposed on other criminals in the same jurisdiction; and
(3) Comparison of sentences imposed in other jurisdictions for commission of the same crime with the sentence imposed in this case.

Solem v. Helm, 463 U. S. 277, 292, 103 S. Ct. 3001, 77 L.Ed. 2d 637 (1983); *Stromas v.*

State, 618 So. 2d 116, 122-23 (Miss. 1993); *Wallace v. State,* 607 So. 2d 1184, 1188 (Miss. 1992); *Hoops v. State*, 681 So. 2d 521, 538 (Miss. 1996); *Smallwood v. Johnson*, 73 F. 3d 1343, 1347 (5th Cir. 1996).

In *White v. State,* 742 So. 2d 1126, 1135-38 (Miss. 1999), the defendant was convicted of selling $40.00 worth of crack cocaine within 1500 feet of a church and was sentenced to sixty (60) years. White appealed the sentence on the basis that it was unconstitutionally disproportionate and the court agreed and remanded, finding that there was nothing in the record to justify such a harsh penalty, since White was apparently a first offender. The *White* court found that the trial court did not exercise any discretion and simply arbitrarily rendered the maximum penalty. The same scenario transpired the same way in *Davis v. State*, 724 So. 2d 342, 344-45 (Miss. 1998), where again the court remanded a sixty year sentence for selling drugs within 1500 feet of a church, finding there was no justification on the record for such a sentence. See also *Towner v. State,* 837 So. 2d 221, 227 (Miss. App. 2003).

Applying the *Solemn* test here, it is clear that the gravity of the offense of selling a controlled substance within 1000 feet of a park is a serious offense and the harshness of the penalty is most severe. In performing a comparison of Long's sentence with sentences imposed in other cases, the excessiveness of the punishment is apparent.

In *Ruff v. State* 910 So. 2d 1160 (Miss. Ct. App. 2005), there was a drug sale within 1500 feet of a park, the sentence was 20 years. In *Hodges v. State,* 906 So. 2d 23

(Miss. App. 2004), the sentence was forty years, with the last twenty years suspended, for possession of controlled substance with intent to distribute within 1500 feet of a school. In *Easter v. State,* 878 So. 2d 10 (Miss. 2004), the sentence was an habitual 40 years for the sale of drugs within 1500 feet of a park. In *Kendrick v. State* 876 So. 2d 420 (Miss. Ct. App. 2004), the sentence was 20 years, habitual, for sale of cocaine with in 1000 feet of a park.

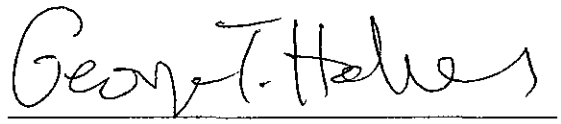
Other jurisdictions are not as harsh either. In *Gervasio v. State* 874 N. E. 2d 1003 (Ind. App. 2007), the sentence was 28 years for dealing methamphetamine weighing within 1,000 feet of a public park. In Arkansas, the enhanced sentence of an additional term of imprisonment of ten (10) years if the offense is committed on or within one thousand (1000) feet of the real property of a park, etc. Ark. Code Ann. A.C.A. § 5-64-411.

It follows, therefore, that Long's sentence is unconstitutionally disproportionate. Resentencing is respectfully requested.

CONCLUSION

Richard Long is entitled to have his conviction reversed, with an acquittal, or with remand for a new trial, or for resentencing.

Respectfully submitted,
RICHARD LEON LONG

By: 

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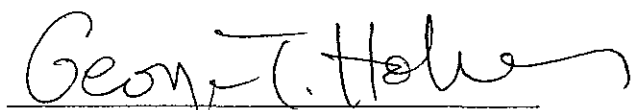
CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the 1st day of July, 2010, mailed a true and correct copy of the above and foregoing Brief Of Appellant to Hon. Robert P. Chamberlin, Circuit Judge, P. O. Box 280, Hernando MS 38632, and to Hon. Smith Murphy, Asst. Dist. Atty., 365 Losher St., Ste. 210, Hernando MS 38632 and to Hon. Scott Stuart, Assistant Attorney General, P. O. Box 220, Jackson MS 39205 all by U. S. Mail, first class postage prepaid.



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