IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

LARRY PRESS WELLS — APPELLANT

VS. — NO. 2009-KP-0842

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

LARRY PRESS WELLS **APPELLANT**

vs. **CAUSE No. 2009-KP-00842-COA**

THE STATE OF MISSISSIPPI **APPELLEE**

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against a judgment of the Circuit Court of Harrison County, Mississippi, First Judicial District, in which the Appellant was convicted and sentenced for his felony of **POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE.**

STATEMENT OF FACTS

Michael Guynes, a patrol officer with the Gulfport police department, conducted undercover work for the department on 24 May 2007. He participated in a "pre-operation" meeting with a Detective Walker and survelliance officers of the same department. Guynes was provided with a sum of money with which to purchase contraband, a "crack" pipe, and a tape recorder. Guynes had taken care to wear soiled and torn clothing and long hair. Guynes was driving a green pick up truck. A "take down" signal was agreed upon, which, once uttered by Guynes would be his brother officers' cue to move in to assist or to make an arrest.

These preliminaries attended to, Guynes set out to the area of Magnolia Cove in the city of Gulfport, which was in the area of Gulf Avenue and 26th Street. There he made contact with several people in his attempt to purchase narcotics. The Appellant was one of those contacted. Guynes asked the Appellant for a "forty", which meant forty dollars worth of "crack" cocaine. The Appellant indicated that he could supply Guynes with that amount; the Appellant got into Guynes' truck and Guynes drove to some apartments and a house. On the way, the Appellant noticed the "crack" pipe and told Guynes that it appeared that he, Guynes, was about to get on the mother ship.

Upon arrival at the house or apartments, Guynes gave the Appellant forty dollars and the Appellant got out of the truck and went behind some bushes. Guynes talked with his brother officers while waiting for the Appellant to return. The Appellant returned to the truck, got in, and Guynes asked him whether he had it. The Appellant responded that he did. Guynes saw it in the Appellant's hand. The Appellant put the "crack" in a crack pipe that had been located in the ashtray. The Appellant wanted Guynes to smoke that quantity in the crack pipe first before he gave Guynes the rest of the crack. The Appellant explained that he had been to jail before, had done "hard time", and did not want to go back. Guynes refused, saying that he did not want to smoke the cocaine at that moment. The Appellant insisted, and at that point Guynes gave the "take down" signal. Seconds later Guynes' fellow officers arrived and arrested the Appellant. The Appellant did not give Guynes the cocaine.

A compact disk recording of the audio tape was played for the jury.

After this purchase, Guynes went to a pre-designated "post buy" location. He then went on to attempt to make other purchases of narcotics. (R. Vol. 2, pp. 96 - 101; 111 - 142).

Narcotics detective Mark Joseph was one of those who provided surveillance and participated in the arrest of the Appellant. When the "take down" signal was made, Joseph got out of his vehicle

and approached the passenger's side of Guynes' vehicle. Joseph pulled the Appellant out of the truck. As he did so, he noticed that the Appellant's right hand was balled up into a fist. The Appellant was placed on the ground and handcuffed. The Appellant being thus secured, Joseph picked the Appellant up and gave him to another officer. Joseph noticed a pipe and a twenty dollar bill at a point close to where the Appellant's right hand had been while he was lying on the ground. There was also an off-white, rock - like substance located close to the pipe. Joseph gave these items to a Detective Walker. (R. Vol. 2, pp. 143 - 148).

The rock - like substance weighed .04 grams and contained cocaine. (R. Vol. 3, pp. 163 - 175).

Detective Bradley Walker described what occurred during the "pre-buy" meeting. He also testified that the federal reserve notes given to Guynes had been photocopied. He went on to describe his participation in the surveillance and arrest of the Appellant. He testified that Joseph found the pipe, rock and a twenty dollar federal reserve note. Walker testified that he had given Guynes that pipe earlier that day, during the "pre-buy" meeting. The twenty - dollar federal reserve note was one of those given to Guynes. Walker testified that he did not himself see the Appellant in possession of cocaine. He did, however, overhear the Appellant discussing smoking cocaine. (R. Vol. 3, pp. 175 - 193).

STATEMENT OF ISSUES

1. WAS THE VERDICT CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE?

2. WAS IT ERROR TO ALLOW A SECOND AMENDMENT TO THE INDICTMENT?

3. DID THE MOTION TO AMEND THE INDICTMENT AND SUBSEQUENT ORDER GRANTING SAME FAIL TO "MEET THE REQUIREMENTS OF LAW"?

4. DID THE TRIAL COURT ERR IN PERMITTING THE AMENDMENT TO THE INDICTMENT?

5. WAS THE APPELLANT DENIED HIS CONSTITUTIONAL RIGHTS TO A SPEEDY TRIAL?

6. DOES THE APPELLANT'S SENTENCE CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT?

7. DID THE TRIAL COURT ERR IN DENYING RELIEF ON THE APPELLANT'S MOTION TO SUPPRESS EVIDENCE?

8. WAS COUNSEL FOR THE APPELLANT INEFFECTIVE?

9. WERE THERE CUMULATIVE ERRORS COMMITTED SUFFICIENT TO DENY THE APPELLANT A FAIR TRIAL?

SUMMARY OF ARGUMENT

1. THAT THE VERDICT IS NOT CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE

2. THAT THE TRIAL COURT DID NOT ERR IN PERMITTING AN AMENDMENT TO THE INDICTMENT

3. THAT THE TRIAL COURT DID NOT ERR IN PERMITTING AN AMENDMENT TO THE INDICTMENT SO AS TO ALLEGE ELIGIBILITY FOR ENHANCED PUNISHMENT

4. THAT THE TRIAL COURT DID NOT ERR IN PERMITTING THE INDICTMENT TO BE AMENDED

5. THAT THE APPELLANT WAS NOT DENIED A SPEEDY TRIAL

6. THAT THE APPELLANT'S SENTENCE AS AN HABITUAL OFFENDER DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT

7. THAT THE TRIAL COURT DID NOT ERR IN ADMITTING A TAPE RECORDING OF THE CONVERSATION BETWEEN THE APPELLANT AND GUYNES, WHICH CONVERSATION OCCURRED PRIOR TO THE APPELLANT'S ARREST

8. THAT COUNSEL FOR THE APPELLANT WAS NOT INEFFECTIVE

9. THAT THERE IS NO CUMULATIVE ERROR IN THE CASE AT BAR

ARGUMENT

1. THAT THE VERDICT IS NOT CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE

In the First Assignment of Error, the Appellant maintains that the proof showed no more than that he possessed cocaine. While the Appellant states that the issue is that the trial court erred in overruling his motion for a new trial on the ground that the evidence was contrary to the great weight of the evidence, his argument in support of it tends to indicate that he believes that the evidence was insufficient to permit a jury verdict on possession with intent to distribute cocaine. After asserting that the evidence was insufficient to support a verdict of possession with intent to distribute, the Appellant concludes his argument by saying that he should be granted a new trial, or else that the trial court should have found the evidence supported no greater of an offense that possession of cocaine or petty larceny.

In responding to this argument, we bear in mind the standards applicable to issues concerning the sufficiency of the evidence and weight of evidence. *Moten v. State*, 20 So.3rd 757, 759 - 760 (Miss. Ct. App. 2009). The claims are substantively distinct, though it seems that this Court's repeated efforts to impress that distinction upon appellants remain futile.

The evidence in support of the verdict, taken as true, together with all reasonable inferences therefrom was that Officer Guynes was involved in a routine, common attempt to buy narcotics. The Appellant indicated to Guynes that he could provide Guynes with a "40". The Appellant got into Guynes' truck, and Guynes drove to a particular location, apparently at the Appellant's direction. Guynes gave the Appellant a sum of money for the purchase of the cocaine; the Appellant got out of the truck, went behind some bushes, and returned to the truck The Appellant put an object later determined to contain cocaine into a "crack" pipe and wanted Guynes to smoke the substance with

him. Given the fact that the Appellant told Guynes that he had done "hard time" before, it is reasonable to infer that the Appellant's purpose in wanting Guynes to smoke the cocaine was to smoke out, so to say, the risk that Guynes might have been an undercover officer. The Appellant was then arrested, and the object in the "crack" pipe retrieved as well as a federal reserve note that had been among the notes given to the Appellant for the purchase of the cocaine.

We submit that this evidence was more than sufficient to permit a reasonable juror to find guilt on the part of the Appellant for the felony of possession of a controlled substance with the intent to distribute. The Appellant was aware of what Guynes wanted to purchase, took money for that purchase, and returned to the truck with the cocaine. The Appellant was aware of what he brought into the truck, seeing as how he wished to smoke it with Guynes. The only reason the Appellant got into Guynes truck in the first place was to sell cocaine to Guynes.

The Appellant, though, citing his attorney's argument on the motion for a directed verdict, says that no one saw the Appellant purchase cocaine. Perhaps this is true, but it is certainly of no importance. The Appellant was not charged with having purchased cocaine. He was charged with having possessed it with the intent to distribute it. Whether the Appellant purchased it is irrelevant given the fact that he took money for it and had it when he returned to the truck. It is completely unimportant where or from whom the Appellant got the cocaine. The Appellant admitted that he had cocaine in his possession and he took money from Guynes for it. There can be no question that at the time the Appellant possessed the cocaine with the intent to distribute it.

The Appellant then says that he merely intended to share a pipe of cocaine with Guynes, rather than to distribute it.[1] The facts, however, show that this is not what the Appellant's intention

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[1] It will not be necessary here to consider the somewhat metaphysical question of whether sharing narcotics with another is in law distributing narcotics to another.

was. It is certainly true that the Appellant wanted Guynes to smoke some of the cocaine, yet the Appellant's comments made at the time clearly demonstrate why. The Appellant told Guynes that he had done "hard time" before and that he did not want to return to prison. Given the context, the Appellant clearly believed that it would be strong proof that Guynes was not involved in law enforcement if Guynes smoked the cocaine. It was, in any event, at most a jury question as to whether the Appellant actually only intended to smoke the cocaine that Guynes paid for, or whether the Appellant merely wanted to be sure that Guynes was not working with law enforcement by having Guynes smoke cocaine.

We will point out, though, that it hardly seems sensible to say, as the Appellant evidently does, that he only intended to smoke the cocaine that Guynes had given him money for. This would be rather like giving a store clerk money for a purchase and then permitting her to keep it for herself. It seems to us that no reasonable juror could believe that the Appellant, after having taken money from Guynes, then went back to Guynes' truck and merely wanted to smoke Guynes' purchase with Guynes. That clearly was not the reason for which Guynes gave the Appellant the money.

That the Appellant had twenty of the dollars given him for the cocaine does not indicate that the Appellant did not intend to distribute what cocaine he had or had purchased. Whether he did or did not have enough to purchase a "40" does not indicate that the Appellant did not intend to distribute what he did have.

It may be true that more than suspicion of intent must be shown in an intent to distribute case, but here there is no mere suspicion. Guynes asked the Appellant for a particular quantity of crack cocaine. The Appellant agreed to provide Guynes with cocaine, got into Guynes's truck, got some cocaine and returned to Guynes's truck with the cocaine. This is not a case of two buddies who went looking for cocaine, found some to buy, and then shared it. The only reason Guynes spoke to the

Appellant was to make a purchase of cocaine, and that is the only reason Guynes supplied it.

It may be that the Appellant never actually gave Guynes cocaine. But it was unnecessary to show that he did. The Appellant was charged with having possessed the cocaine with the intention of distributing it, not with having distributed it.

The evidence was quite sufficient to support the charge brought against the Appellant. It was a matter for the jury to consider whether the Appellant merely possessed cocaine, rather than possessed it with the intent to distribute it. The trial court committed no error in denying relief on the Appellant's motion for a directed verdict.

As for whether the trial court erred in refusing to grant a new trial on the claim that the verdict was contrary to the great weight of the evidence, we note that there was no defense case - in - chief. There was no evidence that might be said to be contrary to the verdict, much less greatly so. The verdict does not constitute an unconscionable injustice. The trial court did not abuse its discretion in refusing to grant a new trial.

The First Assignment of Error is without merit.

2. THAT THE TRIAL COURT DID NOT ERR IN PERMITTING AN AMENDMENT TO THE INDICTMENT

In the Second Assignment of Error, the Appellant claims that the trial court erred in permitting an amendment to the indictment. Several reasons are alleged why this is so.

The Appellant was indicted on 1 October 2007 for possession of cocaine with the intent to distribute it. (R. Vol. 1, pg. 8). On 11 October 2007, the State moved to amend the indictment so as to allege that the Appellant's habitual offender status under Miss. Code Ann. Section 99-19-81. The State alleged that the Appellant had been convicted in the Circuit Court of Harrison County on 10 May 1993 of felony transfer of a controlled substance, and that he was sentenced to a term of

three years. The State further alleged that the Appellant had been convicted of uttering a forgery in the Circuit Court of Harrison County on 10 May 1993 and sentenced to a term of three years imprisonment. The motion further alleged the cause numbers of the convictions. (R. Vol. 1, pp. 11 - 12).

There was a hearing on this motion. In the course of that hearing, the State introduced "pen packs" to establish the Appellant's prior convictions. Counsel for the Appellant announced that he had no objection to the pen packs. The State then moved the court to amend the indictment.

In response, the defense asserted that it would be cruel and unusual punishment to punish the Appellant for the crimes he committed in the past. The defense also appeared to suggest that to do so would run afoul of the proscriptions against double jeopardy. It was also suggested that habitual offender statutes were unknown to the common law. It was said that to allow the amendment would be to deny the Appellant the opportunity to present his side of the case.

The Circuit Court found that the pen packs established that the Appellant had been previously convicted and sentenced as alleged in the motion. It appears that the Appellant had other prior felony convictions as well.

As that point, the Appellant addressed the court and asserted that he was not an habitual offender and that he helped Mr. Caranna during Katrina. He said he had a child in college, was attending alcoholics anonymous, made his first mistake in life when he was thirty - seven years of age, and that he was trying to change his life.

The Circuit Court then explained to the Appellant why the State could assert his habitual offender status. The Circuit Court granted relief on the State's motion on 19 November 2007. (R. Vol. 2, pp. 2 - 12; Vol. 1, pp. 24 - 25).

Here, the Appellant asserts that the amendment was invalid because it did not allege in which

judicial district of Harrison County the convictions were had.[2] This issue was not raised in the Circuit Court during the hearing on the motion; it may not be raised here. *Griffin v. State*, 918 So.2d 882, 886 (Miss. Ct. App. 2006).

Assuming for argument that the question was preserved in the trial court, there is no merit in it. The allegations of the motion to amend alleged the county of conviction and the cause numbers of the convictions, and identified the prior convictions. It may be that there was no allegation as to which judicial district of Harrison County the convictions were had, but this was unnecessary. The information provided was sufficient to identify the jurisdiction, and was sufficient to fulfil the requirements of Rule 11.03 URCCC. Rule 11.03 does not require the allegation of a judicial district, only the "state or federal jurisdiction" of the prior convictions. The State jurisdiction was Harrison County. The information provided by the State was entirely sufficient to notice the Appellant of the convictions upon which the State intended to rely. Specifically, the motion and order entered on the motion set out the nature or description of the offense, the jurisdiction in which the prior convictions were had, and the date of judgment.

The "Exhibits From Motion to Amend Hearing on 11/19/07", contained in the exhibits envelope include the sentencing order related to the Appellant's prior convictions, and it demonstrates that the prior convictions were in the First Judicial District of Harrison County. To the extent that it was error to fail to allege the judicial district involved vis a vis the predicate felonies in the motion to amend, the sentencing order relating to them surely cured any such error.

The Second Assignment of Error is without merit.

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[2] The indictment exhibited against the Appellant in the case at bar did allege the judicial district in which the felony occurred. (R. Vol. 1, pg. 8).

3. THAT THE TRIAL COURT DID NOT ERR IN PERMITTING AN AMENDMENT TO THE INDICTMENT SO AS TO ALLEGE ELIGIBILITY FOR ENHANCED PUNISHMENT

The State filed a motion on 24 April 2009 to amend the indictment so as to allege that the Appellant was eligible for enhanced sentencing in light of his prior conviction of transfer of a controlled substance. (R. Vol. 1, pg. 39). Relief on this motion was granted by Order filed 30 April 2009. (R. Vol. 1, pp. 43 - 44). Both the motion and the Order described the offense involved, the date of conviction, the county of conviction and the cause number. They did not set out the judicial district of Harrison County in which the conviction occurred. The Appellant raises the same claim in the Third Assignment of Error concerning this amendment as he does in the Second Assignment of Error.

There was no objection to this amendment, and certainly no objection on the ground asserted here. This being so, the issue is not before the Court. *Griffin v. State*, 918 So.2d 882, 886 (Miss. Ct. App. 2006).

Assuming for argument that this issue is properly before the Court, there is no merit in it. We adopt in response our argument made in response to the Second Assignment of error on the point. The motion and order thereon set out the prior convictions was sufficient to properly set out the prior convictions. The description of the prior convictions was in no way similar to that in *Vince v. State*, 844 So.2d 510 (Miss. Ct. App. 2003)(Order allowing amendment to indictment wholly failed to set out details of the prior offenses).

The Appellant the claims that the trial court never made a finding as to his status as an habitual offender. The State introduced into evidence at the sentencing hearing State's Exhibits 1 and 2, which documented the Appellant's prior convictions. (R. Vol. 3, pg. 255). The Circuit Court did certainly find that the Appellant was an habitual offender. (R. Vol. 3, pg. 260). This all

occurred in a sentencing hearing consistent with Rule 11.03(2) URCCC.

The Appellant then alleges that the trial court indicated during the hearing on the first motion to amend the indictment that the State would not be permitted to introduce evidence of the Appellant's other convictions. Actually, what the trial court indicated to the prosecutor was that he was limited to the two prior convictions set out in his motion to amend the indictment, in terms of proving habitual offender status. This was because the prosecutor did not include the additional convictions in his motion. (R. Vol. 2, pg. 13). The Appellant, however, asserts that the State was somehow prohibited from seeking additional amendments to the indictment on account of this statement. He also asserts that the State should have been estopped from seeking a second indictment, that, in his view, being a "second bite of the apple".

The Appellant cites no authority for his idea. The claim should therefore be deemed abandoned. *Wall v. State*, 883 So.2d 617, 619 (Miss. Ct. App. 2004).

We are aware of no authority to the effect that the State may seek only one amendment to an indictment in order to seek enhanced sentencing. There is no authority to the effect that multiple lawful amendments to an indictment work a defect in the indictment. In *Speagle v. State*, 956 So.2d 237, 243 (Miss. Ct. App. 2006) there were three amendments to the indictment. Nor has the Appellant presented authority to show or suggest that the passage of time alone may limit the State's ability to seek an amendment to an indictment. Nor has the Appellant alleged any prejudice to his defense on account of the amendments or on account of the time at which they were made.

The Third Assignment of Error is without merit.

4. THAT THE TRIAL COURT DID NOT ERR IN PERMITTING THE INDICTMENT TO BE AMENDED

The Fourth Assignment of Error is a complaint, concerning the amendment to the indictment

which allowed doubling of the sentence on account of the Appellant's prior conviction for having transferred a controlled substance. The Appellant says that the State either should have brought both amendments concerning sentencing at the same time or should have been limited to one amendment in that regard. The Appellant invokes a putative one-bite-at-the-apple rule.

It is quite clear that these amendments were proper. These amendments did not affect the substance of the offense, but only sentencing. Under Rule 7.09 URCCC, amendments such as these are permissible. *E.g. Rayborn v. State*, 961 So.2d 70 (Miss. Ct. App. 2007). There is no limitation under Rule 7.09 or under any other rule that we are aware of as to how many amendments may be sought. While the Appellant cites *Lewis v. State*, 797 So.2d 248 (Miss. Ct. App. 2001) for his "one bit (*sic*) of the apple" notion, *Lewis* actually holds that prisoners in post - conviction relief are to have but one bite at the apple, as does *Smith v. State*, 434 So.2d 212 (Miss. 1983), also cited by the Appellant. Those decisions have nothing whatsoever to do with limitations on the number of times an indictment may be amended. *Debussi v. State*, 453 So.2d 1030 (Miss. 1984) is a case involving application of the proscription against double jeopardy in the context of an habitual offender sentence. The Appellant's prior convictions were properly proved; *Debussi* has no application here.

The Appellant cites *Graves v. State*, 708 So.2d 858 (Miss. 1997), though for what purpose is obscure. The decision has nothing to do with amendments of indictments.

The Appellant claims that he was prejudiced. However, he has utterly failed to demonstrate how his defense was prejudiced. That the Appellant may not have wanted to face the consequences of his criminal history is not prejudice. He has utterly failed to show that some defense was compromised by the amendments or that the amendments materially altered facts constituting the essence of the offense. *Watts v. State*, 828 So. 835, 842 (Miss. Ct. App. 2002). There was no error in allowing the amendments, and no law to demonstrate that there is a limitation to the number of

amendments that may be made to an indictment.

The Fourth Assignment of Error is without merit.

5. THAT THE APPELLANT WAS NOT DENIED A SPEEDY TRIAL

In the Fifth Assignment of Error, the Appellant claims that his constitutional and statutory rights to a speedy trial were violated. There was a motion to dismiss the case against the Appellant on the ground of an alleged violation of the constitutional right, (R. Vol. 1, pg. 19), but no such motion with respect to the statutory right

The record shows that the Appellant was indicted on 1 October 2007 (R. Vol. 1, pg. 8) and that he was arraigned on 5 November 2007 (R. Vol. 1, pg. 23). Trial began on 29 April 2009. (R. Vol. 2, pg. 15).

The Appellant filed no motion to dismiss the cause against him on account of an alleged violation of Miss. Code Ann. Section 99-17-1 (Rev. 2007). This Court has held that an accused will be deemed to have acquiesced in delay if he should fail to allege a violation of Section 99-17-1 within 270 days of his arraignment. *Ray v. State*, 27 So.3rd 416, 423 (Miss. Ct. App. 2009). In addition to this, we note that the Appellant's argument in support of his fifth issue does not present argument in support of an alleged violation of Section 99-17-1. Consequently, the Appellant, besides being deemed to have acquiesced in the delay, must also be deemed to have abandoned his issue with respect to the claim of a violation of the "270 day rule". *Moore v. State*, 996 So.2d 756, 760 (Miss. 2008)(Assignment of error not discussed in brief is considered abandoned).

As for the claim of a denial of the constitutional right to a speedy trial, it is true that a motion to dismiss on that ground exists in the record. But it is equally true that that motion was not brought on for a hearing and that there was no hearing or ruling concerning this alleged denial. Because that motion was not brought forward for a hearing, the issue embraced by it was waived. *Reed v. State*,

No. 2008-KA-00573-COA, Slip Op. At 7-8 (Miss. Ct. App., decided 15 September 2009, Not Yet Officially Reported).

The Appellant has made no attempt to embark upon a plain error analysis in order to preserve his speedy trial claim. *Dora v. State*, 986 So.2d 917, 925 (Miss. 2008). The Assignment of Error is not properly before the Court for this reason as well.

The Fifth Assignment of Error is not properly before the Court for the reasons just set out. However, assuming for argument that the claim of a denial of the constitutional right to a speedy trial is somehow before the Court, there is no merit in it. It will be unnecessary to address the claim of the denial of the statutory denial in view of the fact that there was never such a claim raised in the trial court. In considering the claim of the denial of the constitutional right, we bear in mind the familiar *Barker*[3] factors. *Reed, supra*, Slip Op. At 7.

The Appellant was arrested on 24 May 2007; trial began on 29 April 2009. A period of 705 days passed between the date of arrest and the date trial began. Had the Appellant's motion been brought on for a hearing, this period of time would have required an examination of the remaining *Barker* factors. *Smith v. State*, 550 So.2d 406 (Miss. 1989).

Reasons for delay

Trial was originally set for 10 March 2008. (R. Vol. 1, pg. 23). The period of time between the date of arrest and the original date of trial was 291 days.

Trial did not occur on 10 March 2008 because the trial court, *sua sponte*, ordered a continuance, this occurring on 18 February 2008. The reason for the continuance was that the docket for the week of 10 and 17 March 2008 had been cancelled by the judges. Trial was reset for 12 May

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[3] *Barker v. Wingo*, 417 U.S. 514 (1972).

2008. (R. Vol. 1, pg. 26).[4] The period of time between 10 March 2008 and 12 May 2008 amounted to 63 days. There was no indication in this order that the Appellant waived speedy trial rights or objections.

On 12 May 2008, the defense moved for a continuance of trial to 6 October 2008. The reason for the continuance was that the Appellant was to have surgery during the summer of 2008. The Appellant expressly waived his right to a speedy trial for the period of the continuance. (R. Vol. 1, pg. 29). The period involved in this continuance was 147 days.

On 6 October 2008, trial was continued again, and again on the motion of the defense. The reason for the continuance was that both Division I judges had previously prosecuted the Appellant. The Appellant expressly waived all speedy trial rights or objections. Trial was reset for 26 January 2009. (R. Vol. 1, pg. 32). The period of delay involved was 112 days.

On 29 January 2009, a continuance was granted on joint motion of the State and defense. The Appellant again waived his speedy trial rights. The reason for the continuance was that the Appellant needed more time to secure witnesses. Trial was reset for 23 March 2009. (R. Vol. 1, pg. 33). The period of delay between 26 January 2009 and 23 March 2009 is 56 days.

On 25 March 2009, the defense requested another continuance, the ground therefor being that the Appellant was not available on account of medical issues. The Appellant again waived his speedy trial rights. Trial was set for 28 April 2009. (R. Vol. 1, pg. 36). The period between 23 March 2009 and 28 April 2009 is 36 days.

The period of delay attributable to the State is 291 days, that being the period between arrest and the first trial setting. This period of time will be weighed against the State. A period of 291

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[4] The order of continuance states that the trial was continued to 12 May 2007. We think this was an obvious typographical error, so we substitute 2008 for 2007.

days from arrest to trial is not an inordinate amount of time, particularly in a heavily populated county such as Harrison County.

The period of delay attributable to the defense, and the period for which the Appellant waived speedy trial rights, is 351 days. The 351 days of delay attributable to the defense does not weigh against the State. *Muise v. State*, 997 So.2d 248, 252 (Miss. Ct. App. 2008). Beyond this, each of the continuances involved in this period of time included an express waiver of any potential speedy trial violation. Consequently, for this reason as well this period of time cannot be weighed against the State. *Summers v. State*, 914 So.2d 245, 254 (Miss. Ct. App. 2005).

There was a period of 63 days delay occasioned by the judges of the Circuit Court, who had cancelled the docket. There is no indication that the Appellant waived his speedy trial rights as to this period of time. While it may be that the Court will weigh this period of time against the State, it should not weigh it heavily against the State, the State having no power to interfere with how the judges handled their docket. Delay occasioned by overcrowded dockets does not weigh heavily against the State. *Tarver v. State*, 15 So.3rd 446, 462 (Miss. Ct. App. 2009). Neither should delay resulting from a decision by a trial court to cancel its docket.

Demand for trial

The Appellant demanded trial. (R. Vol. 1, pg. 19). This factor weighs in his favor. However, it should not weigh heavily in his favor in view of the fact that he did not bring on a motion to dismiss for reason of an alleged denial of his right to a speedy trial for a hearing. It should not weigh heavily in his favor in view of the continuances he sought after the demand for trial.

Prejudice

In considering whether an accused has suffered prejudice on account of pre-trial delay, there are three interests involved: (1) the interest in avoiding oppressive pre-trial incarceration; (2) the

interest in minimizing pre-trial anxiety and concern on the part of the accused; and (3) the interest in avoiding the possibility that the defense will be impaired. Of these interests, the last of these three is the most important. *Hersick v. State*, 904 So.2d 116, 123 (Miss. 2004)

There was no allegation or proof of prejudice in the trial court. Here, however, the Appellant claims as prejudice the fact that the State amended the indictment so as to make the Appellant eligible for enhanced sentencing. The Appellant claims, without support in the record, that the State could not have done so but for the delay.

First of all, the Court should reject the notion that *Barker* prejudice is shown by an appellant's supposition that he would have avoided an enhanced sentence but for pre-trial delay in his case. That kind of argument is entirely speculative. For all the Court knows, the State could have easily sought an amendment to the indictment at some earlier time but did not do so because it was not particularly necessary, given the continuances.

In addition to this, the interest in avoiding impairment of a defense does not include an interest in avoiding consequences for repeated law - breaking. Prejudice in this context means the risk of loss of witnesses or evidence. The Appellant does not say that he had some defense vis a vis the prior convictions or conviction which he might have raised but for the delay in proceeding to trial. He simply supposes that he might have got one past the State with respect to sentencing had he gone to trial earlier. This is kind of thing is not a defense as contemplated by *Barker*.

The motion to amend the indictment was filed on 24 April 2009 and concerned a conviction had in the Circuit Court of Harrison County in May of 1993. (R. Vol. 1, pg. 39). The amendment was allowed by Order entered on 30 April 2009. This particular conviction was one of those set out in the State's motion to amend the indictment so as to charge the Appellant as an habitual offender, which motion was filed on 11 October 2007, only some nine days after the filing of the indictment.

(R. Vol. 1, pp. 11 - 12; 8). The Appellant, of course, was surely aware of his prior convictions; but even if by some strange twist of fate he was not aware of them prior to 11 October 2007 he surely was after that time. The State, obviously, was aware of them at that time and could have filed the April, 2009 motion at any time. In view of this, it is highly unlikely that the Appellant would have somehow avoided sentencing under Miss. Code Ann. Section 41-29-147 had trial occurred earlier. An accused does not suffer prejudice on account of an amendment to an indictment that subjects him to enhanced sentencing. *Dora v. State*, 986 So.2d 917, 926 (Miss. 2008).

There is nothing to demonstrate that the Appellant suffered prejudice on account of the delay. The prejudice factor does not weigh in his favor.

Conclusion

At very most, the State was responsible for approximately 354 days of delay, assuming that the action of the Circuit Court in cancelling its docket is to be charged against the prosecution. This period of delay was not inordinate. There have been any number of decisions involving significantly longer periods of delay. While it may be that the Appellant demanded trial, he also acted so as to frustrate a speedier trial, and he never brought a motion concerning an alleged denial of a speedy trial forward for a hearing. He has wholly failed to demonstrate prejudice to his defense. Had the Appellant brought this issue before the Circuit Court, that court would not have erred had it refused to find a violation of the Appellant's right to a speedy trial, there being nothing shown to demonstrate actual prejudice to the Appellant's defense.

The Fifth Assignment of Error is without merit.

6. THAT THE APPELLANT'S SENTENCE AS AN HABITUAL OFFENDER DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT

Prior to imposition of sentence, the Appellant through counsel asserted among other things

that a sixty - year sentence to be served as an habitual offender constituted cruel and unusual punishment. (R. Vol. 3, pg. 256). Subsequent to sentencing, the Appellant filed a motion to reconsider sentence. (R. Vol. 1, pp. 73 - 74). In the course of the hearing on that motion, the Appellant again asserted that the sentence imposed, which was a sixty - year sentence to be served as a non-violent habitual offender, constituted cruel and unusual punishment. While the Appellant cited the *Solem*[5] factors, and asserted that the sentence imposed was disproportionate to the offense, the Appellant offered no evidence on the *Solem* factors. (R. Vol. 3, pp. 269 - 277).

The prosecution, in response to the Appellant's claim, cited a number of decisions from this State's appellate courts, in which sentences as lengthy and lengthier had been upheld. (R. Vol. 3, pp. 279 - 281). The Circuit Court overruled the motion. (R. Vol. 3, pg. 282).

In *Nichols v. State*, 826 So.2d 1288 (Miss. 2002), the Supreme Court discussed the applicability of *Solem* in light of *Harmelin v. Michigan*, 501 U.S. 597 (1991):

> "Sentencing is within the complete discretion of the trial court and not subject to appellate review if it is within the limits prescribed by statute." *Wall v. State,* 718 So.2d 1107,1114 (Miss.1998)(quoting *Hoops v. State,* 681 So.2d 521, 537 (Miss.1996)). *Accord, Berry v. State,* 722 So.2d 706, 707 (Miss.1998). In *Fleming v. State,* 604 So.2d 280, 302 (Miss.1992), this Court held that the general rule in Mississippi is that a sentence that does not exceed the maximum term allowed by the statute cannot be disturbed on appeal. However, this Court will review a sentence that allegedly imposed a penalty that is disproportionate to the crime. *Id.*
>
> The United States Supreme Court has set forth the following three-prong test for an Eighth Amendment proportionality analysis:
>
> (I) the gravity of the offense and the harshness of the penalty;
> (ii) the sentence imposed on other criminals in the same jurisdiction; and
>
> (iii) the sentences imposed for commission of the same crime in other jurisdictions.
>
> *Solem v. Helm,* 463 U.S. 277, 290-92, 103 S.Ct. 3001, 3010-11, 77 L.Ed.2d 637

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[5] *Solem v. Helm*, 463 U.S. 277 (1983).

(1983).

> This Court noted, however, that *Solem* was overruled in *Harmelin v. Michigan,* 501 U.S. 957, 965-66, 111 S.Ct. 2680, 2686-87, 115 L.Ed.2d 836 (1991) "to the extent that it found a guarantee of proportionality in the Eighth Amendment. In light of *Harmelin,* it appears that *Solem* is to apply only when a threshold comparison of the crime committed to the sentence imposed leads to an inference of 'gross disproportionality.' " *Hoops v. State,* 681 So.2d at 538 (citations omitted). The appellate courts will not apply the three-prong disproportionality test when there is a lack of this initial showing. *Young v. State,* 731 So.2d 1120, 1125 (Miss.1999); *Williams v. State,* 784 So.2d 230, 236 (Miss.Ct.App.2000). This Court has held that a sentence that is within the statutorily defined parameters of the crime, usually is upheld and not considered cruel and unusual punishment. *Barnwell v. State,* 567 So.2d 215, 222 (Miss.1990).

Nichols, at 1290.

The preliminary question, then, is whether the sentence imposed leads to an inference of "gross disproportionality". As we have stated above, the prosecutor at trial clearly demonstrated that no such inference existed.

The Appellant was convicted of possession of a relatively small amount of cocaine with the intent to distribute it. He had been previously convicted of transfer of a controlled substance and of forgery.

In *Carney v. State*, 821 So.2d 853 (Miss. Ct. App. 2002), the appellant in that case was sentence to a term of 120 years imprisonment for having sold twenty dollars' worth of cocaine. The sentence was enhanced and was to be served as an habitual offender. This Court upheld the sentence. The Court did not find that the sentence imposed led to an inference of gross disproportionality. In *Stromas v. State*, 618 So.2d 116 (Miss. 1993), the appellant in that case was convicted of having sold a small quantity of cocaine and was sentenced to a term of sixty years imprisonment, he having been convicted previously of an offense under the Controlled Substances

Act. The Supreme Court, noting that drug offenses are serious offenses, did not find that the sentence imposed led to an inference of gross disproportionality.. In *Tate v. State*, 912 So.2d 919 (Miss. 2005), the appellant in that case received a sixty year enhanced and habitual offender sentence upon his conviction for possession of more than an ounce but less than a kilogram of marijuana with the intent to distribute. The prior convictions relied upon by the State were non - violent. The Mississippi Supreme Court found that there was no inference of gross disproportionality. In *Williams v. State*, 794 So.2d 181 (Miss. 2001)(overruled on other grounds), the Court upheld a 120 year habitual offender sentence. The conviction involved was sale of twenty dollars' worth of cocaine. Here, the Appellant's sentence was authorized by law, a fact the Appellant does not dispute, and, as the decisions cited above demonstrate, that sentence did not permit an inference of disproportionality.

The Appellant relies upon *Clowers v. State*, 522 So.2d 762 (Miss. 1988). In that decision, though, the Supreme Court simply held that the Circuit Courts of the State have the authority to reduce an habitual offender sentence where they find the sentence to be imposed is disproportionate in a particular instance. This pre - *Harmelin* decision, however, is limited to its own distinctive facts and procedural posture. *Barnwell v. State*, 567 So.2d 215, 219 (Miss. 1990). This Court has noted *Clowers* inapplicablity in narcotics cases, noting that narcotics offenses are considered very serious offenses in this State. *Bell v. State*, 769 So.2d 247, 252 (Miss. Ct. App. 2000).

Because there was no inference of gross disproportionality, the trial court was not required to consider the *Solem* factors. It may be that the Appellant's prior convictions were non - violent felonies and that the amount of cocaine he possessed with the intent to distribute was a relatively small amount, but the sentence imposed was authorized by law and within statutory limits. As the decisions cited above demonstrate, the sentence was not grossly disproportionate.

Even had the threshold showing been made, the Appellant failed to produce evidence on the *Solem* factors.[6] It was his burden to produce evidence on those factors. His failure to do so meant that the Circuit Court had nothing to consider. Nor does the Appellant here discuss those factors. In view of this, the Appellant's claim is barred here. *Gray v. State*, 926 So.2d 961, 979 - 980 (Miss. Ct. App. 2006).

The Sixth Assignment of Error is without merit.

7. THAT THE TRIAL COURT DID NOT ERR IN ADMITTING A TAPE RECORDING OF THE CONVERSATION BETWEEN THE APPELLANT AND GUYNES, WHICH CONVERSATION OCCURRED PRIOR TO THE APPELLANT'S ARREST

The State wished to enter into evidence a recording of the conversation between the Appellant and Guynes while the two were in Guynes' car and prior to the point in time at which the Appellant was arrested. The tape recording was not clear at points, but the prosecutor wished to enter it into evidence so that he would not have been accused to have withheld evidence during the Appellant's summation.

The defense objected to introduction of the tape recording. The defense first asserted that the officer could not be permitted to testify as to his opinion as to what was said but only as to what exactly was said. The defense further objected to admission of so much of the tape after the point at which Guynes asked, "Where is mine at?" The Appellant claimed that he was detained at that point, could not have voluntarily left the vehicle, and that for that reason the officer was under a duty

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[6] In the course of the sentencing hearing, counsel for the Appellant offered his opinion of what sentences would be imposed for possession with intent to distribute. (R. Vol. 3, pg. 274). There was no evidence, though, on the "sentence imposed on other criminals in the same jurisdiction" factor or on the "sentence imposed for the commission of the same crime in other jurisdictions" factor.

to advise the Appellant of his *Miranda*[7] rights. It was the defense position that the officer knew that the Appellant was going to be arrested and that for that reason the Appellant should have been advised of his rights.

The prosecutor responded by making the point that the Appellant was not under arrest at the point indicated by the defense, though he was certainly later placed under arrest by the "takedown" officers. The prosecutor further pointed out that nothing prevented the Appellant from getting out of the car and that the officer could not have stopped the Appellant from getting out of the car even if he had wanted to do so.

To these points the defense asserted that the Appellant was under detention. According to the Appellant, detention "triggers Miranda".

The Appellant then asserted that the State was under an obligation to provide a transcript of the tape recording. As to this, the prosecutor noted that the Appellant might have made his very own transcript. (R. Vol. 2, pp. 101 - 111).

In the Seventh Assignment of Error, the Appellant begins by telling this Court that the defense asserted at trial that Guynes was under an obligation to place the Appellant under arrest at the time Guynes believed that the Appellant was in possession of cocaine. That, however, is not what the defense asserted. The defense asserted that the Appellant was under arrest at the time Guynes asked, "Where is mine at?", Guynes having reason to believe that the Appellant was in possession of cocaine. It was the defense position that Guynes was required to advise the Appellant of his *Miranda* rights.

Even if the Appellant were correct here as to what was actually asserted at trial, he presents

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[7] *Miranda v. Arizona*, 384 U.S. 436 (1966).

no authority to demonstrate that a law enforcement officer has the duty to arrest a suspect at the very moment he is in possession of enough evidence of law - breaking at to amount to probable cause. In view of the lack of any authority to support this argument, the argument should be considered abandoned or waived. *Pucket v. State*, 879 So.2d 920, 932 (Miss. 2004). There is, on the other hand, no authority of which we are aware to the effect that a law enforcement officer is bound to arrest a suspect at the point the officer is in possession of evidence amounting to probable cause for an arrest. There is authority, though, that a suspect has no right to be arrested and that law enforcement officers are not required to call a halt to a criminal investigation at the moment they are in possession of evidence sufficient to establish probable cause for an arrest. *Griffin v. State*, 339 So.2d 550, 553 - 554 (Miss. 1976)(citing *Hoffa v. United States*, 385 U.S. 293 (1966)).

The Appellant does not appear to claim that he was under arrest at some point in time while he was in Guynes' car, as was alleged in the trial court. That claim made in the trial court appears to be abandoned here. However, if the Court should see the matter differently, there is no merit in it.

An arrest occurs when a person is subjected to actual or constructive seizure of his person, or his voluntary submission to custody, the restraint being under real or pretended legal authority. It is not consummated until there has been a taking of possession of a person by manual caption, or submission on demand; and although a manual touching is unnecessary unless there is resistance to an arrest, there must be restraint of a person to establish an arrest. *Bearden v. State*, 662 So.2d 620, 623 (Miss. 1995). Here, though, until the time the "takedown" officers placed the Appellant under arrest, there was not the first indication that the Appellant was in any way restrained of his freedom. It may be that he was in Guynes' car, but his presence there was entirely voluntary on his part. He

might have as easily left it as he got into it. There was no arrest at that time, not even a *Terry*[8] detention. The Appellant was not in custody while he was inside Guynes' car. That being so, Guynes was not obligated to advise the Appellant of his *Miranda* rights.

The Appellant then says that the tape recording should have been suppressed because the State did not provide a transcript of the recording. The Appellant, however, presents no authority for this bold claim other than a generic and vague citation to the Fourth Amendment of the federal constitution and to Article 3, Section 23 of the State constitution. A violation of these provisions of the constitutions was not alleged in the trial court, and, in addition to this, the Appellant does not trouble himself to explain, by citation to authority, how those provisions are relevant to the issue. His claim of error should be regarded as abandoned, *Pucket, supra*, and barred, *Stevens v. State*, 458 So.2d 726, 730 (Miss. 1984).

We have found no authority to the effect that the State is required to prepare transcripts of tape recordings and provide them to juries. Transcripts, where they are provided, are permitted as an aid to a jury. They are not primary evidence, though. *Coleman v. State*, 697 So.2d 777, 784 - 785 (Miss. 1997). The Appellant, if he felt that a transcript was necessary or helpful, could have easily provided his very own for consideration by the trial court. This would have been no undue burden. In fact, in at least one situation, he would have been obligated to do so. *Turner v. State*, 950 So.2d 243, 248 (Miss. Ct. App. 2007)(Where parties disagree as to the accuracy of transcripts, transcripts from the defense and the State should be received). Since it appears that there is no obligation on the part of the State to provide a transcript of a tape recording, there can be no error in the fact that one was not provided.

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[8] *Terry v. Ohio*, 392 U.S. 1 (1968).

In the event, however, that this Court should find that it was error not to provide a transcript, any such error should be considered harmless. The prosecutor made his purpose in admitting the recording clear. He did so in order to avoid a potential claim in the summation for the defense that he had failed to present all of his evidence. The prosecutor was not relying upon the contents of the tape recording to prove his case so much as he was attempting to avoid a charge of having hidden evidence. The recording itself did not prejudice the Appellant any more than Guynes' testimony.

The Seventh Assignment of Error is without merit.

8. THAT COUNSEL FOR THE APPELLANT WAS NOT INEFFECTIVE

In considering the Appellant's Eighth Assignment of Error, we bear in mind the familiar *Strickland*[9] standard by which ineffective assistance of counsel is assayed. *E.g. Phillips v. State*, 25 So.3rd 404, 408 - 409 (Miss. Ct. App. 2010).

The Appellant's first alleged instance of ineffective assistance of counsel is a claim that his attorney ". . . failed to assert numerous defects in the indictment and procedures in which the state employed to enhance Appellant's sentence not once but twice. The record clearly shows that the attorney did contest the amendments of the indictment. We have discussed the attorney's arguments in this regard above. Notwithstanding what the attorney argued, the law was clearly against the Appellant on the issue of the amendments to the indictment, as we have also pointed out above. An attorney is not ineffective because his efforts were non-availing.

The Appellant then says that the attorney was ineffective for having failed to assert estoppel as a ground to prohibit the second amendment to the indictment. The Appellant, however, presents no authority to demonstrate that such an argument would have had some chance of success. There

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[9] *Strickland v. Washington*, 466 U.S. 668 (1984).

is no "second bite at the apple" rule with respect to amendments to indictments. An attorney is not required to pursue futile objections or theories. *Chase v. State*, 699 So.2d 521, 536 - 537 (Miss. 1997).

The amendments to the indictment and the orders granting those amendments sufficiently described the jurisdiction in which the Appellant's prior convictions occurred. There was no basis, then, for an objection. Even had there been an objection, the very most the Appellant might have hoped to gain from such would have been the formal addition of the judicial district to the motion and order to amend the indictment. The Appellant suffered no prejudice on account of a lack of objection.

The Eighth Assignment of Error is without merit.

9. THAT THERE IS NO CUMULATIVE ERROR IN THE CASE AT BAR

We do not find that "cumulative error" was asserted in the trial court as a basis for a new trial. (R. Vol. 1, pp. 75 - 76). Because it was not raised there, it may not be raised here. *Gibson v. State*, 731 So.2d 1087, 1098 (Miss. 1998).

Assuming for argument, however, that such a claim was raised in the trial court, there is no merit in it. None of the individually assigned errors constituted error, as we have demonstrate above. That being so, there cannot be "cumulative error". *Id.*

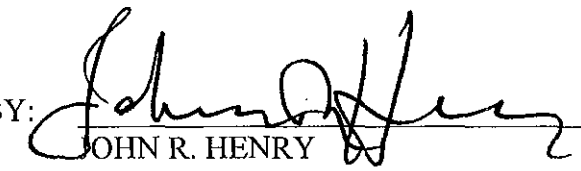
The Ninth Assignment of Error is without merit.

CONCLUSION

The Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

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CERTIFICATE OF SERVICE

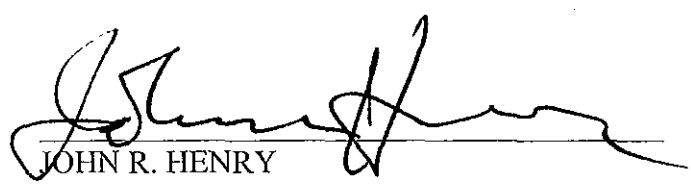
I, John R. Henry, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Jerry O. Terry, Sr.
Circuit Court Judge
421 Linda Drive
Biloxi, MS 39531

Honorable Cono Caranna
District Attorney
P. O. Drawer 1180
Gulfport, MS 39502

Larry Wells, #82067
Harrison County Jail
10451 Larkin Smith Drive
Gulfport, MS 39501

This the 12th day of April, 2010.



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